

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

CC/DEVAS (MAURITIUS) LIMITED,)
ET AL.,)
Petitioners,)
v.) No. 23-1201
ANTRIX CORP. LTD., ET AL.,)
Respondents.)

DEVAS MULTIMEDIA PRIVATE LIMITED,)
Petitioner,)
v.) No. 24-17
ANTRIX CORP. LTD., ET AL.,)
Respondents.)

Pages: 1 through 55

Place: Washington, D.C.

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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.)
15 - - - - -
16
17 Washington, D.C.
18 Monday, March 3, 2025
19
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.
23
24
25

1 APPEARANCES:
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3 the Petitioner in Case 24-17.
4 MATTHEW D. MCGILL, ESQUIRE, Washington, D.C.; on
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9 Petitioners.
10 CARTER G. PHILLIPS, ESQUIRE, Washington, D.C.; on
11 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

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

7 Mr. Streett.

8 ORAL ARGUMENT OF AARON STREETT

9 ON BEHALF OF THE PETITIONER IN CASE 24-17

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

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

21 Antrix's new argument that the
22 arbitration exception requires a nexus with U.S.
23 commerce is waived and meritless. Congress knew
24 how to require a U.S. commercial nexus, and it
25 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 -- a
9 U.S. commercial nexus, I would have a couple
10 things 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.
2 The -- that "subject matter capable" language
3 comes directly from the New York Convention, and
4 this Court construed that very language in
5 Mitsubishi Motors, and this Court explained that
6 for a matter to fall outside of the "subject
7 matter capable of arbitration" clause, Congress
8 would need to expressly legislate that a
9 particular category of cases was not arbitrable
10 and instead 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 -- a concept we would think
2 about, but not under the Foreign Sovereign
3 Immunities Act because the Foreign Sovereign
4 Immunities Act bases subject matter jurisdiction
5 on one of the immunity exceptions being
6 satisfied.

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

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

23 And I'm referring, of course, there to
24 the Fuld versus PLO case. That case potentially
25 contains both the person issue -- both the

1 question of whether the minimum contacts test is
2 required by the Fifth Amendment in an equal way
3 to the Fourteenth, and it also includes a --
4 a -- a statute that deems consent to personal
5 jurisdiction.

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

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

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

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

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

24 JUSTICE SOTOMAYOR: Hold yours until
25 then?

1 MR. STREETT: I think that would make
2 a lot of sense because, for example, if the
3 Court -- if the --

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

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

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

24 And I'm referring particularly to two
25 of the sub-issues of Antrix's constitutional

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

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

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

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

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

1 Process Clause, and --

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas, anything further?

24 Justice Sotomayor?

25 Justice Gorsuch?

1 Justice Kavanaugh?

2 Justice Barrett?

3 Thank you, counsel.

4 Mr. McGill.

5 ORAL ARGUMENT OF MATTHEW D. MCGILL

6 ON BEHALF OF THE PETITIONERS IN CASE 23-1201

7 MR. MCGILL: Mr. Chief Justice, and
8 may it please the Court:

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

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

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

1 sufficient to hale a foreign natural person into
2 court almost 200 years ago in Toland versus
3 Sprague.

4 I welcome the Court's questions.

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

7 MR. MCGILL: Yes, Your Honor.

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

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

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

23 The Ninth Circuit has held in its
24 decision, Gregorian versus Izvestia, that if
25 there is no immunity under the FSIA, the court

1 still must then consider whether "the
2 constitutional constraints of the Due Process
3 Clause preclude the assertion of personal
4 jurisdiction."

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

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

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

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

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

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

25 The minimum contacts standard looks to

1 the contacts of the defendant. The fact that
2 the -- it's a U.S. person bringing the
3 arbitration claim is practically neither here
4 nor there to a -- to the -- to a minimum
5 contacts analysis.

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

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

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

1 the -- the nation, is something altogether
2 different.

3 JUSTICE JACKSON: Can I ask you, if we
4 vacate and remand on the statutory question, is
5 there anything precluding the parties from
6 making the arguments related to the
7 constitutional issue on remand?

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 JUSTICE SOTOMAYOR: I have a question
4 from curiosity. This is not an enforcement
5 action. It's a motion to confirm the
6 arbitration award. How does that get you
7 anything if there are no resources here to
8 enforce it against?

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

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

22 MR. MCGILL: It's to enforce the
23 arbitral --

24 JUSTICE SOTOMAYOR: Now, if -- if you
25 don't get it confirmed now, could you -- you --

1 you have no basis to attach the property that's
2 here otherwise? Is that it?

