No. 22-886

In the Supreme Court of the United States

BLENHEIM CAPITAL HOLDINGS LTD., ET AL.,
PETITIONERS

v.

LOCKHEED MARTIN CORPORATION, ET AL.

---

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
SHARON SWINGLE
SIMON C. BREWER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RICHARD C. VISEK
Acting Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' claims do not fall within the "commercial activity" exception, 28 U.S.C. 1605(a)(2), to foreign sovereign immunity in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion:
  A. The court of appeals correctly concluded that the FMS and offset transactions in this case were sovereign, not commercial, activity 9
  B. Further review is not warranted 17
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 1
Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 17
Camreta v. *Greene*, 563 U.S. 692 (2011) 17
Cicippio v. *Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994), cert. denied, 513 U.S. 1078 (1995) 11
Heroth v. *Kingdom of Saudi Arabia*, 331 Fed. Appx. 1 (D.C. Cir. 2009) 18
Jam v. *International Fin. Corp.*, 586 U.S. 199 (2019) 22
Joseph v. *Office of Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988) 14
McDonnell Douglas Corp. v. *Islamic Republic of Iran*:
  591 F. Supp. 293 (E.D. Mo. 1984), aff'd, 758 F.2d 341, cert. denied, 474 U.S. 948 (1985) 18
  758 F.2d 341 (8th Cir.), cert. denied, 474 U.S. 948 (1985) 18

Cases—Continued: Page

Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. *Cubic Defense Systems, Inc.*, 385 F.3d 1206 (9th Cir. 2004), vacated on other grounds, 546 U.S. 450 (2006) 19

OBB Personenverkehr AG v. *Sachs*, 577 U.S. 27 (2015) 22

Practical Concepts, Inc. v. *Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987) 14

Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607 (1992) 2, 3, 8, 10-12, 14

Rush-Presbyterian-St. Luke's Med. Ctr. v. *Hellenic Republic*, 877 F.2d 574 (7th Cir.), cert. denied, 493 U.S. 937 (1989) 13

Samco Global Arms, Inc. v. *Arita*, 395 F.3d 1212 (11th Cir. 2005) 19

Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 3, 8, 10, 22

Secretary of State for Defence v. *Trimble Navigation Ltd.*, 484 F.3d 700 (4th Cir. 2007) 3, 4

UNC Lear Services, Inc. v. *Kingdom of Saudi Arabia*, 581 F.3d 210 (5th Cir. 2009), cert. denied, 559 U.S. 971 (2010) 19

Verlinden B. V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 12

Virtual Def. & Dev. Int'l, Inc. v. *Republic of Moldova*, 133 F. Supp. 2d 1 (D.D.C. 1999) 20

Treaties, statutes, and regulations:

European Convention on State Immunity, May 16, 1972, E.T.S. No. 74 12

Art. 4(2)(a) 12

Art. 7(2) 12

Treaties, statutes, and regulations—Continued: Page

United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) 12
Art. 7(2) 12
Art. 10(2)(a) 12
Arms Export Control Act, 22 U.S.C. 2751 *et seq.* 3
22 U.S.C. 2751 3
22 U.S.C. 2753 3
22 U.S.C. 2753(a)(1) 3, 11
22 U.S.C. 2753(a)(2) 4
22 U.S.C. 2753(a)(4) 4
22 U.S.C. 2753(d) 4, 11
22 U.S.C. 2761 .... 3, 4
22 U.S.C. 2762 .... 3, 4
22 U.S.C. 2776(b) 4, 11
22 U.S.C. 2778(a) 4
Defense Production Act Amendments of 1992, Pub. L. No. 102-558, § 123, 106 Stat. 4206-4207 4
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.* 1
28 U.S.C. 1603(a) 1
28 U.S.C. 1603(d) 2, 10
28 U.S.C. 1604 1
28 U.S.C. 1605(a)(2) 2, 7, 10, 22
28 U.S.C. 1606 2
22 C.F.R. 120.1 4
48 C.F.R.:
Section 202.101 4
Section 225.7303-2(a)(3)(i) 4, 5
Section 225.7303-2(a)(3)(iii) 5, 15

Regulations—Continued: Page

Section 225.7303-2(a)(3)(iv) 5
Section 225.7306 5
Section 252.215-7014(a)(2) 21

Miscellaneous:

Defense Federal Acquisition Regulation Supplement: Offset Costs (DFARS Case 2015-D028), 83 Fed. Reg. 30,825 (June 29, 2018) 5

Defense Security Cooperation Agency, Dep't of Def., 5105.38-M, *Security Assistance Management Manual* (2012), https://samm.dsca.mil/listing/chapters 3-5, 15

Defense Security Cooperation Univ., Def. Security Cooperation Agency, Dep't of Def., *Security Cooperation Management* (42d ed. 2022), https://perma.cc/2DTH-QQX3....................................... 5, 15

International Court of Justice, *Germany* v. *Italy*, Reports of Judgments, Advisory Opinions, and Orders: Jurisdictional Immunities of the State (Feb. 3, 2012) 12

In the Supreme Court of the United States

No. 22-886

BLENHEIM CAPITAL HOLDINGS LTD., ET AL., PETITIONERS

v.

