No. 10-1144

In the Supreme Court of the United States

REPUBLICA BOLIVARIANA DE VENEZUELA, ET AL., PETITIONERS

v.

DRFP L.L.C., D/B/A SKYE VENTURES

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
DOUGLAS N. LETTER
MELISSA N. PATTERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HAROLD HONGJU KOH
Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

Whether a foreign state's refusal to honor a demand for payment in the United States on a state-backed security that permits the noteholder to demand payment in the United States causes a "direct effect in the United States" within the meaning of the commercial activity exception to foreign sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605(a)(2).

TABLE OF CONTENTS

Page

Statement 1
Discussion 8
A. The Sixth Circuit's application of the FSIA is correct and is consistent with the decisions of other courts of appeals 8
B. The proper interpretation of the notes at issue here is not a question that warrants this Court's review 15
C. Further review is unwarranted because the decision is interlocutory and the district court may dismiss the case on other threshold grounds . . . 17
D. The Sixth Circuit's decision is unlikely to have adverse reciprocal consequences 20
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Adler v. *Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997) 11, 14

Arriba Ltd. v. *Petroleos Mexicanos*, 962 F.2d 528 (5th Cir.), cert. denied, 506 U.S. 956 (1992) 19

Creighton Ltd. v. *Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999) 16

Falcon Invs., Inc. v. *Republic of Venezuela*, No. 00-4123-DES, 2001 WL 584346 (D. Kan. May 22, 2001) 16

First City, Texas-Houston, N.A. v. *Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998) 19

General Elec. Capital Corp. v. *Grossman*, 991 F.2d 1376 (8th Cir. 1993) 13

Cases—Continued: Page

Goodman Holdings v. *Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994), cert. denied, 513 U.S. 1079 (1995) . . . 12

Guevara v. *Republic of Peru*, 608 F.3d 1297 (11th Cir.), cert. denied, 131 S. Ct. 651 (2010) 14

Hanil Bank v. *PT. Bank Negara Indonesia*, 148 F.3d 127 (2d Cir. 1998) 11, 13

Harris Corp. v. *National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982) 14

Keller v. *Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002) 11

O'Bryan v. *Holy See*, 556 F.3d 361 (6th Cir.), cert. denied, 130 S. Ct. 361 (2009) 5

Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607 (1992) 2, 6, 8, 9, 10, 15

Samantar v. *Yousuf*, 130 S. Ct. 2278 (2010) 11

Sinochem Int'l Co. v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) 18, 19

United World Trade, Inc. v. *Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232 (10th Cir. 1994), cert. denied, 513 U.S. 1112 (1995) 12

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 2, 18

Virtual Countries, Inc. v. *Republic of South Africa*, 300 F.3d 230 (2d Cir. 2002) 14

Voest-Alpine Trading USA Corp. v. *Bank of China*, 142 F.3d 887 (5th Cir.), cert. denied, 525 U.S. 1041 (1998) 12

Constitution, statutes, regulations and rule: Page

U.S. Const. Amend. V (Due Process Clause) 10

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* 1

28 U.S.C. 1604 2

28 U.S.C. 1605 2

28 U.S.C. 1605(a)(2) . . . . *passim*

28 U.S.C. 1605A (Supp. II 2008) 2

28 U.S.C. 1607 2

28 U.S.C. 1292(b) 5

28 U.S.C. 1330 1

31 C.F.R.

Pt. 306:

Section 306.25 19

Pt. 315:

Section 315.15 20

Pt. 321:

Section 321.2 20

Pt. 353:

Section 353.6 20

Pt. 357 21

Section 357.2 21

Section 357.13 21

Pt. 363 21

Section 363.11 . . . . 20, 21

Section 363.12 21

Fed. R. Civ. P. 44.1 16

Miscellaneous: Page

H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 2

In the Supreme Court of the United States

No. 10-1144

REPUBLICA BOLIVARIANA DE VENEZUELA, ET AL., PETITIONERS

v.

DRFP L.L.C., D/B/A SKYE VENTURES

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court 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. Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, to codify the circumstances under which a foreign state or its property is subject to the jurisdiction of United States courts. The FSIA largely codified the so-called restrictive theory of foreign sovereign immunity, under which "the sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or

those which private persons normally perform." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976); see *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983).

