No. 15-698

In the Supreme Court of the United States

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., ET AL., PETITIONERS

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, provides that a foreign state and its instrumentalities are generally immune from suit in U.S. courts, subject to limited statutory exceptions. Clause three of the commercial-activity exception eliminates a foreign state's immunity from suit "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). The questions presented are:

1. Whether the court of appeals erred in identifying the foreign state's alleged breach of contract as the relevant "act" for purposes of analyzing whether clause three of the commercial-activity exception is applicable to the contract claims in this case, which allege harm arising from non-payment of amounts owed under the contracts.

2. Whether the court of appeals erred in ruling that the foreign state's alleged failure to make payments under the contracts did not have a "direct effect in the United States" because the foreign state had contractual discretion to select a place of payment outside the United States.

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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. The Foreign Sovereign Immunities Act of 1976 (FSIA or the Act), 28 U.S.C. 1330, 1602 *et seq.*, establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983); see 28 U.S.C. 1603(a) (defining "foreign state" to include "an agency or instrumentality of a foreign state"). Section 1604 provides that a foreign state is "immune from the

jurisdiction of the courts of the United States" unless the suit falls within one of the narrow exceptions to immunity set forth in the Act. 28 U.S.C. 1604; see 28 U.S.C. 1330.

The commercial-activity exception states that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" in certain circumstances. 28 U.S.C. 1605(a). The exception, which has three clauses, applies in a case "in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] 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); see 28 U.S.C. 1603(d) (defining "commercial activity"). This case involves the third clause of the exception.

2. In the mid-1970s, respondent Bolivarian Republic of Venezuela nationalized its oil industry. Pet. App. 3a. As a result, Venezuela controls production and exportation of oil through two state-owned corporations, respondent Petróleos de Venezuela, S.A., and respondent PDVSA Petróleo (collectively PDVSA). *Ibid.* For many decades, petitioner Helmerich & Payne International Drilling Co. (H&P-IDC), a company incorporated in Delaware and based in Oklahoma, provided oil-drilling services to the Venezuelan government through petitioner Helmerich & Payne de Venezuela, C.A. (H&P-V), a company incorporated under Venezuelan law that is a wholly owned subsidiary of H&P-IDC. *Id.* at 2a, 30a.

In 2007, H&P-V entered into ten contracts with PDVSA to provide drilling services for a fixed period using highly specialized drilling rigs, which H&P-IDC purchased and then transferred to H&P-V. Pet. App. 3a. The contracts stated that PDVSA would make payments in U.S. dollars in the United States under certain circumstances. *Id.* at 31a-33a; see *id.* at 32a n.2. But, under the contracts, PDVSA could instead "choose to deposit payments in bolivars in Venezuelan banks whenever, in its 'exclusive discretion' and 'judgment,' it 'deem[ed] it discretionally convenient.'" *Id.* at 21a (quoting C.A. App. 78, 82, 85); see *id.* at 53a-56a. The contracts also stated that they were to be governed by and interpreted in accordance with Venezuelan law and selected "the city of Maturín" in Venezuela "as the only and special forum." D. Ct. Doc. 22-3, at 2 (Aug. 31, 2012); see, *e.g.*, D. Ct. Doc. 40-1, at 29 (Feb. 22, 2013) (slightly different English translation).

PDVSA soon fell significantly behind on payments for the work H&P-V performed. Pet. App. 3a. PDVSA did make approximately 55 payments, totaling about $65 million, to H&P-V's bank account in Tulsa, Oklahoma for work done under the contracts. *Id.* at 34a, 55a. But by 2009, PDVSA had failed to pay approximately $100 million owed to H&P-V for its drilling services. *Id.* at 3a. H&P-V responded by fulfilling its existing contractual obligations, announcing that it would not renew the contracts until it was paid, and disassembling its drilling rigs. *Ibid.*

In June 2010, PDVSA—assisted by the Venezuelan National Guard—blockaded H&P-V's properties where the drills were located. Pet. App. 3a-4a. Shortly thereafter, the Venezuelan National Assembly enacted a bill recommending that then-President Hugo

Chavez expropriate H&P-V's property. *Id.* at 4a-5a. President Chavez issued an expropriation decree the same day. *Id.* at 5a, 34a. "PDVSA now uses H&P-V's rigs and other assets in its state-owned drilling business." *Id.* at 6a.

3. Petitioners filed suit in the District Court for the District of Columbia. Pet. App. 6a. The two-count complaint claimed that (1) PDVSA and Venezuela took petitioners' property in violation of international law, and (2) PDVSA breached the ten drilling contracts with H&P-V. *Ibid.* In the first count, petitioners asserted that the court had jurisdiction under the FSIA's expropriation exception. See 28 U.S.C. 1605(a)(3). In the second count, petitioners asserted that the court had jurisdiction under the FSIA's commercial-activity exception. See 28 U.S.C. 1605(a)(2).[1]

Respondents filed motions to dismiss, arguing that neither FSIA exception is applicable and that the act-of-state doctrine bars this litigation. Pet. App. 6a; see *Republic of Austria* v. *Altmann*, 541 U.S. 677, 700 (2004). The parties agreed to brief certain threshold issues, including whether petitioners had adequately alleged "an act outside the territory of the United States," done "in connection with a commercial activity of the foreign state elsewhere," that "cause[d] a direct effect in the United States." 28 U.S.C. 1605(a)(2); see Pet. App. 6a-7a.