LOCKHEED MARTIN CORPORATION, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The FSIA provides that "a foreign state"—which includes a subdivision, agency, or instrumentality of a foreign state—"shall be immune" from the jurisdiction of United States courts, unless the suit falls within one of the FSIA's limited exceptions. 28 U.S.C. 1604; see 28

U.S.C. 1603(a). If one of those exceptions applies, the foreign state generally "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606.

This case involves the FSIA's commercial-activity exception to immunity from suit. As relevant here, that exception provides that a "foreign state shall not be immune from the jurisdiction of" United States courts

> 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 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). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and specifies that an activity's "commercial character" is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d). This Court has noted that although that definition "leaves the critical term 'commercial' largely undefined," the statute is "not written on a clean slate"; rather it "(and the commercial exception in particular) largely codifies the so-called 'restrictive' theory of foreign sovereign immunity." *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 612 (1992). Based on that restrictive theory, the Court has "conclude[d] that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of

the FSIA." *Id.* at 614; see *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359-361 (1993).

b. i. The Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, allows foreign states to purchase United States defense articles and services. See 22 U.S.C. 2751, 2753, 2761, 2762. There are two main programs under the Act: (1) the Foreign Military Sales (FMS) program, which allows foreign states to purchase articles and services from the U.S. government, and (2) the Direct Commercial Sales (DCS) program, which allows foreign states to purchase articles and services from United States contractors. See Defense Security Cooperation Agency, Dep't of Def., 5105.38-M, *Security Assistance Management Manual* (SAMM) § C.4 (2012), https://samm.dsca.mil/listing/chapters; see also *Secretary of State for Defence* v. *Trimble Navigation Ltd.*, 484 F.3d 700, 703 (4th Cir. 2007). Foreign states generally may use either program to acquire defense articles, although some highly regulated articles may be purchased only through the FMS program. See SAMM §§ C.4.3.4-C.4.3.6. The government designates FMS-only articles based on numerous criteria, including the "geopolitical situation and security relationships" and the need for "enhanced control to prevent proliferation" of the relevant technology "to rogue states or terrorist organizations." *Id.* §§ C.4.3.5.4.1, C.4.3.5.4.3; see *id.* § C.4.3.5.3. FMS-only items include "Nuclear Weapons/Nuclear Propulsion," "Missiles," and "Fighter Aircraft." *Id.* § C.4.3.5.2.

Under the FMS program, the government may sell or lease defense articles to a foreign state if the President determines that doing so "will strengthen the security of the United States and promote world peace." 22 U.S.C. 2753(a)(1); see SAMM § C.4.1. The foreign

state must meet several other criteria, such as generally being eligible to purchase or lease defense articles and agreeing not to transfer title or possession of the articles without the consent of the United States. 22 U.S.C. 2753(a)(2) and (4); see SAMM § C.4. The U.S. government and the foreign state ultimately agree to the terms of the FMS transaction in a letter of offer and acceptance. See SAMM § C.5.4. The government may provide the agreed-upon defense articles out of its own stock, or it may separately contract with a private company to provide the articles. See 22 U.S.C. 2761, 2762. Congress may overrule certain high-value FMS transactions proposed by the President. See 22 U.S.C. 2753(d), 2776(b).

By contrast, the U.S. government is not a party to a DCS transaction. See *Trimble*, 484 F.3d at 703. But the Department of State must authorize a DCS transaction through a license or other form of approval if it involves defense articles or services. See 22 U.S.C. 2778(a) and (b); 22 C.F.R. 120.1.

ii. In some FMS transactions, a private contractor will agree to provide the foreign state with an "offset," which is a "benefit or obligation" that operates "as an inducement or condition to purchase supplies or services pursuant to a foreign military sale." 48 C.F.R. 202.101. The U.S. government is not a party to an offset transaction. See 48 C.F.R. 225.7303-2(a)(3)(i). The United States' policy on whether FMS transactions should include offsets is essentially neutral: The government may not encourage a contractor to enter into an offset agreement, Defense Production Act Amendments of 1992, Pub. L. No. 102-558, § 123, 106 Stat. 4206-4207, and "the responsibility for negotiating offset agreements and satisfying all related commitments

resides" solely with the contractor, SAMM § C.6.3.9; see 48 C.F.R. 225.7306. The government "assumes no obligation to satisfy or administer the offset agreement or to bear any of the associated costs." 48 C.F.R. 225.7303-2(a)(3)(iii); see SAMM § C.6.3.9.

