No. 22-886

IN THE

Supreme Court of the United States

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

v.

LOCKHEED MARTIN CORPORATION, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondent's effort to avoid certiorari is epitomized in its misstatement of the question presented. The question is not "whether South Korea's procurement of the F-35 fighter jets and military satellite through [a Foreign Military Sales (FMS)] transaction is 'commercial activity'" under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2). Opp. i. It is whether South Korea's procurement of a satellite directly from Lockheed Martin (Lockheed) constitutes "commercial activity" under the FSIA, irrespective of whether the procurement serves a military purpose. Pet. i.

The Fourth Circuit answered the question presented "No." But four other circuit courts of appeals would answer "Yes," irrespective of whether the procurement at issue was associated with an FMS transaction. This Court should grant certiorari to resolve the conflict.

I. The Rule Applied By The Fifth, Eighth, Ninth, And Eleventh Circuits Would Hold South Korea's Procurement Of A Satellite From Lockheed To Be Commercial Activity.

Respondent argues that this case is different from the four circuit court decisions Petitioner cited in showing a split of authority. According to Respondent: "None of the cited decisions addressed whether a sale through the FMS program between the U.S. government and a foreign sovereign of equipment that only sovereign governments could purchase was commercial activity, and each is distinguishable." Opp. 19. As the four other circuit decisions make clear, both Respondent's description of the relevant activity

and its understanding of how those circuit decisions would apply here are wrong.

Petitioner's claims do not arise from or challenge a foreign sovereign's participation in the FMS program, any agreement or transaction between a foreign sovereign and the United States government, or the purchase of F-35 jets. Rather, this case is about a foreign sovereign's interference with financing contracts between private parties made to facilitate a supply contract directly between one of those private parties and the foreign sovereign. Specifically, Petitioner claims that South Korea's Defense Acquisition Program Administration (DAPA) tortiously interfered with Petitioner's contracts with Lockheed Martin Overseas Corporation and Airbus Defence and Space Ltd. Pet. 9. Those contracts provided for the financing structure that would enable Petitioner to acquire a satellite from Airbus Defence and Space SAS and then provide that satellite to Lockheed, which would in turn provide it to DAPA pursuant to a contract executed directly between Lockheed and DAPA. *Id.* at 8–9. The United States was not party to any of those contracts. *Id.* at 6–7. The satellite's only connection to DAPA's acquisition of F-35 jets through the FMS program was that the satellite was supplied to DAPA as an "offset," in effect, reducing the cost of the F-35 jets. As a matter of U.S. law and policy, the supply of the satellite as an "offset" is an independent business arrangement that is "strictly between" DAPA and Lockheed. *Id.* at 7.

As four other circuit decisions show, the DAPA conduct at issue is "commercial activity" for FSIA purposes regardless of whether DAPA would use the satellite for military purposes, whether DAPA entered

into the supply contract with Lockheed in connection with an FMS transaction, whether DAPA's acquisition of the satellite would also serve as an "offset" to an FMS transaction for F-35 jets, and whether only a foreign sovereign could have purchased the F-35 jets (*see* Opp. 5). What matters is whether the foreign sovereign's activity is the *type* of activity that private parties engage in for commercial purposes—and contracts to acquire goods directly from a private company are such an activity.

Respondent admits that the Fifth and Eighth Circuits declared that contracts between foreign sovereigns and U.S. companies to supply goods or services were commercial activities, even though those contracts were directly related to the procurement of military jets via FMS transactions. Opp. 19. The courts stressed that "the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant" and that "*a contract by a foreign government to buy* provisions or *equipment for its armed forces* … constitutes a commercial activity." *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 348–49 & n.2 (8th Cir.) (quotation marks omitted); *accord UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 217–18 (5th Cir. 2009).

Likewise, there is no basis for supposing that the decisions by the Ninth and Eleventh Circuits relied on in the Petition would have been any different had the contracts at issue in those cases been connected to an FMS transaction. Like the Eighth and Fifth Circuits, the Ninth and Eleventh Circuits declared that the character of a sovereign's activity is determined "by reference to the nature of the … act, rather than by

reference to its purpose," and thus concluded that a foreign sovereign's contract to purchase military equipment is commercial activity. *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 385 F.3d 1206, 1211, 1219–20 (9th Cir. 2004) (quotation marks omitted), *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); *accord Samco Global Arms, Inc. v. Arita*, 395 F.3d 1212, 1216 (11th Cir. 2005). The record in *Samco* even noted that the goods supplied were not ordinarily available to private parties on the open market. *See* Complaint, *Samco Global Arms, Inc. v. Republic of Honduras*, No. 02-cv-20118, Dkt. No. 1 (S.D. Fla. Jan. 14, 2002) (bringing claims involving weapons, munitions, and explosives, some of which were sourced from the Egyptian military). In this case, by contrast, the satellite procured by DAPA was based on the same general model purchased by private parties (the Eurostar 3000), tailored to DAPA's specific needs. Pet. 32 n.10.

