Nos. 17-1041, 17-1070

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BAE SYSTEMS TECHNOLOGY SOLUTION & SERVICES, INC.,

Plaintiff-Appellee/Cross-Appellant,

v.

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

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY IN NO. 17-1041 AND AFFIRMANCE IN NO. 17-1070

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INTRODUCTION

This case involves an agreement between a defense contractor and the Republic of Korea,[1] both of which anticipated entering into separate Foreign Military Sales (FMS) contracts with the United States. The district court ultimately found the parties' agreement unenforceable based on its understanding of U.S. national security interests. The court also concluded that those perceived interests justified enjoining Korea from maintaining a breach-of-contract action in Korea (though the court later declined to make its injunction permanent for other reasons).

In response to this Court's invitation, and without opining on any other issues, the United States is filing this amicus brief to make two points. First, U.S. national security interests do not render unenforceable the requirement in the Memorandum of Agreement (MOA) that the contractor use its "best effort" to secure a given price. Enforcing such a provision can present national security benefits by broadening the methods through which foreign governments can access FMS items sold by U.S. defense contractors, which in turn benefits the U.S. government. But enforcement of such provisions can also present national security costs because these provisions may incentivize contractors to act in ways that might be contrary to the U.S. government's interests. In the final calculus, the United States believes that U.S. national security

[1] Plaintiff is BAE Systems Technology Solution & Services Inc. Defendants are the Republic of Korea and its Defense Acquisition Program Administration. For brevity, we refer to plaintiff as "BAE" and to the defendants as "Korea."

interests do not prohibit enforcement of the provision at issue here.

Since the United States is neutral (from a national security perspective) on the agreement's enforcement, it follows that national security interests also do not justify enjoining Korea from maintaining a breach-of-contract action in Korean courts. But in addition, such an antisuit injunction, barring a foreign sovereign from invoking the jurisdiction of its own courts, would be a truly extraordinary remedy with significant consequences for international comity, and its issuance could have significant negative consequences for the U.S. government (which frequently requires its foreign contractors to litigate in the United States). Particularly in a case like this, where the contractor has expressly consented to suit in a foreign forum with significant ties to the case, the requested antisuit injunction is improper.

ARGUMENT

I. United States National Security Interests Do Not Render Unenforceable The MOA's "Best Effort" Clause

In August 2012, following a bid competition, BAE and Korea executed an MOA with "binding effect." Joint Appendix (JA) 2341-42; Korea Opening Br. 9. Korea pledged, among other things, to negotiate with the United States to identify BAE as the preferred contractor in an anticipated FMS agreement. JA 2342-43, 2350; Korea Opening Br. 9. BAE pledged, among other things, to use "its best effort" to have its agreement with the United States contain various provisions, including specified pricing provisions. JA1754, 2342-43. Korea believes BAE breached that

obligation, and it seeks damages here (in a counterclaim) and in Korean court. JA793-94; Korea Opening Br. 11. We do not understand Korea to be seeking to hold BAE responsible for any separate actions by the United States. Nor do we understand Korea to be claiming that BAE is liable for its failure to *achieve* specified terms in an FMS contract (as distinguished from BAE's alleged failure to use best efforts).

So understood, the United States's considered judgment is that enforcing the MOA's "best effort" clause is not contrary to U.S. national security interests. Chiefly, this is because enforcing such clauses presents countervailing costs and benefits.

On the one hand, if such agreements are deemed unenforceable on national security grounds, it could create national security concerns for the U.S. by influencing allied countries to look elsewhere for some military purchases. In the international marketplace, there are numerous foreign producers competing to sell defense articles, and who are willing to make various concessions to prospective purchasers. Defense Inst. of Sec. Cooperation Studies, *The Management of Security Cooperation* ("*Greenbook*") 9-19 to 9-20 (37.1 ed., May 2017); *see also* Catherine A. Theohary, Cong. Research Serv., *Conventional Arms Transfers to Developing Nations, 2008-2015*, at 4-5 (Dec. 19, 2016). Korea at least, and potentially other countries, have domestic laws that require or encourage entering into agreements like the MOA before procuring defense items. If U.S. courts unilaterally held such agreements unenforceable, these countries could be less likely to purchase defense articles from U.S. suppliers—because those countries might either buy from foreign competitors bound by similar agreements or might

refrain from buying the articles it all.