Notwithstanding those features of an offset arrangement, the costs of any offset are built directly into the FMS contract between the government and the foreign state. See SAMM § C.6.3.9; Defense Security Cooperation Univ., Def. Security Cooperation Agency, Dep't of Def., *Security Cooperation Management* 9-21-9-22 (42d ed. 2022) (*Green Book*), https://perma.cc/2DTH-QQX3. Thus, although an offset "agreement[] [is] distinct and independent of" the FMS contract, 48 C.F.R. 225.7303-2(a)(3)(i), the offset becomes part of the overall FMS transaction, and "[o]ffset costs" are "included" in "estimated prices quoted in the" letters of offer and acceptance, SAMM § 6.3.9.1.

At the relevant time for purposes of this case, a Department of Defense (DOD) contracting officer was required to determine that an offset's costs were reasonable before allowing an FMS sale to include an offset. Today, offsets "are deemed reasonable" "with no further analysis necessary on the part of the contracting officer," so long as the contractor submits appropriate documentation of the offset agreement. 48 C.F.R. 225.7303-2(a)(3)(iv); see *Defense Federal Acquisition Regulation Supplement: Offset Costs (DFARS Case 2015-D028)*, 83 Fed. Reg. 30,825, 30,828 (June 29, 2018) (explaining DOD's rationale for no longer requiring a reasonableness assessment).

2. Petitioners are Blenheim Capital, a company that specializes in developing and structuring offset transactions, as well as its holding company, Blenheim Holdings.

Pet. App. 5, 28. This case involves an offset agreement developed by petitioners. *Id.* at 5-6. Around 2011, the Republic of Korea and its Defense Acquisition Program Administration (collectively, South Korea), began pursuing the FMS purchase of 40 F-35 fighter jets. *Id.* at 1-2, 5-7. The F-35 is an advanced fighter jet manufactured by respondent Lockheed Martin for the U.S. government. *Id.* at 5. Because of the high cost of the 40 fighter jets—valued at around $7 billion—South Korea's acquisition required an offset transaction. *Id.* at 5-6.

Petitioners brokered a transaction with the following structure. Through the FMS program, South Korea would purchase from the U.S. government 40 F-35 fighter jets that the government acquired from Lockheed. See Pet. App. 5-7. As an offset, South Korea would receive an advanced military satellite, manufactured by Airbus, that was capable of integrating with the jets; the satellite was worth approximately $3.1 billion. *Id.* at 6. As part of the letter of offer and acceptance, South Korea would make a $150 million payment for the satellite through the U.S. government. See *ibid.* The government would disburse that payment to Lockheed, which in turn would pay petitioners. *Ibid.* The parties agreed to the offset transaction, and DOD approved it (that is, a DOD contracting officer determined that the offset's costs were reasonable). *Id.* at 5-6; see p. 5, *supra*.

That arrangement collapsed. The parties dispute the reasons for the collapse, Pet. App. 3-4, but petitioners allege that Lockheed and "Airbus (and later on, South Korea) conspired to 'cut [petitioners] out' of the offset transaction," *id.* at 7. The transaction was restructured, and South Korea acquired the F-35 fighter

jets and the military satellite—which Airbus provided directly under a new offset agreement approved by DOD as part of the FMS contract. *Id.* at 8.

3. Petitioners sued South Korea, Airbus, and Lockheed in the United States District Court for the Eastern District of Virginia. See Pet. App. 27-28. As relevant here, petitioners pleaded Virginia state-law claims alleging that South Korea, Airbus, and Lockheed tortiously interfered with petitioners' contractual relationship with Lockheed. *Id.* at 4, 8. Petitioners invoked the court's subject-matter jurisdiction under the FSIA for those claims. *Id.* at 8, 31.