Under the FSIA, the general rule is that "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. 1604. The statute then enumerates certain exceptions to that immunity. 28 U.S.C. 1605, 1605A (Supp. II 2008), 1607. One such exception provides that "[a] foreign state shall not be immune * * * in any case * * * in which the action 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." 28 U.S.C. 1605(a)(2). In *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), this Court examined this provision and held that "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity." *Id.* at 618 (citation and internal quotation marks omitted). The court further explained that Section 1605(a)(2) does not contain "any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Ibid.*

2. In 2004, respondent Skye Ventures, also known as DRFP L.L.C., filed this suit against petitioners, the Bolivarian Republic of Venezuela and the Venezuelan Ministry of Finance. Pet. App. 26a. Respondent alleges that in 1981, a state-owned agricultural assistance bank, Banco Desarrollo Agropecuario SA (Bandagro), issued a series of bearer promissory notes backed by Venezuela and set to mature in 1991. See First Am. Compl.,

Dkt. No. 147, ¶¶ 6-8, 10 (Mar. 2, 2009).[1] Respondent further alleges that the Bandagro notes provide that they are to be governed by the laws of Switzerland and the Uniform Rules for Collections set out in an International Chamber of Commerce (ICC) publication, ICC Brochure 322.[2] *Id.* ¶ 13. According to respondent, under these authorities, "demand for payment of matured bearer promissory notes may be made upon the guarantor from any location where such notes are held and requires the guarantor to make deposit of funds at such location, including locations in the United States." *Ibid.*

Respondent alleges that because Bandagro is now defunct, Venezuela, as the guarantor on the notes, is responsible for payment. First Am. Compl. ¶¶ 15-16. In accordance with what respondent maintains are the terms of the notes, respondent allegedly made a demand for payment from petitioners "from Columbus, Ohio and through its attorneys, pursuant to Swiss law and the provisions of the Notes and ICC rules, upon the Ministry for redemption of the Notes requesting funds to be deposited in a financial institution in Columbus, Ohio, U.S.A." *Id.* ¶ 32. Respondent asserts that petitioners "failed to tender payment as guarantors of the Notes within a commercially reasonable time," *id.* ¶ 33, and accordingly respondent seeks a money judgment for $100,000,000 (the face value of the notes) plus interest. *Id.* ¶¶ 34-65.

Petitioners moved to dismiss, arguing, among other things, that the Bandagro notes are forgeries and there-

[1] All "Dkt. No." references are to documents filed in the district court in this case, No. 2:04-cv-793 (S.D. Ohio).

[2] The ICC's Uniform Rules for Collections have been updated and are now contained in Publication 522. See Pet. App. 54a; First Am. Compl. ¶ 13.

fore petitioners had not actually engaged in any "commercial activity" within the meaning of the FSIA. See Foreign Sovereign Defs.' Mem. of Law, Dkt. No. 14, at 11-12 (Jan. 31, 2005). Subsequently, while jurisdictional discovery was proceeding, petitioners changed tack and urged the court to dismiss the case immediately on either of two grounds, both of which petitioners asserted could be resolved without further discovery. See Foreign Sovereign Defs.' Notice of Supp. Authority and Mem. of Law, Dkt. No. 106, at 1-2, 15-16 (June 7, 2007) (Notice of Supplemental Authority). First, petitioners argued that even if the notes were valid, petitioners' alleged nonpayment did not cause a "direct effect" in the United States, as required by the FSIA's commercial-activity exception to foreign sovereign immunity. Second, petitioners contended that dismissal was warranted on *forum non conveniens* grounds.

The district court denied the motion to dismiss on both those grounds. Pet. App. 24a-25a. With respect to the FSIA, the court held that "assuming the promissory notes in question are valid, [petitioners] are not immune" because petitioners' nonpayment on the notes caused a direct effect in the United States. *Id.* at 25a & n.1, 36a-45a. Observing that the courts of appeals had generally found the requisite direct effect "when the debt instrument in question does not specifically indicate any one place of payment but rather allows the holder to designate a place of payment," the district court framed the question as "whether the Notes allowed [respondent] to validly designate Columbus as the place of payment." *Id.* at 38a-39a. In determining the payment procedures, the court relied on unrebutted affidavits submitted by respondent as to the effect of the notes' incorporation of Swiss law and an ICC bro-

chure. The court concluded that respondent had "establish[ed] that under the negotiated terms of the Notes, including the ICC regulations and Swiss law, [respondent] was entitled to designate any place of payment it desired, including Columbus [Ohio]." *Id.* at 41a. The court therefore held that petitioners' "failure to pay on the Notes caused a direct effect in the United States, because the Notes allowed [respondent] to designate a place of payment in the United States and [petitioners] were contractually obligated under the terms of the Notes to pay at that location." *Id.* at 44a.

