No. 18-19

IN THE

Supreme Court of the United States

REPUBLIC OF KOREA'S DEFENSE ACQUISITION PROGRAM ADMINISTRATION; REPUBLIC OF KOREA,

Petitioners,

v.

BAE SYSTEMS TECHNOLOGY SOLUTIONS & SERVICES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Fourth Circuit correctly conclude that the breach-of-contract claim of the Republic of Korea and its Defense Acquisition Program Administration against BAE Systems Technology Solutions & Services Inc. for allegedly raising its price on a Foreign Military Sales ("FMS") project is improper when, under the FMS Program, (i) the U.S. Government controls the price; (ii) there is no direct contractual relationship between the foreign government and the U.S. contractor; and (iii) the foreign government agrees to an exclusive sovereign-to-sovereign dispute resolution process?

2. Did the Fourth Circuit correctly conclude that DAPA waived any sovereign immunity it might otherwise have enjoyed when DAPA failed to assert an immunity defense in its initial answer and counterclaims?

CORPORATE DISCLOSURE STATEMENT

BAE Systems Technology Solutions & Services Inc. is a wholly-owned subsidiary of BAE Systems, Inc., which is a wholly-owned subsidiary of BAE Systems Holdings Inc. BAE Systems Holdings Inc. is a wholly-owned subsidiary of BAE Systems (Holdings) Ltd., which is a wholly-owned subsidiary of BAE Systems plc. BAE Systems plc is publicly traded on the London Stock Exchange. BAE Systems, Inc. is a U.S. corporation that maintains a Special Security Agreement with the U.S. Government and BAE Systems plc that allows BAE Systems, Inc. and its subsidiaries to supply products and services to the U.S. Government.

PARTIES TO THE PROCEEDINGS

The petitioners are the Republic of Korea and its Defense Acquisition Program Administration. The respondent is BAE Systems Technology Solutions & Services Inc. The United States of America appeared as *amicus curiae* in the Court of Appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) affirming the district court's grant of summary judgment in favor of BAE TSS is reported at *BAE Systems Technology Solution & Services Inc. v. Republic of Korea's Defense Acquisition Program Administration*, Nos. 17-1041, 17-1070, 884 F.3d 463 (4th Cir. Mar. 6, 2018) (amended Mar. 27, 2018). The district court's memorandum opinion (Pet. App. 58a-75a) finding that the court had subject matter jurisdiction because the commercial activity exception of the Foreign Sovereign Immunities Act applied is unreported but is available at *BAE Systems Technology Solution & Services Inc. v. Republic of Korea's Defense Acquisition Program Administration*, No. PWG-14-3551, 2016 WL 6167914 (D. Md. Oct. 24, 2016). The district court's memorandum opinion (Pet. App. 37a-57a) granting summary judgment in favor of BAE TSS is unreported but is available at *BAE Systems Technology Solution & Services Inc. v. Republic of Korea's Defense Acquisition Program Administration*, No. PWG-14-3551, 2016 WL 7115955 (D. Md. Dec. 7, 2016).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 6, 2018, and amended on March 27, 2018. A petition for rehearing was denied on April 3, 2018. The petition for a writ of *certiorari* was filed on June 29, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1605 of Title 28 of the United States Code provides in relevant part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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[.]

STATEMENT OF THE CASE

This case arises from a contract dispute between the Republic of Korea ("ROK") and its Defense Acquisition Program Administration (collectively, "DAPA") and a United States defense contractor, BAE TSS, relating to a project to upgrade DAPA's fleet of F-16 fighters (the "KF-16 Upgrade Program" or "Upgrade Program") pursuant to the U.S. Foreign Military Sales ("FMS") Program.

I. The Foreign Military Sales Program

Under U.S. law, there are two methods for a foreign government to purchase military equipment and services from a U.S. contractor: directly through a Direct Commercial Sale ("DCS") or, indirectly, under the FMS Program. *See Secretary of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 703 (4th Cir. 2007). A DCS transaction involves a direct contractual relationship between the foreign sovereign and the contractor; an FMS transaction does not. Defense Institute of Security Assistance Management, *Online Green Book* ("*Green Book*"), at 9-2.[1] Rather, the FMS Program uses the back-to-back contractual structure described below, with the U.S. Government ("USG") purchasing military goods or services that it then resells to the foreign government.

The Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2751 *et seq.*, authorizes the Executive Branch to engage in FMS transactions when selling certain defense articles and services to foreign governments. Under the AECA, Congress authorizes the Executive Branch to engage in such ales only when "the President finds that the furnishing of defense articles and defense services . . . will strengthen the security of the United States and promote world peace." 22 U.S.C. § 2753(a)(1).

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1. "The *Green Book* is a textbook published by the Defense Institute of Security Cooperation Studies (DISCS), a part of the Department of Defense (DoD) that provides research support to advance U.S. foreign policy through security assistance and cooperation. 'It does not set policy, precedent, or procedures,' but rather 'describes them.'" Pet. App. 4a n.2 (quoting *Resources: Publications*, DISCS, Def. Sec. Cooperation Agency, http://www.discs.dsca.mil/_pages/resources/default.aspx?section=publications&type= greenbook).

As the USG explained in its *amicus* brief in *Trimble*, "the United States retains control over every important aspect of the [FMS] transaction." Dkt. 39-50 at 23.[2] Thus, for example, if a once-allied country turns hostile, as Iran did in 1979, the USG has the authority to terminate military cooperation and owns the relationship with U.S. defense contractors responsible for any outstanding FMS projects. Def. Sec. Cooperation Agency, U.S. Dept. of Def., Security Assistance Management Manual ("SAMM"), DoD 5195.38-M, § C5.F4, Letter of Offer and Acceptance Standard Terms and Conditions, § 1.5.

A foreign government initiates an FMS transaction by submitting a Letter of Request ("LOR") to the USG. *Id*. § C5.2.1.[3] The foreign government then enters into an agreement with the USG referred to as a Letter of Offer and Acceptance ("LOA"). *Id.* § C5.4.1. The USG, in turn, enters into an agreement with the U.S. contractor, the prime contract. *See Trimble*, 484 F.3d at 703.

In an FMS transaction,

> [t]he USG assumes responsibility for the procurement of FMS items. It determines the contract type, selects the contract source, and negotiates prices and contract terms with

2. "Dkt." refers to the electronic docket for the district court action, Case No. 8:14-cv-3551-PWG (D. Md.).