Such lessened interest in American defense purchases can in turn have significant national security consequences. Most concretely, the United States wants its military allies and partners to use equipment that integrates easily with the equipment used by U.S. forces; this facilitates joint military exercises and operations. *See* 22 U.S.C. § 2751 (Congressional finding that cooperation with friendly countries is "especially important" because "the effectiveness of their armed forces to act in concert to deter or defeat aggression is directly related to the operational compatibility of their defense equipment"). Additionally, when U.S. defense contractors also sell for foreign partners, economies of scale can lessen overall unit-costs for the United States to buy similar items. *See Greenbook* 15-7 (explaining that FMS and Defense Department "orders are often consolidated to obtain economy-of-scale buys and therefore lower unit prices"). If this Court holds that the "best effort" clause here is unenforceable, the end result could thus be both increased logistical challenges for U.S. forces, and a functional price increase for the U.S. military.

On the other hand, the United States recognizes that contract provisions like the "best effort" clause can incentivize contractors towards securing pricing and technical terms favorable to a foreign government—and potentially adverse to the United States—in an FMS contract between that government and the United States. While these concerns are partially mitigated by the fact that the United States retains ultimate control over the contract terms, the United States nonetheless has legitimate

national security concerns about the effect that these incentives can have in negotiations over the sale of highly regulated military goods.

Overall, after accounting for competing concerns, the United States believes that our national security interests do not require that the parties' "best effort" clause be unenforceable.[2] Indeed, this neutrality parallels current policy on FMS "offsets," which can present some similar policy concerns. *See* Defense Production Act Amendments of 1992, Pub. L. No. 102-558, § 123, 106 Stat. 4198, 4206-07 (expressing neutrality with regard to "offsets," and recognizing that while offset transactions can have problems, unilateral steps to forbid offset transactions can put U.S. contractors at a competitive disadvantage).[3]

This case does not present the same national security concerns as *Secretary of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700 (4th Cir. 2007). There, after fully executing a Letter of Offer and Acceptance with the United States, a foreign country sued a contractor for the contractor's alleged breach of an FMS agreement with the United States. But here, Korea is not attempting to hold BAE liable for breach of a contract to export controlled goods. Korea's liability theory instead

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[2] The United States would not necessarily make the same assessment as to all "best effort" clauses in the FMS context. For instance, a contract dispute may concern such highly classified items that its mere adjudication could itself be contrary to national security interests. Or, enforcement of a particular contract clause might have such a significant effect on the U.S. defense industry that it alters the policy calculus. But the United States is unaware of any such special circumstances here.

[3] We take no position on whether BAE's "best effort" promise was an "offset," and we see no need for this Court to address the issue to resolve this case.

appears consistent with the principle that the United States retains final control over the goods' export, and Korea is not seeking to reorder the FMS statutory structure. Also, unlike the *Trimble* plaintiff, Korea is not here reneging on a commitment to settle disputes with the United States using government-to-government negotiation. The United States understands Korea to be seeking compensation only for BAE's own alleged failure to use best efforts, and not for actions by the United States. And at least to the extent that Korea's objections concern the portion of the anticipated FMS deal that was never memorialized in a Letter of Offer and Acceptance with the United States, *cf.* JA846, Korea does not appear to be reneging on any executed promise to consult government-to-government with the United States.

II. BAE's Requested Antisuit Injunction Is Improper

For the same reasons that national security concerns do not render the "best effort" clause unenforceable, such concerns also do not justify BAE's requested permanent antisuit injunction. But even if the "best effort" clause was unenforceable, the United States would still view BAE's requested antisuit injunction as inappropriate. Enjoining a foreign sovereign from bringing suit in its own country is an extraordinary remedy that would be rarely (and possibly never) justified. It is not justified here.

The legal standard to be applied in assessing a request for a foreign antisuit injunction is undecided in this Circuit. Some courts employ the "conservative approach," under which an antisuit injunction cannot issue unless the movant

demonstrates that (1) the foreign action would prevent U.S. jurisdiction or threaten a vital U.S. policy, and (2) the domestic interests outweigh concerns of international comity.[4] Others courts use the "liberal approach," which also accounts for concerns of international comity, but which does not allow such concerns to "wholly dominate" the analysis to the exclusion of other concerns.[5]

This Court need not take a position in this dispute, however, because both versions of the test appropriately give substantial weight to international comity, and here the comity impact of an antisuit injunction is so substantial that BAE's requested injunction is improper under either standard. BAE is not merely trying to have a U.S. court control the activities in a foreign court (itself a considerable affront to foreign sovereignty that should be done sparingly). Instead, it is attempting to enjoin *a foreign sovereign itself* from maintaining a lawsuit in its own courts, and which seeks to enforce a military procurement-related contract entered into *within its own borders* pursuant to its domestic laws.

