

No. 17-1536

IN THE
Supreme Court of the United States

MMA CONSULTANTS 1, INC.,

Petitioner,

v.

REPUBLIC OF PERU,

Respondent.

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

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondent is the Republic of Peru (“Peru”). Peru is a sovereign nation and qualifies as a “foreign state” under the U.S. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611). Petitioner is MMA Consultants 1, Inc.

RULE 29.6 STATEMENT

Respondent is not a corporation, and has no parent corporation or shares held by a publicly traded company.

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PRELIMINARY STATEMENT

This case arises from a contract claim brought on bonds issued over 140 years ago by the Republic of Peru with respect to a private company engaged in mining bird guano. By their terms, all principal and interest on the bonds was due and payable in full no later than 1880. Although the face of the bonds stated they were issued and payable in New York, an international arbitral award relating to the parties to the bonds established that the bonds were never actually issued or sold in New York. In dismissing the case, the lower courts held that Petitioner MMA Consultants 1, Inc. could not rely (i) on the face of the bonds alone, or (ii) on its demand letters to Peru in 2015 to establish the U.S. jurisdictional nexus required by the commercial activity exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (the “FSIA”). Since nothing about the decision below raises a compelling question or breaks with this Court’s prior FSIA rulings, certiorari should be denied.

STATEMENT OF THE CASE

The salient facts, as found by the Court of Appeals and District Court, appear in the Petitioner’s Appendix (“App.”) at pages A6 through A7, A18 through A27, and A44 through A48.¹ These facts come largely from (i) the face of the Bonds, and (ii) an international arbitral decision, dated 1901, resolving all debts as between Peru and the company for whose benefit the Bonds were issued.

1. Materials cited from Petitioner’s Appendix are cited “A__”. Capitalized terms not defined herein are as defined by the courts below (A17-A79), and include The Republic of Peru (“**Peru**”); Petitioner MMA Consultants 1, Inc. (“**MMA**”); the “**Bonds**”; and the international arbitration award issued in 1901 (the “**Award**”).

The Bonds and the Award

The Bonds arose out of an historical period during which Peru marketed bird guano as a source of quicklime. Peru entered into business dealings with Consignee Company for Guano (“CCG”), incorporated and headquartered in Peru, resulting in Peru owing CCG money relating to its guano concession. A18-19. Peru then delivered the Bonds to CCG, which CCG could use to settle Peru’s debt, if needed. Id., A20 (providing a Bond transcription).

The Bonds specified payment of principal and interest at the New York office of a financial agent. A19-20. The face of the Bonds expressly state that they shall be redeemed based on a lottery covering specified percentages of outstanding Bonds each year from 1876 through 1880. A20. The Bonds were *not* open-ended. Rather, they expressly provide that by 1880, any Bonds not yet redeemed “shall be considered and deal[t] with . . . as if they had been” redeemed by 1880. Id. Interest on the Bonds was *not* open-ended either—rather, interest ceased as Bonds were redeemed. See id. at A20-21. Thus, as to any Bond, interest ceased accruing “from and after the day on which the principal shall become payable.” A20.

The guano at the heart of Peru and CCG’s dealings was the subject of a war between Chile and Peru, which ended with a Peace Treaty in 1883. A21. The Peace Treaty established “an arbitration tribunal to resolve [guano] creditors’ completing claims to [guano] proceeds.” A21-22. There is no dispute that CCG arbitrated a claim with Peru relating to money CCG claimed on its guano operations. That arbitration resulted in a published Award in 1901.

The Award showed that the Bonds were never issued to the public. A6-7; A23. Instead, Peru delivered the Bonds directly to CCG—a Peruvian company operating in Peru. A23; A45. The Award found that CCG then debited Peru’s account with CCG on each Bond redemption date for the principal *and* interest that would otherwise have been due on the Bonds. A6-7; A23; A45. CCG did this *each year* between 1876 and 1880 until the debt relating to the Bonds was exhausted. A6-7; A23; A45. Significantly, the Award also determined that the Bonds *remained in CCG’s possession* long after they had lapsed—at least until 1901—the year the Award was issued. A23; A45. Thus, CCG “did not even try to establish that it had sought to put the certificates into circulation,” nor did CCG ever return the extinguished Bonds to Peru. A23-24. Historical documents also showed that the financial agent named on the face of the Bonds ceased to exist during the term of the Bonds and, thus, could not have served as a place of payment in New York for the Bonds. A60.