Before petitioners served South Korea pursuant to the Hague Service Convention, see Pet. App. 28, the district court dismissed the complaint, *id.* at 27-46. The court held that it lacked subject-matter jurisdiction under the FSIA for two independent reasons. *Id.* at 38-46. First, the court determined that the FMS transaction was not "commercial activity," 28 U.S.C. 1605(a)(2), because South Korea acted in a sovereign capacity when it participated in that transaction with the U.S. government. Pet. App. 41-42, 45-46. Second, the court determined that petitioners' claims were not "based upon" any commercial activity, 28 U.S.C. 1605(a)(2), because "[t]he 'gravamen' of [petitioners'] suit" is tortious interference with petitioners' contractual agreement with Lockheed—"not the commercial activity by South Korea." Pet. App. 46; see *id.* at 42-45.

4. a. The court of appeals affirmed. Pet. App. 1-26. The court first rejected petitioners' argument that any transaction involving "the purchase and sale of goods" is commercial activity under the FSIA. *Id.* at 13. The court explained that whether a particular purchase is commercial activity depends on "'whether the particular

actions that the foreign state performs' are 'the *type* of actions by which a private party engages in trade or commerce.'" *Id.* at 14 (quoting *Weltover*, 504 U.S. at 614). The court also emphasized that a foreign 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.*" *Id.* at 15 (quoting *Nelson*, 507 U.S. at 360).

Applying that standard, the court of appeals found that the FMS and offset transactions did not fall within the FSIA's commercial-activity exception. Pet. App. 15-19. The court noted that F-35 fighter jets could only be acquired from the U.S. government through the FMS program, and that only friendly foreign states may participate in that program. *Id.* at 15-16. The court also emphasized that "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." *Id.* at 18; see *id.* at 16. Turning to the offset transaction, the court explained that the military satellite that was the subject of the offset contained "next-generation capabilities," "'integrat[ed] with the F-35 fighter planes,'" and "satisf[ied] South Korea's" "classified" "military specifications." *Id.* at 6, 16, 18. The court further explained that the offset was subject to approval by the U.S. government. *Id.* at 5-6, 19. Given those features of the FMS and offset transactions, the court concluded that "the activity at issue in this case was not the *type* that could be pursued by private citizens or corporations." *Id.* at 18.

In reaching that conclusion, the court of appeals rejected petitioners' attempt to distinguish the offset from the FMS sale. Pet. App. 18-19. The court explained that

petitioners' "own characterization of the transaction" in their complaint required the court to consider the two transactions in tandem. *Id.* at 18. The court noted that the complaint indicated that the offset "was a necessary and integral part of the procurement by South Korea of the F-35s." *Id.* at 18-19. And the court observed that "all monetary transactions" at issue—including those for the offset—"flow[ed] through the Pentagon." *Id.* at 19 (emphasis omitted). The court therefore concluded that the offset transaction did not create jurisdiction under the FSIA's commercial-activity exception.

b. The court of appeals denied rehearing en banc. Pet. App. 47-48.

DISCUSSION

This Court should deny the petition for a writ of certiorari. The court of appeals correctly held that both the FMS transaction and the associated offset transaction constitute sovereign activity, and therefore that the FSIA's commercial-activity exception does not apply. Contrary to petitioners' assertions, that conclusion does not conflict with any decision of this Court or of another court of appeals. Indeed, the Fourth Circuit's decision below is the first court of appeals decision to address the commercial-activity exception's application to an offset agreement. And this case would not be a suitable vehicle for addressing that issue in any event.

A. The Court Of Appeals Correctly Concluded That The FMS And Offset Transactions In This Case Were Sovereign, Not Commercial, Activity

1. a. The FSIA's commercial-activity exception provides that a foreign state is not immune from federal-court jurisdiction "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 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). This Court has explained that a foreign state's act is "'commercial'" when the foreign state acts "in the manner of a private player within" a market—in other words, when "the particular actions that the foreign state performs" "are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (citation omitted). Because the FSIA's definition of "commercial activity" expressly provides that "the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,'" the inquiry turns on the "outward form of the conduct" rather than "the *reason* why the foreign state engages in the activity." *Id.* at 614, 617 (quoting 28 U.S.C. 1603(d)).

b. The court of appeals correctly articulated those governing principles. The court explained that South Korea could "engage[] in commercial activity" only by exercising "those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." Pet. App. 15 (quoting *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 360 (1993)) (emphasis omitted). And the court asked "'whether the particular *actions*'" South Korea performed "are 'the *type* of actions by which a private party engages in trade or commerce.'" *Id.* at 14 (quoting *Weltover*, 504 U.S. at 614).