Respondent counters that the decision below aligns with the unpublished decision in *Heroth v. Kingdom of Saudi Arabia*, 331 F. App'x 1 (D.C. Cir. 2009). Contrary to Respondent's suggestion (Opp. 21), however, the D.C. Circuit did not adopt a sweeping rule that claims "arising out of an FMS transaction" are never "commercial activity" under the FSIA, and the particular activities at issue there were meaningfully different from here. The court held that "Saudi Arabia providing for the [Saudi Arabian National Guard] to protect the Riyadh complex [and] Saudi Arabia participating in the FMS program" were not commercial activities, but the court never considered whether a foreign sovereign's contract

directly with a private supplier of goods—the situation presented here—is commercial activity. 331 App'x at 3. Anyway, if *Heroth* did align with the decision below, that would only reinforce the need for this Court to resolve an entrenched circuit split.

In sum, as the certiorari petition explained, U.S. companies sell approximately $170 billion worth of military equipment and supplies to foreign governments annually. Pet. 5. Before the decision below, the law had been clear: when a foreign government enters into a contract with a U.S. company for the procurement of military equipment, that constitutes commercial activity under the FSIA. The Fourth Circuit's decision has cast substantial doubt over that rule. This Court should grant certiorari to resolve that doubt, and to confirm that a contract between a foreign government and a U.S. company to procure military equipment is commercial activity under the FSIA.

II. The Fourth Circuit's Decision Is Wrong Under *Weltover* And The Restrictive Theory Of Sovereign Immunity That *Weltover* Adopted.

Respondent argues that Petitioner takes an "extreme view" in asserting that "any transaction that involves the purchase of goods pursuant to a contract is 'commercial activity' because private parties also enter into contracts to purchase goods." Opp. 17. On the contrary, that is almost verbatim the standard articulated in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). This Court in *Weltover* held that "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 … commerce." *Id.* at 614 (quotation marks

omitted). This Court elaborated that "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. Respondent thus admits that Petitioner's position accords with *Weltover* and that the Fourth Circuit's position directly contradicts *Weltover*. Unlike the Fourth Circuit, the Fifth, Eighth, Ninth, and Eleventh Circuits all heeded *Weltover*'s teaching that the type of activity rather than its purpose controls, and that the activity type is characterized at a high level of generality—such as a contract to acquire goods, regardless of the particulars of the transaction.

Retreating to overblown scare tactics, Respondent argues that, under Petitioner's view, "all government conduct (other than enacting legislation) would be commercial activity, because all government conduct can be reduced to employing personnel, buying goods, and contracting for services—actions that private parties also perform." Opp. 18. But courts have declared *not* "commercial" myriad types of activities that would not qualify as commercial under Petitioner's standard. *See, e.g., Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1326–28 (11th Cir. 2003) (sovereign's decision to compensate for taking of real property); *MCI Telecomms. Corp. v. Alhadhood*, 82 F.3d 658, 663 (5th Cir. 1996) (sovereign's promises for payment made through diplomatic channels); *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328–29 (9th Cir. 1984) (sovereign's issuance of export license).

As the Petition explained (Pet. 29–31), *Weltover*'s "commercial activity" test reflects the "restrictive theory of immunity" that existed as a matter of

international common law at the time of the FSIA's enactment in 1976—a theory that this Court has repeatedly held was "codifie[d]" by the FSIA. *Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 488 (1983). As *Weltover* held: "The meaning of 'commercial' is the meaning generally attached to that term under the restrictive theory at the time the statute was enacted." 504 U.S. at 612–13.

As the Petition showed, the restrictive theory of immunity provides that determining whether the relevant "type" of activity is one which a private party could do must be determined "in the abstract." Explanatory Report to the European Convention on State Immunity art. 7 ¶37, May 16, 1972, E.T.S. No. 74. Thus, in determining whether activity is commercial, the fact that "private persons" would be legally "prohibit[ed]" from engaging in the particular transaction, or that the particular transaction was "govern[ed]" by "special rules" by virtue of the sovereign's participation, "is to be left out of account." *Id.* These principles are embodied in *Weltover*'s—as well as the Fifth, Eighth, Ninth, and Eleventh Circuits'—recognition that a foreign sovereign's procurement of military equipment from private suppliers is commercial activity because private actors can also enter contracts to acquire goods—irrespective of whether they could buy the particular goods at issue.

In contrast, the Fourth Circuit criticized Petitioner's position for characterizing the relevant activity by DAPA "at too general a level." Pet. App. 14. The Fourth Circuit held that Petitioner had to show that a private party could purchase the specific good being acquired by the sovereign in precisely the same

way as the sovereign. *Id.* at 15–17. Applying that reasoning, the Fourth Circuit held that DAPA's procurement of the satellite from Lockheed was not commercial activity because a private party could not buy military equipment associated in any way with an FMS transaction, and thus could not participate in the satellite offset transaction in the same way that DAPA was. *Id.* at 18. That analysis contradicts *Weltover*'s test and the restrictive theory of immunity that test embodies.

