No. ____

IN THE

Supreme Court of the United States

BLENHEIM CAPITAL HOLDINGS LTD. AND BLENHEIM CAPITAL PARTNERS LTD.,

Petitioners,

v.

LOCKHEED MARTIN CORPORATION, AIRBUS DEFENCE AND SPACE SAS, DEFENSE ACQUISITION PROGRAM ADMINISTRATION, AND REPUBLIC OF SOUTH KOREA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a foreign government's procurement of goods for a military purpose, through a contract with a U.S. company, commercial activity within the meaning of the Foreign Sovereign Immunities Act?

PARTIES TO THE PROCEEDING

Petitioners Blenheim Capital Partners Limited and Blenheim Capital Holdings Limited ("Petitioners" or "Blenheim") were plaintiffs in the District Court and appellants in the Fourth Circuit.

Respondents Lockheed Martin Corporation ("Lockheed") and Airbus Defense and Space SAS ("Airbus") were defendants in the District Court and appellees in the Fourth Circuit. The Republic of Korea ("South Korea") and its Defense Acquisition Program Administration ("DAPA") were served as defendants under the Hague Convention shortly after the District Court dismissed the First Amended Complaint and did not participate in proceedings in the Fourth Circuit.

RULE 29.6 STATEMENT

Petitioner Blenheim Capital Partners Limited is wholly owned by Petitioner Blenheim Capital Holdings Limited. The parent of Blenheim Capital Holdings Limited is Summit Overseas Developments Limited. No publicly held corporation owns ten percent or more of Blenheim Capital Holdings Limited or its parent.

RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit:

Blenheim Capital Holdings Ltd. et al. v. Lockheed Martin Corporation et al., No. 20-1608 (E.D. Va.), order filed September 30, 2021.

Blenheim Capital Holdings Ltd. et al. v. Lockheed Martin Corporation et al., No. 21-2104 (4th Cir.), opinion filed November 15, 2022, and petition for rehearing denied December 13, 2022.

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INTRODUCTION

The Foreign Sovereign Immunities Act ("FSIA") provides that foreign sovereigns are not immune from suit in United States courts if they engage in "commercial activity" with the requisite nexus to the United States. 28 U.S.C. § 1605(a)(2). The FSIA does not define "commercial," but does provide that 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." *Id.* § 1603(d). Applying that provision, this Court has held that foreign sovereigns engage in commercial activity when the conduct is of the same general "type" in which private parties engage. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). For example, when a government issues regulations, it is engaged in sovereign conduct; but when a government enters into "a contract to buy army boots or even bullets" it is engaged in commercial activity, "because private companies can similarly use sales contracts to acquire goods." *Id.* at 614–15.

Applying this general principle, four circuits have held that when a foreign sovereign contracts to procure military equipment from U.S. suppliers, the foreign sovereign engages in commercial activity under the FSIA. *See McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir. 1985); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.* ("*Cubic*"), 385 F.3d 1206, 1219–20 (9th Cir. 2004); *Samco Global Arms, Inc. v. Arita*, 395 F.3d 1212, 1216 (11th Cir. 2005); *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 217 (5th Cir. 2009). These cases make clear that it is irrelevant whether the military

equipment at issue could have been purchased by private parties. Indeed, in one district court case relied upon in two of the circuit court decisions (*Cubic* and *Samco*), a foreign sovereign sold MiG fighter jets capable of firing nuclear weapons to the United States, and that was held to be commercial activity under the FSIA. *Virtual Defense & Development International, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 2–4 (D.D.C. 1999).

Here, however, the Fourth Circuit created a split of authority by rejecting the principle of law applied in *Weltover* and the four circuits cited above. South Korea contracted directly with Lockheed to procure a satellite for military purposes. The satellite procurement was an "offset" to Lockheed's provision of F-35 fighter jets to South Korea through the U.S. Foreign Military Sales program. Petitioner brokered and designed the financing structure for this offset transaction. Petitioner alleges that Lockheed, Airbus, and South Korea conspired to tortiously interfere with Petitioner's contracts and to cut Petitioner from the deal. The Fourth Circuit held that South Korea was immune because it did not engage in commercial activity under the FSIA. Instead of asking whether South Korea's contract with Lockheed to acquire a satellite was the same general "type" of activity that private parties engage in (which it is), the Fourth Circuit asked whether private parties could engage in ***precisely the same transaction***.

The Fourth Circuit thus failed to apply the rule of law announced in *Weltover* and created a split with the four circuits that have faithfully applied *Weltover*. The law of "commercial activity" under the FSIA now

lacks national uniformity, which is especially problematic given that the FSIA governs relations between the United States and foreign sovereigns. This Court should grant certiorari to resolve this split of authority and to reverse the Fourth Circuit's departure from the text of the FSIA and from the reasoning of *Weltover*.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit (App. 1–26) is reported at 53 F.4th 286. The Opinion of the United States District Court for the Eastern District of Virginia (App. 27–46) is unreported.

JURISDICTION

The Court of Appeals issued its opinion and judgment on November 15, 2022, and denied Petitioners' petition for rehearing on December 13, 2022 (App. 47–48). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition presents a question under the commercial-activity exception of the Foreign Sovereign Immunities Act, found at 28 U.S.C. § 1605(a)(2), with relevant definitions found at 28 U.S.C § 1603(d) & (e). The relevant provisions are reproduced in the Appendix (App. 49–50).

STATEMENT OF THE CASE

A. Statutory Background

The Foreign Sovereign Immunities Act provides that federal courts have subject matter jurisdiction over all claims against a foreign state in which the state is not entitled to sovereign immunity. 28 U.S.C. § 1330(a). While foreign states are generally immune from suit, *id.* § 1604, the FSIA enumerates certain exceptions to that principle. Those exceptions include any case

> 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.

Id. § 1605(a)(2).

The Act defines "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act" and states that 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." *Id.* § 1603(d).

This Court has held that "commercial activity" under the FSIA occurs "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). The operative

question "is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade or commerce.'" *Id.* For instance, "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.* at 614–15.

B. Factual and Procedural Background

Private defense contractors based in the United States sell approximately $170 billion in defense materiel annually to approved foreign governments pursuant to the Arms Control Export Act and International Traffic in Arms Regulations. *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).[1] Sometimes these transactions occur directly between the defense contractor and the foreign sovereign, in which case they are referred to as Direct Commercial Sales ("DCS"). And sometimes they occur with the U.S. Department of Defense ("DoD") acting as an intermediary: *i.e.*, DoD acquires the goods from the U.S. defense contractor, receives payment from the foreign sovereign, and transfers the money to the defense contractor and the goods to the foreign sovereign pur-

[1] References to the Joint Appendix filed in the Fourth Circuit are indicated as JA-__. *See* Joint Appendix, *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp.*, No. 21-2104 (4th Cir. Nov. 30, 2021), ECF No. 15.

chaser. When DoD acts as an intermediary, the transactions are referred to as Foreign Military Sales ("FMS").

Regardless of whether the transaction is conducted as a DCS or an FMS, such sales often involve an additional "offset" transaction. An offset transaction is a transfer of some good or service that reduces the cost of the underlying procurement to the foreign sovereign. JA-74 (¶43). Foreign governments use offsets as a means of reducing the financial impact of their defense procurements, obtaining technological and manufacturing information, supporting employment, expanding domestic industries, or otherwise making the expenditure of national funds on foreign purchases more politically palatable. *Id.*

Offsets can take various forms, including coproduction arrangements and subcontracting, technology transfers, in-country manufacturing, marketing and financial assistance, and public-private partnerships. *Id.* Offset transactions are typically intricate and multidimensional, requiring sophisticated financial modeling and knowledge of various industries and the differing legal requirements of various countries. JA-63 (¶4).

Critically, offset transactions are executed and implemented directly between the private defense contractor and the foreign government. The U.S. government does not act as an intermediary, and the foreign sovereign contracts directly with the U.S. defense contractor. This is emphasized in the authoritative guidance, commonly known as the "Green Book," published by the DoD entity responsible for oversight of DCS and FMS transactions. The Green Book de-

scribes an offset transaction as "an international business arrangement" that "is a package of additional benefits that a contractor agrees to provide to the purchasing country in addition to delivering the primary product or service," and that is "recognized as a legitimate, legal business arrangement found in international acquisitions." Def. Sec. Coop. Agency, Dep't of Def., Security Cooperation Management at 9-1, 9-2 (2022) [hereinafter "Green Book"]. Further, "[a]ny offset arrangement is strictly between the Purchaser and the U.S. defense contractor. The U.S. government is not a party to any offset agreements that may be required by the Purchaser in relation to the sales made in this LOA." *Id.* at 8-7; *see also id.* at 9-20 ("Offsets are permissible under FMS. However, it must be emphasized that the offset agreement is between the purchasing country and the U.S. contractor. The USG is not party to the agreement and does not retain any obligation to enforce the contractor's performance of the agreement.").

Petitioner Blenheim specializes in developing and implementing international offset transactions. JA-62–63 (¶2). For several years, Blenheim served as the offset broker for Lockheed, successfully designing and implementing offsets that permitted Lockheed to win valuable procurements. JA-63–64(¶¶3–5).

Between 2011 and 2016, Blenheim devised and began implementing a transaction that would help meet the offset obligations associated with Lockheed's supply of F-35 fighter jets to South Korea. JA-64–65 (¶¶6–8). Blenheim's offset transaction was called "Project Archer," and the offset it would provide South Korea was a much-needed satellite. *Id.* The key to the transaction was a Blenheim-devised financing

structure that would allow Lockheed to provide the satellite to South Korea at virtually no cost, thereby satisfying South Korea's requirements for qualifying as an offset. This financing structure worked as follows:

- Lockheed would pay Blenheim a broker fee of $150 million out of the several billion dollars paid to Lockheed for the F-35 transaction;
- Blenheim would use that $150 million as an equity investment into a Blenheim affiliate that, with additional debt financing, would buy three satellites from Airbus Defence and Space Ltd. ("Airbus England");
- one of those satellites would be provided to South Korea's Defense Acquisition Program Administration ("DAPA") and delivered through a satellite launch in the United States at Cape Canaveral, pursuant to a contract entered into directly between Lockheed and DAPA;
- the other two satellites would be deployed commercially by Blenheim, generating a stream of revenue that would pay off the debt financing and generate a profit for Blenheim.

JA-64–65, 79–81 (¶¶8, 63).

Lockheed, Airbus, and DAPA all approved Project Archer, and the parties began implementing it through a series of agreements and efforts. JA-81–84 (¶¶72–80). Specifically, Lockheed and DAPA executed a Memorandum of Understanding for the acquisition of the satellite, which would be delivered for launch in

the United States and would qualify as an offset for the F-35 procurement. JA-78–79 (¶61).

However, for reasons that are hotly contested by the parties, DAPA, Lockheed, and Airbus ultimately abandoned Project Archer and cut Blenheim out of the deal. JA-85-101 (¶¶82–138). Among other things, Blenheim alleges that DAPA conspired with Lockheed and Airbus to tortiously interfere with Blenheim's contracts and prospective contracts to implement Project Archer. JA-99–101, 123–29 (¶¶129–38, 239–69). In particular, Blenheim alleges that DAPA conspired with Lockheed to terminate the satellite financing structure Blenheim had designed. Instead, Lockheed and DAPA would replace Blenheim's financing structure with financing that DAPA would provide—in the form of $155 million of additional funds DAPA would pay to Lockheed through the U.S. government as part of the F-35 transaction and $500 million in additional offset credits DAPA promised to provide to Lockheed, thereby enhancing Lockheed's ability to meet its offset obligations for various procurements by South Korea. JA-101, 104, 112 (¶¶136, 148, 184). These actions were inconsistent with the goals and requirements for an offset transaction and contributed to a scandal in South Korea over the procurement. JA-104–05 (¶151).

Ultimately, Airbus and Lockheed delivered the satellite to DAPA through a launch that took place at Cape Canaveral in July of 2020. JA-66–67, 104 (¶¶11, 13, 148).

Blenheim filed a complaint against South Korea, DAPA, Lockheed, and Airbus on December 31, 2021. App. 8. Blenheim filed a first amended complaint on May 21, 2021. *Id.* Both complaints advanced claims

against DAPA and South Korea for tortious interference and civil conspiracy to commit tortious acts. *Id.* South Korea did not respond to Plaintiffs' request to waive Hague Convention service of process, so Plaintiffs undertook the lengthy process of serving South Korea and DAPA under the Hague Convention. JA-319–22.