The court of appeals likewise correctly applied those principles in concluding that neither the FMS transaction nor the offset transaction in this case was commercial activity under the FSIA.

i. FMS transactions are not "the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 504 U.S. at 614 (citation and emphasis omitted). When the United States engages in an FMS transaction, it sells defense articles or services to a foreign state based on a letter of offer and acceptance between one sovereign (the United States) and another (a foreign state). See pp. 3-4, *supra*. Before entering into an FMS transaction with a foreign state, the President must find that the agreement "will strengthen the security of the United States and promote world peace." 22 U.S.C. 2753(a)(1). Congress can override certain FMS transactions. See 22 U.S.C. 2753(d), 2776(b). And many defense articles can *only* be purchased by foreign states through the FMS program, due to the security and other United States interests such sales implicate.

Those features of FMS transactions confirm that they involve conduct that is inherently sovereign. They are not the type of actions by which a private party engages in commerce, see *Weltover*, 504 U.S. at 614; rather, FMS transactions involve government-to-government agreements serving the security of each nation. And FMS transactions are not "directed or influenced by the market but rather by the President's and Congress's judgment on national security concerns." Pet. App. 17; see *Cicippio* v. *Islamic Republic of Iran*, 30 F.3d 164, 168-169 (D.C. Cir. 1994) ("Governments negotiating with each other invariably take into account non-marketplace considerations—most obviously political relations—and so they cannot be thought to be behaving, in that setting, as businessmen."), cert. denied, 513 U.S. 1078 (1995).

Two international agreements based on the restrictive theory of foreign sovereign immunity confirm that

sovereigns are generally immune from suit when they engage in sovereign-to-sovereign transactions.[1] This Court has explained that the FSIA "(and the commercial exception in particular) largely codifies the so-called 'restrictive' theory of foreign sovereign immunity." *Weltover*, 504 U.S. at 612; see *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Like the FSIA, the United Nations Convention on Jurisdictional Immunities of States and Their Property (United Nations Convention), G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004), was intended to codify the restrictive theory of sovereign immunity. See International Court of Justice, *Germany* v. *Italy*, Reports of Judgments, Advisory Opinions, and Orders: Jurisdictional Immunities of the State ¶ 59 (Feb. 3, 2012). That Convention, which currently is not in effect, includes an exception to jurisdictional immunity in relation to certain commercial transactions, but explicitly provides that the exception "does not apply" to "commercial transaction[s] between States." United Nations Convention art. 10(2)(a). Similarly, the European Convention on State Immunity (European Convention), May 16, 1972, E.T.S. No. 74, also adopts a restrictive view of immunity and provides that its commercial-activity exception "shall not apply if all the parties to the dispute are States," *id.* at art. 7(2); see *Germany* v. *Italy* ¶ 58. The European Convention further provides for immunity "in the case of a contract concluded between States." European Convention art. 4(2)(a). Because FMS agreements are sovereign-to-sovereign, under the restrictive theory of sovereign immunity a sovereign is not subject to suit based on its involvement in such an agreement.

---

[1] The United States is not a party to either agreement, so they are relevant only to the extent they reflect customary international law.

The facts of this case highlight the inherently sovereign nature of FMS transactions. South Korea acquired F-35 fighter jets that could be sold only through the FMS program. Pet. App. 6, 15-16. As the court of appeals explained, "[e]ven the F-35s' manufacturer" could not sell them to South Korea; South Korea could purchase them only from the U.S. government in a sovereign-to-sovereign FMS transaction. *Id.* at 18 (emphasis omitted); cf. *Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 578 (7th Cir.) ("[C]ertain contracts, although generally of a type in which a private person could enter, are by their nature governmental, since only a sovereign entity deals in the particular kind of goods or services."), cert. denied, 493 U.S. 937 (1989). And "all aspects of the" FMS transaction were "approved and managed by the U.S. government." Pet. App. 6-7. The court of appeals correctly determined that the FMS transaction in this case was inherently sovereign in nature—and therefore did not trigger the FSIA's commercial-activity exception.

ii. The court of appeals likewise correctly concluded that the closely associated offset transaction involving a military satellite did not constitute commercial activity. The satellite was produced according to South Korea's classified military specifications and was tailored for integration with the F-35 fighter jets. Pet. App. 6, 18. The U.S. government approved the offset. *Id.* at 5-6; see p. 5, *supra*. Payments for the satellite were made through DOD under the terms of the letter of offer and acceptance between the United States and South Korea. See Pet. App. 19. And, as petitioners alleged, the offset "was a necessary and integral part of the procurement by South Korea of the F-35s." *Id.* at 18-19. Given those features, South Korea exercised

uniquely sovereign powers by entering into the offset agreement—and did not engage in commercial activity under the FSIA.