The Proceedings Below

MMA sent three demand letters to Peru in 2015 for payment on the Bonds, and sued Peru for breach of contract when payment was not made. A3. MMA relied on the text on the face of the Bonds—never pleading or providing any other jurisdictional facts—to assert jurisdiction under the first and third prongs of the FSIA commercial activity exception. The relevant clauses of the commercial activity exception provide that:

- Courts may exercise jurisdiction over an action that “is based upon a commercial activity carried on in the United States by the foreign state.” **[First Prong]**

- Courts may exercise jurisdiction over an action that “is 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.” [Third Prong]

28 U.S.C. § 1605(a)(2). The District Court dismissed, holding that MMA had not established the jurisdictional nexus required under either prong of the commercial activity exception to the FSIA. The District Court also held that MMA failed to state a claim on 140-year old Bonds because Peru was no longer obligated on the Bonds and, in any event, any claim on the Bonds was time-barred. A48-62; A71. The Second Circuit affirmed, finding that the facts above (including that the Bonds were never issued into the United States) were amply supported. A5-8. As such, MMA could not establish FSIA jurisdiction because (i) Peru’s failure or refusal to pay on the Bonds in 2015 occurred in Peru (A10-11); and (ii) non-payment in the United States in 2015 did not create a U.S. direct effect because there was no longer any obligation for Peru to make payment here. A15-16.

REASONS FOR DENYING MMA’S PETITION FOR CERTIORARI

MMA’s Petition should be denied because no compelling question is presented, including with respect to any conflict with this Court’s prior FSIA rulings. Sup. Ct. R. 10. MMA’s questions presented² are, at most, challenges

2. To the extent MMA raises arguments in its brief accompanying its Petition for Certiorari that are not addressed in the four questions MMA presents for review, those arguments should not be granted review. Sup. Ct. R. 14(a).

to how the lower courts applied properly stated law or challenges to facts found by the lower courts. Neither of these are grounds for review by this Court.³ See *id.* Specifically, Petitioner’s first three questions challenge how the lower courts applied OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015) to the facts. Generally, an alleged misapplication of law would not merit review. See Salazar-Limon v. City of Houston, 581 U.S. —, 137 S. Ct. 1277, 1278 (Apr. 24, 2017). Moreover, the decisions below in no way conflict with OBB, other decisions by the Court, or decisions by other Circuits. Petitioner’s fourth question challenges a factual finding by the District Court that the Second Circuit held was supported by “ample evidence” (A6), and does not warrant review. The Supreme Court is not a trier of fact. See Sup. Ct. R. 10. Simply stated, the Court “is not the place to review . . . evidence” nor would it be the place to “reverse a Court of Appeals because [the Court] in its place [] would find the record tilting one way rather than other.” NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 503 (1951).

A. THE SECOND CIRCUIT PROPERLY APPLIED OBB IN HOLDING THAT THE GRAVAMEN OF MMA’S BREACH OF CONTRACT CLAIM IS IN PERU.

Under the first prong of the FSIA commercial activities exception, courts may exercise jurisdiction over a foreign sovereign, like Peru, where “[t]he action is *based upon* a commercial activity carried on in the

3. That the District Court dismissed MMA’s claim on two additional, independent grounds further militates against granting certiorari.

United States by the foreign state.” 28 U.S.C. § 1605(a)(2) (emphasis added). In OBB, this Court made clear that, in determining the location of the conduct a claim is “based upon,” federal courts must “zero in” on the “gravamen” of the claim to find what action truly gave rise to a plaintiff’s grievance. 136 S. Ct. at 395. MMA claims the Second Circuit misapplied OBB because (i) it was a tort case, not a contract case, and (ii) OBB applies only where the basis of a claim consists of conduct entirely outside of the United States. Petition at 7-26. Neither assertion is correct.