3. "The *SAMM* is issued under the authority of Department of Defense ('DoD') directive 5105.65. DoD 5105.65 § 5.8 established the Defense Security Cooperation Agency ('DSCA') and authorized the DSCA to develop and promulgate the *SAMM.* The President delegated authority under the AECA to the DoD via executive order." *Trimble*, 484 F.3d at 703 n.1 (citations omitted).

> individual contractors. These negotiations are conducted on the same basis as procurements for DOD purchasers. Under FMS, the foreign purchaser trusts the USG to negotiate a contract that meets the customer's needs.

Green Book, at 15-8.

In short, the foreign government "is not a legal participant in the [FMS] procurement contract[.]" *Green Book*, at 9-3.

II. The USG Controls the FMS Price

The USG "[p]rice[s] FMS contracts using the same principles used in pricing other defense contracts." DFARS 225.7303(a). It does "not accept directions from the FMS customer on source selection decisions or contract terms[.]" DFARS 225.7304(f). Under the standard terms for LOAs ("Standard Terms"), a foreign government may cancel the LOA at any time prior to the delivery. SAMM § C5.F4, Standard Terms, § 2.1. However, if a foreign government proceeds, it agrees "to pay to the USG the total cost to the USG of the items even if costs exceed the amounts estimated in this LOA." *Id.* § C5.F4, Standard Terms, § 4.4.1.

The USG thus has complete control over FMS pricing. Pet. App. 5a. The foreign government must accept the price established by the USG. *Id.*

The FMS price thus embodies a multiplicity of factors, many of which have national security implications, including interoperability requirements (*i.e.*, how Korea's fighters communicate and work together with the U.S.

military), technology transfer, protection of classified information, technical requirements, the redundancy of systems, number of spare parts, mandated test flights, and program timing (which can affect pricing through both labor and material costs). *See, e.g.*, *Green Book*, at Ch. 7 & 15-1; SAMM § C4.3.5. By retaining for itself ultimate control over FMS pricing, the USG ensures that it maintains control over these issues as well.

Before the district court, DAPA argued that it had the authority to "Determine a Price the Contractor Will Charge the USG," *i.e.*, to dictate the FMS price through its own price competition. Dkt. 75 at 11. On appeal, DAPA abandoned the contention, conceding that the USG need not adopt a foreign government's "negotiated cost proposals." *See* C.A. No. 17-1041, Dkt. 14 at 6.

It is thus uncontested that the USG, not the foreign sovereign, makes the determination as to whether an adequate price competition for an FMS project has occurred. FAR 15.403-1(c)(1); *see also* DFARS 225.7303(b). Here, after BAE TSS' role evolved to lead contractor, with Raytheon Company ("Raytheon") as its subcontractor, the USG determined that DAPA's price competition was not adequate. Dkt. 81-13 at 7; Dkt. 77-1 ¶¶ 6-10; Dkt. 81-29; Dkt. 81-30.

In its petition for a writ of *certiorari*, DAPA characterizes this dispute as stemming from a "Korean process." *See* Pet. 16. That is fundamentally incorrect. It is undisputed that the USG required the Upgrade Program to proceed under the FMS Program for U.S. national security reasons. *See* Pet. 19. Under the FMS Program, a foreign government is permitted to conduct a competition to identify a potential U.S. contractor and may request

a sole source award to that contractor. However, the USG is not required to honor that request. Pet. App. 6a; DFARS 225.7304(a); SAMM § C6.3.5; *see generally* Dkt. 77 at 11-13. This dispute stems from an FMS project, not a "Korean process."

III. A Foreign Sovereign Must Resolve FMS Disputes Through Government-to-Government Consultations

The Standard LOA Terms provide that (i) the LOA "is subject to U.S. law and regulation, including U.S. procurement law"; and (ii) the foreign government and the USG "agree to resolve any disagreement regarding this LOA by consultations between the USG and the [foreign government] and not to refer any such disagreement to any international tribunal or third party for settlement." SAMM § C5.F4, Standard Terms, §§ 7.1-7.2.

In *Trimble*, the United Kingdom claimed to be a third-party beneficiary of an FMS agreement between the USG and Trimble, asserting that chips manufactured by the U.S. contractor for use in GPS devices were defective. The Fourth Circuit noted that "[c]ivil liabilities arising out of the performance by a private contractor of federal procurement contracts are governed by federal common law." 484 F.3d at 705-06 (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504-05 (1988)). The court held that the United Kingdom was not entitled to third-party beneficiary status because a lawsuit by a foreign government against a U.S. contractor would undermine the back-to-back contractual structure and exclusive government-to-government dispute resolution process of the FMS Program. *Id.* at 708.

In its *amicus* brief in *Trimble*, the USG underscored the importance of the question, stating that "[t]he United States has a strong national security interest in retaining for itself the right to enforce or terminate FMS contracts for restricted military equipment." Dkt. 39-50 at 9. A lawsuit against an FMS contractor "therefore implicates important national security interests and, potentially, financial obligations of the Federal Government." *Id.* The Government emphasized that "[i]f exposed to third-party claims by foreign governments, military contractors might reconsider their historic willingness to participate in these FMS transactions. [The United Kingdom's] insistence that its [lawsuit against the contractor] is consistent with the purpose of the Arms Export Control Act and the policy goals of the United States … is simply untrue." Dkt. 39-50 at 28.

IV. The KF-16 Upgrade Program

In 2011, DAPA announced a program to upgrade the avionics systems of its fleet of F-16 fighter aircraft. It held a competition to identify contractors in its LOR to the USG. Lockheed Martin (the original manufacturer of the F-16) and BAE TSS submitted bids to serve as systems-integrator for the Upgrade Program. Dkt. 39-3 at 2-3; Dkt. 69 ¶ 2. Northrop Grumman Corporation and Raytheon submitted bids to serve as the radar provider. Dkt. 39-3 at 3; Dkt. 69 ¶ 2. All previous F-16 upgrade programs had been performed by Lockheed Martin and Northrop Grumman Corporation.

In connection with its competition, DAPA required all companies that submitted bids to provide letters of guarantee. In November 2011, BAE TSS issued an initial Letter of Guarantee in the amount of $43,250,000. BAE TSS issued subsequent letters of guarantee, which

extended the expiration date and preserved the amount of $43,250,000. The letters of guarantee provided that BAE TSS would pay the amount of the letter of guarantee "if we fail to execute the contract with DAPA after the bid is awarded to us (provided that such contract is consistent with our bid)" or "we do not respond timely to the evaluation formalities of the bidder's qualification if we are designated as an eligible bidder." *See, e.g.*, Dkt. 81-4 at 2. DAPA does not allege that BAE TSS violated these requirements.

