No. 22-886

IN THE

Supreme Court of the United States

BLENHEIM CAPITAL HOLDINGS LTD., ET AL.,
Petitioners,

v.

LOCKHEED MARTIN CORPORATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF

A. Response to the United States' Arguments That the Fourth Circuit's Decision Was Correct and Not in Conflict with *Weltover* and Four Other Circuits

The Government argues that the Court of Appeals correctly held that South Korea did not engage in commercial activity when it entered into a contract with Lockheed for the acquisition of a satellite to be used for military purposes, or when it engaged in tortious conduct interfering with Blenheim's financing of that acquisition. Its arguments do not withstand scrutiny and merely underscore the need for this Court's review.

The Government's central argument is that the underlying FMS transaction, in which South Korea acquired F-35 fighter jets through a contract with the United States (who in turn acquired the jets from Lockheed), was not commercial activity under the FSIA. Assuming that is correct, it is irrelevant. The question is not whether the FMS transaction between South Korea and the United States was commercial activity; the question is whether South Korea's contract that was executed directly with Lockheed to procure a satellite, and the attendant tortious conduct, was commercial activity.

The Government's conflation of the offset transaction with the underlying FMS transaction goes to the heart of the Fourth Circuit's error. To focus on the FMS transaction is to focus on the ***purpose*** of the satellite offset transaction, rather than its ***nature.*** Doing so violates both the plain text of the FSIA, 28 U.S.C. § 1603(d) ("The commercial character of an

activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."), and this Court's decision in *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992) ("because the Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives").

This central error reveals itself in a close reading of the Government's brief. By constantly emphasizing the undisputed fact that the purpose of the offset transaction was inextricably linked to the F-35 FMS transaction, the Government ends up (perhaps unwittingly) arguing that it is the purpose of the offset transaction that should govern the commercial activity inquiry, rather than the nature of the transaction. For example, in trying to distinguish the reasoning in *Weltover*, it makes the following assertion:

> And unlike boots or bullets, F-35 fighter jets—the only goods exchanged in the FMS transaction here and **the only reason for the related offset**—are sold exclusively by one sovereign (the United States) to other sovereigns.

Gov. Br. at 15 (emphasis added).

But the whole point of *Weltover* is that, pursuant to the plain text of 28 U.S.C. § 1603(d), it does not matter what "the only reason for the related offset" was. Just as it did not matter in *Weltover* that the

Republic of Argentina was restructuring its government bonds to address the uniquely sovereign interests of managing a foreign currency crisis and its macroeconomic and monetary policies, it does not matter that the reason South Korea was procuring a satellite from Lockheed was to generate an offset for its F-35 FMS transaction. That underlying purpose is irrelevant, yet it is the centerpiece of the Government's brief, just as it was the erroneous centerpiece of the Fourth Circuit's decision below.

It is similarly revealing that when the Government tries to cite case law to support the proposition that not every purchase of goods by a foreign sovereign from a private U.S. company is commercial activity under the FSIA, it cites only three cases: the Fourth Circuit decision in this case and dicta from two cases decided ***before*** this Court's *Weltover* decision. Gov. Br. at 14 (citing *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987) and *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988)). That these are the only cases it can cite for its central legal assertion reveals that the decision below is an outlier and in conflict with all post-*Weltover* case law. Under *Weltover*, it has been clear to all other courts that when a foreign sovereign enters into a contract to acquire goods from a private company, that is commercial activity under the FSIA—no matter what the purpose of that transaction might be.

That is the reason why four other circuits have readily held that when a foreign sovereign acquires military goods from a private company, that constitutes commercial activity under the FSIA. Pet. at 18-25. The only way for the Government to

distinguish those cases is by saying they did not involve a transaction that was entered into to serve as an offset to an underlying FMS transaction. That is equivalent to arguing that those cases are inapposite because the ***purpose*** of the transaction at issue in each of those cases was different from the purpose in this case. But the government's purpose in all cases was a sovereign purpose, and the purpose in all cases was irrelevant under the FSIA. 28 U.S.C. § 1603(d). Only the Fourth Circuit in this case failed to recognize that, thus splitting from the other circuits.