3 MR. MCGILL: So, Your Honor --

4 JUSTICE SOTOMAYOR: Because the risk
5 would be here?

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

16 JUSTICE SOTOMAYOR: Ah. Okay. Thank
17 you.

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

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor? No? Sorry.

22 JUSTICE SOTOMAYOR: I -- I --

23 CHIEF JUSTICE ROBERTS: Anything
24 further?

25 Justice Gorsuch?

1 Justice Jackson?

2 Thank you, counsel.

3 MR. MCGILL: Thank you.

4 CHIEF JUSTICE ROBERTS: Ms. Harris.

5 ORAL ARGUMENT OF SARAH M. HARRIS

6 FOR THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONERS

8 MS. HARRIS: Mr. Chief Justice, and

9 may it please the Court:

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

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

24 I welcome the Court's questions.

25 JUSTICE THOMAS: I know you think that

1 the Respondent waived the arbitration exception
2 point, that -- that even that requires some
3 nexus.

4 Do you have any preliminary argument
5 as to whether they're right on the -- on the
6 merits of that argument?

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

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

25 Second point on this is that Chapter 2

1 of Title 9 is devoted in -- in painstaking
2 detail to implementing the New York Convention,
3 and its provisions are flatly inconsistent with
4 the idea that only U.S. commerce is allowed or
5 that you could only have a foreign sovereign
6 subjected to U.S. courts for enforcement of a
7 New York Convention matter based on those. So,
8 to start with, 9 U.S.C. 202, which provides that
9 matters arising other -- under the New York
10 Convention just need to involve commercial
11 matters, not matters involving U.S. commerce,
12 commercial matters.

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

20 And then, to remove any doubt, Section
21 208 provides that if there is any tension
22 between Chapter 2, which is this whole
23 reticulated scheme for enforcing the New York
24 Convention, and Chapter 1, the domestic FAA,
25 where Respondents are drawing their limitation,

1 Chapter 2 wins. And so that's the second point.

2 And third is, just with respect to the
3 arbitration exception itself, Respondents' view
4 makes very little sense. So their idea is that
5 the subject matter capable of arbitration in the
6 U.S. has this implicit limitation for U.S.
7 commerce. But the place where Congress seems to
8 have required -- accounted for U.S. interests
9 and required something short of a nexus but a
10 connection is actually (a) through (d) of the
11 arbitration exception.

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

23 It's hard to fathom why Congress would
24 have taken the trouble to create the -- these
25 very specific grounds for identifying something

1 connected to the United States, whether it's
2 arbitrating here, ratifying a treaty that the
3 U.S. is a party to, or having something that
4 could have otherwise been brought in U.S. courts
5 or there's an otherwise a waiver, if Congress
6 all -- the long wanted this massive limitation
7 that no court has ever adopted and that is
8 flatly contrary to the way that arbitration
9 agreements and treaties have been enforced in
10 the United States for a long time. So that's
11 what the United States would like to have
12 briefed.

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

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

23 JUSTICE GORSUCH: Yeah.

24 MS. HARRIS: And the United States'
25 position in Fuld is that the Fifth Amendment due

1 process inquiry is different given the nature of
2 the Fourteenth Amendment. It's a territorial
3 limit on states. This Court's recognized in
4 cases like J. McIntyre, BMS, a long line of
5 cases, that the Fourteenth Amendment also
6 implicates federalism interests that, of course,
7 do not apply when you're talking about Fifth
8 Amendment due process and that when you're
9 thinking about Fifth Amendment due process, one,
10 you know, you're thinking about Congress and
11 Congress's powers especially over foreign
12 affairs, so --

13 JUSTICE GORSUCH: I -- I appreciate
14 all that, but minimum contacts, is there some
15 hook in the Fourteenth Amendment to require them
16 independent of what Congress has provided?

17 MS. HARRIS: So independent of what
18 Congress is providing, the United States'
19 position in Fuld is no, the minimum contacts
20 would not be the right test.

21 JUSTICE GORSUCH: Thank you.

22 MS. HARRIS: And just to reiterate,
23 you know, this seems like a straightforward
24 test -- case. Everyone appears to agree on the
25 question presented. We would, therefore, ask

1 that the Court reverse.