The district court also rejected petitioners' *forum non conveniens* argument, on the ground that Venezuela was not an available and adequate alternative forum.[3] Pet. App. 45a-51a.

3. a. Petitioners appealed the district court's FSIA ruling under the collateral order doctrine, see *O'Bryan* v. *Holy See*, 556 F.3d 361, 372 (6th Cir.), cert. denied, 130 S. Ct. 361 (2009), and the *forum non conveniens* ruling pursuant to certification under 28 U.S.C. 1292(b). Mem. Op. and Order, Dkt. No. 155, at 1-2 (Apr. 1, 2009). The court of appeals affirmed the finding of a direct effect in the United States under the FSIA, reversed the *forum non conveniens* holding, and remanded for further proceedings. Pet. App. 2a, 14a.

[3] Although the court stated that it "assum[ed]" for purposes of resolving the direct-effect question that the notes were valid, the court denied petitioners' motion to dismiss "on the grounds of subject matter jurisdiction and *forum non conveniens*," without mentioning—or adjudicating—petitioners' argument that there was no jurisdiction under the FSIA because the notes were forgeries and petitioners had therefore not engaged in any commercial activity. Pet. App. 25a; see Mem. Op. and Order, Dkt. No. 155, at 1 (Apr. 1, 2009). The court also stated that it was leaving open for future resolution the questions surrounding the notes' validity. Pet. App. 24a-25a & n.1; see pp. 17-19, *infra*.

With respect to the existence of a direct effect, the court of appeals, like the district court, assumed "for purposes of deciding the jurisdictional issues before" it that the notes were valid. Pet. App. 4a. The majority explained that there are "two aspects to the 'direct effect' question": whether respondent "is restricted by contract or by the terms of the notes in selecting the United States as a jurisdiction in which to seek and enforce payment of the notes"; and whether, in light of the notes' terms, petitioners' "refusal to honor [respondent's] demand for payment in Ohio is an 'act [that] causes a direct effect in the United States'" under the FSIA. *Id.* at 5a (quoting 28 U.S.C. 1605(a)(2)) (alteration in opinion). On the first issue, the majority relied on respondent's affidavit testimony regarding Swiss law and the ICC rules, concluding that "it would appear that by the terms of the notes * * * [respondent] was entitled to demand and enforce payment in Ohio." *Id.* at 6a.

Turning to the second part of the analysis, the court of appeals explained that in *Weltover*, this Court had held that a foreign sovereign's nonpayment on bonds that permitted the holder to designate the United States as the place of payment, after the holder had designated New York, caused a direct effect in the United States. Pet. App. 6a-7a (citing *Weltover*, 504 U.S. at 619). The court of appeals concluded that because respondent "had the right to designate the United States as a place of payment of the notes" and had exercised that right by choosing the United States, petitioners' nonpayment caused a direct effect in the United States under Section 1605(a)(2). *Id.* at 9a.

With respect to the *forum non conveniens* issue, the court reversed the district court's conclusion that Venezuela was not an available and adequate alternative fo-

rum and remanded to the district court "for a full consideration of the question whether the doctrine of *forum non conveniens* applies." Pet. App. 13a; *id.* at 9a-13a.

b. Judge Martin dissented from the court's FSIA holding. Pet. App. 15a-21a. He agreed with the majority that a "note itself may create federal jurisdiction in the United States and concede sovereign immunity * * * by not specifying a place of performance but instead expressly granting the plaintiff the right to choose the place." *Id.* at 17a. Observing that "the parties dispute whether the Notes grant the holder the right to state the place of performance and specifically * * * what the concept of a 'place of payment' means," *id.* at 18a, Judge Martin explained that in his view, there was a "fundamental difference" between permitting the noteholder to demand payment *from* any location where he is present, and permitting the noteholder to demand payment *at* any location, *id.* at 20a. Deeming it "incredible" that a sovereign would agree to make payment in any location of the noteholder's choice when that action "waives sovereign immunity as to every country in which a noteholder may" demand payment, Judge Martin declined to read the notes to permit the noteholder to designate the place of payment in the absence of an express provision to that effect. *Id.* at 20a, 21a. He therefore would have held that the notes simply permitted the holder to "request that a bank anywhere in the world demand payment on its behalf," and that petitioners' failure to make payment after respondent chose to demand payment from within the United States did not cause a direct effect under the FSIA. *Id.* at 21a.