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[4] *See, e.g.*, *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359-61 (8th Cir. 2007); *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004); *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 161 (3d Cir. 2001); *Gau Shan Co. v. Bankers Tr. Co.*, 956 F.2d 1349, 1354-55 (6th Cir. 1992); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35-37 (2d Cir. 1987); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984).

[5] *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 (5th Cir. 2003). *Accord E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006) (explaining that if the impact on comity is "tolerable," then an antisuit injunction can issue based on the other factors that might justify such an injunction).

Attempting to manage a foreign state's conduct in this manner, within its own territory, departs dramatically from ordinary sovereignty norms. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 79 (3d Cir. 1994) (noting it is "widely accepted that each sovereign nation has the sole jurisdiction to prescribe and administer its own laws, in its own country, pertaining to its own citizens, in its *own* discretion," and ultimately reversing an injunction that sought to prevent the Philippine government from taking retaliatory actions in the Philippines against witnesses in a U.S. judicial proceeding); *cf. Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (recognizing the basic principle that every sovereign state must respect the independence of every other sovereign state, and so the courts of one state do not sit in judgment of the acts of a second, done within its own territory); *id.* at 303-04 (explaining that this principle rests "upon the highest considerations of international comity and expediency," and that failure to honor it could cause international conflict). The drastic nature of BAE's requested remedy is reinforced by the absence of such a remedy in the Foreign Sovereign Immunities Act's text. And that Act's legislative history clarifies that injunctive relief against foreign states should only be permissible "when circumstances [a]re clearly appropriate," H.R. Rep. No. 94-1487, at 22 (1976). There is no indication Congress would have viewed this type of extraordinary relief as appropriate.

Permitting an antisuit injunction in this context would also threaten to cause significant harms to the United States. The laws in many foreign nations do not even

permit a court to enter an injunction against a foreign state,[6] and many foreign states will expect the United States to extend them the same respect and courtesy. If U.S. courts fail to do so, this could disrupt our relations with the foreign country. *Cf. Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945) (recognizing that actions affecting foreign state property can cause international disputes). Moreover, the United States engages in extensive overseas activities and is subject to many suits in foreign courts. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017). Because "some foreign states" account for principles of "reciprocity" in their treatment of other sovereign litigants, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), there is a real risk that issuance of an antisuit injunction in cases like this could prompt reciprocal injunctions against the United States.

Finally, the United States regularly signs foreign contracts which require that contract disputes be resolved in U.S. courts. United States interests could thus be

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[6] *See* Hazel Fox, *International Law and Restraints on the Exercise of Jurisdiction by National Courts of States*, *in International Law* 357, 364, 366, 371(Malcolm D. Evans ed., 2003); *id.* at 371 ("Nor may an injunction or order for specific performance be directed by a national court against a foreign State on pain of penalty if not obeyed."). *See also, e.g.*, State Immunity Act, R.S.C. 1985, c S-18 § 11 (Can.) (a state shall be immune from any "injunction, specific performance or the recovery of land or other property" except in certain terrorism cases); State Immunity Act, 1978, c. 33, § 13(2)-(4) (Gr. Brit.) (foreign state may not be subject to any "injunction or order for specific performance," absent narrow circumstances not present here); State Immunity Act c. 313 (2014 Rev. Ed.) § 15(2)-(4) (Sing.) (similar); Foreign States Immunities Act 87 of 1981 § 14 (S. Afr.) (similar).

significantly hindered if courts let contractors bypass their express consent to a suit in a foreign forum with significant ties to the case. The parties here agree that, at minimum, BAE consented to suit in Korea (their textual dispute concerns whether other fora were also contemplated, *see* Korea Opening Br. 26-33; BAE Opening Br. 47). That forum choice hardly seems opportunistic since the parties' agreement was apparently signed in Korea, *see* JA85, and concerns a purchase by the Korean government. An injunction is inherently an equitable remedy, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006), and so BAE's attempt to backtrack from its previous consent to suit in Korea makes this case a particularly poor candidate to overcome the significant international comity problems that can result from BAE's requested injunction.

CONCLUSION

For the foregoing reasons, the United States's national security interests do not require that the MOA's "best effort" clause be held unenforceable. The Court should also hold that BAE's requested antisuit injunction is improper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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