C. District Court Decision

While Blenheim was engaged in the process of serving the summons and complaint on South Korea and DAPA, Lockheed and Airbus filed motions to dismiss in which they argued, among other things, that the district court lacked subject matter jurisdiction because the FSIA's commercial-activity exception did not apply to Blenheim's claims against South Korea and DAPA. JA-136–41, 262. On September 30, 2021, the district court granted those motions to dismiss, ruling that it lacked subject matter jurisdiction over Blenheim's complaint because the FSIA commercial-activity exception does not apply to the transaction upon which Blenheim's claims are based. App. 46.[2]

The district court held that "the transaction at issue here does not meet the 'commercial activity' exception of the FSIA" because the "transaction was sovereign-to-sovereign" and "South Korea could not pur-

[2] The First Amended Complaint also asserted a federal antitrust claim against Lockheed and Airbus, which provided an alternative basis for federal subject matter jurisdiction. App. 8; JA-122–23 (¶¶233–38). The district court also dismissed that claim based on the statute of limitations and the Foreign Trade Antitrust Improvements Act, App. 33, 35–36, and that dismissal was affirmed by the Fourth Circuit, App. 26. Blenheim does not seek certiorari review of those antitrust issues.

chase the F-35 fighter jets through a direct commercial sale." App. 45–46. The district court did not analyze the fact that the satellite offset transaction was implemented through a contract directly between DAPA and Lockheed, but it did recognize that "the gravamen of Plaintiffs' claims is the tortious interference with contract by Defendants," and that the "government-to-government FMS transaction does not form the basis of Plaintiffs' claims." App. 42.

Nonetheless, the court held that "where the conduct constituting the *gravamen* of the plaintiff's suit occurs abroad, the 'commercial activity' exception to the FSIA does *not* apply." App. 45. The district court based that holding on this Court's decision in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015). App. 40, 45. The plaintiff in *OBB* did not raise claims under the third clause of § 1605(a)(2), which expressly provides an exception to sovereign immunity for 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." *See* 577 U.S. at 31 n.1 (emphasis added); 28 U.S.C. § 1605(a)(2). Blenheim did invoke that third clause of § 1605(a)(2) (as well as the first clause) in both the district court and on appeal. *See* Opposition to Defendants' Motion to Dismiss at 12–18, Blenheim Capital Holdings, No. 20-cv-01608 (E.D. Va. July 16, 2021), ECF No. 75; Appellants' Opening Brief at 37–44, *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp.*, No. 21-2104 (4th Cir. Nov. 30, 2021), ECF. No. 16.

Service of South Korea was completed on October 8, 2021, after the district court issued its dismissal order.[3] JA-483. Blenheim timely appealed.

D. Fourth Circuit Decision

The Fourth Circuit affirmed dismissal of Blenheim's claims for lack of subject matter jurisdiction. With respect to the FSIA issue, the Fourth Circuit held that "not every purchase of goods by a sovereign is 'commercial activity.'" App. 14. Instead, the Fourth Circuit held that if a foreign sovereign purchases goods that only a sovereign nation can purchase, then "it is engaged in *sovereign activity* that is not excepted from the immunity conferred by the FSIA, even if it involves the purchase of goods." App. 15–19. The court further held that while Blenheim's claims are based upon the defendants' tortious interference with Blenheim's financing structure for the satellite offset transaction between Lockheed and South Korea, that particular conduct could not be analyzed separately for FSIA purposes because it was connected to the F-35 FMS transaction, which was subject to U.S. government control and approval. App. 15–19. Accordingly, the Fourth Circuit concluded that "the offset transaction in this case was not the type of activity in which a private party could have participated," that "South Korea did not act in the manner of a private party in its procurement of the F-35s and the military satellite," and therefore the offset transaction was not commercial activity within the meaning of the FSIA. App. 21.

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[3] The First Amended Complaint was subsequently served on counsel for South Korea. App. 469–81.

The Fourth Circuit based its reasoning on the features of the FMS program and the nature of the goods at issue in the FMS transaction, reasoning that "[a]ctivities such as creating and maintaining armed forces and obtaining for them arms and other tools of war—supplied only by sovereigns and to sovereigns in furtherance of mutual defense arrangements—are peculiarly sovereign activities" and thus not "commercial activity." App. 17. In short, because private parties could not purchase the F-35 fighters in the underlying procurement transaction, and because that F-35 transaction required the U.S. government to serve as an intermediary, the associated satellite offset transaction and its private financing structure constituted sovereign activity and the "commercial activity exception" of the FSIA did not apply. *See id.*

Blenheim's petition for rehearing or rehearing en banc was denied without opinion on December 13, 2022. App. 47–48. Blenheim has timely filed this petition on March 13, 2023.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH FOUR OTHER CIRCUITS' INTERPRETATION OF THE FSIA AND OF THIS COURT'S DECISION IN *WELTOVER*.

The Court should grant certiorari to resolve a question on which the circuits are split: when a foreign government procures military equipment through a contract executed with a U.S. defense contractor, is that sovereign engaged in commercial activity under the FSIA? Prior to the Fourth Circuit's decision in this case, all courts to have considered the question—this Court in *Weltover*, four circuits, and two significant district court decisions—said the answer to that question is "Yes." The Fourth Circuit said the answer is "No." This Court should grant certiorari to resolve this split of authority and provide a definitive answer to this question of international importance.

A. The FSIA, as Interpreted in *Weltover*, Provides That a Foreign Sovereign Engages in Commercial Activity When It Procures Military Goods from a U.S. Contractor, Even if the Goods Are to Be Used for a Military Purpose.

The FSIA defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction." 28 U.S.C. § 1603(d). But the FSIA does not define the term "commercial." Instead, it provides the following interpretative guidance: "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." *Id*. (emphasis added). "If this is a definition, it is one distinguished only by its diffidence; . . . it 'leaves the critical term "commercial" largely undefined.'" *Saudi Arabia v. Nelson*, 507 U.S. 349, 359 (1993) (quoting *Weltover*, 504 U.S. at 612).

Nonetheless, this Court has provided substantial elucidation of the meaning of "commercial" under the FSIA. In *Weltover*, this Court squarely held that if the "nature" of the foreign sovereign's activity is the same "type" of activity engaged in by private parties, then the activity is "commercial" even if it has a uniquely sovereign "purpose." 504 U.S. at 614–17.

The facts of *Weltover* drive home the point. The Republic of Argentina faced a serious foreign-exchange crisis that threatened the national economy. To address that national crisis, the Argentine government and its central bank issued bonds, repayable in U.S. dollars on the London, Frankfurt, or New York markets. *Id.* at 609–10. When the bonds started coming due, the Argentine government realized it lacked sufficient reserves to retire them, unilaterally extended the time for payment, and offered bondholders substitute instruments as a means of rescheduling the debts. *Id.* at 610. Some bondholders refused to accept the government's rescheduling of its own debt and insisted that the government make full, timely repayment in New York. *Id.* When Argentina did not pay, the bondholders filed a breach of contract action, relying on the FSIA for jurisdiction. *Id.*

This Court concluded that the issuance of the bonds by Argentina was "commercial activity" within the meaning of the FSIA because Argentina was acting "not as regulator of a market, but in the

manner of a private player within it." *Id.* at 614. The Court explained that

> 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. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Id. at 614.

In other words, even if the foreign sovereign is acting "with the aim of fulfilling uniquely sovereign objectives," it is still engaged in commercial activity if the "type" of action it took is one that private parties also take. *Id.* In further explaining this distinction, this Court stated:

> Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; ***whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts to acquire goods***.

Id. at 614–15 (emphasis added).

The Court's holding in *Weltover* is also supported by the FSIA's legislative history. The House Report states:

> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity.

H. Rep. No. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615.

Further, as explained in Section D below, *Weltover* held that the FSIA adopted the "restrictive theory of immunity" that prevailed in international law as of 1976. *See Weltover*, 504 U.S. at 612–13; note 8, *infra*. Numerous authorities in existence when the FSIA was enacted, including the European Convention on State Immunity, make clear that when a foreign sovereign procures military equipment from contractors, it is engaged in non-immune commercial activity—even if private parties would be legally prohibited from procuring the specific goods in question.[4]

[4] *See, e.g.*, Explanatory Report to the European Convention on State Immunity art. 7 ¶37, May 16, 1972, E.T.S. No. 74.

B. Four Circuits Have Held That Foreign Sovereign Procurements of Military Equipment Constitute Commercial Activity under the FSIA.

Both before and after this Court's *Weltover* decision, the circuit courts have held that sovereign procurements of military equipment constitute commercial activity under the FSIA. This line of authority began with the Eighth Circuit's decision in *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 343, 349 (8th Cir. 1985). In *McDonnell*, the government of Iran had contracted with McDonnell Douglas in the mid-1970s to purchase replacement components for F-4 fighter aircraft, which had been procured through the FMS program. *Id.* at 343–45. The Eighth Circuit held that "a contract by a foreign government to buy equipment for its armed services constitutes a commercial activity to which sovereign immunity does not apply." *Id.* at 349. Presaging this Court's decision in *Weltover*, the Eighth Circuit reasoned that "the intent of the purchasing sovereign to use the goods for military purposes does not take the transaction outside of the 'commercial' exception to sovereign immunity." *Id.*[5]

[5] The Eighth Circuit recognized that: "Several cases construing FSIA also make clear that a contract by a foreign government to buy equipment for its armed services constitutes a commercial activity to which sovereign immunity does not apply." *Id.* at 349 (citing *Behring Int'l v. Imperial Iranian Air Force,* 475 F. Supp. 383, 388-90 (D.N.J.1979) (actions of Iranian Air Force in contracting for freight forwarding services is commercial and not sovereign); *Texas Trading & Milling v. Federal Republic of Nigeria,* 647 F.2d 300, 309 (2d Cir. 1981)

In a 2004 decision, the Ninth Circuit relied on both *Weltover* and *McDonnell* in holding that Iran's Ministry of Defense engaged in "commercial activity" under the FSIA when it entered into a contract with a California-based defense firm "relating to the sale and servicing of an Air Combat Maneuvering Range ('ACMR') for use by the Iranian Air Force." *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.* ("*Cubic*"), 385 F.3d 1206, 1211, 1219–20 (9th Cir. 2004), *vacated on other grounds sub nom. Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 546 U.S. 450 (2005). An "Air Combat Maneuvering Range" is obviously not a product that a private party can purchase. Nevertheless, the Ninth Circuit held that when Iran's Ministry of Defense procured that "military hardware," *id.* at 1210, it engaged in commercial activity. The Ninth Circuit approvingly cited the reasoning of two of its prior decisions recognizing "that 'a contract to purchase military supplies, although clearly undertaken for public use, is commercial in nature . . . .' *Joseph v. Office of the Consulate Gen. of Nigeria,* 830 F.2d 1018, 1023 (9th Cir.1987); *see also Park v. Shin,* 313 F.3d 1138, 1145

(dictum) (contract by foreign government "for the sale of army boots" constitutes a "commercial activity"), *overruled on other grounds by Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Nat'l Am. Corp. v. Federal Republic of Nigeria,* 448 F. Supp. 622, 627, 641–42 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979)).

(9th Cir.2002) (quoting *Joseph*)." *Cubic,* 385 F.3d at 1220.[6]

The next year, the Eleventh Circuit followed suit. In *Samco Global Arms, Inc. v. Arita*, 395 F.3d 1212 (11th Cir. 2005), the court held that Honduras engaged in commercial activity under the FSIA when it entered into a contract providing for the import of "an inventory of weapons, munitions, and explosives," which the Honduran Armed Forces would control under a bailment agreement with a purchase option. *Id.* at 1215. These "weapons, munitions, and explosives" were of a kind not ordinarily available to private parties on the open market; they included 146 anti-aircraft guns, some 368,300 rounds of high explosive 20mm munitions for those antiaircraft guns, 60mm mortars and grenades, rocket-propelled grenades, and grenade launchers. *See* Complaint, *Samco Global Arms, Inc. v. Republic of Honduras*, No. 02-cv-20118 (S.D. Fla. Jan. 14, 2002). A number of the weapons at issue appear to have been sourced from the Egyptian military. *Id.* Nevertheless, the Eleventh Circuit held: "The mere fact that the military was involved in the storage and purchase of arms does not alone convert the activity into an exercise of sovereign power." *Samco*, 395 F.3d at 1216 (citing *Weltover*, 504 U.S. at 614–15). In support, the Eleventh Circuit

[6] While the *Cubic* decision involved the commercial-activity exception in 28 U.S.C. § 1610(b)(2) (relating to attachment of assets), rather than the commercial-activity exception in § 1605(a)(2) (relating to jurisdiction over claims), the FSIA's definition of "commercial activity" is the same for both. *See Cubic*, 385 F.3d at 1219–20. That is why the Ninth Circuit's *Cubic* decision relied on *McDonnell* and other § 1605(a)(2) cases.

favorably cited and relied on *Weltover*, *McDonnell*, and *Cubic*. 395 F.3d at 1216–18 & n.9.