2 CHIEF JUSTICE ROBERTS: Questions?

3 JUSTICE ALITO: What about the -- the
4 question whether a foreign state is a person?

5 MS. HARRIS: Whether a foreign state
6 is a person?

7 JUSTICE ALITO: Yes.

8 MS. HARRIS: So the United States, if
9 you were to entertain the concept of the due
10 process question being in this case, the United
11 States' position is that foreign states are not
12 persons for constitutional purposes, consistent
13 with what this Court suggested in *Weltover* and
14 the consent -- the post-*Weltover* consensus of
15 courts of appeals.

16 That flows from, first of all, I mean,
17 I think the way the Constitution deals with
18 foreign states by calling them foreign states
19 and foreign nations as distinct from persons and
20 the fact that foreign nations deal with the
21 United States on a plane of international
22 relations where they have all sorts of tools of
23 diplomacy that are very far afield from the idea
24 that foreign sovereigns can invoke due process
25 in U.S. courts to sort of thwart the judgments

1 of the political branches as to when they should
2 face suit. That carries immense foreign
3 relations concerns, which is something the
4 United States cares obviously a lot about in
5 terms of flexibility in dealing with our -- with
6 foreign countries.

7 JUSTICE ALITO: Do you think
8 Mr. McGill is correct that if we don't reach the
9 issue, it will just bounce back here very
10 quickly?

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

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Anything

1 further?

2 Thank you, counsel.

3 Mr. Phillips.

4 ORAL ARGUMENT OF CARTER G. PHILLIPS

5 ON BEHALF OF THE RESPONDENTS

6 MR. PHILLIPS: Thank you, Mr. Chief
7 Justice.

8 I think it's appropriate to try to
9 take a step back and understand the context in
10 which this case arises.

11 We are here talking about an
12 arbitration agreement between two corporations
13 incorporated in India, enter into a contract
14 that was executed in India, to be performed in
15 India. When there was a disagreement between
16 the parties, the contract specifically provides
17 that that agreement should be resolved by
18 arbitration in India according to Indian law and
19 that -- and that after that, according to the
20 government of India, by a court of competent
21 jurisdiction, it would be reviewed by an Indian
22 court.

23 There is nothing in that agreement
24 that remotely implicates any interest of the
25 United States of America, and there's certainly

1 nothing in that entire enterprise that remotely
2 affects either interstate or foreign commerce.

3 And that is a fundamental limitation
4 of the Federal Arbitration Act that begins with
5 the proposition that this statute is limited to
6 actions that operate in interstate or foreign
7 commerce. And, therefore, this is outside of
8 the Federal Arbitration Act.

9 If you look at Section 202, which the
10 Solicitor General herself makes reference to,
11 she -- she quotes the first sentence talk --
12 talking about "commercial" and what that means.
13 And "commercial" in that context is -- I think
14 it clearly goes back to Section 2 and Section 1,
15 which takes you right back to the Commerce
16 Clause, foreign commerce clause restriction.

17 But read the second sentence of
18 Section 201: An agreement or award -- or award
19 arising out of such a relationship which is
20 entirely between citizens of the United States
21 shall be deemed not to fall under the
22 convention.

23 All right? So, when you have two U.S.
24 citizens, they enter into an arbitration
25 agreement, that's not part of the convention.

1 It seems to me quite improbable, candidly, that
2 the United States Congress that wrote that
3 language had in mind that an agreement entered
4 into by two Indian citizens could, in fact,
5 be -- could -- could, in fact, be reviewed by a
6 U.S. court.

7 To be sure, once you have
8 confirmation -- and I think this goes to your
9 question, Justice Sotomayor -- once you have
10 confirmation, then you can execute literally
11 anywhere in the world where you can find
12 property. There's no question about that.

13 The issue in this case is
14 confirmation, what courts have the ability to
15 convert the arbitral award into a judicial
16 decree. And I submit to you that the only court
17 that has that power to do that here would be the
18 court in India, which, in fact, has held that
19 this award should be set aside.

20 JUSTICE SOTOMAYOR: I'm sorry, can I
21 just go back to that? What difference does it
22 matter under your theory that this contract is
23 between two Indian citizens as opposed to --
24 let's say it was an American corporation who
25 contracted to do exactly the same thing in

1 India. Would that be considered a commercial
2 transaction subject to the FAA?

3 MR. PHILLIPS: So are you -- you're
4 talking about a -- a U.S. --

5 JUSTICE SOTOMAYOR: A U.S. If the
6 plaintiff was a --

7 MR. PHILLIPS: -- citizen enters into
8 an agreement?

9 JUSTICE SOTOMAYOR: Yeah.

10 MR. PHILLIPS: That would make all the
11 difference in the world because that's --
12 that's --

13 JUSTICE SOTOMAYOR: So it's not the
14 subject matter --

15 MR. PHILLIPS: -- that's an agreement
16 operating in foreign commerce.

17 JUSTICE SOTOMAYOR: It's -- that's not
18 the subject matter of the contract? You think
19 it has to do with who -- who's making the
20 contract as opposed to the subject matter?