DAPA also required that BAE TSS sign a Memorandum of Agreement ("MOA"). The parties' August 1, 2012 MOA purported to govern the parties' conduct in an FMS process that culminated in (i) an LOA between the USG and the ROK, and (ii) a prime contract between the USG and BAE TSS, both governed by U.S. law. Dkt. 40-5 at 14-47. There has never been a reported case involving a similar agreement between an FMS customer and a U.S. contractor; and there is no evidence of any other such agreement in the record, other than the MOA that DAPA required Raytheon to sign as part of the same Upgrade Program.

The August 2012 MOA attached annexes relating to price, statement of work, technical specifications, and other terms for the Upgrade Program as negotiated by DAPA and BAE TSS. Dkt. 40-5 at 22-47. In the MOA, DAPA agreed to include the contents of the annexes in its LOR to the USG. BAE TSS agreed to "support [the] inclusion" of the contents of the annexes in the LOA. Dkt. 40-5 at 17.

The MOA stated that if certain delays occurred before the sovereign-to-sovereign LOA was concluded "due to the sole failure of" BAE TSS or its subcontractors, the letter

of guarantee "shall fall under the jurisdiction of the ROK Treasury for action in accordance with its terms." Dkt. 40-5 at 20. However, "such time as was expended by the USG" in concluding the LOA "shall not be considered in determining delay." *Id.*

The MOA "automatically terminate[d]" with "the signature of the FMS LOA by both DAPA, ROK[,] and the USG[,]" Dkt. 40-5 at 19, at which time BAE TSS is relieved of "all obligations under this MOA and [the letter of guarantee]." *Id.*

The MOA included a $536 million price for a specific scope of work. Dkt. 40-5 at 22. At the time of the MOA, it was not envisioned that BAE TSS would serve as lead contractor for the KF-16 Upgrade Program. DAPA had a separate MOA with Raytheon — and submitted a distinct LOR to the USG — for the radar portion of the Upgrade Program. Accordingly, Raytheon's radar work was not included in the $536 million price or specified scope of the MOA with BAE TSS. Dkt. 40-5 at 24-25; Dkt. 69 ¶ 7.

The USG later rejected DAPA's proposed approach, insisting that the Upgrade Program proceed as a single, integrated FMS project because of the sensitive military technology involved and requiring that BAE TSS serve as lead contractor. Pet. App. 5a, 21a; Dkt. 81-1 & 81-2. Thus, both the price and the scope of work for the Upgrade Program changed from that included in the August 2012 MOA.

In September 2013, the USG, DAPA, and BAE TSS met to discuss the pricing of the Upgrade Program. The USG emphasized to DAPA that "there is only one cost which is relevant, and that was the FMS program cost

estimate provided by the USG." Dkt. 81-2 at 4. To meet DAPA's budgetary goals, the parties examined a number of measures including scope and risk pool adjustments to attempt to reduce the price below the USG's previous estimate of over $2 billion. Dkt. 81-3.

Because DAPA wanted to expend funds on the Upgrade Program prior to the end of 2013, a two-phased LOA approach was proposed. Dkt. 81-3 at 10-11; Dkt. 69 ¶ 8. LOA-1 was to address pre-planning activities and long-lead support items; LOA-2 was to cover the remainder of the program. Dkt. 81-3 at 10-11.

During the September 2013 meetings, the USG and DAPA tentatively agreed on an approximately $1.7 billion price. The meeting minutes, which DAPA signed, are explicit that the price was not finalized:

> **Program Risk Assessment.** The work accomplished to achieve the DAPA budget goal [of $1.7 billion] is in many respects unprecedented. The LOR requests a highly complex, extremely integrated capability. The aggressive cost posture on the part of both BAE and the USG results in a program with high cost risk. While the USG will endeavor to work with BAE to achieve DAPA's cost goals, there are no guarantees that future funding will not be required during program execution.

Dkt. 81-3 at 11.

DAPA and BAE TSS never amended the MOA to incorporate the September 2013 revised scope of work or the $1.7 billion price.

DAPA submitted a revised LOR to the USG in September 2013. Dkt. 39-18; Dkt. 69 ¶ 9. In December 2013, DAPA and the USG executed the LOA for the Upgrade Program. Dkt. 69 ¶ 10. The LOA had an "estimated cost" of $184,990,550. *Id.* ¶ 11. It covered the pre-planning activities and long-lead support items. *Id.* ¶ 10. The remaining activities required for the Upgrade Program were still to be negotiated and incorporated into the LOA by amendment, referred to as "LOA-2." Dkt. 40-11 at 5.

Incorporating the mandatory standard terms, the LOA provided "that the U.S. DoD is solely responsible for negotiating the terms and conditions of contracts necessary to fulfill the requirements in this LOA." Dkt. 40-11 at 11, § 1.2. The ROK agreed "[t]o pay to the USG the total cost to the USG of the items even if costs exceed the amounts estimated in this LOA" (Dkt. 40-11 at 13, § 4.4.1); that the LOA "is subject to U.S. law and regulation, including U.S. procurement law" (Dkt. 40-11 at 15, § 7.1); and that the ROK would "resolve any disagreement [] by consultations between the USG and [the ROK] and not to refer any such disagreement to any international tribunal or third party for settlement." *Id.* § 7.2.

In May 2014, the USG awarded the Upgrade Program contract to BAE TSS pursuant to the FMS Program. Dkt. 69 ¶ 12. The initial scope of the May 2014 contract between BAE TSS and the Air Force mirrored that of LOA-1. Dkt. 69 ¶ 12. BAE TSS performed a significant amount of the LOA-1 work prior to termination. DAPA does not allege that any of that work was unsatisfactory.

In August and September 2014, the USG informed DAPA that the cost of the full program would be $2.4-2.5 billion, not the approximately $1.7 billion

previously discussed. In doing so, the USG explicitly cited the "Program Risk Assessment" language from the September 2013 meeting notes quoted above, which made clear that the $1.7 billion price was not final. Dkt. 81-5.

The USG increased the price for the Upgrade Program based on "historical cost data from similar F-16 development programs." Dkt. 81-6. That is, the USG's price increase was based on its historical experience with Lockheed Martin for previous F-16 upgrade programs, not on actions taken by BAE TSS.