Likewise, it is revealing that the Government makes no effort to address the fact that the customary international law codified by the FSIA held that when a foreign sovereign acquired goods from a private party that it would have been illegal for a private party to have acquired, that purchase of goods is still commercial activity and hence not eligible for sovereign immunity. Pet. at 29-32. That is what the 1972 European Convention on State Immunity provided, and numerous courts of appeal have looked to that Convention as evidence of the customary international law adopted by the FSIA. Pet. at 30-31 & n.9.

The Government's brief itself cites to the 1972 European Convention on State Immunity as evidence of the customary international law that was codified by the FSIA—it does so to make the point that transactions between sovereigns are not commercial activity. But as shown above, that is not the issue presented by this case. The issue here is whether a transaction entered into through a contract executed directly between a foreign sovereign and a private U.S. company is commercial activity, or whether it

loses its status as commercial activity simply because its purpose was to facilitate another transaction that only the government could do. The European Convention plainly says an activity such as the purchase of goods from a private company remains commercial even if it would have been illegal for a private party to purchase those goods: "the fact that the law of the State of the forum or that of the defendant State would prohibit private persons from exercising the relevant activity, would permit only certain categories of persons to do so, or would contain special rules governing the exercise of that activity by the State, is to be left out of account." Explanatory Report to the European Convention on State Immunity art. 7 ¶37, May 16, 1972, E.T.S. No. 74; *see also* Pet. at 31 (citing international case law finding no immunity for state purchasers of arms and munitions).

In short, the customary international law adopted by the FSIA was clear: when a foreign sovereign acquires goods from a private company, that is commercial activity irrespective of what the purpose of the transaction is, and irrespective of whether a private party would have been prohibited from purchasing those specific goods. That principle is what decided the result in *Weltover*, and it has been specifically applied to hold that purchases of military goods for sovereign purposes is commercial activity by the Fifth, Eighth, Ninth, and Eleventh Circuits. Pet. at 18-25. But the decision below failed to apply that principle. Review and reversal are therefore warranted.

B. Response to the United States' Argument That This Case Presents a Poor Vehicle for Review

As shown above, the Government's argument that there is no circuit split depends on its mischaracterization of this case as different because the purpose of the transaction was to provide an offset to an FMS transaction. That purpose is irrelevant as a matter of law, and thus not a basis for denying the existence of a circuit split on the issue of whether a contract by a foreign sovereign to acquire goods from a private company for a military purpose is commercial activity. Four circuits have said "Yes" to that question, and the court below said "No." That is a split that needs to be resolved.

That one circuit held that an FMS transaction between sovereigns is not commercial activity is of no moment. *See* Gov. Br. at 17-18 (citing *Heroth v. Kingdom of Saudi Arabia*, 331 Fed. App'x 1, 2-3 (D.C. Cir. 2009)).[1]

The Government argues this case is a "poor vehicle" for review because it involves "unique facts." Gov. Br. at 21. But every case involves "unique facts." The Government says the "unique facts" counseling against review here are that (a) the satellite transaction was "closely linked to the underlying sale

[1] Nevertheless, it is worth noting that a district court within the same circuit as *Heroth* held that FMS transactions are commercial activity. *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88, 110 (D.D.C. 2020), *abrogated in other part by Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021). That district court reasoned that that *Heroth*'s discussion, "in a footnote," of whether FMS transactions are commercial was "unnecessary to the holding" and "relied on inapposite authority," leading the *Heroth* court to "misapply[y] the standard from *Weltover*." *Id.*

of the FMS-only F-35 fighter jets," (b) "DOD determined that the offset's costs were reasonable and approved the offset before it could proceed," and (c) "DOD no longer assesses the reasonableness of an offset's costs or separately approves offset transactions." *Id.* None of these facts counsel against review. The bottom line is that the lower court applied a "purpose" test in determining the commercial activity exception, and created precedent that will lead to confusion instead of clarity in the $170 billion annual industry in which U.S. companies sell military goods to foreign sovereigns.[2] Those transactions necessarily occur in part as FMS transactions, in part as Direct Commercial Sales, and in part as offsets. Regardless, the law on what constitutes commercial activity should be settled, and the disparity in the guidance from the courts of appeal should be resolved.