21 MR. PHILLIPS: I think it -- I think
22 it has to do -- yes, I think Mitsubishi says it
23 has to do with both. Subject matter capable of
24 settlement by arbitration under the laws of the
25 United States is -- to be sure, includes things

1 like could you exclude antitrust, can you
2 exclude domestic relations. Those are subject
3 matters.

4 JUSTICE SOTOMAYOR: Yeah. Well, but
5 that seems to --

6 MR. PHILLIPS: But there's also a
7 subject matter --

8 JUSTICE SOTOMAYOR: -- but -- but that
9 seems to be all it excludes, meaning I don't see
10 anything in the language of the convention that
11 suggests that the citizenships of the parties
12 entering into the agreement --

13 MR. PHILLIPS: Section -- Section --

14 JUSTICE SOTOMAYOR: -- have anything
15 to do with the subject matter.

16 MR. PHILLIPS: Section 202 takes you
17 straight back to Section 2, and Section 2 takes
18 you right back to Section 1.

19 JUSTICE SOTOMAYOR: Mr. Phillips, the
20 one thing this is leading me to believe is that
21 this wasn't adequately argued below. Whether
22 you have --

23 MR. PHILLIPS: But this is subject
24 matter jurisdiction, Justice Sotomayor.

25 JUSTICE JACKSON: Is it, Mr. Phillips?

1 That -- that was my question. I'm trying to
2 figure out whether your argument is, you know,
3 seeded in subject matter jurisdiction or
4 personal jurisdiction.

5 Where -- I -- I understand the thrust
6 of what you're saying, but where -- where is it
7 coming from in terms of the doctrines that we
8 use to evaluate the limits on judicial
9 authority?

10 MR. PHILLIPS: Right. 1330(a) says
11 that there is only subject matter jurisdiction
12 when there has -- when there is clearly an
13 exemption to the Foreign Sovereign Immunities
14 Act that operates.

15 JUSTICE JACKSON: And counsel on the
16 other side says that below at least you conceded
17 that the arbitration agreement -- or the
18 arbitration exception applies here and there was
19 subject matter jurisdiction.

20 MR. PHILLIPS: Right. But this Court
21 still has to say -- of course, still -- still
22 have to satisfy -- I mean, it -- it would be
23 inherent in protecting the interests and rights
24 of a government like India or its -- or its
25 state-owned enterprises.

1 JUSTICE JACKSON: Well, I guess I just
2 want to understand your position. Are you
3 saying that the arbitration exception is
4 satisfied here or not?

5 MR. PHILLIPS: No, it -- I'm saying
6 it's not satisfied here, which is why I
7 didn't -- and -- and -- and it's not waivable.

8 JUSTICE JACKSON: And it's not
9 waivable?

10 MR. PHILLIPS: Correct.

11 JUSTICE JACKSON: So the fact that you
12 said below that it was satisfied, we don't --
13 we're not bound by that in any way? Or you're
14 not?

15 MR. PHILLIPS: You're not bound by
16 that in any way.

17 JUSTICE JACKSON: You're not.

18 MR. PHILLIPS: And I think it's fair
19 to -- you know, in context, you should
20 recognize, right, the -- the -- the law in the
21 Ninth Circuit was absolutely clear that minimum
22 contacts was required, there was no -- you know,
23 there were no minimum contacts in this case, and
24 that this case would be easily resolved in the
25 Ninth Circuit on the basis of -- of that

1 interpretation of the -- of the FSIA --

2 JUSTICE GORSUCH: Mr. Phillips --

3 JUSTICE KAGAN: Have you given up on

4 that?

5 MR. PHILLIPS: -- and 13 -- I'm sorry,

6 Your Honor?

7 JUSTICE KAGAN: Have you given up on

8 that?

9 MR. PHILLIPS: I have given up on

10 that, Your Honor.

11 JUSTICE GORSUCH: So --

12 JUSTICE KAGAN: So why isn't the right

13 thing to do just to say everybody agrees that

14 the Ninth Circuit was wrong, we toss it back to

15 the Ninth Circuit for everything else?