As part of its overall price increase, the USG directed certain scope and schedule changes for BAE TSS that caused a cost increase of $193 million. As BAE TSS explained to DAPA, no part of this cost increase was the result of BAE TSS' actions. *See, e.g.*, Dkt. 81-9 & 81-10.

In September 2014, DAPA and the USG met to discuss the USG's new pricing. The USG emphasized that "[i]n FMS programs, there is no direct contractual relationship between the partner country and contractor. . . . [A]ny agreements made between DAPA and BAE are not binding." Dkt. 81-13 at 3. "Col[onel] Kang [of DAPA] replied that he understood." *Id*. The USG also reiterated that the September 2013 pricing was tentative. Dkt. 81-13 at 2.

The USG described to DAPA its historical cost methodology to develop its $2.4-2.5 billion estimate, which critically did not include BAE TSS' costs.

> The USG compared Korea requirements to other similar F-16 modification programs. Cost data is from 10 historical FMS new

> aircraft buys and 5 modification cases from 1992-present. Estimation included in the number of aircraft requested in the LOR and other pertinent factors. The database looks at commonly purchased items and country specific items. The cost data uses actual data from definitized contracts. The Cost estimate methodology includes a range of costs based on USAF's 40 years of producing, upgrading, and modifying the F-16.

Dkt. 81-13 at 3.

Relatedly, the USG expressly stated that BAE TSS' price was irrelevant to the USG's cost estimate. In the September 2014 meetings, DAPA asked the USG if the USG would lower its price estimate for the Upgrade Program if BAE TSS lowered its costs. The USG responded that "any change submitted from the contractor to DAPA will have little or no impact to the USG cost estimate" and "the position from the contractor will not change the USG cost estimate." Dkt. 81-13 at 9. Rather, "[t]o be able to execute this program, the cost will be between $2.4-2.5B." *Id.* at 7. "[T]he USG position on costs is that the $2.4B to $2.5B is required to provide the requirements from the LOR." *Id.* at 6.

Despite BAE TSS' assurances that it remained committed to the $1.7 billion price for the agreed scope of work (Dkt. 81-9) and despite the USG's explicit statements confirming that its price increase was not the result of BAE TSS' actions, DAPA steadfastly blamed BAE TSS for the price increase. Dkt. 81-7 & 81-8.

Ultimately, the sovereigns were unable to reach an agreement on pricing. At DAPA's direction, the USG terminated the program in November 2014. Lockheed Martin, a U.S. company, later assumed responsibility for the follow-on activities that replaced the Upgrade Program.

V. Procedural History

BAE TSS filed a complaint in the United States District Court for the District of Maryland, seeking a declaration that the MOA was unenforceable under the FMS Program and federal common law and that BAE TSS breached no contractual obligation. The complaint alleged that DAPA is not entitled to sovereign immunity because its conduct falls within the commercial activity exception under the Foreign Sovereign Immunities Act ("FSIA"). Dkt. 22 at 4.

The ROK filed a breach-of-contract suit against BAE TSS in Korean court, asserting that BAE TSS must pay the amount of the letter of guarantee because it allegedly violated its obligations under the MOA by increasing its price for the Upgrade Program. Dkt. 81-12 at 22-28.

In the current action, DAPA filed a motion to dismiss, contending that venue was improper, the forum selection provision of the MOA required the suit to be heard in South Korea, and the U.S. court should stay or dismiss the action in favor of the Korean action. The district court denied DAPA's motion. The court concluded that the MOA was "inextricably intertwined" with the FMS Program. Thus, the Court concluded that the "crux" of *Trimble* applies here. "[T]he FMS Program does not permit the

foreign government to sue the domestic contractor, but rather 'requires the intermediation of the United States,' a requirement that 'reflects the national security interests of the United States.'" Dkt. 43 at 23 (quoting *Trimble*, 484 F.3d at 707).

After more than a year of litigation, DAPA filed an answer and counterclaims without asserting a sovereign immunity defense. Dkt. 47. Three weeks later, DAPA filed an amended answer and counterclaims, merely denying that the FSIA commercial activity exception applied, but again failing to assert that DAPA enjoyed sovereign immunity. Dkt. 53 at 2.

As the district court recounted:

> Defendants challenged this Court's jurisdiction for the first time in their Opposition to Plaintiff's preliminary injunction motion, [citing Defs.' Opp'n at 6, 24], after having failed to raise the defense in their motion to dismiss, ECF No. 26, in their answer, ECF No. 47, during any conference calls with the Court, or at any other time during the preceding almost nineteen months of litigation. (Plaintiff filed its Complaint on November 11, 2014; Defendants originally filed their Opposition on June 6, 2016.)

Dkt. 84 at 19-20.

The court chastised DAPA for its tardy assertion of immunity. *Id.* However, the court permitted the parties to submit briefing on the issue. In its brief, DAPA did not

raise its current argument with respect to waiver. DAPA simply argued that its amended answer superseded its original answer. Dkt. 101 at 20 & n.15. It did not, as it does now, (i) admit that its initial answer had waived immunity; (ii) contend that it withdrew that waiver on the terms on which it was made under Rule 12; or (iii) cite *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984), the sole case on which it currently relies. To the contrary, BAE TSS cited *Canadian Overseas* in support of its waiver argument. Dkt. 102 at 29-30.

The district court rejected DAPA's assertion of sovereign immunity and held that the FSIA's commercial activity exception applies to this dispute. The court concluded:

> The "gravamen" of this suit could not be more commercial in nature. At its "core," this case is about whether or not South Korea has a viable breach of contract claim against BAE for its failure pay DAPA $43,250,000 due to the contractor's asserted failure to prevent the U.S. Government from increasing the price of the F-16 fleet upgrades that were the subject of an underlying FMS contract.

Pet App. 69a-70a.

The court also noted that "[t]here is strong reason to conclude that South Korea waived any sovereign immunity it once possessed by failing to raise the issue in its first Answer and Counterclaims, *see* Answer [J.A. 780-99], an action considered a 'point of no return' for the assertion of foreign sovereign immunity." Pet. App. 68a (quoting

Canadian Overseas Ores Ltd., 727 F.2d at 277). Clearly, DAPA now seeks to rehabilitate its prior, failed arguments in its petition for a writ of *certiorari* before this Court.