In 2009, the Fifth Circuit likewise held that when a foreign sovereign purchases military equipment, it is engaged in commercial activity. In *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210 (5th Cir. 2009), the court held that Saudi Arabia engaged in commercial activity when it entered into a contract for the supply of parts and components for its fleet of F-5 supersonic light fighter aircraft, which had been acquired through the FMS program. *Id.* at 217–18. Under this "Spare Parts and Ground Equipment" ("SPAGE") contract, "F-5 parts and components that needed repair were shipped from Saudi Arabia to Lear in San Antonio," where Lear assessed them, sought approval from Saudi Arabia to perform repairs, and then performed the repairs. *Id.* at 212–13. The Fifth Circuit held that the "SPAGE contract for the repair and replacement of goods is a commercial activity, regardless of the product's end use for a military purpose." *Id.* at 217. The court reasoned: "The SPAGE contract is precisely the type of transaction the Supreme Court discussed in *Weltover*. . . . Regardless of the end use of the F-5 components in aircraft that were used for national defense, the SPAGE contract was for goods and services and is properly construed as commercial activity." *Id.* at 217–18. Although sales of the F-5 and the technical know-how associated with it are closely regulated by the United States—and likely could not be provided to a private party—that point was immaterial to the Fifth Circuit's analysis.

UNC Lear distinguished the SPAGE contract involving the supply of military equipment to Saudi Arabia (which it held was commercial) from a

different contract under which "Lear sent hundreds of personnel to Saudi Arabia to provide training and support services to the Royal Saudi Air Force ('RSAF')." *Id.* at 213. Under this Technical Support Program ("TSP") contract, the employees "were integrated with RSAF personnel" and "worked directly for and under the control of the RSAF." *Id.* The Fifth Circuit held this TSP contract was not "commercial activity" because "TSP employees were integrated into the RSAF and can be considered military personnel," the employment of whom Congress sought to explicitly exclude from commercial activity. *Id.* at 216 ("The legislative history from the FSIA instructs 'the employment of diplomatic, civil service, or military personnel' is not commercial in nature.") (quoting H.R. Rep. No. 94-1487, at 16). "Unlike a contract to buy army boots or bullets, . . . the TSP was a contract to provide *personnel* that were vital to the operation of a national air defense system." *Id.* Notably, the Fifth Circuit concluded that "[a]lthough performance under the two contracts may be related, the contracts were distinct and separate" and needed to be considered separately for purposes of the commercial activity exception. *Id.* at 216.

Both the Ninth Circuit's *Cubic* decision and the Eleventh Circuit's *Samco* decision relied on a 1999 decision by the District Court for the District of Columbia that addressed facts similar to those at issue here and illustrated well the legal principle in question. *See Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova* ("*Virtual Defense*"), 133 F. Supp. 2d 1, 2–4 (D.D.C. 1999). In *Virtual Defense*, the court held that Moldova was engaged in commercial activity under the FSIA when it sold to the United States government its MiG fighter jets that were "capable of

firing nuclear weapons." *Id.* The case involved a U.S.-based arms broker who claimed that Moldova had engaged it to broker the sale of the MiGs and then breached that agreement by unilaterally selling the MiGs to the U.S. government. *Id.* The court rejected Moldova's argument "that the commercial activity exception does not apply in this instance because the type of action at issue, *i.e.*, the sale of planes capable of firing nuclear weapons, is not the 'type of action by which a private party engages in trade and traffic or commerce' because only sovereign nations own or sell these planes." *Id.* at 4. Instead, relying on the FSIA's text, its legislative history, and some of the cases cited above, the court recognized that "a contract by a foreign government to buy equipment for its armed services constitutes a commercial activity to which sovereign immunity does not apply." *Id.* (citing, inter alia, *McDonnell* and *Texas Trading*). MiG fighter jets "capable of firing nuclear weapons" are ***not*** the kind of goods that a private party can purchase. Nevertheless, *Virtual Defense* held that fact was not relevant to the inquiry: instead of looking at whether a private party could engage in precisely the same transaction as that at issue, the correct FSIA inquiry is to look at whether the general "***type***" of activity was the purchase or sale of goods, in which case the commercial-activity exception applies. "The mere fact that the goods sold by Moldova were MiG-29 planes does not change the nature of Moldova's actions." *Id.* at 4.

The decision in *Virtual Defense* was not appealed. No subsequent court decision has disagreed with the holding or rationale in *Virtual Defense*. To the contrary, other circuit courts have cited it favorably and relied on it. *See Cubic*, 385 F.3d at 1220; *Samco*,

395 F.3d at 1216 n.9. This confirms that the clear, unquestioned rule of law prior to the Fourth Circuit decision in this case was that courts should consider only whether the type of activity the foreign sovereign engaged in was the procurement or sale of goods and should not ask whether a private party could engage in the purchase or sale of the precise goods at issue.

Confirming this unquestioned legal framework, in 2020, the D.C. District Court once again held that a foreign sovereign engages in commercial activity when it purchases military equipment and made clear this rule applied even if the equipment can only be acquired by a sovereign directly from the U.S. government pursuant to the FMS program. In *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88 (D.D.C. 2020), *abrogated in other part by Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021), the court held that a "clear example of commercial activity" by Hungary was "purchasing military equipment" pursuant to the FMS program, "including but not limited to airplanes, munitions, electronics and armaments from United States companies and suppliers." 443 F. Supp.3d at 106, 109–11. The court rejected the argument "that purchases made through the FMSP are not commercial because only states, not private parties, are eligible to participate in the program." *Id.* at 110. Observing *Weltover*'s holding that the "important issue is the 'type of action' engaged in, which in this case is the purchasing of goods," the court reasoned that "[m]aking purchases through the FMSP, as Hungary did, is merely a means of executing the purchase but does not alter the type of action, which, like a 'contract to buy army boots,'

was commercial." *Id.* (quoting *Weltover*, 504 U.S. at 614).[7]

C. The Fourth Circuit's Decision Here Conflicts with the Unbroken Line of Authority Holding That Foreign Sovereign Purchases of Military Equipment Constitute Commercial Activity under the FSIA.

Contrary to the cases discussed above, the Fourth Circuit held that South Korea's procurement of a military satellite from Lockheed was not "commercial activity" under the FSIA. App. 21. The Fourth Circuit reached this decision by focusing on the overall ***purpose*** of the satellite offset transaction: *i.e.*, that it was designed to fulfill Lockheed's offset obligations to South Korea triggered by the FMS transaction involving the F-35s. *See* App. 16–17. By focusing on that purpose, the Fourth Circuit failed to analyze the nature of the satellite offset transaction itself. It thereby became the first court to hold that a foreign sovereign's procurement of a product from a U.S. company pursuant to a direct contract between that sovereign and the U.S. company is not "commercial activity" under the FSIA. To the contrary, as shown above, numerous cases have held that even when the product being acquired is military equipment that no

[7] In *Simon*, Chief Judge Howell explicitly chose not to follow *Heroth v. Kingdom of Saudi Arabia*, 565 F. Supp. 2d 59, 68 n.9 (D.D.C. 2008), *aff'd*, 331 F. App'x 1 (D.C. Cir. 2009), which held that FMS transactions were not commercial activity (in a case involving procurement of military services, not equipment). *Simon* states that *Heroth*'s discussion of whether FMS transactions are commercial came "in a footnote" in the district court decision, was "unnecessary" to the decision, was reliant "on inapposite authority," and therefore "misapplied the standard from *Weltover*." *Simon*, 443 F. Supp. 3d at 110.

private party could purchase (including MiG fighter jets capable of firing nuclear weapons), the purchase or sale of that product between a foreign sovereign and a private company is commercial activity under the FSIA.

The Fourth Circuit's decision failed to cite *McDonnell*, *Cubic*, *Samco*, or *UNC Lear* (all of which were cited in Blenheim's briefing). *See* App. 9–21; JA-343–44. The court thus issued a decision departing from four sister circuits without even bothering to discuss those cases.

Instead of discussing conflicting precedent, the Fourth Circuit focused entirely on the sovereign purposes surrounding the FMS program. It began by observing that "the sale of F-35s was restricted as a Foreign Military Sale and therefore could only be made with the approval and supervision of the U.S. government, and then only to a friendly country." App. 15–16. It found that such a sale was "subject to controlling considerations of national security and public policy." App. 16. It emphasized that the satellite was "designed with next-generation capabilities," that its "inclusion in the offset transaction was subject to the United States' approval and supervision," and that "the money for the satellite had to be paid to the United States and only then was disbursed by it, as provided by the terms of the approved transaction." *Id.* The court then recounted the regulatory regime governing the F-35 sale as established by the Arms Control Export Act ("AECA"), 22 U.S.C. § 2751 *et seq.*, and relied on that to conclude that "the *nature* of the offset transaction was a military procurement by South Korea from the United States of military items manufactured by Lockheed

and Airbus, which was subject to plenary U.S. government control in furtherance of a policy of 'international defense cooperation among the United States and those friendly countries to which it is allied by mutual defense treaties.'" App. 16–17 (quoting 22 U.S.C. § 2751). The court also held that even apart from the AECA, "the entire procurement activity and transaction in this case was inherently sovereign activity" because "[a]ctivities such as creating and maintaining armed forces and obtaining for them arms and other tools of war—supplied only by sovereigns and to sovereigns in furtherance of mutual defense arrangements—are peculiarly sovereign activities." App. 17.

The foregoing analysis departs from the principles, reasoning, and holdings of *Weltover*, *McDonnell*, *Virtual Defense, Cubic*, *Samco, UNC Lear,* and *Simon*. Those cases analyzed whether a private party could engage in the same "***type***" of transaction as the one engaged in by the foreign sovereign—*i.e.*, the procurement or sale of goods pursuant to a contract. By contrast, the Fourth Circuit analyzed whether a private party could engage in ***the exact same transaction*** as the one engaged in by the foreign sovereign. The Fourth Circuit therefore applied a different rule of law than that applied by this Court in *Weltover* and by the Fifth, Eighth, Ninth, and Eleventh Circuits.

By focusing on the general "nature" or "type" of the transaction, the FSIA (as explained in *Weltover*) eschews examination of the particular attributes of the transaction. In *Weltover*, this Court ***could*** have said, "Only sovereign foreign states can issue sovereign debt and only sovereign states engage in

unilateral restructuring of such debt to address a foreign exchange crisis; therefore, this is not the kind of transaction in which a private party can engage." But this Court did not say that. Instead, it focused on the general nature of the transaction—issuance of debt instruments—and held that general type of activity could be engaged in by private parties. *See Weltover*, 504 U.S. at 614–17.

Likewise, the Eighth, Ninth, Eleventh, and Fifth Circuits ***could*** have analyzed whether the particular military equipment at issue could have been purchased by private parties or instead implicated "peculiarly sovereign activities." But they did not. They analyzed the general nature of the transactions—the purchase or sale of goods—and held that they were of a "type" that private parties could engage in, and thus were commercial, not sovereign, in nature.

This Court should grant certiorari to resolve this split in the circuits and to ensure a uniform application of the FSIA's commercial-activity exception.

D. This Court Should Grant the Petition to Resolve the Split in Authority by Reversing the Fourth Circuit's Decision.

This Court should grant certiorari to reverse the Fourth Circuit and to confirm that the rule applied by the other four circuits is correct. There are at least four reasons to reverse the Fourth Circuit.

First, the Fourth Circuit's decision contradicts the governing principle of *Weltover*: that in analyzing the "nature" of the transaction, courts should determine whether private parties could engage in the general

"type" of transaction at issue, not whether private parties could engage in precisely the same transaction as the one engaged in by the sovereign defendant. *Weltover*, 504 U.S. at 614 (holding that "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives" but rather "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce'") (citation omitted). That is why the prevailing case law contradicts the holding of the Fourth Circuit, as shown above.

Second, *Weltover* held that the FSIA codified the restrictive theory of immunity common in international law in 1976, which included the European Convention on State Immunity. *Weltover*, 504 U.S. at 612–13. That Convention stated unequivocally that the rule applied by the Fourth Circuit is wrong.