2. Petitioners' contrary arguments are misplaced.

a. Petitioners suggest (Pet. 27) that when cases involve "procurement or sale of goods pursuant to a contract," the FSIA's commercial-activity exception is satisfied. But as the court of appeals explained, petitioners' proposed approach would unduly set the rule "at too general a level, such that it would essentially encompass every purchase or sale of goods involving a foreign sovereign." Pet. App. 14. This Court has never suggested that all contracts for the sale of goods are commercial, as the courts of appeals routinely recognize. See, *e.g.*, *ibid.* ("[N]ot every purchase of goods by a sovereign is 'commercial activity.'"); *Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987) ("[A] contract between a foreign state and a private party for the purchase of goods or services 'may presumptively be,' but is not inevitably, 'commercial activity.'") (citation omitted); *Joseph* v. *Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987) (similar), cert. denied, 485 U.S. 905 (1988). Indeed, petitioners' approach would seem to sweep even FMS transactions between two sovereigns within the commercial-activity exception. But, as discussed, FMS transactions clearly are not commercial in nature.

Petitioners' emphasis (Pet. 1, 5, 16, 30) on this Court's statement in *Weltover* 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" is therefore misguided. 504 U.S. at 614-615. Private companies can, of course, purchase or sell certain military goods in market transactions. But

private companies cannot engage in FMS-style transactions in which the United States sells highly sensitive military equipment to a foreign state based on a presidential judgment about the foreign-policy and national-security interests of the United States. And unlike boots or bullets, F-35 fighter jets—the only goods exchanged in the FMS transaction here and the only reason for the related offset—are sold exclusively by one sovereign (the United States) to other sovereigns. Thus, unlike Argentina in *Weltover*—which this Court found acted as "a private player within" "a market" when it issued bonds, *id.* at 614—South Korea did not act as a private player in a market when it purchased F-35s and engaged in the connected offset transaction.

b. Petitioners note (Pet. 34-35) that offset transactions are distinct from FMS transactions. Petitioners are correct to the extent that the United States is not a party to offset agreements and does not assume any performance obligations for offsets. See 48 C.F.R. 225.7303-2(a)(3)(iii); SAMM § C.6.3.9; *Green Book* 9-21-9-22. But it does not follow that every offset transaction therefore falls within the commercial-activity exception. And the offset here falls outside that exception.

As previously explained, see p. 5, *supra*, an offset's costs are built directly into the FMS contract between the United States and the foreign state. DOD separately approved the military satellite offset here. And the offset was closely tied to the underlying FMS transaction because the military satellite was equipped with classified technology for "integration with the F-35 fighter planes." Pet. App. 3; see *id.* at 18.

What is more, as the court of appeals correctly observed, petitioners' "own characterization of the" offset

"transaction" in their complaint supports the conclusion that the two transactions were closely related. Pet. App. 18. The complaint indicates that the satellite acquisition "was a necessary and integral part of the procurement by South Korea of the F-35s." *Id.* at 18-19; see, *e.g.*, Am. Compl. ¶ 28 ("[P]roviding a military satellite offset [was] part of the F-35 fighter plane acquisition."); *id.* ¶ 34 ("South Korea's acquisition of" both the "F-35 fighter planes and a military satellite" "occurred through and were facilitated by [DOD] and its F-35 Joint Program Office."); *id.* ¶ 45 ("South Korea's regulations required that before South Korea could enter into an FMS contract, the contractor had to receive approval from South Korea of the contractor's plan to satisfy its offset obligations that would arise from the FMS contract."); *id.* ¶ 59 ("[T]he proposed military offset project was a critical part of" the bid to provide the F-35 fighter jets.). And all the payments for the offset "flow[ed] through the Pentagon." *Id.* ¶ 46; see Pet. App. 19. Having made those allegations, petitioners cannot now portray the offset as distinct from the underlying FMS transaction for purposes of establishing jurisdiction under the FSIA.

c. Petitioners finally assert (Pet. 26) that the court of appeals improperly "focused entirely on the sovereign purposes surrounding" the transactions. Read in isolation, certain statements in the court's opinion appear to reference the military purposes underlying South Korea's acquisitions. See Pet. App. 17 ("Activities such as creating and maintaining armed forces and obtaining for them arms and other tools of war * * * are peculiarly sovereign activities."). But the court articulated and applied the correct legal standard, see p. 10, *supra*, emphasizing that "the nature" of the

conduct at issue—"rather than * * * its purpose"—was determinative, Pet. App. 14 (citation and emphasis omitted). And the court's holding rested on its determination that an FMS transaction by its nature differs from an ordinary commercial transaction—and that the particular offset agreement here was bound up with the FMS agreement and likewise was not a standard commercial transaction. In any event, to the extent any language in the decision below could be read more broadly than its holding, this Court's "resources are not well spent superintending each word a lower court utters en route to a final judgment." *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011); see *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court" "reviews judgments, not statements in opinions.").