BAE TSS filed a motion for summary judgment. In opposing that motion, DAPA argued that it could control the FMS price (Dkt. 75 at 11), an argument it has since dropped. DAPA additionally argued that the MOA is ancillary to the FMS transaction and permissible because it is akin to an offset agreement. An offset agreement is an auxiliary package of additional benefits that an FMS contractor agrees to provide to, or perform for, the foreign government in addition to delivering the primary product or service. *Green Book*, at 9-18. The court rejected DAPA's offset argument, labeling it a "sleight of hand." Pet. App. 52a.

The district court granted summary judgment in favor of BAE TSS, concluding that DAPA's claim that BAE TSS improperly raised its price for the Upgrade Program is incompatible with, and impermissible under, the FMS Program. The court explained that the "FMS Program is specifically structured to require disagreements that arise during FMS transactions to be resolved through sovereign-to-sovereign consultation rather than through litigation." Pet. App. 56a. Thus, "[p]ermitting South Korea to enforce a contract against BAE that holds the contractor accountable for ensuring that predetermined contract terms govern the FMS transaction would run contrary to the FMS Program's structure and the national-security interests that underlie it." Pet. App. 56a-57a.

The court concluded that DAPA "seeks to hold BAE liable for the U.S. Government's conduct" and therefore "seeks to do indirectly what the FMS regulations prohibit

it from accomplishing directly — namely sue BAE for its performance on an FMS contract." Pet. App. 52a, 54a.

DAPA appealed. As in the district court, DAPA again failed to raise its current immunity argument on appeal. DAPA did not argue that it initially had waived sovereign immunity, but later withdrew that waiver. Neither did it cite Rule 12 or *Canadian Overseas*. Instead, DAPA advanced an abbreviated waiver argument, simply contending that its amended answer superseded its original answer and that it sufficiently "raised the question of the district court's jurisdiction" in its motion to dismiss (based on a forum selection clause). C.A. No. 17-1041, Dkt. 14 at 42; *see also* C.A. No. 17-1041, Dkt. 33 at 32.

After oral argument, the court of appeals invited the USG to submit an *amicus* brief. Pet. App. 34a-36a. The USG brief "supported neither party" (Pet. App. 27a), stating that "the United States is neutral (from a national security perspective) on the agreement's enforcement." Pet. App. 80a. The USG acknowledged that MOA-type agreements "may incentivize contractors to act in ways that might be contrary to the U.S. government's interests." *Id.*

In its *amicus*, the USG did not address the structural aspects of the FMS Program — the USG's control over price, the back-to-back contractual structure, and the exclusive sovereign-to-sovereign dispute resolution process — on which the district court and later the Fourth Circuit rested their decisions. Further, the USG based its position on an understanding that DAPA was not attempting to hold BAE TSS responsible for the USG's actions, despite an explicit finding by the district court to the contrary. Dkt. 104 at 12.

In a unanimous opinion, the Fourth Circuit panel affirmed the district court's decision. The court held that DAPA waived its sovereign immunity defense because it "participated in the litigation for over a year, including by filing a motion to dismiss and a responsive pleading, without giving any indication it asserted sovereign immunity." Pet. App. 20a. The court rejected DAPA's argument that its amended answer superseded it original answer for purposes of FSIA immunity. Pet. App. 19a-20a.

The court noted that "[a]lthough Korea largely relies on its forum selection clause and immunity arguments, it also challenges on the merits the grant of summary judgment to BAE." Pet. App. 21a. The court agreed with the district court that the MOA was "intimately linked to the FMS transaction" and held that the MOA was impermissible because it would undermine the FMS structure in "two critical ways." Pet. App. 22a, 24a.

First, the MOA undermines the FMS dispute resolution procedure. The court explained that, under the FMS regime, a foreign government cannot sue a U.S. contractor

> because the foreign state does not contract directly with that contractor for the goods and services the contractor ultimately supplies (via the U.S. government) to the foreign state . . . . The FMS structure thus shields a U.S. contractor, such as BAE, from liability. . . . Permitting Korea to impose such liability would run counter to the FMS structure.

Pet. App. 24a (citing *Trimble*, 484 F.3d at 707).

Second, the court explained that enforcing the MOA would undermine the USG's control over the FMS price. "Because the U.S. government retains control over price in an FMS transaction, a foreign state generally has no cause of action — against anyone — if the price demanded by the U.S. government increases over time. If a foreign state does not wish to abide by this limitation, it need not, and should not, enter into an FMS transaction." Pet. App. 26a. The court rejected DAPA's analogy likening the MOA to an offset agreement because "[o]ffsets, unlike the BAE-Korea agreement, do not undermine the FMS structure." Pet. App. 26a n.11.

In reaching its decision, the Fourth Circuit noted that the USG *amicus* brief "fails to even mention the statute authorizing FMS transactions (AECA), the regulations governing such transactions (DFARS), the key manual with which FMS transactions must comply (SAMM), or the standard terms used in FMS agreements." Pet. App. 28a. The Court rejected the USG's attempt to distinguish *Trimble* factually, rather than addressing "concerns at the center of the *Trimble* holding that the foreign government's lawsuit runs counter to the statutory and regulatory structure underpinning FMS transactions." Pet. App. 28a at n.13. The Court concluded the USG's proposed case-by-case approach was "unworkable." Pet. App. 29a.

DAPA petitioned the Court of Appeals for rehearing and rehearing *en banc*, acknowledging for the first time that its initial answer waived sovereign immunity and arguing that it later withdrew its waiver by amending its answer. DAPA first cited Rule 12(h) and *Canadian Overseas* in its petition (C.A. No. 17-1041, Dkt. 61), which the Fourth Circuit denied. Pet. App. 76a-77a.

REASONS FOR DENYING *CERTIORARI*

DAPA offers no compelling justification for granting *certiorari*. DAPA does not attempt to identify a split of authority with respect to the first question presented. There is not even a divergence of opinion — the district court and all three panelists concluded DAPA's claim runs afoul of the FMS Program and no judge dissented from denial of rehearing *en banc*. Moreover, the enforceability of this MOA does not present an important or recurring question of federal law. The dispute instead reflects unique circumstances.

DAPA's attempt to manufacture a circuit split with respect to the sovereign immunity issue crumbles on even minimal inspection. The case on which DAPA relies, *Canadian Overseas*, was cited by the Fourth Circuit in support of its holding that DAPA waived its immunity. Like the Fourth Circuit, *Canadian Overseas* held that a foreign sovereign waives its immunity if, as was the case here, it fails to assert an immunity defense in its first responsive pleading. *Id.* at 277.