4. The court of appeals denied rehearing en banc. Pet. App. 22a.

DISCUSSION

Petitioners challenge the court of appeals' conclusion that their nonpayment on the Bandagro notes caused a direct effect in the United States within the meaning of Section 1605(a)(2) of the FSIA. Further review is not warranted. The court of appeals correctly applied the FSIA's "direct effect" requirement in light of its interpretation of the notes' provisions, and the decision does not implicate a conflict among the courts of appeals. At bottom, petitioners' challenge rests on their disagreement with the court of appeals' interpretation of the payment provisions in the particular notes at issue here, and that question does not warrant this Court's review. In addition, the decision is interlocutory, and the district court on remand may dismiss the case on other threshold grounds. The decision also is unlikely to have adverse reciprocal consequences for the United States' administration of its sovereign securities. The petition for a writ of certiorari should therefore be denied.

A. The Sixth Circuit's Application Of The FSIA Is Correct And Is Consistent With The Decisions Of Other Courts Of Appeals

1. In *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), this Court examined the commercial-activity exception of the FSIA that permits the exercise of jurisdiction where an act occurring outside the United States has a "direct effect" within the United States. The Court explained that "an effect is direct if it follows as an immediate consequence of the defendant's * * * activity," and that Section 1605(a)(2) does not contain "any unexpressed requirement of substantiality or foreseeability." *Id.* at 618 (citation and internal quotation marks omitted). The Court then applied that

standard to government bonds issued by Argentina, which provided for payment "through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor." *Id.* at 609-610. Because the bondholder had chosen New York as the place of payment, the Court concluded that "New York was thus the place of performance for Argentina's ultimate contractual obligations." *Id.* at 619. The sovereign's nonpayment therefore "necessarily" created the requisite direct effect under Section 1605(a)(2) because "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Ibid.*

The court of appeals' decision is a straightforward application of *Weltover*. The court of appeals first addressed whether the provisions of the Bandagro notes gave respondent the right to designate the United States as the place of payment. Pet. App. 5a-8a. The court concluded that, by providing that the notes are governed by Swiss law and ICC rules, the parties had agreed that respondent "had the right to designate the United States as a place of payment of the notes," *id.* at 9a, which respondent had done. *Ibid.* Having so answered that antecedent question, the court correctly viewed the circumstances as analogous to those presented in *Weltover*: as in that case, the notes at issue gave the holder the right to choose the place of payment on the notes, and the holder chose the United States. See *ibid.* The court therefore concluded, consistent with *Weltover*, that when petitioners failed to pay on the bonds, "money that was supposed to have been delivered to [respondent] at its office in Columbus was not forthcoming, causing a direct effect in the United States" under Section 1605(a)(2). *Ibid.* (citing *Weltover*, 504 U.S. at 619).

Petitioners argue that the Sixth Circuit erroneously found a "direct effect" in the United States "simply because [the notes] do not specifically *preclude* payment in the United States." Pet. 9; see Pet. i (stating the question presented as whether a foreign sovereign's refusal to pay causes a direct effect within the United States "based merely on the failure of the securities to exclude the United States as a place of payment"); Pet. 18-21. The premise of petitioners' argument is incorrect, however, because the court did not construe the notes as silent regarding place of payment. Rather, the court held that the notes' terms reflected an affirmative agreement that permitted the holder to choose to demand payment in the United States. See Pet. App. 6a ("[I]t would appear that by the terms of the notes * * * [respondent] was entitled to demand and enforce payment in Ohio."); *id.* at 8a. The question whether *Weltover* would permit a court to find a "direct effect" under Section 1605(a)(2) based on notes that are altogether silent as to the place of payment is thus not presented here.[4] And, as discussed further below, see pp. 15-17, *infra*, whether the court correctly construed the notes' provisions as addressing the place of payment is

---

[4] For similar reasons, petitioners' argument (Pet. 23-24) that the minimum-contacts requirement of the Fifth Amendment's Due Process Clause is not satisfied because "the Bandagro notes are silent as to the place of payment, and [respondent] does not allege that [petitioners] engaged in any business" directed at the United States, is not presented here. Cf. *Weltover*, 504 U.S. at 619 ("[a]ssuming, without deciding," that minimum contacts are necessary, the Court concluded that "Argentina possessed 'minimum contacts' that would satisfy the constitutional test"). In addition, the court of appeals did not address this question, and petitioners allege no conflict among the circuits with respect to whether or how a minimum-contacts requirement applies in this context.

not a question that independently warrants this Court's review.