16 MR. PHILLIPS: Because, in order to

17 get to 1330(a), you have to go through -- there

18 has to be an exception under the Foreign

19 Sovereign Immunities Act. And if you don't --

20 so -- so you have to have subject matter

21 jurisdiction.

22 JUSTICE GORSUCH: Yeah. But why --

23 why wouldn't the Ninth Circuit be the

24 appropriate forum for that argument in the first

25 instance?

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

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

8 MR. PHILLIPS: But it's -- but it's --
9 it's --

10 JUSTICE GORSUCH: -- why wouldn't we
11 normally send it back?

12 MR. PHILLIPS: Well, as I understand
13 it, the Court, even on its own motion, could sua
14 sponte decide that issue.

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

17 My question is this is an argument
18 that you disclaimed in the district court, you
19 disclaimed in the court of appeals, and you're
20 making for the first time here. Do you see any
21 impediment to us simply remanding the matter --
22 vacating and remanding the matter back to the
23 Ninth Circuit to consider your argument in the
24 first instance?

25 MR. PHILLIPS: It -- it -- it would be

1 a little strange, I guess, for the Court to --

2 JUSTICE GORSUCH: You might think it a
3 little strange, but do you see any impediment to
4 it?

5 MR. PHILLIPS: I would think the Court
6 would want to ensure itself it has subject
7 matter jurisdiction.

8 I -- I suppose the -- the -- the
9 single impediment to it, candidly, would be
10 taking into account the -- the brief filed by
11 the Government of India, which has said all
12 along that this case is -- this is an Indian
13 matter that's been resolved by India --

14 JUSTICE GORSUCH: Yeah, I -- I've
15 heard that.

16 MR. PHILLIPS: -- et cetera, and that
17 this remains an irritant.

18 JUSTICE GORSUCH: But I'm -- I'm --
19 I'm looking for a legal impediment, the course
20 that Justice Kagan outlined, and I'm not hearing
21 one.

22 MR. PHILLIPS: Well, I don't know, I
23 mean, unless the Court's willing to ignore the
24 subject matter jurisdiction to resolve a
25 personal jurisdiction --

1 JUSTICE GORSUCH: All right. Let --
2 let --

3 JUSTICE KAGAN: But we wouldn't be
4 ignoring the subject matter jurisdiction,
5 Mr. Phillips. We'd just be saying, you know, as
6 to the view of subject matter jurisdiction that
7 was taken by the Ninth Circuit, that's
8 incorrect, nobody defends it, so try again and
9 see whether there's subject matter jurisdiction
10 in this case.

11 Not only does there seem to me no
12 impediment, I mean, I don't see really what's
13 strange about that. I would think it would be
14 strange to do the opposite given that neither
15 the Ninth Circuit nor, as far as I'm aware, any
16 circuit has evaluated the theory that you're
17 raising now.

18 MR. PHILLIPS: To be sure, I mean,
19 that -- that -- that's undeniably true. I --
20 but I -- you know, the -- the bottom line is is
21 that subject matter jurisdiction is not waivable
22 and --

23 JUSTICE KAGAN: We -- we wouldn't be
24 saying it's waivable. We would just be saying,
25 you know, nobody's raised these subject matter

1 jurisdiction arguments.

2 MR. PHILLIPS: Well --

3 JUSTICE KAGAN: The ones that were
4 raised, the ones that were passed on are wrong.
5 There are some other arguments that people are
6 tossing around. We're not the people to
7 evaluate that in the first instance when neither
8 the Ninth Circuit nor any other circuit has done
9 so.

10 MR. PHILLIPS: Look, the -- the -- to
11 be sure, the -- I think the Court can decide for
12 itself how to order up dealing with
13 jurisdictional issues. I -- I would just go
14 back to two points. One is it goes to subject
15 matter jurisdiction, not waivable. Second of
16 all, the longer this litigation continues, it
17 serves as an irritant to the Indian government.

18 JUSTICE GORSUCH: Yeah. Well, I --
19 I -- I get that. But part of it is that it's a
20 new argument that's being pressed here for the
21 first time, and so, in terms of prolonging the
22 litigation, that seems to me perhaps nobody's
23 hands are entirely clean here.

24 On the question whether it is subject
25 matter jurisdiction, this is a sovereign

1 immunity defense and that's waivable. So what
2 do we do about that?

3 MR. PHILLIPS: Well, you don't -- you
4 don't get to 1330(a) unless -- unless -- well,
5 it's waivable because it -- but it hadn't been
6 waived.