B. Further Review Is Not Warranted

In addition to being correct, the court of appeals' decision does not merit further review. Contrary to petitioners' assertion (Pet. 14-17), the decision below does not conflict with this Court's decision in *Weltover*. See pp. 10-15, *supra*. And there is no broad disagreement among the courts of appeals over the proper interpretation of the commercial-activity exception. The decision below is the first court of appeals decision to address offsets to FMS agreements—so there is likewise no disagreement on that narrow issue. Moreover, the unique facts of this case and the existence of an additional jurisdictional question make it an unsuitable vehicle for this Court's review.

1. There is no disagreement among the courts of appeals regarding the proper treatment of FMS agreements and associated offset agreements under the FSIA's commercial-activity exception. The D.C. Circuit—the only other court of appeals to consider

whether sales of military goods or services through the FMS program fall within the commercial-activity exception—reached the same conclusion as the Fourth Circuit below. The D.C. Circuit held that when Saudi Arabia entered into an FMS agreement with the United States for military training services—which were provided by a private contractor—the commercial-activity exception was inapplicable to claims alleging failure to provide adequate security and failure to warn. *Heroth* v. *Kingdom of Saudi Arabia*, 331 Fed. Appx. 1, 2-3 (2009). And the decision below is the only court of appeals decision to address an offset associated with an FMS transaction, so there is no disagreement on that issue, either.

Petitioners nevertheless assert (Pet. 18-28) that the decision below conflicts with decisions of other courts of appeals. But the decisions petitioners identify did not consider sales through the FMS program or offsets associated with FMS transactions. Rather, they involved private parties' sales of goods or services—which could be sold in market transactions to foreign sovereigns.

In *McDonnell Douglas Corp.* v. *Islamic Republic of Iran*, 758 F.2d 341, cert. denied, 474 U.S. 948 (1985), the Eighth Circuit held that a foreign government's purchase of military aircraft parts directly from the manufacturer fell within the commercial-activity exception. *Id.* at 343, 349. Although the aircraft themselves had been purchased through an FMS agreement, see *McDonnell Douglas Corp.* v. *Islamic Republic of Iran*, 591 F. Supp. 293, 297 (E.D. Mo. 1984), aff'd, 758 F.2d 341 (8th Cir. 1985), the case did not involve a dispute about the FMS agreement, a related offset agreement, or an agreement that was otherwise intertwined with a sovereign-to-sovereign transaction. See *McDonnell*

Douglas Corp., 758 F.2d at 343 n.2 (contrasting the direct commercial sale at issue with a separate FMS agreement).

The same is true of *UNC Lear Services, Inc.* v. *Kingdom of Saudi Arabia*, 581 F.3d 210 (5th Cir. 2009), cert. denied, 559 U.S. 971 (2010). There, the Fifth Circuit held that a contract between a foreign government and a private contractor for repair parts and services for military aircraft triggered the commercial-activity exception. *Id.* at 212, 217. The court distinguished that contract from a separate contract in which the private contractor "provide[d] personnel" that "were integrated with the" foreign government's air force, finding that "the nature of" the latter contract was "sovereign" and therefore did not trigger the commercial-activity exception. *Id.* at 216.

The Ninth Circuit's decision in *Ministry of Defense & Support for Armed Forces of the Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 385 F.3d 1206 (2004), vacated on other grounds, 546 U.S. 450 (2006) (per curiam), likewise did not involve an FMS or offset agreement—or anything similar to such agreements. The court merely held that the sale of military equipment by a private company directly to a foreign government constituted commercial activity. *Id.* at 1211, 1219-1220.

And in *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212 (2005), the Eleventh Circuit held that a foreign government's alleged breach of a contract with a private contractor "for the bailment of" "weapons, munitions, and explosives," "with a purchase option," fell within the commercial-activity exception. *Id.* at 1215-1216. That decision did not involve an FMS or other sovereign-to-

sovereign agreement—or a contract with an integral relationship to such an agreement.