Respondent asks the Court to disregard this conflict because the United States is not a party to the European Convention. That misses the point, which is that the restrictive theory adopted through the Convention was separately adopted as the law of the land by the FSIA, as this Court recognized in *Weltover* and *Verlinden*. Accordingly, federal courts routinely look to the Convention for guidance in resolving questions of whether a foreign sovereign's act is "commercial activity" for FSIA purposes. *See* Pet. 30 n.9 (collecting cases).

The Court should grant certiorari to clarify the "commercial activity" test and to correct the Fourth Circuit's misapplication of it.

III. Respondent's Efforts To Show This Case To Be A "Poor Vehicle" Are Misplaced.

Respondent argues that this case is a poor vehicle to review the FSIA issue presented because the "party whose interests are most directly affected by the question presented—the government of South Korea—is not a party in this Court." Opp. 24.

To be clear, DAPA is absent only because Respondent and the other private defendant insisted

on pursuing their motions to dismiss without waiting for service on DAPA—which Petitioner pursued diligently—to be completed.[1] In any event, DAPA's absence is irrelevant. Petitioner's suit was dismissed based on the lower court's resolution of the FSIA issue. It would be deeply unfair if review of a *dispositive* issue were inappropriate just because an interested party were absent from the case.

Respondent's contention is particularly inapt in the FSIA context because a foreign sovereign's immunity must—and often is—decided "even if the foreign state does not enter an appearance to assert an immunity defense" because "subject matter jurisdiction turns on the existence of an exception to foreign sovereign immunity." *Verlinden*, 461 U.S. at 493 n.20. When the foreign sovereign does not appear, courts must still resolve FSIA issues if "suggested by *any* party—or, for that matter, [a] non-party." *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 946 F.3d 120, 135 (2d Cir. 2019) (quotation marks omitted) (deciding whether Cuba was immune even though "Cuba never appeared" because Cuba's private co-defendant was entitled to raise Cuba's sovereign immunity defense); *see also, e.g.*, *MOL*, 736 F.2d at 1328 (deciding whether commercial-activity exception applied even

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[1] Petitioner first asked DAPA and South Korea to waive the lengthy and cumbersome Hague Convention process for service. C.A.J.A.319–22. Receiving no response, Petitioner commenced the Hague Convention process and diligently pursued it until service was complete. C.A.J.A.483–96. However, by that point, the district court had already dismissed on FSIA grounds at the insistence of Respondent and the other private defendant. Then, Petitioner had to appeal, even though DAPA and South Korea had not yet formally entered the case. C.A.J.A.480–81.

though "Bangladesh did not appear" and immunity defense was raised only by amicus curiae).

This case is of a piece. Without any participation by South Korea, Respondent aggressively asserted an FSIA defense to deprive the federal court of jurisdiction over Petitioner's claims, the issue was briefed extensively in the district court and the court of appeals, and the courts below agreed with Respondent and dismissed accordingly. Given that *Respondent* raised the FSIA as an affirmative defense below, it should not now be heard to say the issue is unreviewable because it did not wait for the foreign sovereign to raise it. Indeed, this Court has recognized that where there are parties before the Court with a strong incentive to argue both sides of an issue—as there are here—it does not matter that all parties potentially affected by the decision are not present. *See United States v. Windsor*, 570 U.S. 744, 760–61 (2013) (prudential concerns were satisfied based on the "sharp adversarial presentation of the issues").

Finally, Respondent argues that even if DAPA's procurement of the satellite is deemed "commercial activity," Petitioner's claims must be dismissed anyway because they are not "based upon" that activity. Rather, Respondent says, "the gravamen of the claims was Airbus's, Lockheed Martin's, and South Korea's supposed tortious interference with Blenheim's private contracts with Lockheed Martin and with Airbus." Opp. 25.

To be sure, Petitioner claims that DAPA tortiously interfered with its contracts with affiliates of Lockheed Martin and Airbus. But Respondent draws the wrong conclusion from that claim. DAPA's

tortious conduct occurred in connection with its procurement of the satellite. Tortious conduct performed in connection with commercial activity is itself commercial activity. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988) (citing FSIA legislative history that commercial activity includes "business torts"). Thus, Petitioner's tortious-interference claims are "based upon" commercial activity. *See id.* Separately, the FSIA's commercial-activity exception applies to claims "based upon … acts taken in connection with commercial activity" outside the United States, 28 U.S.C. § 1605(a)(2) (third clause), and DAPA's commercial activity in procuring the satellite consisted of conduct that occurred at least in part outside the United States. C.A.J.A.77 (¶ 57); C.A.J.A.100–01 (¶¶ 132–38). Thus, the third commercial-activity exception to the FSIA would also apply once the procurement of the satellite is properly held to be commercial activity.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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