7 JUSTICE GORSUCH: Well, that's -- that
8 is the question. I mean, if you stipulate below
9 that there is statutory basis for -- for the
10 Court's jurisdiction, it seems to me that that
11 might have been a waiver. Why -- why wouldn't
12 that be right?

13 MR. PHILLIPS: Well, because -- well,
14 as I understand it, subject matter jurisdiction
15 in -- in the ordinary course is not waivable.

16 JUSTICE GORSUCH: In the -- in the
17 ordinary course. But sovereign immunity's a
18 little different, isn't it?

19 MR. PHILLIPS: Right. But I would
20 think that in the absence of a clear waiver,
21 which, of course, is where you -- which is the
22 very first exception, right, after you get past
23 the first exception and you're looking at the
24 rest of the exceptions, in that context, it
25 would seem to me that you have to again waive

1 those provisions explicitly.

2 JUSTICE GORSUCH: Yeah, but when you
3 say I agree that there's statutory jurisdiction
4 and you've done it in two courts, why -- why --
5 I mean, and it's a waivable defense, I -- I
6 guess I'm a little curious why -- why you aren't
7 stuck with that.

8 MR. PHILLIPS: I -- the best I can
9 give you is that the Court has historically
10 treated -- this is clearly a subject matter
11 jurisdiction question.

12 JUSTICE GORSUCH: Yeah. But you --
13 you'd agree sovereign --

14 MR. PHILLIPS: That's what 1330(a)
15 says.

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

19 MR. PHILLIPS: Yes, because the
20 Congress has -- has dealt with it in a little
21 bit different way but only as to the statement
22 that it waives at the outset, not in -- in the
23 sense that it waives going forward.

24 Again, the -- the -- you know, this
25 Court's -- all -- the U.S. authorities, U.S.

1 courts only have the authority to deal with
2 arbitrations that -- that have some kind of an
3 international component to them.

4 JUSTICE JACKSON: All right,
5 Mr. Phillips, on the -- on the merits of your
6 argument, how --

7 MR. PHILLIPS: Thank you.

8 JUSTICE JACKSON: -- how do you
9 respond to General Harris's points about the
10 subcategories within the arbitration
11 exception --

12 MR. PHILLIPS: Mm-hmm.

13 JUSTICE JACKSON: -- and that those
14 seem to be the place in which Congress was
15 accounting for the kinds of contacts that you
16 say exist in that prefatory language about
17 subject matter?

18 MR. PHILLIPS: Right. I -- I would
19 view the prefatory language as the -- not
20 prefatory but, in fact, setting out the first
21 limit on the arbitration, arbitrability.

22 JUSTICE JACKSON: So what was the need
23 for the -- the rest of them if -- if --

24 MR. PHILLIPS: So, first of all, the
25 question is, is this within foreign commerce or

1 interstate commerce? Is this a subject matter
2 capable of resolution by the United States?
3 Meaning that it's either in our foreign commerce
4 or within our interstate commerce.

5 Once you get past -- and if the answer
6 is yes, then you look at the sub-provisions to
7 say, you know, did the parties agree to have it
8 arbitrated here? Then that would be a reason to
9 bring it here.

10 I mean, the -- the first one is
11 just -- is an overarching requirement that you
12 have to affect foreign commerce, I mean, which
13 makes sense. That's the limit of Congress's
14 power, right? Congress doesn't have the
15 power -- the United States courts don't have the
16 power to dictate to the world what's fair and
17 just.

18 JUSTICE JACKSON: What about consent?
19 I don't -- I don't -- I guess I just don't
20 understand how that necessarily dovetails with
21 the idea that the United States Congress might
22 want to allow for litigation of disputes
23 concerning arbitration agreements where the
24 international parties have agreed to that.

25 MR. PHILLIPS: But there are no -- I

1 mean, I don't know what you mean by
2 "international parties." We are -- they are
3 non-U.S. parties to be sure, but they are both
4 citizens of India.