Weltover held that the FSIA "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952," explaining that the "meaning of 'commercial' is the meaning generally attached to that term under the restrictive theory at the time the statute was enacted." *Id.* The doctrine of restrictive immunity at the time of the FSIA's enactment was found in the State Department's Tate Letter, *see id.*; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983), which invoked the general trend in international law and the

law of foreign countries adopting restrictive immunity.[8] That is why *Weltover* cited an Italian court decision for the proposition that "a contract to buy army boots or even bullets is a 'commercial' activity." 504 U.S. at 615 (citing *Stato di Rumania v. Trutta,* [1926] Foro It. I 584, 585–86, 589 (Corte di Cass. del Regno, Italy)).

The prevailing understanding of the restrictive theory of immunity at the time of the FSIA's enactment included the 1972 European Convention on State Immunity. *See* European Convention on State Immunity, May 16, 1972, E.T.S. No. 74. That is why, based on the reasoning in *Weltover*, circuit courts have recognized that the European Convention elucidates the scope of the restrictive theory codified by the FSIA.[9]

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[8] *See* Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984, 984–85 (1952) (pointing to prevailing trends international law and decisions by foreign courts).

[9] *See, e.g.*, *Texas Trading & Milling Corp.*, 647 F.2d at 310 (citing the European Convention on State Immunity and contemporaneous English case law in support of its holding that the commercial-activity exception applied); *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 372 (2d Cir. 2006) (relying on the European Convention on State Immunity as persuasive authority and noting that the "European understanding" of restrictive immunity was "presumably known to the drafters of the FSIA"), *aff'd and remanded,* 551 U.S. 193 (2007); *Connecticut Bank of Com. v. Republic of Congo*, 309 F.3d 240, 256 (5th Cir. 2002), *as amended on denial of reh'g* (Aug. 29, 2002) (examining the European Convention on State Immunity and British State Immunity Act of 1976 in interpreting execution immunities under the FSIA).

The European Convention explicitly rejected the reasoning applied by the Fourth Circuit. The Convention provides that states do not have sovereign immunity when engaging in acts on the territory of the forum state that are "in the same manner as a private person in an industrial, commercial or financial activity." European Convention art. 7(1). The Convention's explanatory report states:

> The expression "in the same manner as a private person" (*more privatorum*) is to be construed in the abstract. In particular, 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, e.g.*, *Arms Sale Commission Case*, Oberlandesgericht [OLG] [Superior Provincial Court], Oct. 10, 1972, 1975 OLGZ 379 (Ger.), *translated and reprinted in* 65 I.L.R. 119 (1984) (holding foreign sovereign was not immune from suit by broker for commissions on the sale of arms); *Société pour la fabrication des cartouches v. Col M, Ministre de la Guerre de Bulgarie*, Civ. [Tribunal of First Instance] Bruxelles (1st Ch.), Dec. 29, 1888, Belgique Judiciaire, 1889, p. 383 (Bel.) (holding that sovereign state was not immune from suit by Belgian munitions manufacturer for payment).

The Fourth Circuit directly contradicted this principle by analyzing whether a private party could engage in precisely the same transaction as that engaged in by South Korea. Thus, the international law governing the restrictive theory of immunity that was codified by the FSIA requires reversal of the Fourth Circuit's decision.

Third, the rule adopted by the Fourth Circuit is nebulous and fact-intensive, whereas the rule applied by the other four circuits is a clear, bright line. Under the Fourth Circuit's approach, courts must analyze whether private parties could engage in precisely the same transaction as the foreign sovereign. This inquiry will not always yield a clear answer. For example, private parties can acquire precisely the same Airbus satellite as the one South Korea acquired here.[10] It may be that some of the configurations on that satellite were different because of the military purpose for which it was to be used, but that was not established by anything in the record. The Fourth Circuit merely assumed that because something is for a military purpose, it must be something that has features that are categorically different from the features on a satellite purchased by private persons. Applying

[10] *See* Jr Ng, *South Korea's First Dedicated MilSat Nears Launch*, Asian Mil. Rev. (June 15, 2020), https://www.asianmilitaryreview.com/2020/06/south-koreas-first-dedicated-milsat-nears-launch/ (identifying the satellite purchased by South Korea in the offset transaction at issue as an Airbus Eurostar 3000); *List of Satellites at Geostationary Orbit*, SatBeams, https://www.satbeams.com/satellites?model=Eurostar-3000 (last accessed Mar. 10, 2023) (database listing dozens of Airbus Eurostar 3000 satellites owned and operated by private companies, including SES S.A., Eutelsat Communications S.A., and AT&T).

the Fourth Circuit's rule in future cases will trigger such fact-intensive disputes.[11]

By contrast, the rule of law applied in the other circuits is clear and easy to apply: if the transaction is of the general type that private persons can engage in it—such as the purchase or sale of goods pursuant to a contract—then it is commercial activity, regardless of the particular products or the use to which they will be put.

Fourth, regardless of how this Court might analyze a legal claim involving an FMS transaction, it should make clear that when a foreign sovereign contracts with a U.S. company for an *offset agreement* that is associated with an FMS, that offset agreement is commercial activity under the FSIA. Other circuits are clear that separate contracts must be evaluated separately for purposes of the commercial activity exception. *See UNC Lear*, 581 F.3d at 216 (concluding that "[a]lthough performance under the two contracts may be related, the contracts were distinct and separate" and needed to be considered separately under the FSIA). And the Green Book makes clear that an offset transaction such as the satellite procurement in this case are "an international business arrangement" that "is strictly between the Purchaser and the U.S.

[11] As yet another example, it would even be possible to find evidence of private parties purchasing military fighter jets. *See, e.g.*, Eric Tegler, *Who Could Train Ukrainian Pilots to Fly Those F-16s They're Not Supposed to Be Getting?,* Forbes (Mar. 8, 2023 9:00AM), https://www.forbes.com/sites/erictegler/2023/03/08/who-could-train-ukrainian-pilots-to-fly-those-f-16s-theyre-not-supposed-to-be-getting/ (noting prevalence of private contractors such as Draken International that use fleets of decommissioned fighter jets, including F-16s, to act as simulated foreign "aggressors" in military training exercises).

defense contractor." Green Book, *supra*, at 8-7, 9-1, 9-2.

By analyzing the offset transaction based on the characteristics of FMS transactions (and entirely ignoring the Green Book guidance), the Fourth Circuit relied on the *purpose* of the transaction, rather than its *nature*. This violated the plain text of § 1603(d). By doing so, the Fourth Circuit became the first court to hold that when a foreign sovereign contracts directly with a U.S. company for the procurement of military goods, it has not engaged in commercial activity under the FSIA. This Court should grant *certiorari* to make clear that is not the law.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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March 13, 2023

APPENDIX

APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 21-2104

BLENHEIM CAPITAL HOLDINGS LTD.; BLENHEIM CAPITAL PARTNERS LTD.,

Plaintiffs - Appellants,

v.

LOCKHEED MARTIN CORPORATION; AIRBUS DEFENCE AND SPACE SAS,

Defendants - Appellees,

and

DEFENSE ACQUISITION PROGRAM ADMINISTRATION; REPUBLIC OF KOREA,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, Senior District Judge. (1:20-cv-01608-LO-JFA)

Argued: September 16, 2022 Decided: November 15,

2022

Before GREGORY, Chief Judge, and NIEMEYER and THACKER, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Gregory and Judge Thacker joined.

ARGUED: Hamish P.M. Hume, BOIES, SCHILLER & FLEXNER, LLP, Washington, D.C., for Appellants. Marc Laurence Greenwald, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York; Brian T. McLaughlin, CROWELL & MORING LLP, Washington, D.C., for Appellees. **ON BRIEF:** Samuel C. Kaplan, Jesse M. Panuccio, BOIES, SCHILLER & FLEXNER, LLP, Washington, D.C., for Appellants. Lyndsay A. Gorton, CROWELL & MORING LLP, Washington, D.C., for Appellee Lockheed Martin Corporation.

NIEMEYER, Circuit Judge:

Blenheim Capital Holdings Ltd. and Blenheim Capital Partners Ltd., Guernsey-based companies (collectively, "Blenheim"), commenced this action against Lockheed Martin Corporation, Airbus Defence and Space SAS, and the Republic of Korea and its

Defense Acquisition Program Administration (the last two, collectively, "South Korea"), alleging that the defendants conspired to "cut it out" as the broker for a large, complex international military procurement transaction.* Under the terms of the transaction, South Korea would acquire 40 F-35 fighter planes — valued at roughly $7 billion — manufactured by Lockheed and a "Next-gen" military satellite — valued at over $3 billion — manufactured by Airbus and equipped with capabilities for "integration with the F-35 fighter planes." South Korea would pay $7 billion for the F-35s and $150 million toward the cost of the military satellite, with the remaining value of the satellite serving as an "offset" to effectively reduce South Korea's costs and thus "sweeten" the transaction. Further, the $150 million payment by South Korea was to be paid to Lockheed and passed on to Blenheim in installments, which Blenheim would use as capital to procure the financing for the purchase of three satellites from Airbus. One of these satellites would be the military satellite for South Korea, and the other two would be retained by Blenheim, which it would operate, leasing their transmission capacity to earn income to pay for the satellite production and financing costs and provide Blenheim with "a total profit of at least $500 million." The entire transaction was subject to the approval and supervision of the U.S. government.

For reasons that are vigorously disputed by the

* For purposes of this appeal, when referring to Lockheed, we include its divisions, subsidiaries, and affiliated companies, as alleged by Blenheim in its complaint; and when referring to Airbus, we likewise include its affiliated companies, as alleged.

parties, Lockheed terminated the brokerage arrangement with Blenheim and restructured the transaction to be a "direct procurement" between Lockheed, Airbus, and South Korea, again with the approval and supervision of the U.S. government. Blenheim was left to bear the costs it had incurred in designing and working on the transaction, and it was also denied the prospects for profit from owning and operating two satellites.

In its first amended complaint, Blenheim alleged that the defendants (1) tortiously interfered with its brokerage arrangement and its prospective business expectations; (2) conspired to do so; (3) were unjustly enriched; and (4) conspired to violate federal and state antitrust laws. For subject matter jurisdiction, it relied on federal question jurisdiction under 28 U.S.C. § 1331, based on its federal antitrust claim, and on the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330(a), 1604, 1605(a)(2), and 28 U.S.C. § 1367 (supplemental jurisdiction) for its tort claims.

The district court granted the defendants' motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). With respect to the tort claims, it concluded that it lacked subject matter jurisdiction by reason of the Foreign Sovereign Immunities Act because South Korea was presumptively immune from jurisdiction under the Act and had not been engaged in "commercial activity," which is excepted from the immunity from jurisdiction conferred by the Act. And on the antitrust claim, it held that the action was barred by both the applicable four-year statute of limitations and the Foreign Trade Antitrust

Improvements Act of 1982, which requires that anticompetitive conduct have a sufficient effect on domestic or import commerce to be subject to U.S. antitrust laws.

Finding no reversible error in the district court's analysis, we affirm.

I

According to Blenheim's complaint, Blenheim "specializes in developing, structuring, and modeling international 'offset' transactions, which are often part of government procurements." "Offset" transactions are those in which the supplier in a procurement contract provides a collateral "sweetener" to the procuring government to reduce the procuring government's cost in the transaction. Offset transactions are "common in defense procurements."

Beginning in 2011, Blenheim worked with Lockheed to structure an offset transaction that would secure the sale of 40 F-35 fighter planes to South Korea after South Korea "accelerated its plans to enhance stealth-fighter capabilities in response to public outcry over North Korean aggression." The F-35 is a fifth-generation fighter plane manufactured by Lockheed for the U.S. government, and it represents the state-of-the-art in such military equipment and includes classified technology. Because of the F-35's high cost, Lockheed and Blenheim recognized that South Korea would require an offset transaction. Following much work, Blenheim proposed and the relevant parties accepted, with the approval of the U.S. Department of Defense, the terms of an offset transaction in which (1) Lockheed would provide

South Korea with 40 F-35 planes with a value of roughly $7 billion; (2) Blenheim would arrange to have Airbus manufacture three satellites, one of which — a military satellite designed with "Next-gen" capabilities, including "integration with the F-35 fighter planes" — would be provided to South Korea, with the other two to be retained by Blenheim to operate; (3) South Korea would pay for the 40 F- 35s and contribute $150 million toward the cost of the military satellite, which had an offset value of "more than $3.1 billion," effectively reducing South Korea's overall cost by almost one-half; (4) the $150 million payment would be transferred (via the U.S. Department of Defense) to Lockheed and then in installments to Blenheim for the purpose of obtaining financing for the cost of the satellites; (5) Blenheim would then operate the two satellites provided to it, leasing their transmission capacity to generate income to pay for all three satellites and to provide it with an estimated profit of $500 million.