2. Petitioners contend (Pet. 12-18) that the courts of appeals are "irreconcilably fractured" regarding when, under *Weltover*, a foreign state's refusal to make payment at a United States location causes a direct effect in the United States. Petitioners are incorrect.

Applying *Weltover*, the courts of appeals that have addressed the issue have unanimously concluded that a foreign sovereign's nonpayment in the United States on a debt instrument or contract that permits the payee to designate a United States locale as the place of payment, when the payee has made such a designation, creates a "direct effect" in the United States under Section 1605(a)(2). See *Hanil Bank* v. *PT. Bank Negara Indonesia*, 148 F.3d 127, 129-130, 132 (2d Cir. 1998) (where the instrument authorized the plaintiff to choose any location as the place of payment, including the chosen locale of New York, defendant's failure to pay caused a direct effect under *Weltover*, and there was no need for the instrument expressly to designate the United States); *Adler* v. *Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997) (an agreement requiring only that the plaintiff utilize a "non-Nigerian bank" permitted the plaintiff to elect a bank in New York as the place of payment, and Nigeria's failure to satisfy contractual obligations in New York "necessarily had a direct effect in the United States" under *Weltover*); see also *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811, 817-818 (6th Cir. 2002) (agreeing with courts that "found a direct effect when a defendant agrees to pay funds to an account in the United States and then fails to do so"), abrogated on other grounds by *Samantar* v. *Yousuf*, 130 S. Ct. 2278 (2010).

The courts of appeals also generally agree that if a contract or debt instrument does not contemplate that the noteholder may specify a place of payment within the United States, or the noteholder designates a location outside the United States, there is *not* the requisite direct effect within the United States. See, *e.g*, *United World Trade, Inc.* v. *Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237-1238 (10th Cir. 1994) (finding no direct effect where a contract specified Paris as the place of payment and did not contemplate that either party would perform any part of the contract in the United States, even though the contract's provision that payment be made in U.S. dollars meant that a U.S. bank might be incidentally involved in converting payment to dollars), cert. denied, 513 U.S. 1112 (1995); *Goodman Holdings* v. *Rafidain Bank*, 26 F.3d 1143, 1146-1147 (D.C. Cir. 1994) (no direct effect when the only connection to the United States was that some of the payments were made *from* U.S. bank accounts, and "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid"), cert. denied, 513 U.S. 1079 (1995). But see *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887, 889, 896 (5th Cir.) (*Voest-Alpine*) (finding a direct effect caused by nonpayment in the United States on a contract that was silent as to the place of payment, when the foreign sovereign acknowledged a practice of sending the funds to the location designated by debtholder), cert. denied, 525 U.S. 1041 (1998).[5]

[5] Any conflict between the Fifth Circuit's decision in *Voest-Alpine* and the other circuits' decisions is not implicated in this case, given that the Fifth Circuit would find a direct effect even when the other courts

Here, because the Sixth Circuit concluded that the Bandagro notes permitted respondent to designate the United States as the place of payment, see Pet. App. 6a-9a, the court's ruling that petitioners' nonpayment after respondent chose the United States caused a direct effect in the United States is consistent with the decisions addressing similar agreements. See, *e.g.*, *Hanil Bank*, 148 F.3d at 132; Pet. App. 8a (drawing comparison to *Hanil Bank*).