1. OBB’s analysis of “based upon” is not limited to torts.

MMA claims the Second Circuit misapplied OBB and Saudi Arabia v. Nelson, 507 U.S. 349 (1993) because they were tort cases. But, this misses the point. OBB and Nelson squarely address the meaning of “based upon” as used *throughout* the FSIA. Nowhere does the statutory language suggest that “based upon” might have a different meaning for different FSIA exceptions in Section 1605. Nor has this Court suggested that “based upon” might have a different meaning when applied to a tort as opposed to a breach of contract. See generally OBB, 136 S. Ct 390; Nelson, 507 U.S. 349. Indeed, nothing in the Court’s opinion suggests that “based upon” as used in OBB applies only to tortious conduct. See OBB, 136 S. Ct at 397 n.2.

The Circuit Courts have not adopted MMA’s theory, uniformly applying OBB’s gravamen analysis beyond the tort context, and specifically to breach of contract claims. See, e.g., Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98 (2d Cir. 2016), cert. denied, 137 S. Ct. 493 (2016) (alleged violation of the

Securities and Exchange Act); Devengoechea v. Bolivarian Rep. of Venez., 2018 U.S. App. LEXIS 12228 (11th Cir. May 10, 2018) (breach of contract and unjust enrichment); Telchi v. Isr. Military Indus., 2017 U.S. App. LEXIS 25031 (11th Cir. Dec. 12, 2017) (breach of contract and breach of the duty of good faith and fair dealing).

Nor can MMA fashion a conflict between OBB and Republic of Argentina v. Weltover, 504 U.S. 607 (1992). See Petition at 17-20. In Weltover it was uncontested that the cause of action was “based upon” a foreign sovereign defaulting on bonds due at the time and payable in New York. 504 U.S. at 611-12. Thus, as the Second Circuit held, the gravamen of the claim in Weltover was a foreign sovereign’s actions “related to ‘garden-variety debt instruments’—including issuing bonds, executing bonds, and refusing to pay a debt on a bond—all [of which] classify as ‘commercial activities’ for the purposes of FSIA § 1605(a)(2).”⁴ A11 (quoting Weltover, 504 U.S. at 614-15).

2. OBB is not limited to conduct entirely outside the United States.

MMA also tries to argue that OBB only applies where conduct forming the basis of the claim is entirely outside the United States. But, OBB does not say that. MMA relies on language stating that the Court “consider[ed] . . . only a case in which the gravamen of *each claim* is found in the same place.” Petition at 9; OBB, 136 S. Ct. at 397 n.2

4. Nor does Guirlando v. T.C. Ziraat Bankasi A.S. support MMA’s argument because that case was not discussing the location of activity the claim was “based upon,” but a different test under the third prong of the commercial activities exception. 602 F.3d 69, 81 (2d Cir. 2010).

(emphasis added). In OBB, however, there was an act in the United States, but the gravamen of plaintiff's five claims was in Austria. See OBB, 136 S. Ct. at 394, 397. Here, that MMA chose to send its demand letters from the United States does not change the fact that Peru's refusal to pay in Peru is the gravamen of MMA's claim.⁵

Finally, contrary to MMA's assertion (Petition at 13), the Second Circuit did not engage in a "single element analysis." See OBB, 136 S. Ct. at 396. A single element analysis, as this Court made clear, occurs when a court analyzes the location of each element of a cause of action and rests jurisdiction on the basis that any single element of the claim occurred in the United States. OBB 136 S. Ct. at 394-95. That is not what the Second Circuit did. A9-11. To the contrary, the court followed OBB and found that it lacked jurisdiction even though U.S. activity formed part of the basis for MMA's claim. A10. Rather, as instructed by this Court, the Second Circuit examined the core of MMA's claim and, relying on MMA's own pleadings, found that the gravamen of MMA's claim was "Peru's failure and refusal to pay"—an event in Peru, not New York. A10-13.