Blenheim thus functioned as a broker in the transaction in accordance with the terms of an "International Brokerage Agreement" between it and Lockheed. Because the transaction involved highly sensitive military equipment designed and manufactured for the U.S. military, it could be accomplished only as a "Foreign Military Sale," requiring approval and control by the U.S. Department of Defense. Indeed, negotiations for the transaction took place in the offices of the U.S. Department of Defense, including the Pentagon, because the negotiations "involved classified information." The statutes and regulations governing the sale of the F-35s to South Korea required all

aspects of the transaction to be approved and managed by the U.S. government, including the U.S. government's receipt and disbursal of all monies in the manner agreed, including even the $150 million that South Korea paid to Lockheed for payment to Blenheim.

Blenheim's complaint alleged that, beginning sometime in 2015, Lockheed and Airbus (and later on, South Korea) conspired to "cut Blenheim out" of the offset transaction. Lockheed's motivation for doing so, according to Blenheim, was that Lockheed became concerned that carrying out the transaction would position Blenheim to compete with a division of Lockheed that was in the market for satellite transmission capacity. The complaint thus alleged that Lockheed, in furtherance of the conspiracy, delayed paying Blenheim the installments of the $150 million that it had received from South Korea via the U.S. Department of Defense. Lockheed made the first payment of $45 million on June 15, 2016—which was after its due date—and then made no further payments. And finally, by letter dated October 6, 2016, it terminated Blenheim's role as the broker in the offset transaction. The letter stated:

> This letter will serve as formal notice by Lockheed Martin Oversees Corporation and its affiliates ("LMOC") to Blenheim Capital Partners and its affiliates ("Blenheim") of the immediate termination of International Broker Agreement LMOC-07-51 between LMOC and Blenheim dated October 26, 2007, including all amendments, exhibits, appendices, and attachments thereto (the "IBA").

> As discussed at length in previous written communications, Blenheim has materially breached the IBA (and relevant appendices and exhibits thereto). Such material breaches remain uncured. Accordingly, pursuant to Section11.B. of the IBA, the IBA is terminated for cause.

The complaint alleged that Lockheed, Airbus, and South Korea then restructured the offset transaction, cutting Blenheim out of it, such that Lockheed agreed to provide 40 F-35s to South Korea and Airbus agreed to provide the military satellite. The U.S. Department of Defense approved the restructured transaction, and the military satellite for South Korea was launched from Cape Canaveral on July 20, 2020.

Blenheim commenced this action on December 31, 2020, alleging that the defendants (1) tortiously interfered with its International Brokerage Agreement and prospective business expectancies; (2) conspired to do so; and (3) were unjustly enriched. And by its first amended complaint, filed on May 21, 2021, Blenheim added claims under federal and state antitrust laws.

In response, the defendants filed motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) (lack of subject-matter jurisdiction) and 12(b)(6) (failure to state a claim), contending, first, that the district court lacked jurisdiction over Blenheim's tort claims by reason of the Foreign Sovereign Immunities Act and, second, that the complaint failed to state antitrust claims because they were barred by the applicable four-year statute of limitations and, in any event, failed to satisfy the

requirements of the Foreign Trade Antitrust Improvements Act. The district court agreed with the defendants' positions and, by order dated September 30, 2021, dismissed Blenheim's first amended complaint.

From the district court's order, Blenheim filed this appeal, contending (1) that the offset transaction or the separate brokerage agreement was "commercial activity" and therefore was excepted from the immunity conferred by the Foreign Sovereign Immunities Act; (2) that the antitrust claims "accrued" within four years of its original complaint and that its first amended complaint adding the antitrust claims related back to the filing date of the original complaint; and (3) that its antitrust claims satisfied the requirements of the Foreign Trade Antitrust Improvement Act based on the alleged anticompetitive conduct's sufficient effect on U.S. commerce.

II

Blenheim contends first that the district court erred in dismissing its tort claims against South Korea for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–1611, because the basis for its claims was "commercial activity" by South Korea, which is excepted from the immunity conferred by the Act.

The FSIA provides that "a foreign state shall be *immune from the jurisdiction of the courts of the United States* and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (emphasis added); *see also id.* § 1330 (providing

district courts with original jurisdiction over foreign states "not entitled to immunity under §§ 1605-1607"). Blenheim contends, however, that its claims fall within the exception relating to "commercial activity" as set forth in § 1605(a)(2). That section provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case — 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.

28 U.S.C. § 1605(a)(2) (emphasis added) (reformatted for clarity). And "commercial activity," which is the subject of each exception, is defined as:

> either a regular course of commercial conduct or a particular commercial transaction or act. 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.

Id. § 1603(d).

Blenheim's argument thus raises, at its core, the question of whether its tort claims are based on "commercial activity," as excepted from the immunity from jurisdiction conferred by § 1604.

As a general principle, the subject-matter jurisdiction of a district court is a question of law for the court, not the jury, to decide. When a defendant files a motion under Rule 12(b)(1) challenging subject-matter jurisdiction and relying simply on the allegations of the complaint, the court must take the jurisdictional facts alleged as true — as in the case of a motion filed under Rule 12(b)(6) — and determine, as a matter of law, whether the court has jurisdiction. *See Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). But if the defendant disputes the facts alleged for jurisdiction, providing the court with contradicting facts, the court "may go beyond the complaint, conduct evidentiary proceedings, and resolve the disputed jurisdictional facts." *Id.*

Under the FSIA, a foreign state is "presumptively immune" from the jurisdiction of U.S. courts, *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993), and when the foreign state asserts immunity from jurisdiction under the Act, the "focus shifts" to whether the plaintiff has demonstrated an exception to such immunity, a question of law, *Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 212 (4th Cir. 2011) (quoting *Phoenix Consulting Inc. v. Republic of Angola*, 212 F.3d 36, 40 (D.C. Cir. 2000). We review the district court's ruling on FSIA jurisdiction *de novo*, *see BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 473 (4th Cir. 2018), although we review the court's underlying

findings of fact under the clear error standard. Here, however, the governing facts are those of the complaint, which we accept as true for purposes of our analysis.

In this case, when the defendants asserted a lack of jurisdiction under the FSIA, Blenheim contended that the conduct alleged in the complaint was based on "commercial activity," as excepted from immunity from jurisdiction under § 1605(a)(2). Focusing mostly on its obligation under the transaction to procure the military satellite for South Korea, it now asserts:

> Blenheim's claims are principally based upon the commercial transaction that provided a military satellite to South Korea as an "offset" for the F-35 purchase. This transaction was implemented through commercial contracts executed solely by South Korea and Lockheed (to deliver the satellite and related services to South Korea), and by Lockheed with Airbus SAS (to supply the satellite to Lockheed). The U.S. government was not a party to those contracts, and was not permitted to be a party to those contracts.
>
> * * *
>
> The U.S. government never took title to the satellite, and thus did not act as an intermediary for this "offset" in the way it did for the F-35s. The district court's conclusion with respect to the F-35 sale is therefore inapplicable to the satellite piece of the transaction.
>
> * * *

> Blenheim's claims are based principally upon the procurement and financing of the satellite purchase, which was clearly commercial activity.

Blenheim argues that, following the FSIA's directive to consider the "nature" of the activity, the offset transaction was commercial because it simply involved "the purchase and sale of goods." It argues further that it is irrelevant whether the goods being purchased could only be purchased by sovereigns for sovereign purposes, "such as military equipment acquired for national defense," or whether they were "sold through the [Foreign Military Sales] Program."

The defendants do not deny Blenheim's characterization of the offset transaction as the sale of goods to South Korea, but they contend that Blenheim's argument is framed at too general a level. Rather, they argue, the inquiry must focus on whether the activity was of a type "exclusively reserved to sovereigns." When the inquiry is so directed, they maintain, it becomes clear that the sale of the F-35s and the military satellite, as a "Foreign Military Sale," could *only* be made between sovereigns exercising sovereign authority. As they argue:

> In [a Foreign Military Sale], the sovereign has no privity of contract with the private contractor. . . . In fact, the foreign sovereign effectively delegates control to the U.S. Government, from negotiating terms with the manufacturer's price and more, and it cannot directly sue the contractor for its performance. [Foreign Military Sales] transactions are also subject to various national security and defense

> policies, and the foreign sovereign must meet a host of conditions. . . . Indeed, the [Arms Export Control Act] conditions [Foreign Military Sales] on a finding by the President that such sale will strengthen the security of the United States and promote peace.

At the outset, we agree with the defendants' observation that Blenheim's definition of commercial activity is made at too general a level, such that it would essentially encompass every purchase or sale of goods involving a foreign sovereign. We conclude that not every purchase of goods by a sovereign is "commercial activity." Some by their nature are, and some are not. Nonetheless, the issue is somewhat different. As the Supreme Court has pointed out, it is "whether the particular *actions* that the foreign state performs" are "the *type* of actions by which a private party engages in trade or commerce." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (first emphasis added) (cleaned up).

The FSIA defines "commercial activity" as "a regular course of commercial conduct" or a "particular commercial transaction." 28 U.S.C. § 1603(d). But it does not define "commercial." Rather, it provides only interpretative guidance, stating:

> 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*.

Id. (emphasis added). The Supreme Court observed, "If this is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case

on the subject, it 'leaves the critical term "commercial" largely undefined.'" *Nelson*, 507 U.S. at 359 (quoting *Weltover*, 504 U.S. at 612). But the Court nonetheless undertook to define the term, beginning with its initial observation that Congress intended the immunity to apply to "sovereign or public acts (*jure imperii*)" and not to acts that are "private or commercial in character (*jure gestionis*)." *Id.* at 360. It then concluded:

> [A] state engages in commercial activity . . . where it exercises *only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns*. Put differently, a foreign state engages in commercial activity . . . only where it acts *in the manner of a private player within the market*.

Id. (emphasis added) (cleaned up); *see also Weltover*, 504 U.S. at 614. Thus, when the sovereign engages in a transaction peculiar to sovereigns — one in which private parties cannot engage — it is engaged in *sovereign activity* that is not excepted from the immunity conferred by the FSIA, even if it involves the purchase of goods. Applying this test to the offset transaction in which Blenheim was a participant and from which it was subsequently "cut out," we conclude that South Korea was engaged in conduct peculiar to sovereigns and therefore was not engaged in "commercial activity" as excepted from the immunity from jurisdiction conferred by the FSIA.

We begin with the observation that the F-35s and the coordinating military satellite — the subjects of the offset transaction — involved highly advanced technology and that the sale of F-35s was restricted as a Foreign Military Sale and therefore could only be

made with the approval and supervision of the U.S. government, and then only to a friendly country. It was also subject to controlling considerations of national security and public policy. While the satellite was manufactured by Airbus, a foreign company outside the United States, it was nonetheless to be designed with next-generation capabilities that included the capability of engaging with the F-35s, and its inclusion in the offset transaction was subject to the United States' approval and supervision. Indeed, the money for the satellite had to be paid to the United States and only then was disbursed by it, as provided by the terms of the approved transaction.

Foreign Military Sales cannot be made except in compliance with the Arms Export Control Act, 22 U.S.C. § 2751 *et seq.*, which requires approval of sales by the President of the United States and certification to Congress. And the President can approve such a transaction only if, among other things, (1) the President finds that the defense articles "will strengthen the security of the United States and promote world peace"; (2) the country to whom the articles are to be provided agrees "not to transfer title to, or possession of" them without the consent of the President; and (3) the country receiving the goods agrees to "maintain the security" of them. *Id.* § 2753(a). Moreover, private parties participating in Foreign Military Sales are subject to criminal penalties if they are not appropriately registered and licensed. *Id.* § 2778(b), (c).

In this case, the *nature* of the offset transaction was a military procurement by South Korea from the United States of military items manufactured by

Lockheed and Airbus, which was subject to plenary U.S. government control in furtherance of a policy of "international defense cooperation among the United States and those friendly countries to which it is allied by mutual defense treaties." 22 U.S.C. § 2751. And transactions such as the offset transaction in this case can be approved "only when they are consistent with the foreign policy interests of the United States." *Id.* It is clear that a private party could not engage in such a procurement, whether as buyer or seller. Such activity, by its nature, involves the transfer of military assets only to sovereigns and then only in furtherance of U.S. public policy and mutual military cooperation between countries. Moreover, it is not activity directed or influenced by the market but rather by the President's and Congress's judgment on national security concerns. Foreign Military Sales "reflect[] the national security interests of the United States," *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 707 (4th Cir. 2007), and therefore have a special contract structure that does not permit designation of the transaction as a "commercial activity."