If anything, that the Government has decided to stop approving offset transactions only serves to underscore that there may be something untoward that occurred in transactions such as the one at issue in this case, which weighs in favor of review and reversal, not against it.

Further, the Government's argument about the "unique facts" of this case unwittingly reveals, once again, that it is defending an analysis that applies the wrong legal standard. The Government argues that "other offsets have minimal connection to the underlying FMS transaction or the United States' national-security interests," and therefore "Such

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[2] *See U.S. Arms Sales and Defense Trade*, U.S. Dep't of State (January 20, 2021), https://www.state.gov/u-s-arms-sales-and-defense-trade/; *see also* 22 U.S.C. § 2762; JA-73 (¶39).

offset transactions may require a different analysis to determine whether they fall within the FSIA's commercial-activity exception." Gov. Br. at 21. This makes no sense. The ***purpose*** of the offset transaction, and how closely that purpose is tied to an FMS transaction, is not what governs the inquiry. Instead, the inquiry is into the ***nature*** of the transaction. If it is a contract entered into by a foreign sovereign directly with a U.S. contractor to procure goods, then it is commercial activity. That simple concept, articulated in *Weltover* and applied uniformly by multiple circuits before this case, was abandoned by the Fourth Circuit here, just as it is contradicted by the Government's arguments. That calls out for review and reversal.

The Government also argues that the existence of a second jurisdictional argument makes this case a poor vehicle for review. That alleged second jurisdictional issue is the district court's statement that "petitioners' suit is not 'based upon' any commercial activity because '[t]he 'gravamen' of [petitioners'] suit is tortious interference with [the] contract' between petitioners and Lockheed—'not the commercial activity by South Korea.'" Gov. Br. at 22 (quoting App. 46). That was an obviously erroneous ruling that the Court of Appeals chose to ignore, and that cannot possibly be a basis for refusing to grant review. The fact that Petitioners' claims were based upon the tortious interference by South Korea with Petitioners' financing structure for the satellite offset transaction merely confirms why they should satisfy the commercial activity exception. First, the FSIA's legislative history and case law makes clear that commercial activity includes the commission of

"business torts." *See* H.R. Rep. No. 94-1487, at 17 (1976) (commercial activity includes "business torts").

Second, the district court fundamentally misunderstood and misapplied this Court's decision in *OBB Personenverkehr AG v. Sachs,* 577 U.S. 27 (2015). That case addressed only the first commercial activity exception—for claims "based upon a commercial activity carried on in the United States by the foreign state"—and held that it did not apply to a tort claim by a person injured by a train in Europe, and who then argued his claim was based on the commercial activity of the defendant selling Eurail tickets in the United States. *Id.* at 29. But the district court wrongly held that *OBB* stood for the following proposition: "where the conduct constituting the *gravamen* of the plaintiffs [sic] suit occurs abroad, the "commercial activity" exception to the FSIA does *not* apply." App. 45 (citing *OBB*). That is obviously wrong. As shown above, "business torts" can indeed be commercial activity under the FSIA. Further, the district court overlooked the fact that *OBB* was limited to the first commercial activity exception. *See* 577 U.S. at 31, n.1 ("As Sachs relies only on the first clause to establish jurisdiction over her suit, we limit our inquiry to that clause."). The plain text of the FSIA's third exception states that foreign sovereigns are not immune from claims "based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). That language clearly encompasses claims based on torts committed outside of the United States that are in connection with commercial activity conducted

outside the United States, so long as there is a "direct effect" in the United States. Thus, the district court completely misunderstood the *OBB* holding, and its categorical ruling regarding business torts was obviously wrong.

In short, there is no serious alternative jurisdictional issue, as shown by the fact that the Fourth Circuit said nothing about any possible alternative basis for its decision. Further, even if there were a doubt about that, this Court would have the discretion to address any such issue and correct the district court's erroneous analysis.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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