I. DAPA's Claim is Impermissible Under the FMS Program

A. The Court of Appeals' Decision Is Correct

The Fourth Circuit (and the district court before it) correctly held that DAPA's claim against BAE TSS is improper under the FMS Program. DAPA's suit undermines the USG's control over price, the back-to-back contractual structure of the FMS Program, and the exclusive sovereign-to-sovereign dispute resolution process.

DAPA contends that its claims against BAE TSS are nonetheless permissible because they (i) rest on the MOA; and (ii) the MOA is separate from the actual contract for military goods and services.

As both the district court and the Fourth Circuit concluded, DAPA's characterization of the MOA is untenable. The MOA was intimately tied to the FMS Program. The agreement was "to document the items proposed by [BAE TSS] for inclusion into the anticipated FMS LOR . . . ." Dkt. 40-5 at 16. It attached annexes relating to the potential price, statement of work, technical specifications, and other terms for the Upgrade Program. *Id*. DAPA agreed to include the contents of the annexes in its formal FMS request to the USG. Dkt. 40-5 at 16-17. BAE TSS agreed to "support [the] inclusion" of the contents of the annexes in the government-to-government FMS agreement. *Id*. The MOA, moreover, automatically terminated with the signature of the government-to-government LOA. Dkt. 40-5 at 19.

The conclusion that the foreign sovereign cannot sue the FMS contractor is particularly apt here. As both the district court and the Fourth Circuit determined, DAPA seeks to hold BAE TSS responsible for a price increase imposed by the USG. Pet. App. 54a; Pet. App. 29a.

DAPA's attempt to distinguish *Trimble* is unavailing. *Trimble* did not involve a direct agreement between the foreign government and the U.S. contractor. Yet, the reasoning of *Trimble* applies with equal — even greater — force here. *Trimble* held that the structure of the FMS Program requires the USG to control the relationship with a contractor and prohibits a suit by the foreign government against the contractor. Thus, a foreign government is not a third-party beneficiary under an LOA.

The LOA is an agreement negotiated by the USG, presumably reflecting its policies and priorities. By contrast, the USG had no input into the MOA. Allowing a foreign government to enforce an MOA relating directly to the substance of an FMS transaction — an agreement on which the USG exercised no influence — undermines the FMS structure to an even greater extent than the third-party beneficiary claim at issue in *Trimble*. Here, DAPA requests this Court to force the Fourth Circuit to reconsider its ruling in *Trimble* — an invitation the Fourth Circuit properly declined.

B. The Court of Appeals' Decision Affirms Executive Authority

Citing *Department of Navy v. Egan*, 484 U.S. 518 (1988), and *Ziglar v. Abassi*, 137 S. Ct. 1843 (2017), DAPA contends that this Court's review is warranted because the Fourth Circuit's decision undermines Executive authority. That is inaccurate.

Egan and *Ziglar* involved legal challenges to Executive actions. In *Egan*, the plaintiff sought to second guess the Executive's decision to revoke his security clearance. 484 U.S. at 520. In *Ziglar*, alien detainees who were held on immigration violations in the wake of the September 11, 2001 terrorist attacks brought a putative class action under *Bivens* against federal executive officials responsible for their detention. 137 S. Ct. at 1852-54.

This case, by contrast, involves a contract claim. BAE TSS did not bring suit challenging Executive action. To the extent that either party is challenging the USG's decisions, it is DAPA. The USG required the Upgrade

Program to proceed as an FMS project. The USG rejected the price that both DAPA and BAE TSS desired for the Upgrade Program. The USG required DAPA to sign an LOA including an exclusive dispute resolution process. DAPA's suit seeks to undermine those decisions.

Indeed, contrary to DAPA's assertions, the Fourth Circuit's opinion expressly affirms the Executive's national security authority. It holds that a foreign sovereign may not circumvent the requirements of the FMS Program. The USG retains the unfettered authority to resolve FMS disputes based on its assessment of the national security interests. Here, if the USG had agreed with DAPA's contentions, it could have required the Upgrade Program be performed at the price DAPA desired (a result BAE TSS would have welcomed). The Fourth Circuit's decision does not diminish the Executive's authority in any respect.

This case concerns a simple matter of statutory and regulatory interpretation, which "is a familiar judicial exercise." *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

Finally, DAPA argues for the first time in its petition for *certiorari* that the Fourth Circuit's decision undermines U.S. national security by potentially dissuading foreign governments from participating in the FMS Program. Assuming that DAPA has not waived this argument (Pet. App. 29a at n.14), it is misplaced.

The FMS Program is intended to encourage security cooperation with our allies. However, it does so under strict conditions. If, as here, the USG requires a project to proceed under the FMS Program, rather than as a direct commercial sale, the USG must approve the FMS project and exercises complete control over the FMS process. That control includes an agreement by the foreign government to pay the price of the FMS project even if it exceeds that estimated in the LOA, the back-to-back contractual structure, and an exclusive dispute resolution process that offers no more than "consultations" and in which the USG retains the last word.

Each of these features is much more likely to dissuade a foreign government from participating in the FMS Program than the inability to enforce an MOA-type agreement. It is telling that Lockheed Martin, another U.S. company, assumed responsibility for the follow-on activities that replaced the Upgrade Program after DAPA terminated BAE TSS. Indeed, despite the district court's holding in this case, FMS sales are at record levels.[4]

To the extent that DAPA is suggesting that the Fourth Circuit's decision did not give enough weight to the USG's *amicus* brief, the argument provides no basis for this Court's review. Even with respect to diplomatic concerns, courts credit the USG's positions only to the extent they are adequately reasoned, based on a proper understanding of the facts, and directed to the correct issues. *See, e.g.*, *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247,

4. Def. Sec. Cooperation Agency, U.S. Dept. of Def., Foreign Military Sales, Foreign Military Construction Sales, and Other Security Cooperation Historical Facts (Sept. 30, 2017), http://www.dsca.mil/sites/default/ files/fiscal_year_series_-_30_september_2017.pdf.

270-73 (rejecting Solicitor General's proffered statutory interpretation based on mistakes of law and lack of textual support); *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712, 724 (9th Cir. 2014) (rejecting Solicitor General's position when USG "characterize[d] the facts in a way that conflict[ed] with the . . . record," and addressed "an altogether different issue" from the one presented); *FG Hemisphere Assoc., LLC v. Dem. Rep. Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011) (rejecting USG's views regarding propriety of contempt sanctions against foreign sovereign when USG conflated issues and failed to explain adequately reasons underlying its conclusions).