Indeed, apart from the Arms Export Control Act, the entire procurement activity and transaction in this case was inherently sovereign activity. Activities such as creating and maintaining armed forces and obtaining for them arms and other tools of war — supplied only by sovereigns and to sovereigns in furtherance of mutual defense arrangements — are peculiarly sovereign activities. And while the activity here did not involve the creation of armed forces, it did involve providing them with F-35s that can only be obtained from the U.S. government and only provided

to a friendly government. Moreover, the sale of F-35s to South Korea was conditioned on the U.S. government's determination that the transaction would advance goals related to foreign relations and national defense. *Even the F-35s' manufacturer cannot engage in that activity*, much less other private parties. Thus, the activity at issue in this case was not the *type* that could be pursued by private citizens or corporations. A sovereign "engages in commercial activity . . . only where it acts in the manner of a private player within the market." *Nelson*, 507 U.S. at 360 (cleaned up). It follows that South Korea was not engaged in "commercial activity" within the meaning of the FSIA.

Blenheim seeks to avoid this conclusion by arguing that the harm to it was isolated to its arrangement with Airbus for the manufacture and sale of three satellites, two of which Blenheim would have operated itself. It thus seeks to break out its contract benefits from the offset transaction as a whole in order to argue that the satellite transaction was commercial because a private person or corporation could purchase satellites from Airbus. But this argument ignores Blenheim's own characterization of the transaction. The complaint described South Korea as having an indispensable role. It also described the satellite as satisfying South Korea's needs and military specifications, which were classified. Moreover, it alleged that the offset transaction, including Blenheim's arrangement with Airbus for the manufacture of the satellites, was complicated, integrating many components and parties and requiring Blenheim's expertise to design it. Blenheim's arrangement with Airbus was a necessary and

integral part of the procurement by South Korea of the F-35s. As Blenheim alleged, it designed the entire transaction as an integrated offset deal, in which "all four major stakeholders" would benefit — South Korea, Lockheed, Airbus, and Blenheim. It also alleged that the U.S. Department of Defense "play[ed] a major role in the sales" and was an "essential player." Indeed, Blenheim's particular arrangement with Airbus for the purchase of the satellites was also regulated by the United States. As Blenheim alleged, "[E]ven though sovereigns demand offsets as a 'sweetener' for defense procurements from foreign suppliers, in the U.S. [Foreign Military Sales] context, those sovereigns end up footing the bill for the offset with all monetary transactions *flowing through the Pentagon*." (Emphasis added).

Blenheim relies on two district court cases to argue that even taking the offset transaction as an integrated activity involving South Korea, the offset transaction by its nature was commercial activity. In the first case, *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1 (D.D.C. 1999), Moldova was seeking to sell Russian-made MiG fighter planes "to bolster its weakening economy." *Id*. at 2. The MiGs were being sold on the open market, drawing interest from Iran, to the alarm of the United States. Moldova then entered into a contract with Virtual Defense as broker to help it find a buyer that the United States would approve. The MiGs were thereafter purchased by the United States, and Virtual Defense then sued Moldova for its commission on the transaction. The district court concluded that the transaction was an open market transaction in which any private entity could have participated and was therefore

"commercial" for purposes of the FSIA. *Id.* at 4. It explained:

> In the instant case, Moldova acted as a private participant in the market when i[t] engaged in discussions with Virtual regarding the sale of the MiGs and when it eventually sold the MiGs to the United States. The mere fact that the goods sold by Moldova were MiG-29 planes does not change the nature of Moldova's actions. Accordingly, the court concludes that the relevant actions of Moldova constitute commercial activities within the definition espoused in the FSIA.

Id. The transaction in *Virtual Defense* is clearly distinct from the highly regulated offset transaction in this case involving South Korea's procurement of F-35s and a related military satellite. While *Virtual Defense* did involve the sale of technically advanced military aircraft, the structure of the transaction was nothing more than an ordinary commercial sale by Moldova, without any regulatory oversight. Indeed, the United States became involved precisely because the MiGs were being sold on the open market, and possibly to Iran.

The second case relied on by Blenheim, *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88 (D.D.C. 2020), likewise does not significantly advance Blenheim's argument. While *Simon* concluded that the Foreign Military Sale involved there was commercial activity, it did so by analyzing the transaction at issue as one "like a contract to buy army boots," *id.* at 110 (cleaned up), which stands in sharp contrast to the goods being procured here and the circumstances of the

procurement. Moreover, the court's reasoning gave scant attention to the manner in which Foreign Military Sales transactions are structured and regulated.

At bottom, we conclude that the offset transaction in this case was not the type of activity in which a private party could have participated and that South Korea did not act in the manner of a private party in its procurement of the F-35s and the military satellite. *See Nelson*, 507 U.S. at 360 (quoting *Weltover*, 504 U.S. at 614).

Because we conclude that the offset transaction was not commercial activity as excepted from the immunity from jurisdiction conferred in the FSIA, we affirm the district court's conclusion that it lacked jurisdiction over Blenheim's tort claims. *See* 28 U.S.C. §§ 1604, 1367.

III

With respect to Blenheim's antitrust claims, the district court dismissed them based on both the applicable four-year statute of limitations and its conclusion that they were barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a. Blenheim contends that both rulings were in error.

On the limitations ruling, the district court concluded that Blenheim's claims "accrued" on October 6, 2016, when, as alleged in the complaint, Lockheed sent Blenheim a letter giving it "formal notice . . . of the immediate termination of the [International Brokerage Agreement]" between Lockheed and Blenheim. While Blenheim commenced this action on December 31, 2020, more than four

years after the October 2016 date, it contends that it had challenged the October 2016 letter as invalid because Lockheed did not have cause to terminate the arrangement and that the agreement was actually terminated only when Lockheed responded to that challenge in January 2017 with a no-cause 30 days' notice of termination, which was within the four-year period before Blenheim filed its original complaint. Blenheim also argues that its injury "was not complete" until the restructuring of the offset transaction was completed and the military satellite was actually launched in 2020, thus deferring or extending to 2020 when its action accrued.

The Clayton Act, under which Blenheim brought its federal antitrust claim, creates a private cause of action for "any person who shall be *injured* in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a) (emphasis added). And § 15b provides that such actions "shall be forever barred unless commenced within 4 years after the cause of action accrued." *Id.* § 15b. The Virginia statute, on which Blenheim brings its state antitrust claim, provides similarly. *See* Va. Code Ann. §§ 59.1-9.12(b), 59.1-9.14.

An antitrust action "accrues" "when a defendant commits an act that *injures* a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (emphasis added). "Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators

on that date." *Id.* at 339; *see also GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 177 (4th Cir. 2007) (noting that "a cause of action generally accrues when a defendant commits an act that causes economic harm to a plaintiff").

Of course, a defense based on the statute of limitations is ordinarily raised as an affirmative defense, *see* Fed. R. Civ. P. 8(c), and the burden of establishing that affirmative defense rests on the defendant, *see Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). Therefore, the limitations defense cannot usually be addressed on a motion to dismiss under Rule 12(b)(6), which challenges only the *legal sufficiency of the complaint*, not usually affirmative defenses that the defendant can assert to the complaint. "But in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)." *Id.*; *see also Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993). In this case, the defendants relied solely on the allegations of the complaint in moving to dismiss the antitrust claims as untimely. Accordingly, to review the district court's ruling granting that motion, we must turn to the complaint.

Blenheim's complaint alleged, as relevant to when its antitrust causes of action accrued, that "from 2012 through 2016 Blenheim Capital devised and structured an innovative offset deal," as described in detail. After Blenheim had "conceived, modeled, and begun the implementation" of the offset transaction, Lockheed, Airbus, and South Korea "conspired to cut

Blenheim out of the deal," and they thus "benefitted from years of work and effort by Blenheim . . . to maximize their own advantages and profits." The complaint alleged further that the defendants "agreed to proceed with a restructured transaction that cut out Blenheim *in late 2016*" (emphasis added), thus misappropriating Blenheim's "years of effort" on the offset transaction and leaving it with nothing in return. In addition, the complaint alleged that while South Korea had paid Lockheed $150 million, which Lockheed was to pay to Blenheim in installments as seed money to finance the satellites, Lockheed paid Blenheim only one installment of $45 million, leaving $105 million unpaid. According to the complaint, by late 2016, Blenheim had paid $20 million of the $45 million to Airbus as commitment for the financing, which never occurred. And Blenheim was cut out from the transaction because, as alleged, Lockheed became concerned that "Blenheim would become a competitor . . . for the sale and leasing of satellite capacity." In furtherance of the conspiracy, "on October 6, 2016, [Lockheed] provided Blenheim with a purported 'formal notice . . . of the immediate termination' of the [International Brokerage Agreement] for cause." Thereafter, "[h]aving conspired to cut Blenheim out of the offset transaction, Lockheed, Airbus, and South Korea proceeded with the military satellite procurement and worked to obtain the necessary approvals . . . to do so. On July 20, 2020, the satellite was launched from Cape Canaveral, Florida. . . . Though the launch was the fruit of Blenheim's labors, it received nothing."

Not only do the complaint's allegations place October 6, 2016, as the date when Blenheim was cut

out of the offset transaction, they also describe how, as of that date, Blenheim was injured in its business and property and Lockheed, Airbus, and South Korea were enriched by the product of Blenheim's years of work and effort, seizing the fruits and denying Blenheim the benefits of the deal. Indeed, as of that time, October 6, 2016, Blenheim had already paid $20 million to Airbus as a finance commitment, for which it received nothing because of the October 6, 2016 termination. Finally, as the complaint alleged, Blenheim was also denied, as of that date, the benefit of procuring satellites and obtaining a profit from their operation. Indeed, the complaint stated dramatically that after October 6, 2016, Blenheim "received nothing." Under these circumstances, we conclude that Blenheim's cause of action accrued on October 6, 2016, when Blenheim felt the "adverse impact of [the] antitrust conspiracy." *Zenith Radio Corp.*, 401 U.S. at 339.

Blenheim argues that it was not injured until January 2017 because it was only then that Lockheed *legally* terminated the brokerage agreement. But the question of whether Lockheed's October 2016 termination of the brokerage agreement caused Blenheim injury does not depend on whether that termination was legal. The complaint alleges clearly that Lockheed's October 2016 termination, whether legal or illegal, cut Blenheim out of the transaction and thus deprived it of its anticipated benefits.

Also, Blenheim's alternative argument that the accrual date of its action was extended until the restructured offset transaction was complete, *i.e.*, when the satellite was launched in 2020, lacks legal support. The fact that some damages *were to accrue in*

the future does not extend the accrual date. *See Zenith Radio Corp.*, 401 U.S. at 339. As the Supreme Court noted, to recover future damages, the plaintiff still must "sue within the requisite number of years from the accrual of the action," when it *first* felt "the adverse impact of [the] antitrust conspiracy." *Id.* Because Blenheim felt adverse impacts immediately upon Lockheed's October 2016 termination of the brokerage agreement, the date of the satellite launch is not relevant to the date when the cause of action accrued.

Accordingly, we affirm the district court's ruling that Blenheim's antitrust claims are barred by the applicable four-year statute of limitations.

While the district court also concluded, indeed persuasively, that the FTAIA barred Blenheim's antitrust claims because the anticompetitive conduct alleged did not sufficiently affect U.S. domestic or import commerce, we do not address that issue in light of our ruling affirming dismissal on the basis of the statute of limitations.

The judgment of the district court is, accordingly,

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

BLENHEIM CAPITAL HOLDINGS, LTD, ET. AL.,	)	
Plaintiffs,	)	
v.	)	
LOCKHEED MARTIN CORPORATION, ET AL.	)	Civil Action No. 1:20-cv-1608 Hon. Liam O'Grady
Defendants.	)	

ORDER

This matter comes before the Court on Defendant Lockheed Martin Corporation's Motion to Dismiss Plaintiffs' Amended Complaint, Dkt. 58, and on Defendant Airbus Defense Space and SAS's Motion to Dismiss Plaintiffs' Amended Complaint, Dkt. 66. The matter has been fully briefed, and the Court held a hearing on Wednesday, September 22, 2021. Based on the following analysis, both Motions to Dismiss are **GRANTED.**

I. BACKGROUND

A. The Parties

Plaintiff Blenheim Capital is a company based in Guernsey. Blenheim is an experienced broker in structuring offset agreements for defense trade transactions. Plaintiff Blenheim Holdings is the 100% owner of Blenheim Capital. Dkt. 53 at 7.