Nonetheless, petitioners urge that review is warranted because a conflict exists between those courts that require a plaintiff to show that the foreign sovereign performed a "legally significant act" within the United States in order to establish a direct effect within the meaning of Section 1605(a)(2), and those courts, like the Sixth Circuit, that eschew such a requirement. See Pet. 12-17. Although petitioners are correct that the courts of appeals have disagreed as to whether a "legally significant act" is necessary after this Court's *Weltover* decision, that disagreement is not implicated here because the outcome in this case would be the same under either approach. The Second and Ninth Circuits, which require a legally significant act in the United States, have held that such an act occurs when—as the courts below found—a sovereign fails to make payments on a debt instrument that permits the holder to designate any place of payment and the holder has chosen the United States.[6] See *Hanil Bank*, 148 F.3d at 129-130,

---

would not, and that the courts below determined that the notes did provide for respondent to designate the place of payment.

[6] Petitioners assert (Pet. 12) that the Eighth and Eleventh Circuits have adopted the "legally significant act" standard, but the cases on which petitioners rely do not adopt that test. In *General Electric Capital Corp.* v. *Grossman*, 991 F.2d 1376, 1385 (1993), the Eighth

133 (when plaintiff could choose any place of payment and chose the United States, the "most legally significant act—the breach of contract—occurred in the United States"); *Adler*, 107 F.3d at 727 (finding that nonpayment to U.S. bank, when agreement provided that payment would be made to a "non-Nigerian bank," was a legally significant act).

Finally, petitioners argue that contrary to the Sixth Circuit's decision, some courts of appeals have held that the debt instrument must "*expressly* specify the United States as a place of payment or authorize the plaintiff to designate the place." Pet. 13 (emphasis added). None of the cases on which petitioners rely, however, suggests that an agreement must expressly name the United States as the place of payment. See, *e.g.*, *Guevara* v. *Republic of Peru*, 608 F.3d 1297, 1309-1310 (11th Cir.) (concluding that plaintiff's failed attempt, from the United States, to claim a reward offered and administered in Peru did not create a direct effect), cert. denied, 131 S. Ct. 651 (2010); *Virtual Countries, Inc.* v. *Republic of South Africa*, 300 F.3d 230, 239 (2d Cir. 2002) (noting that in a previous case, "[s]atisfaction of the geographical jurisdictional nexus * * * depended on the fact that the contract stipulated performance in New York," but not suggesting that such an express stipulation was the only way to create the necessary direct effect).

Circuit simply observed that the Second Circuit had, pre-*Weltover*, "noted that in determining whether the effect in the United States is direct, courts often look to the place where legally significant acts occurred." In *Harris Corp.* v. *National Iranian Radio & Television*, 691 F.2d 1344 (1982), a pre-*Weltover* case, the Eleventh Circuit did not refer to, much less adopt, this standard. See *id*. at 1351.

B. The Proper Interpretation Of The Notes At Issue Here Is Not A Question That Warrants This Court's Review

Because the Sixth Circuit's legal conclusion that petitioners' nonpayment created a direct effect within the United States resulted from a straightforward application of *Weltover* to the parties' obligations under the Bandagro notes as construed by the courts below, petitioners' challenge to the court's decision is at bottom a disagreement with the court's interpretation of the notes. See pp. 10-11, *supra*. That case-specific question does not warrant further review.

Petitioners argue (Pet. 19-20) that Swiss law and the ICC rules, which the notes expressly incorporate as governing their terms and conditions, do not allow the noteholder to demand payment *at* its chosen location, but rather only *from* its chosen location. In petitioners' view, the ICC publication permits noteholders to initiate payment through a series of banks from any location, but the place of payment, where the note must be presented to the debtor and payment made out to the collecting bank, remains in Venezuela.[7] See Pet. 20. Respondent counters (Br. in Opp. 19) that the lower courts correctly concluded that Swiss law and the ICC rules permit the noteholder to demand actual payment *at* any location, including in the United States.

---

[7] There may be a distinction between a note that allows the holder to designate a place of payment and a note that simply allows the holder to request payment from a locale of its choice. Cf. U.S. Amicus Br. at 18 n.12, *Weltover*, *supra* (No. 91-763) (noting a potential distinction between a contract provision designating a place of payment and "mere remittance instructions for a debt that [the sovereign is] legally obligated to pay at some other location"). But for the reasons stated below, see pp. 16-17, *infra*, whether the Bandagro notes implicate this distinction is unclear, and this question does not merit this Court's review.