5 JUSTICE JACKSON: No, I understand
6 that, but -- but your -- your argument suggests
7 that the Congress could not determine to make
8 U.S. courts available to litigate disputes
9 between non-U.S. parties in the context of
10 international agreements, et cetera, et cetera.
11 And I don't know necessarily --

12 MR. PHILLIPS: But even this isn't
13 an -- I mean, I -- I --

14 JUSTICE JACKSON: Yeah.

15 MR. PHILLIPS: You -- yes, I think
16 there's a serious question about how far
17 Congress can go in the first place. You know,
18 why -- why would Congress open the courts and
19 the use -- and -- and limited judicial resources
20 to resolve the question of the validity of an
21 agreement between non-U.S. citizens on a
22 non-U.S. contract to be resolved by arbitration
23 in a non-U.S. forum subject to review by a
24 non-U.S. court which in this case has, in fact,
25 declared the -- set aside the -- the award,

1 which, frankly, raises its own mootness issue
2 that the Court ought to -- ought to at least be
3 concerned about in this particular litigation.

4 JUSTICE JACKSON: So does it matter
5 for your argument that the contract in this
6 case, the parties agreed to have the disputes
7 litigated by an Indian court? What if they had
8 agreed to have it litigated in the U.S.? Could
9 Congress, in your view, given this statute -- or
10 could Congress allow for U.S. courts to hear
11 that?

12 MR. PHILLIPS: That's an interest --
13 that's a tougher question, to be sure, because,
14 again, why would U.S. courts want to waste their
15 resources resolving a dispute of another
16 country?

17 JUSTICE JACKSON: I mean, I think, in
18 the background, what I'm worried about your --
19 your argument, in the background, we do have
20 international relations and circumstances in
21 which Congress might want to allow for
22 international parties to do certain things as a
23 part of their -- you know, of the United States'
24 relationship with other countries.

25 And your kind of blanket subject

1 matter jurisdiction argument seems to me to
2 undercut that in a -- in a concerning way.

3 MR. PHILLIPS: Well, I would -- I
4 would candidly be more concerned about the flip
5 side of it, which is, I mean, let's think about
6 this in the concept of reciprocity, Justice
7 Jackson. If you -- if you had -- General Motors
8 has a domestic agreement with another company
9 and, for some reason, the other company refuses
10 to go to arbitration. Under -- under the
11 government's -- under the broad theory put
12 forward by the Petitioners in this case, that
13 agreement, you -- the -- the -- the -- the
14 unhappy party in theory could go to India or
15 Russia or any of the other 171 signatories and
16 get an order to compel arbitration that would be
17 enforceable in those countries against U.S.
18 citizens.

19 As I said, read the second sentence in
20 Section 202. Any dispute between two U.S.
21 citizens is not subject to the Federal
22 Arbitration Act. Why should any dispute between
23 two citizens of another country, when it's
24 excluded -- unless there are aspects of it that
25 extend beyond that country? This -- it seems to

1 me this goes to -- and if you want to know why
2 you should decide it, it's because this is at
3 the -- this is beyond the limits of what I think
4 Congress legitimately can regulate under this
5 circumstance --

6 JUSTICE JACKSON: Ordinarily, that's
7 in -- in -- in constitutional realm, though,
8 so -- but you're making a statutory argument?

9 MR. PHILLIPS: I'm saying Congress
10 wouldn't have wanted to take this any further
11 than what it said in that statute. And the
12 statute says it's got to be in foreign commerce.
13 And foreign commerce means a relationship
14 between a state, a territory, and a foreign
15 state, not a relationship that arises
16 exclusively between U.S. citizens -- I mean,
17 sorry, Indian citizens in India under an Indian
18 contract with -- with a dispute resolution
19 system in India to be decided by an Indian court
20 and then to have the Indian court's decision
21 that set it aside ignored by the U.S. courts.

22 If you want to know where the problems
23 of foreign relations arise, read the Government
24 of India's brief. It tells you that this kind
25 of disrespect to an Indian court and this kind

1 of disrespect in terms of intruding into the
2 relationship between the State of India -- the
3 Government of India and its state-owned
4 enterprise to find out what assets are being
5 done and who's doing what with whom, those are
6 the reasons why the Court should not be
7 enforcing this kind of award under these kinds
8 of circumstances.

9 JUSTICE KAGAN: But the Solicitor
10 General tells us that the United States'
11 interests would be perfectly well served if we
12 just remanded this case.

13 MR. PHILLIPS: Well, the Solicitor
14 General also didn't have the benefit of -- of
15 thinking about the Foreign Sovereign Immunities
16 Act argument. You know, I apologize for that.
17 And -- and, look, if the Court -- if the Court
18 thought -- I think the Court, rather than
19 remanding, if -- if -- if you take my argument
20 seriously, which I think you have to, then you
21 ought to ask the case -- you know, reset the
22 case for argument -- rebrief that issue, and
23 then we'll argue that preferably next month
24 because it's fresh in my mind. I'd rather not
25 have to renew all of this stuff.