Defendant Lockheed Martin is a Maryland corporation. Lockheed is a global security and aerospace company serving both U.S. and international customers with defense, civil, and commercial products and services. It is one of the largest companies in the world. Dkt. 53 at 7.

Defendant Airbus Defense and Space SAS ("Airbus France") is a French company. It is a division of Airbus SE, a global leader in the defense and space industry. Dkt. 53 at 8.

Defendant Republic of South Korea ("South Korea") is a foreign sovereign state.

Defendant Defense Acquisition Program Administration ("DAPA") is an executive agency of the South Korean government within the Ministry of National Defense. Dkt. 53 at 8. South Korea is a member of the Hague Convention and has not yet been served in this lawsuit.

B. Statement of Facts

In a Foreign Military Sale ("FMS"), a domestic producer sells military goods to a foreign government, using the U.S. Department of Defense ("DoD") as an intermediary. Often, as part of an FMS transaction, the foreign purchaser will require the domestic

partner to provide the foreign government with an "offset." In an offset transaction, the domestic producer is required to directly provide the foreign purchaser with goods or services that partially "offset" the foreign government's procurement expenditures. Dkt. 76-1 at 23. Prior to the events at issue in this case, Plaintiff Blenheim had amassed significant experience in the field of offset agreements, having structured offset solutions for more than twenty multinational corporations, which satisfied approximately $18.5 billion in offset obligations. Dkt. 76-1 at 23.

In the 1990's, Lockheed developed the F-35 fighter jet. In 2011, South Korea announced an intent to enhance its stealth-fighter capabilities, and Lockheed thus had an opportunity to sell, via the FMS process, a fleet of F-35s to South Korea. Dkt. 76-1 at 24-25.

Lockheed engaged Blenheim to develop an offset offer - titled "Project Archer." In Project Archer, Blenheim developed an offset transaction whereby Lockheed Martin Overseas Corporation ("LMOC") would provide South Korea with a military satellite. LMOC would provide $150 million to Blenheim, which Blenheim would then use, in combination with financing, to procure three satellites. One of these satellites would be provided to South Korea to satisfy Lockheed's F-35 offset obligation. Blenheim would own the remaining two commercial satellites, and would sell their bandwidth for use in secure government communications. Dkt. 76-1 at 24. Blenheim expected this arrangement to result in excess of

$500 million in profits. Dkt. 76-1 at 92.

Blenheim then conducted a bidding process to identify the optimal original equipment manufacturer ("OEM") partner for Project Archer. Ultimately, Blenheim selected Airbus England, an affiliate of Airbus SAS, as the OEM for Project Archer. On November 22, 2013, South Korea accepted Lockheed's bid, which included the Project Archer offset offer, to provide South Korea's new fighter jets. Dkt. 76-1 at 25. LMOC and Airbus England both signed contracts obligating them to participate in Project Archer. Dkt. 76-1 at 25.

Ultimately, Lockheed and Airbus SAS decided to cut Blenheim out of the deal. Dkt. 76-1 at 26. South Korea also began to pressure the Defendants into a direct-procurement, on the basis that it would accelerate receipt of the military satellite, and to offer inducements to Lockheed.

Dkt. 76-1 at 29. On October 6, 2016, LMOC provided Blenheim with a purported "formal notice . . . of the immediate termination" of the contract ("the IBA") for cause. Dkt. 76-1 at 29. Lockheed, Airbus France, and South Korea proceeded with the military satellite procurement and worked to obtain the necessary approvals and permits from the Defense Security Cooperation Agency, the Federal Aviation Administration, and other government agencies to do so. Lockheed paid Airbus for the satellite and South Korea credited billions of dollars to Lockheed's offset obligation. Dkt. 53 at 43.

As Plaintiff Blenheim writes, "In the end, Lockheed, Airbus SAS, and South Korea all achieved their goals: Lockheed, at no additional cost to itself, offset its obligations to South Korea and kept a competitor out the market; Airbus SAS kept its sale of the military satellite and kept a competitor out of the market; and South Korea received its military satellite. Only Blenheim, the party that spent years of effort and significant resources on Project Archer, was left with nothing." Dkt. 76-1 at 30.

II. LEGAL STANDARD

In its Amended Complaint, Dkt. 53, Plaintiff Blenheim asserts two bases for subject matter jurisdiction pursuant to a federal question. First, Plaintiff Blenheim asserts that this Court has subject matter jurisdiction over claims against Defendants Lockheed and Airbus because Plaintiffs' claims for violations of 15 U.S.C. § I - the Sherman Act - arise under federal law.

Dkt. 53 at 8. Second, Plaintiff Blenheim asserts that this Court has subject matter jurisdiction over claims against South Korea and South Korea's Defense Acquisition Program Administration (DAPA) pursuant to the Foreign Sovereign Immunities Act ("FSIA"). *Id.* Each of these bases for subject matter jurisdiction is addressed in turn.[1]

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[1] Defendant Lockheed Martin Corporation's Motion to Dismiss, Dkt. 58, argues that this Court lacks subject matter jurisdiction under the Foreign Sovereign Immunity Act. Defendant Airbus SAS's Motion to Dismiss, Dkt. 66,

A. Plaintiffs' Antitrust Claim

Plaintiff Blenheim fails to adequately assert an antitrust claim for two reasons. First, the antitrust claim falls outside the four year statute of limitations period and, second, the antitrust claim is barred by the Foreign Trade Antitrust Improvements Act ("FTAIA").

1. Statute of Limitations on Plaintiffs' Antitrust Claim

A federal antitrust claim "shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. The same four year statute of limitations applies to claims brought under Virginia's state antitrust law. Va. Code Ann. *§* 59.1-9.14.

The four year statute of limitations period begins to run when the cause of action accrues, which "generally [begins] when a defendant commits an act that causes economic harm to a plaintiff." *GO Comput., Inc. v. Microsoft Corp.,* 508 F.3d 170, 177 (4th Cir. 2007) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321,338 (1971). In other words, ". . . discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella v. Wood,* 528 U.S. 549, 555 (2000).

At the latest, Blenheim was aware of its alleged injury by October 6, 2016. This is the date on which Lockheed "provided Blenheim with a

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argues that this Court lacks subject matter jurisdiction under the Sherman Act. Each Defendant adopts the other's arguments on these fronts.

purported 'formal notice . . . of the immediate termination' of the IBA for cause," Dkt. 53 at 42, thereby causing economic injury to Blenheim.

Plaintiff Blenheim first filed its antitrust claim in the Amended Complaint on May 21, 2021. Dkt. 53. More than four years transpired between October 6, 2016 and May 21, 2021. Even Plaintiff Blenheim's original Complaint, Dkt. 1, which was filed on December 31, 2020 and which notably did not state an antitrust claim, also falls outside the four year statute of limitations period. Therefore, Blenheim is barred from bringing its antitrust claim under both federal and Virginia state law.

2. Plaintiffs' Substantive Antitrust Claim

In addition to being barred by the four year statute of limitations period on its antitrust claim, Plaintiff Blenheim fails to sufficiently allege an antitrust claim.

a. Legal Standard

Plaintiff Blenheim alleges antitrust violations against Defendants Lockheed and Airbus under 15 U.S.C. § 1—the Sherman Act. The Sherman Act is a federal antitrust statute that prohibits activities that restrict interstate commerce and competition in the marketplace. It provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal." 15 U.S.C. § I.

The Sherman Act is limited somewhat by the

Foreign Trade Antitrust Improvements Act of 1982, which "excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce . . . with foreign nations.' It then creates exceptions to the general rule, applicable where (roughly speaking) the conduct significantly harms imports, domestic commerce, or American exporters." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.,* 542 U.S. 155, 158 (2004) (internal citations omitted). So, generally, the Sherman Act does not reach foreign antitrust injuries. However, the U.S. may still have jurisdiction over an antitrust claim regarding foreign commerce where one of two exceptions applies: (1) the domestic effects exception or (2) the import exception.

First, the domestic effects exception applies when anticompetitive conduct: "(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.'" *Id.* at 159. This exception does not apply when a claim rests solely on foreign harm. For example, in *F Hoffman-La Roche Ltd* v. *Empagran S.A.,* the Supreme Court considered a price-fixing scheme that resulted in higher vitamin prices both in the United States and internationally. The Court explained that an international purchaser who suffered from higher prices was barred from bringing a Sherman Act claim under the FTAIA, while a U.S. purchaser suffering the same harm could bring such a claim.

Id. The Court signaled a hesitancy to apply American antitrust laws and remedies to a foreign plaintiff for conduct that occurred abroad, particularly when the foreign injury was deemed independent of any potential domestic injury. *Id.* at 165. The domestic effect of any anti-competitive conduct must be "direct, substantial, and reasonably foreseeable." 15 U.S.C. § 6a. The Seventh Circuit has explained, "Just as tort law cuts off recovery for those whose injuries are too remote from the cause of an injury, so does the FTAIA exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce." *Minn-Chem, Inc. v. Agrium, Inc.,* 683 F.3d 845, 857 (7th Cir. 2012) (cleaned up).

Second, the import exception to the general rule abrogating the Sherman Act's applicability to foreign commerce states that "the Sherman Act applies to a defendant's conduct abroad that constitutes, includes, or has as a necessary consequence the movement of goods into this country." *Biocad JSC v. F. Hoffman-La Roche,* 942 F.3d 88, 96 (2d Cir. 2019). Notably, "[c]onduct does not 'involve' import commerce if it has no direct or immediate consequence for domestic markets and is intended merely to have a domestic impact in the future. Nothing in the text of the FTAJA otherwise suggests intent-based analysis." *Id.* at 97.

Plaintiffs' antitrust claims are barred under the Foreign Trade Antitrust Improvements Act as Defendants' conduct meets neither the domestic

effects exception nor the imports exception to the FTAIA. Plaintiffs' claim is too remote and too speculative to be considered an antitrust violation.

b. Discussion

In Plaintiffs' Amended Complaint, Plaintiffs color a number of Defendants' behaviors as anticompetitive. For example, Plaintiffs state that "Multiple Lockheed executives repeatedly expressed concern about the competitive impact of the transaction, including that through Project Archer, Lockheed was essentially funding a new competitor for Lockheed's own satellite division, LM Space." Dkt. 53 at 27. Plaintiffs further allege that, "Like the Lockheed officials . . . various Airbus officials grew concerned that Blenheim would become a competitor with Airbus France and its affiliates in the market for the sale and leasing of satellite capacity. It expressed such concerns on multiple occasions, including at a 2015 dinner attended by senior executives of Airbus France and Airbus England . . . An Airbus England official who was friendly to Blenheim, and supportive of Project Archer, told Blenheim's CEO to 'watch your back' because Airbus France officials were concerned with the competitive impact of providing the satellites to Blenheim." Dkt. 53 at 30.

More specifically, Plaintiffs allege an antitrust violation, stating that they "suffered an injury from a conspiracy that reduced output and eliminated a nascent competitor in the market for the sale of commercial satellite capacity, including but not limited to the X and Ka band satellite capacity in the region covered by MYGOVSAT." Dkt. 76-1 at 38.

Plaintiffs allege that Defendant Airbus was a competitor and consumer in the market of selling or leasing capacity in X and Ka bands. Dkt. 76-1 at 39.

Defendants counter that Plaintiffs' antitrust claims are barred by the FTAIA. Defendants note that the Sherman Act protects against conspiracies to unreasonably restrain trade in the market, not the ending of a business relationship. Dkt. 67 at 33; *see Oksanen* v. *Page Mem'l Hosp.,* 945 F.2d 696, 711 (4th Cir. 1991). Defendants note in particular that Plaintiffs' claims meet neither the import exception nor the domestic effects exception of the FTAIA. Defendants are correct in this assertion. Plaintiffs claim is too remote and speculative to be properly considered an antitrust violation.

First, Defendants note that Plaintiffs' claims do not meet the import exception, as the purported market that Plaintiffs describe is entirely foreign. In Defendants' words: "Blenheim did not import anything to the United States; instead, Blenheim, based in Guernsey, contracted with a French and American company to build a satellite for South Korea." Blenheim alleges no conduct involving imports to the U.S. Dkt. 67 at 36.