Here, the USG submitted its brief as *amicus curiae* "support[ing] neither party." Pet. App. 27a. Further, the *amicus* brief did not "meaningfully engage" the central question of whether the MOA "would undermine the FMS structure established by Congress." Pet. App. 28a.

The USG's *amicus* was inconsistent with the USG's previous position in *Trimble*, in which the USG emphasized that the back-to-back structure and dispute resolution process reflect important national security interests. *See, e.g.*, Dkt. 39-50 at 25-26 ("The United States has a strong national security interest in retaining control over the FMS procurement process for restricted military hardware such as the microchips."); Dkt. 39-50 at 27 ("The two-part structure of th[e] FMS arrangement, and the terms of the contracts involved, were designed to protect U.S. interests ….").

In its *amicus*, the USG argued that *Trimble* addressed only the USG's control over the export of the final goods in an FMS transaction. Pet. App. 84a-85a. The USG, however, failed entirely to address the reasoning

of *Trimble*. *See* Pet. App. 28a at n.13. *Trimble* rested primarily on the structural features addressed above. Moreover, in its own words, the USG retains "control over every important aspect of the [FMS] transaction," Dkt. 39-50 at 23, not simply the export of the final product.

The USG also stated that it did not understand DAPA to be attempting to hold BAE TSS responsible for the USG's actions. That is inaccurate. After the USG informed DAPA that it was increasing the Upgrade Program price based on historical data for previous programs (Dkt. 81-6), DAPA alleged that BAE TSS failed to achieve from the USG the price that DAPA sought for the Program. *See*, *e.g.*, Dkt. 81-7. Accordingly, the district court concluded "because, as South Korea concedes, the FMS Program prohibits a foreign sovereign from suing the U.S. Government for violating a LOA, Defs.' Opp'n 11, South Korea instead seeks to hold BAE liable for the U.S. Government's conduct." Pet. App. 52a. The Fourth Circuit concurred, stating DAPA improperly "seeks to hold BAE liable for higher prices demanded by the United States in the government-to-government negotiation. The record makes this connection plain: one day after the U.S. government announced a price increase, Korea demanded payment from BAE." Pet. App. 29a.

To the extent that the USG was suggesting that the courts make case-by-case national security determinations related to FMS disputes, the Fourth Circuit's decision is more deferential to Executive authority. That decision allows the USG to make those determinations within the FMS consultations process. In fact, the USG already made the national security determination on DAPA's claims when it required the Upgrade Program to proceed as an FMS project.

C. The Fourth Circuit's Decision Does Not Conflict with Decisions of Other Courts and Does Not Present an Important or Recurring Question of Federal Law

The Fourth Circuit's decision does not conflict with a decision of this Court or any other circuit court.

Without a divergence of authority, DAPA attempts to justify *certiorari* by conjuring a parade of horribles. The suggestion is misplaced. There simply is no parade. This case is *sui generis*. There is not another reported case (or any instance of which BAE TSS is aware) involving an agreement between a foreign government and a domestic contractor relating to the substance of an FMS project. The Fourth Circuit's decision thus does not upset any long-standing practice or understanding.

To the contrary, the potential negative consequences would arise only if the Fourth Circuit were reversed. If the petitioner's legal theory were adopted, future FMS customers would undoubtedly require contractors to sign MOA-type agreements — arrangements that, according to the USG, "may incentivize contractors to act in ways that might be contrary to the U.S. government's interests." Pet. App. 80a. Such chaos is antithetical to the AECA and the FMS structure.

DAPA's suggestion that the Fourth Circuit's decision invalidates offset agreements is incorrect. The Fourth Circuit held that the MOA is unenforceable because it "would undermine the FMS structure in two critical ways." Pet App. 24a. "First, it would undermine the FMS dispute settlement provisions." *Id.* "Second, enforcement of the BAE-Korea agreement would undermine the control the United States retains in all FMS transactions over

price." Pet App. 25a. The Fourth Circuit did not suggest that offset agreements pose similar concerns.

Rather, the Fourth Circuit, like the district court, simply rejected DAPA's attempt to analogize this MOA, which was directed at the core aspects of the FMS project, to an offset agreement. Pet. App. 26a at n.11 ("Offsets, unlike the BAE-Korea agreement, do not undermine the FMS structure.").

Similarly, contrary to DAPA's assertions, the Fourth Circuit did not issue a "blanket invalidation" (Pet. i) of all contracts between FMS contractors and foreign governments. It held that DAPA's attempt to impose liability on BAE TSS under the MOA was improper because the MOA undermined the FMS structure. The Fourth Circuit did not prejudge other hypothetical claims or other hypothetical agreements.

D. The Case Is Not the Proper Vehicle for *Certiorari*

Even assuming the enforceability of an FMS-related MOA were an important question of federal law, this case is not the proper vehicle for addressing that issue.

First, it is undisputed that the USG raised its price for, and changed the scope of, the Upgrade Program subsequent to the September 2013 tentative agreement. Thus, this case undeniably implicates U.S. national security decisions and does not present a clean dispute regarding the effect of the contractor's actions.

Second, there are clear, alternative grounds for defeating DAPA's claims. DAPA asserts that BAE TSS breached its best efforts obligations in the August 2012 MOA because it failed to achieve the September 2013, $1.7 billion price. However, that price was expressly tentative and non-binding. *See, e.g.*, Dkt. 81-3 at 11; Dkt. 81-5; Dkt. 81-13 at 3. Further, the August 2012 MOA included a specific price ($536 million) for a specific scope of work. Dkt. 40-5 at 22-47. At the USG's insistence, that price and scope of work changed. Dkt. 81-5; Dkt. 81-6; *see also* Dkt. 81-13 at 3-5. Yet, the parties never amended the MOA to incorporate the $1.7 billion price. Thus, there was no contractually-binding promise for BAE TSS with respect to that price.

Further, the MOA "automatically terminate[d]" with "the signature of the FMS LOA by both DAPA, ROK and the USG[,]" at which time BAE TSS was relieved of "all obligations under this MOA and [the letter of guarantee]." Dkt. 40-5 at 19. The USG and DAPA signed the LOA for the Upgrade Program in December 2013. Dkt. 69 ¶ 10. Accordingly, at that point, the MOA terminated.

Finally, when the USG informed DAPA that it was rejecting the $1.7 billion price, the USG stated expressly that it based that decision on historical prices for previous F-16 upgrade programs (*i.e.*, on previous Lockheed Martin prices), not on BAE TSS' actions. Dkt. 81-6; Dkt. 81-13 at 3. The USG then informed DAPA that even if BAE TSS lowered its cost, the USG's price for the Upgrade Program would be $2.4-2.5 billion because that was the USG's estimate for the program that DAPA had requested. Dkt. 81-13 at 9.