1 (Laughter.)

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

4 But that would make more sense to me
5 than simply trying to -- the problem is you
6 can't just flip off a piece a -- a piece -- this
7 is not lint on a sweater that you can knock off
8 and move away.

9 This is -- this is attached to the
10 fabric of the sweater through 1330(a) and (b).
11 1330(a) sends you to the Foreign Sovereign
12 Immunities Act. You have to do business with
13 the Foreign Sovereign Immunities Act. You can't
14 just simply say, well, nothing in 1330(a) and
15 (b) calls for minimum contacts because I
16 don't -- I don't -- I don't dispute that issue.
17 There's no -- I -- I recognize that fact.

18 Now I do think there is a second
19 argument. And I think it's not fair to say that
20 Antrix, which is a foreign corporation, and --
21 and -- and foreign corporations have -- have
22 long been recognized as having due process
23 rights, that they are persons. And I don't
24 think there's anything -- I don't think
25 Banchik's -- this Court's decision in Banchik

1 does anything to -- to -- to detract from that,
2 and, therefore, they have -- they should have a
3 Fifth Amendment right to some form of -- of due
4 process, which, in this context, I would hope
5 would include minimum contacts. And we already
6 know from the Ninth Circuit's decision that
7 there are no contacts in -- arising in this
8 case.

9 So there is still a very significant
10 Fifth Amendment issue here for the Court to
11 resolve that only affects Antrix. You know,
12 there's no reason for the Court to decide at
13 this point whether India or any other foreign
14 sovereign is entitled to -- entitled to due
15 process rights. That one I think clearly should
16 be saved for another day.

17 CHIEF JUSTICE ROBERTS: Anything
18 further?

19 JUSTICE THOMAS: No.

20 CHIEF JUSTICE ROBERTS: Anything
21 further?

22 Thank you, counsel.

23 MR. PHILLIPS: Thank you, Your Honor.
24 Please -- please affirm.

25 CHIEF JUSTICE ROBERTS: Mr. McGill.

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

3 MR. MCGILL: Thank you, Mr. Chief
4 Justice.

5 On the construction of Section
6 1330(b), we have another instance of radical
7 agreement. It does not require minimum
8 contacts. We also have radical agreement that
9 Antrix previously conceded that the arbitration
10 exception applies. That establishes that an
11 immunity exception applies either under
12 1605(a)(6), which is the arbitration exception,
13 or 1605(a)(1), which is the waiver exception.
14 Either way, an immunity exception applies, and
15 that is all that is required to establish
16 subject matter jurisdiction under Section
17 1330(a).

18 Going to the merits of the brand-new
19 argument, the relevant text here is "subject
20 matter capable of arbitration under the laws of
21 the United States." That is torn from the New
22 York Convention. It appears in both Article II
23 and Article V. It was construed by this Court
24 in Mitsubishi Motors, and it requires an express
25 direction from Congress to exclude a subject

1 matter from arbitration under the laws of the
2 United States.

3 Section 2 of the FAA, Section 202 of
4 the Chapter 2 of Title 9, neither of them
5 excludes anything whatsoever from arbitration
6 under the laws of the United States. It is
7 simply not true that just because an item is not
8 something that can be arbitrated under the FAA,
9 it cannot be arbitrated at all under the United
10 States.

11 What we're left with is a policy
12 argument that Congress would not have wanted to
13 allow foreign persons to bring claims to enforce
14 arbitral awards. The Supreme Court, this Court,
15 addressed that in Verlinden when it said that
16 this Foreign Sovereign Immunities Act allows
17 foreign persons to bring claims.

18 Therefore, because we're talking about
19 the Foreign Sovereign Immunities Act, you're
20 always talking, in -- at least in the language
21 of Verlinden, you're always allowing a foreign
22 plaintiff versus a foreign state defendant.
23 This is a -- this has been settled since
24 Verlinden.

25 The last point is that if Antrix's

1 argument here were accepted and only U.S.
2 persons can bring claims to enforce arbitral
3 awards, international arbitral awards in the
4 United States, then we could fairly only expect
5 that similar reciprocal limitations would be
6 placed on the ability of United States
7 businesses to bring -- to enforce their arbitral
8 awards outside of the United States, which is
9 vital to the enforcement of arbitral awards
10 internationally.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 The case is submitted.

14 (Whereupon, at 10:55 a.m., the case
15 was submitted.)

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