This dispute is not a question on which the circuit courts are divided—or even one that other circuit courts have addressed.[8] Nor is it sufficiently important to merit this Court's review. Although many international agreements provide that any disputes that arise will be settled by ICC arbitration, see, *e.g.*, *Creighton Ltd.* v. *Government of the State of Qatar*, 181 F.3d 118, 120 (D.C. Cir. 1999), the United States is unaware of any substantial body of agreements that are governed by ICC's Uniform Rules for Collections and that could be affected by the court of appeals' interpretation of that document. In particular, United States Treasury bonds are not governed by the ICC rules, see pp. 19-21, *infra*, and thus the Court's resolution of this question would not affect the treatment of United States securities.

This case also would be an unsuitable vehicle to review the proper interpretation of Swiss law or the ICC rules. Petitioners did not raise their current argument—that Swiss law and the ICC rules do not permit a noteholder to designate the place of payment, but rather address only the place from which the noteholder can request payment—before the district court, and they did not present evidence or testimony that would support their current arguments. See Fed. R. Civ. P. 44.1 (providing for submission of evidence on the meaning of foreign law); Pet. App. 40a-41a; Supp. Br. of Foreign Sovereign Defs., Dkt. No. 138-1, at 21-23 (July 31, 2008). The district court therefore relied on respon-

---

[8] In *Falcon Investments, Inc.* v. *Republic of Venezuela*, No. 00-4123-DES, 2001 WL 584346 (D. Kan. May 22, 2001), a district court examined a Bandagro note, and concluded that because neither party had argued that the Swiss laws governing the note's terms spoke to place of payment, the court would apply Kansas law to determine place of payment. See *id.* at *5.

dent's experts' "unrebutted affidavit[s]" regarding the meaning of Swiss law and the ICC regulations in holding that the notes' incorporation of those provisions had the effect of permitting a noteholder to choose the place of payment. See Pet. App. 39a-40a. The court of appeals accepted the district court's conclusions without further analysis, stating that "it would appear that by the terms of the notes, including the provision that Swiss law govern any dispute over terms and conditions, [respondent] was entitled to demand and enforce payment in Ohio." *Id.* at 6a. As a result, the evidence and arguments regarding the effect of the notes' incorporation of Swiss law and the ICC rules are insufficiently developed for this case to be an appropriate vehicle for this Court to determine the correct interpretation of the notes.

C. Further Review Is Unwarranted Because The Decision Is Interlocutory And The District Court May Dismiss The Case On Other Threshold Grounds

The court of appeals' decision also does not warrant this Court's review because it is interlocutory, and on remand, the district court may dismiss the case on either of two threshold grounds.

First, although the district court denied petitioners' motion to dismiss on *forum non conveniens* grounds, the court of appeals reversed and remanded, directing the district court to undertake "a full consideration of the question whether the doctrine of *forum non conveniens* applies." Pet. App. 12a-14a. Because resolving the *forum non conveniens* issue would not, according to petitioners, entail any need for further discovery, see Notice of Supplemental Authority 24, the district court

may conclude on remand that the case should be immediately dismissed.

Second, the district court has yet to fully resolve the existence of jurisdiction under the FSIA. Because the district court and the court of appeals "assume[d]" that the notes were valid for purposes of deciding the "direct effect" issue, Pet. App. 4a, 25a, the validity of the notes themselves—and thus whether petitioners actually engaged in any commercial activity that might eliminate their presumptive immunity from jurisdiction in this case by virtue of Section 1605(a)(2)—remains an open question to be decided on remand.

Petitioners initially moved to dismiss the complaint on the ground that "fraudulent and forged Notes * * * cannot form the basis of any alleged commercial activity." See Foreign Sovereign Defs.' Mem. of Law, Dkt. No. 14, at 24 (Jan. 31, 2005). Before the district court could resolve that issue, however, petitioners requested that the district court first address their "direct effect" and *forum non conveniens* arguments. See Notice of Supplemental Authority 23-25; see *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) (holding that a district court has discretion to determine that judicial economy would be best served by resolving certain other threshold issues before adjudicating subject-matter jurisdiction). The district court did so, and petitioners took an interlocutory appeal of the court's decision on those issues.