Second, Defendants note that Plaintiffs' claims do not meet the domestic effects exception. Defendants note that Plaintiffs' plan to sell satellite capacity to Malaysia never extended beyond negotiations, and that there was never any effect on U.S. commerce. Dkt. 67 at 37. In Defendants' words: "The mere possibility that Blenheim eventually may have sold satellites to Malaysia, contracted with an unnamed satellite

communications provider to use Malaysia's orbital positions, and participated in a constellation that could cover part of the U.S. 'is too remote and speculative' to fall within the purview of FTAIA." Dkt. 67 at 37.

Plaintiff Blenheim counters that, "Defendants base their argument on a misstatement of Blenheim's allegations . . . Instead, Blenheim alleges it intended to use Malaysia's orbital positions to lease and sell *satellite capacity* to other *third parties* . . . Moreover, Blenheim's allegations make clear that it was planning to combine coverage with another satellite provider to provide *global coverage* . . . This shows Blenheim would have been in the business of providing certain kinds of satellite capacity on a global basis, including in the United States—making the FTAIA inapplicable." Dkt. 76-1 at 49 (emphasis in original).

Ultimately, Plaintiff Blenheim's allegations here fail to meet either the import exception or the domestic effects exception of the FTAJA. They do not allege an "import." No good was ever imported into the United States. The fact that Plaintiffs intended to sell satellite capacity that might reach the United States does not suffice. *See Biocad JSC v. F Hoffman-La Roche,* 942 F.3d 88, 97 (2d Cir. 2019). Nor do Plaintiffs allege any "direct, substantial and reasonably foreseeable effect" as required under 15 U.S.C. § 6a. Their claim is speculative, as Plaintiffs never actually provided satellite coverage. Even if they did, it is hard to fathom how such coverage could be considered a

"direct" and "substantial" influence on United States commerce.

The FTAIA cuts off recovery for "foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce." *Minn-Chem, Inc. v. Agrium, Inc.,* 683 F.3d 845,857 (7th Cir. 2012) (cleaned up). As the Fourth Circuit has stated," . . . the antitrust laws were not intended . . . as a vehicle for converting business tort claims into antitrust causes of action." *Oksanen v. Page Mem'l Hosp.,* 945 F.2d 696, 711 (4th Cir. 1991). Here, Plaintiff Blenheim attempts to convert a business tort claim into an antitrust claim, but cannot do so.

B. Plaintiffs' Foreign Sovereign Immunities Act Claim

Plaintiffs fail to state a claim under the Foreign Sovereign Immunities Act ("FSIA"). The sale at issue in this case is a sovereign-to-sovereign transaction and does not fit the FSIA's "commercial activity" exception.

1. Legal Standard

The Foreign Sovereign Immunities Act provides that federal courts have original jurisdiction over all claims against a foreign state in which the state is not entitled to sovereign immunity. 28 U.S.C. § 1330(a). However, "[a] foreign state shall *not* be immune from the jurisdiction of courts of the United States in any case . . . in which the action is based upon a *commercial activity* carried on in the United States by the foreign state . . ." 28 U.S.C. § 1605(a)(2) (emphasis added). This has been referred to as the "commercial activity" exception to the FSIA.

The "commercial activity" exception to the FSIA has been tailored by the Supreme Court. The Court has held that where the conduct constituting the *gravamen* of the plaintiffs suit occurs abroad, the "commercial activity" exception to the FSIA does *not* apply. *OBB Personenverkehr AG v. Sachs,* 136 S.Ct. 390 (2015). The Court does not apply an element by element analysis, but instead zeroes in on the core of the plaintiffs suit to identify the conduct that the suit was "based upon." *Id.* The Court has explained that "based upon" means those elements of a claim that, if proven, would entitle plaintiff to relief under his theory of the case. It requires more than a mere connection with—or relation to—the commercial activity. *See Saudi Arabia v. Nelson,* 507 U.S. 349 (1993).

The Supreme Court has also limited the "commercial activity" exception to the FSIA to those cases in which a state exercises only those powers that can be exercised by private citizens. Where a state exercises powers that are particular only to sovereigns, the commercial activity exception does not apply. *Id. See also Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607 (1992) (explaining that when a foreign sovereign acts in the manner of a private player within a market, the actions are "commercial" within the meaning of the FSIA). The "commercial activity" exception concerns the *type* of actions engaged in by the government, rather than their purpose. *See* 28 U.S.C. § 1603(d); *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 614 (1992).

2. Discussion

In this case, Plaintiffs assert that their claims against Defendant South Korea and South Korea's Defense Acquisition Program Administration (DAPA) are based on South Korea's commercial activity within the United States. Specifically, Plaintiffs allege that the funds that South Korea and DAPA provided to the U.S. Department of Defense for the purchase of a military satellite were passed to Lockheed, as the prime contractor, and then directly to Airbus; and that Blenheim was cut out of the deal. Dkt. 53.

In the Motion to Dismiss, Defendants counter that the "commercial activity" exception to the FSIA does not apply here. Defendants note, first, that the conduct alleged by Plaintiffs is not "commercial activity," and, second, the action is not "based on" commercial activity as the conduct alleged does not constitute the gravamen of the suit. Dkt. 59. Each of these assertions is considered in turn, below.

First, Defendants note—correctly—that a foreign sovereign engages in "commercial activity" only when it exercises "those powers that can also be exercised by private citizens," and not when it employs powers that are particular to sovereigns. *See France.com, Inc. v. French Republic,* 992 F.3d 248,252 (4th Cir. 2021). Defendants note that the Pentagon's Foreign Military Sales ("FMS") transactions alleged by Plaintiffs are exclusively between the U.S. government and a foreign government—here, South Korea. Private citizens in the marketplace could not participate in this transaction. Further, there was no privity of

contract between the contractor and the foreign sovereign. *See* Dkt. 59.

Second, Defendants note that, even if South Korea's involvement in the FMS program could be deemed "commercial activity," Plaintiff Blenheim's claims against South Korea are not *"based upon"* that activity because they do not form the gravamen of Plaintiffs' suit for tortious interference of contract. Dkt, 59 at 23. "Based upon" means those claims that, if proven, would entitle Plaintiff to relief. *See Saudi Arabia v. Nelson, 501* U.S. 349 (1993). Here, the gravamen of Plaintiffs' claims is the tortious interference with contract by Defendants. The government-to-government FMS transaction does not form the basis of Plaintiffs' claims. *See* Dkt. 77.

Plaintiffs counter with two compelling—although nonbinding and distinguishable—cases defining "commercial activity": *Simon v. Republic of Hungary,* 443 F.Supp.3d 88 (D.D.C. 2020) and *BAE Systems Technology v. Republic of Korea's Defense Acquisition Program Administration,* 2016 WL 6167914 (D. Md. 2016). Plaintiffs argue that both *Simon* and *BAE* hold that FMS transactions constitute "commercial activity" under the FSIA, and the types of military equipment sold in those cases are subject to the same or similar "FMS-only" restrictions as those referred to by Defendants. Dkt. 76-1 at 33. Plaintiffs further note that the offset transaction was not government-to-government, as the satellite offset never called for the satellite to be transferred to or from the U.S. government. Dkt. 76-1 at 33.

These cases are both nonbinding and distinguishable. In *Simon,* the United States District Court for the District of Columbia considered a class action brought by fourteen Hungarian Jewish survivors of the Hungarian Holocaust against the Republic of Hungary and the Hungarian state-owned railway (MAV) arising from Defendants' participation in and perpetration of the Holocaust. Plaintiffs sought restitution for property that was seized from them as part of Hungary's broader effort to eradicate the Jewish people. *Simon v. Republic of Hungary,* 443 F.Supp.3d 88, 92-94 (D.D.C. 2020). On remand, the Court held that the Plaintiffs' complaint "sufficiently alleges, in claims asserting genocidal takings of property from Hungarian Jews between 1941 and 1945, that each defendant, Hungary and MAV, commingled that expropriated property in the country's treasury and thereby continue to possess such property to sustain their commercial activities, including Hungary's debt offerings and military purchases in the United States . . ." *Id.* at 116. The Court further noted that Hungary and the railway engaged in commercial activity in the United States as required to satisfy the commercial-activity nexus element of the expropriation exception to sovereign immunity under the FSIA. *Id.* at 109-110. The present case has a starkly different factual background; moreover, the present case does not deal with the "expropriation exception" to sovereign immunity, as is at issue in *Simon.* As the Court in *Simon* notes, "the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), 'waives foreign sovereign

immunity in cases asserting that 'rights in property [were] taken in violation of international law . . .'" *Id.* at 99. The Court held, specifically, that "Plaintiffs' allegations regarding Hungary's bond offerings and military equipment purchases are sufficient to meet the commercial activity prong of the expropriation exception." *Id.* at 107. Moreover, as Defendants note, *"Simon* did not involve an FMS-Only transaction with equipment that is *not* available for purchase by private entities, as was the case here with the procurement of F-35 aircraft. *Simon* is therefore also distinguishable." Dkt. 77 at 9.

BAE Systems Technology v. Republic of Korea's Defense Acquisition Program Administration, 2016 WL 6167914 (D. Md. 2016), is similarly non-binding and distinguishable. That case involved a contract dispute between BAE Systems and the Republic of Korea and its Defense Acquisition Program Administration (DAPA). The Court held that, "[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." *Id.* at *6. The Court held that "commercial activity occurs 'in the United States' if there is a 'substantial contact' between the commercial activity and the United States." *Id.* at *5. Unlike in *BAE,* in the present case, the commercial activity at issue is not the gravamen of Plaintiffs' suit; there is no "substantial contact"

between the commercial activity and the United States. Moreover, as Defendants note, *BAE* does not actually hold that the FMS transaction was a commercial activity, and is therefore inapposite. Dkt. 77 at 9.

Ultimately, this Court is compelled to follow the precedent set by the U.S. Supreme Court. That case law is clear: where the conduct constituting the *gravamen* of the plaintiffs suit occurs abroad, the "commercial activity" exception to the FSIA does *not* apply. *See OBB Personenverkehr AG v. Sachs,* 136 S.Ct. 390 (2015). The Supreme Court does not apply an element by element analysis, but instead zeroes in on the core of the plaintiffs suit to identify the conduct that the suit was "based upon." *Id.* The Supreme Court has also explained that "based upon" means those elements of a claim that, if proven, would entitle plaintiff to relief under his theory of the case. It requires more than a mere connection with- or relation to - the commercial activity. *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993). Finally, the "commercial activity" exception to the FSIA is limited to those cases in which a state exercises only those powers that can be exercised by private citizens. Where a state exercises powers that are particular only to sovereigns, the commercial activity exception does not apply. *Id. See also Republic of Argentina v. Weltover,* 504 U.S. 607 (1992).

Following the law as set forth by the Supreme Court, this Court finds that the transaction at issue here does not meet the

"commercial activity" exception of the FSIA. The transaction was sovereign-to-sovereign. South Korea could not purchase the F-35 fighter jets through a direct commercial sale. Additionally, Plaintiff Blenheim fails to show that its claims are "based upon" the conduct alleged by South Korea. The "gravamen" of Blenheim's suit is tortious interference with contract between Lockheed and Airbus—not the commercial activity by South Korea.

III. CONCLUSION

As Plaintiff Blenheim has failed to allege an antitrust claim or a claim under the Foreign Sovereign Immunities Act, this Court lacks subject matter jurisdiction to hear this case. Therefore, Defendant Lockheed Martin Corporation's Motion to Dismiss Plaintiffs' Amended Complaint, Dkt. 58, and Defendant Airbus Defense Space and SAS's Motion to Dismiss Plaintiffs' Amended Complaint, Dkt. 66 are both hereby **GRANTED.** The Amended Complaint, Dkt. 53, is **DISMISSED.**

It is **SO ORDERED.**

September 30, 2021
Alexandria, Virginia

_____
Liam O'Grady
United States
District Judge

APPENDIX C

FILED: December 13, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2104
(1:20-cv-01608-LO-JFA)

BLENHEIM CAPITAL HOLDINGS LTD.; BLENHEIM CAPITAL PARTNERS LTD.

Plaintiffs - Appellants

v.

LOCKHEED MARTIN CORPORATION; AIRBUS DEFENCE AND SPACE SAS

Defendants - Appellees

and

DEFENSE ACQUISITION PROGRAM ADMINISTRATION; REPUBLIC OF KOREA

Defendants

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under

Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Niemeyer, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

RELEVANT STATUORY PROVISIONS

28 U.S.C. § 1605(a)(2)

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

* * *

> **(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;

* * *

28 U.S.C. § 1603(d) & (e)

For purposes of this chapter—

* * *

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. 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.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.