There therefore is no conflict between those decisions and the court of appeals' decision in this case. The goods and services at issue in those decisions generally could be acquired on the open market and were obtained by foreign governments in direct exchanges with private contractors even if they had a military purpose. In contrast, F-35 fighter jets cannot be acquired on the open market because they are FMS-only articles—and therefore South Korea obtained the jets in a sovereign-to-sovereign agreement with the U.S. government. Pet. App. 16-18.[2] And, unlike the transactions in the decisions petitioners identify, the offset transaction in this case was tied up with the sovereign-to-sovereign FMS agreement: The government approved the offset agreement; the satellite was tailored to classified military specifications and to integrate with the jets; and the offset "was a necessary and integral part of the procurement by South Korea of the F-35s." *Id.* at 18-19; see *id.* at 6.

There likewise is no disagreement among the courts of appeals concerning the relevant principles for determining whether a foreign state's purchase of military goods is commercial activity under the FSIA. Consistent with other courts of appeals, the Fourth Circuit in this case recognized that "not every purchase of

---

[2] In contrast, if military jets were offered for sale on the open market, resulting sales might constitute commercial activity under the FSIA. See *Virtual Def. & Dev. Int'l, Inc.* v. *Republic of Moldova*, 133 F. Supp. 2d 1, 3-4 (D.D.C. 1999) (concluding that a foreign state "acted as a private participant in the market," and therefore engaged in commercial activity, when it offered MiG-29 planes to private parties and other governments).

goods by a sovereign is 'commercial activity'" and decided the commercial-activity exception's applicability by reference to the "nature" of the course of conduct. Pet. App. 14, 16 (citation and emphasis omitted).

2. This case also involves unique facts that would make it a poor vehicle to address the application of the FSIA's commercial-activity exception to offsets. As noted, the offset transaction in which South Korea purchased the miliary satellite was closely linked to the underlying sale of the FMS-only F-35 fighter jets; indeed, the satellite was integrated with the jets. And DOD determined that the offset's costs were reasonable and approved the offset before it could proceed.

Because DOD no longer assesses the reasonableness of an offset's costs or separately approves offset transactions, see p. 5, *supra*, this case would be a poor vehicle to consider the commercial-activity exception's applicability to offset transactions going forward. Moreover, unlike the offset here, other offsets have minimal connection to the underlying FMS transaction or the United States' national-security interests. For example, a "contractor may agree to purchase certain manufactured products, agricultural commodities, raw materials, or services, or make an equity investment or grant of equipment required by the FMS customer, or may agree to build a school, road or other facility." 48 C.F.R. 252.215-7014(a)(2). Such offset transactions may require a different analysis to determine whether they fall within the FSIA's commercial-activity exception. But no court of appeals has yet addressed such an offset. And this case's distinct facts might prevent the Court from fully considering the commercial-activity exception's application to offset agreements with minimal

connection to the underlying FMS transaction or the United States' national-security interests.

3. Finally, this case would be a poor vehicle for addressing the scope of the FSIA's commercial-activity exception because petitioners' claims may fail to meet the FSIA's "other requirements"—and therefore the federal courts still may lack jurisdiction under the FSIA regardless of the correct disposition of the question presented. *Jam* v. *International Fin. Corp.*, 586 U.S. 199, 215 (2019). As relevant here, even if a foreign state engages in commercial activity, the commercial-activity exception applies only if the suit "is *based upon* a commercial activity carried on in the United States by the foreign state" 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) (emphases added). This Court has held that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 35 (2015).

The district court found that petitioners' suit is not "based upon" any commercial activity because "[t]he 'gravamen' of [petitioners'] suit is tortious interference with [the] contract" between petitioners and Lockheed—"not the commercial activity by South Korea." Pet. App. 46. In the court's view, the FMS and offset transactions were not the actions that actually injured petitioners, and therefore the gravamen of the suit was not South Korea's purported commercial activity. See *id.* at 42-46; cf. *Nelson*, 507 U.S. at 358 (distinguishing "activities [that] led to the conduct that eventually injured" the plaintiffs from "the basis for the [plaintiffs'] suit").

The court of appeals did not consider that alternative holding by the district court. Although petitioners do not ask this Court to resolve whether their suit is "based upon" commercial activity, petitioners and Lockheed vigorously dispute that issue. Br. in Opp. 24-25; Reply Br. 10-11. Regardless of its appropriate resolution, the presence of this additional jurisdictional issue might complicate this Court's consideration of whether South Korea engaged in commercial activity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
SHARON SWINGLE
SIMON C. BREWER
Attorneys

RICHARD C. VISEK
Acting Legal Adviser
Department of State

MAY 2024