On remand, before proceeding to the merits of the case, the district court will be obligated to satisfy itself that it has subject-matter jurisdiction by resolving petitioners' contention that because the notes are forgeries, they did not engage in any commercial activity concerning the notes. See *Verlinden B.V.* v. *Central Bank of*

Nigeria, 461 U.S. 480, 493-494 (1983); *Sinochem*, 549 U.S. at 433. Thus, although petitioners argue (Pet. 25-28) that this case warrants the Court's immediate attention because foreign sovereigns should not be subjected to the jurisdiction of the United States courts on the basis of forged instruments, petitioners will have an opportunity on remand to argue that the notes were forged and thus cannot serve as a basis for FSIA jurisdiction.[9]

---

[9] Petitioners have argued that resolving this question will burden them by requiring additional discovery into whether the notes are forgeries, an issue that substantially overlaps with the merits of the suit. See Notice of Supplemental Authority 23. The district court may, however, choose to address the *forum non conveniens* issue first, and if the court dismisses the case on that ground, there will be no need for additional discovery into the validity of the notes. See *Sinochem*, 549 U.S. at 436. Should the court reach the FSIA question whether petitioners actually engaged in commercial activity with respect to the notes, resolving that jurisdictional issue may involve some of the same factual questions as the merits of petitioners' liability on the notes, but resolution of that threshold issue nonetheless does not "entail any assumption by the court of substantive law-declaring power." *Id.* at 433 (citation and internal quotation marks omitted). And the district court can accomplish the "delicate balancing between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery," *First City, Texas-Houston, N.A.* v. *Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (citation and internal quotation marks omitted), by ordering jurisdictional discovery "circumspectly and only to verify allegations of specific facts crucial" to the district court's resolution of subject-matter jurisdiction, *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.), cert. denied, 506 U.S. 956 (1992).

D. The Sixth Circuit's Decision Is Unlikely To Have Adverse Reciprocal Consequences

Finally, further review is unwarranted because the decision below is unlikely to have any reciprocal implications for the treatment of United States sovereign debt obligations. Because securities issued by the Department of the Treasury are subject to extensive regulations that provide detailed rules regarding how the bonds may be redeemed, it is unlikely that situations would arise in which the United States would be subject to jurisdiction in foreign courts based on the securities' payment terms. Only a small minority of the United States securities in circulation are, like the Bandagro notes, in paper form, and aside from savings bonds, all paper securities—including all of the very small number of extant bearer bonds—must be redeemed in the United States, through presentation and surrender to the Bureau of the Public Debt in the Department of the Treasury.[10] 31 C.F.R. 306.25. The overwhelming majority of United States securities are in book-entry form—*i.e.*, their existence and ownership is recorded

---

[10] Paper savings bonds, which are the only paper securities currently being issued, are the only extant paper securities that may be redeemed abroad. But the restrictions on those bonds make redemption abroad a relatively rare occurrence. Savings bonds are registered to identified holders; they may be owned only by United States citizens and residents, as well as certain Canadian and Mexican citizens who work in the United States; they are not readily transferrable; and they may be redeemed abroad only by qualified paying agents, such as foreign branches of certain United States banks. 31 C.F.R. 353.6, 315.15, 321.2. In addition, the Department of the Treasury is phasing out paper savings bonds in favor of book-entry savings bonds, which are paid through a Treasury-maintained system that requires account holders to have a Social Security number, a domestic address of record, and an account at one of certain United States financial institutions. 31 C.F.R. 363.11.

electronically rather than in certificate form. 31 C.F.R. 357.2. The holders of book-entry securities are recorded in Treasury-maintained redemption systems or the commercial book-entry system, all of which systems are extensively regulated. See, *e.g.*, 31 C.F.R. Pts. 357, 363. TreasuryDirect®, the primary Treasury-maintained redemption system, requires all account holders to have a Social Security number and an account at a United States depository financial institution in order to receive payment. 31 C.F.R. 363.11, .12. And when a Treasury security in the commercial book-entry system matures, the United States' obligation to pay principal and interest is discharged when certain book entries are made at the Federal Reserve banks in the United States. 31 C.F.R. 357.13. Finally, because the vast majority of United States securities are in book-entry form, the potential for fraud through the presentation of a forged security is extremely low. Contrary to petitioners' assertion (Pet. 28), then, the Sixth Circuit's decision is unlikely to adversely affect the United States' administration of programs for its sovereign debt obligations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

GINGER D. ANDERS
Assistant to the Solicitor General

DOUGLAS N. LETTER
MELISSA N. PATTERSON
Attorneys

HAROLD HONGJU KOH
Legal Adviser
Department of State

DECEMBER 2011