Further, the MOA states that for BAE TSS to be liable, the delay (or, in this case, failure) of the LOA to be concluded must be "due to the sole failure of" BAE TSS. Dkt. 40-5 at 20. There is no basis for such a conclusion.

II. DAPA CANNOT ASSERT SOVEREIGN IMMUNITY IN CONNECTION WITH THIS CONTRACT DISPUTE

A. DAPA Failed to Preserve its Current Sovereign Immunity Argument

In its petition for *certiorari*, DAPA now contends that although it waived its sovereign immunity by filing a responsive pleading without raising its immunity defense, (i) it then withdrew its waiver of sovereign immunity; and (ii) such withdrawal was "in accordance with the terms of the waiver." Pet. 27. DAPA rests this argument on Federal Rule of Civil Procedure 12(h) and the statement in *Canadian Overseas Ltd.*, 727 F.2d at 277, that "Congress intended that the FSIA be interpreted in harmony with the Federal Rules of Civil Procedure." *See* Pet. 27.

DAPA did not advance this argument before the district court or before the Fourth Circuit panel. DAPA did not concede that it waived its immunity when it filed its initial answer. DAPA did not cite either Rule 12(h) or *Canadian Overseas*. *See* Dkt. 101 at 20 & n.15; C.A. No. 17-1041, Dkt. 14 at 42 & Dkt. 33 at 32. DAPA first advanced those contentions in its petition for rehearing *en banc*. C.A. No. 17-1041, Dkt. 61. Accordingly, DAPA failed to preserve its current argument. *See, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 & n.4 (2002) (argument not properly raised below was waived); *United States v. Bean*,

437 U.S. 71, 74 & n.2 (1978) (claim raised for first time in Supreme Court brief was waived).

B. The Fourth Circuit Correctly Decided that DAPA Waived its Immunity

The case law is unanimous that by filing a responsive pleading without raising sovereign immunity, a foreign government waives its FSIA defense. *See, e.g.*, *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 743-44 (7th Cir. 2007); *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000); *In re Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999); *Allendale v. Bull Data Systems, Inc.*, 10 F.3d 425, 432 (7th Cir. 1993); Restatement (Fourth) of Foreign Relations Law: Sovereign Immunity § 453, cmt. c (2015); *see also* H.R. Rep. No. 94-1487, at 6617 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617; S. Rep. No. 94-1310, at 17-18 (1976).

The filing of a responsive pleading serves as the "point of no return for asserting foreign sovereign immunity" (*Canadian Overseas*, 727 F.2d at 277), the "last chance to assert FSIA immunity" in a proceeding. *Drexel Burnham Lambert Grp. v. Comm. of Receivers for A.W. Galadari*, 12 F.3d 317, 326 (2d Cir. 1993). "[O]nce the immunity is waived in a proceeding, it cannot be revived in that proceeding." *Flota Maritima Browning De Cuba, Sociadad Anonima v. Motor Vessel Ciudad De La Habana*, 335 F.2d 619, 625 (4th Cir. 1964).

Moreover, DAPA's withdrawal argument is misplaced. The withdrawal of a waiver referred to in 28 U.S.C. § 1605(a)(1) is inapplicable in these circumstances. Withdrawal must be "in accordance with the terms of

the waiver." A foreign sovereign's waiver of immunity thus may not be withdrawn unless the waiver includes an explicit procedure for the future revocation of that waiver, for example, in a contractual provision. *See, e.g.*, *Themis Cap., LLC v. Dem. Rep. of Congo*, 881 F. Supp. 2d 508, 516 (S.D.N.Y. 2012) ("[W]here a proper waiver does not contain a procedure for the future revocation of that waiver, a foreign state's waiver of jurisdictional immunity is irrevocable."); H.R. Rep. 94-1487, at 6617 (discussing withdrawal of waiver).

The filing of a responsive pleading constitutes voluntary participation in the suit. Such participation is not accompanied by an explicit procedure for future revocation of the waiver of immunity.

C. The Fourth Circuit's Decision Does Not Conflict with *Canadian Overseas*

DAPA wrongly claims that the Fourth Circuit's decision conflicts with *Canadian Overseas*. In that case, the Second Circuit held that "the defense of sovereign immunity is lost if not made in the first responsive pleading," *i.e.*, the initial answer, and that a motion to dismiss was not a "pleading." 727 F.2d at 277. Indeed, the court further held that depending on the circumstances, a sovereign's participation in a case prior to filing its answer might constitute waiver. *Id.*

Canadian Overseas is thus entirely consistent with the Fourth Circuit's decision. The case did not involve, and provides no support for, DAPA's current "withdrawal of waiver" argument.

D. Alternative Grounds Require the Same Sovereign Immunity Outcome

DAPA asserts a breach of contract claim against BAE TSS, seeking money damages. Dkt. 81-12 at 22-28. BAE TSS' declaratory judgment suit is simply the other side of the coin of that commercial dispute. Accordingly, the district court held that the FSIA's commercial activity exception is satisfied, as "the 'gravamen' of this suit could not be more commercial in nature." Pet. App. 69a; *see also McDonnell Douglas Corp. v. Islamic Republic of Iran*, 591 F. Supp. 293, 296 (E.D. Mo. 1984), *aff'd*, 758 F.2d 341, 347, 349 (8th Cir. 1985) (holding contractual dispute related to FMS and DCS agreements fell within commercial activity exception). Thus, even had DAPA not waived any immunity it might otherwise have enjoyed, DAPA would not be immune from suit.

Moreover, DAPA additionally waived its immunity by participating in the FMS Program. As Judge Wald concluded in her concurrence in *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985), when a foreign sovereign enters into an agreement with the USG that incorporates by reference a U.S. regulatory scheme, it waives sovereign immunity, and that waiver extends to third parties protected by the regulation at issue. *Id.* at 1005-06.

The LOA includes a choice of U.S. law. Dkt. 40-11 at 15, § 7.1. It incorporates the standard LOA clause requiring sovereign-to-sovereign dispute resolution and the ROK's agreement "not to refer any such disagreement to any international tribunal or third party for settlement." *Id.*, § 7.2. As the district court and Fourth Circuit held, that

structure protects contractors from suit, and thus DAPA's waiver of immunity in the LOA extends to BAE TSS.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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