B. THE SECOND CIRCUIT'S HOLDING THAT THERE WAS NO DIRECT EFFECT IN THE UNITED STATES DOES NOT WARRANT REVIEW.

Nothing in the Second Circuit's decision creates a conflict with this Court's decision in Weltover, 504 U.S. at

5. MMA also cannot use its unilateral act to create jurisdiction. See Burger King v. Rudzewicz, 471 U.S. 462, 474-75 (1985).

619. Rather, the Second Circuit only held that there cannot be a direct effect in the United States based solely on the face of the Bonds where the jurisdictional facts showed that no obligation to pay on the Bonds actually ever arose in New York. A13-16; A52-A62.

The third prong of the commercial activity exception provides that there will be jurisdiction on a suit “based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” 28 U.S.C. § 1605(a)(2). Designating New York as the place of performance and then failing to pay money here will have a U.S. direct effect only where “[m]oney that was supposed to have been delivered” to the United States “was not forthcoming.” Weltover, 504 U.S. at 619. But, those are not the jurisdictional facts here, and MMA is wrong in asserting that Weltover stands for the idea that designation of payment in New York, *without more*, always creates a U.S. direct effect. Petition at 22.

Unlike Weltover, where Argentina unquestionably had defaulted on current obligations to pay in New York, Peru had no current legal obligation to make Bond payments in New York almost 140 years after the Bonds lapsed by their terms. A14-16; A73 (finding there was no legal obligation for Peru to pay at all). There is no conflict with Weltover because the Bond debt was discharged as of 1880 when, per the Award, Peru finished paying CCG in Peru. A7; see also A73. In any event, because CCG kept the Bonds long past 1880—the last date any payments of principal or interest were due on the Bonds—they were never issued here and no payment obligations ever arose here. A6-7; A45. Thus, one way or another, the Bonds lapsed, and there

was no current obligation to redeem or pay the Bonds in 2015 in New York meaning there could be no U.S. direct effect under Weltover.⁶ Tellingly, MMA cannot cite a single case in which a financial instrument which is no longer “required to be paid” in the United States—or at all, as is the case here—creates a direct effect. See Petition at 22-26 (citing only cases involving current defaults).⁷

C. MMA’S FACTUAL QUESTION DOES NOT WARRANT REVIEW.

MMA’s attack on the factual record below does not warrant review for two reasons. First, MMA’s argument that the Second Circuit applied the wrong standard of review, relying on MMA’s re-characterization of the findings as being of a mixture of fact and law, has no basis in the record and does not warrant review. See Petition at 28-33. The Second Circuit correctly applied the clearly erroneous standard of review in reviewing the lower court’s findings of jurisdictional fact. See Anderson v. Bessemer City, 470 U.S. 564 (1985) (citing Fed. R. Civ. Pro. 52(a)). Having never provided the applicable standard

6. As the Second Circuit highlighted, by MMA’s own admissions below “the only method for a bondholder to obtain payment today would be to present the Bonds directly to Peru. But according to this logic, Peru could fulfill its contractual requirements by compensating MMA *anywhere*” such that “[t]here is no requirement that the repayment of this debt be made in New York.” A15-16 (quoting Kensington Int’l Ltd. v. Itoua, 505 F.3d 147, 158 (2d Cir. 2007)).

7. Because there was no direct effect under any circumstances, MMA’s assertion (Petition at 7-9) that the lower court erred by applying the OBB gravamen analysis to the direct effect prong of FSIA §1605(a)(2) is irrelevant.

of review in its briefs below—contrary to Second Circuit rules⁸—MMA cannot now argue otherwise.

Second, the Supreme Court is not a trier of fact and, thus, should not grant certiorari to entertain MMA's assertion that the Second Circuit misread the Award. See Sup. Ct. R. 10; NLRB, 340 U.S. at 503. The heart of MMA's argument is that it disagrees with how the lower courts read the Award. See Petition at 27-33. This is not a matter warranting Supreme Court review. See Sup. Ct. R. 10; NLRB, 340 U.S. at 503.

CONCLUSION

For the abovementioned reasons, Respondent the Republic of Peru respectfully requests that the Court deny MMA's Petition for Writ of Certiorari.

Respectfully submitted,

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8. See Fed. R. App. Pro. 28(a)(8)(B).