With respect to the breach-of-contract claims, the district court denied the motions to dismiss, concluding that the claims fall within the scope of the third

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[1] Petitioners' expropriation claim is the subject of a separate certiorari petition pending before this Court (No. 15-423), as to which the United States is filing a separate amicus brief at the Court's invitation.

clause of the commercial-activity exception to foreign-state immunity. Pet. App. 50a-61a. In the court's view, PDVSA's alleged breach of contract had a direct effect in the United States because PDVSA "agreed to contracts with [petitioners] that required the purchase and use of specific parts from specific U.S.-based companies," and the breach "resulted in the loss of revenues that would otherwise have been generated in the United States." *Id.* at 60a-61a (internal quotation marks omitted).

4. The court of appeals unanimously reversed the district court's ruling with respect to clause three of the commercial-activity exception, finding that provision inapplicable to the breach-of-contract claims.[2] Pet. App. 18a-23a.

First, the court of appeals rejected H&P-V's argument that the alleged breach of contract gave rise to a direct effect in the United States because the "agreements with PDVSA required contracts with U.S.-based companies for various drilling rig parts." Pet. App. 19a. The court noted that "H&P-V concedes that none of th[ose] third-party contracts was breached" and that the assertion of "third-party loss" was "therefore based on expected loss from *future* contracts that H&P-V says it would have entered into [with the third parties] had PDVSA renewed its own contracts with H&P-V instead of breaching them." *Id.* at 19a-20a. That was not sufficient to constitute a direct effect in the United States, the court concluded,

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[2] Judge Sentelle "fully concur[red] in the majority's discussion and conclusion concerning the issues related to the commercial activity exception" (while dissenting from the expropriation determination). Pet. App. 23a (Sentelle, J., concurring in part and dissenting in part).

because "any losses to third parties based on expected future contracts were not a direct effect of PDVSA's breach, but rather of PDVSA's contractually permitted decision not to renew its agreement with H&P-V." *Id.* at 20a; see *ibid.* (stating that under clause three, "the 'direct effect' in the United States must arise from the foreign state's allegedly unlawful act—here, the breach of contract").

Second, the court of appeals rejected H&P-V's argument that, because "PDVSA made payments to Helmerich & Payne's Oklahoma bank account," PDVSA's failure to make further payments under the contracts caused a direct effect in the United States. Pet. App. 21a; see *id.* at 22a. The court emphasized that "the contracts gave H&P-V no power to demand payment in the United States" because "PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its exclusive discretion and judgment, it deemed" such payments "discretionally convenient." *Id.* at 21a (brackets, citation, and internal quotation marks omitted). Under those circumstances, the court explained, no money was "'supposed' to have been paid" in the United States. *Id.* at 22a (quoting *Republic of Arg.* v. *Weltover*, 504 U.S. 607, 619 (1992)).

Finally, the court of appeals rejected H&P-V's argument that PDVSA's alleged breach had a direct effect in the United States by "halt[ing] a flow of commerce between Venezuela and the United States." Pet. App. 22a. The flow of commerce stopped, the court determined, not directly because of PDVSA's breach, but because H&P-IDC chose to cease doing business in Venezuela. *Id.* at 22a-23a; see *id.* at 23a ("given that the contracts were for set periods of time ranging from five months to one year, there was no

guarantee of future business * * * beyond those contracts").

DISCUSSION

The court of appeals correctly ruled that the third clause of the FSIA's commercial-activity exception to foreign-state immunity does not apply to the breach-of-contract claims asserted in this case, and its decision does not conflict with any decisions of this Court or other courts of appeals. This Court's recent decision in *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015), which issued after the decision below, reinforces the lower court's conclusion here, and a remand for further consideration in light of *Sachs* would serve no purpose. Accordingly, further review is not warranted.

A. Further Review Of The Court Of Appeals' Ruling As To Which Act Might Give Rise To A Direct Effect In The United States Is Not Warranted

1. a. The petition asks this Court to address whether, under the third clause of the FSIA's commercial-activity exception, "a breach-of-contract action" is based upon "any act necessary to establish an element of the claim, including acts of contract formation or performance, or solely those acts that breached the contract." Pet. i.[3] The third clause states that a foreign state shall not be immune from suit if "the action is based upon * * * an act outside

[3] See, *e.g.*, Pet. 11 (arguing that the court of appeals erred in focusing solely on "direct effects" caused by PDVSA's alleged breach and failing to consider claimed "direct effects of the formation and performance of [the] drilling contracts with PDVSA," such as a "flow of commerce in the United States," in its jurisdictional analysis).

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's decision in *Sachs* governs the analysis of which "act" the breach-of-contract claims in this case are "based upon" for purposes of that exception.

In *Sachs*, a case involving the first clause of the commercial-activity exception, the Court rejected the argument that a plaintiff's personal-injury suit relating to a train accident in Austria was "based upon" the foreign state's sale of a train pass to the plaintiff in the United States. 136 S. Ct. at 393-394. The plaintiff contended that the sale was sufficient to satisfy the "based upon" requirement because it established one element of her claim. See *id.* at 394. This Court ruled that "the mere fact that the sale of the * * * pass would establish a single element of a claim is insufficient to demonstrate that the claim is 'based upon' that sale for purposes of § 1605(a)(2)." *Id.* at 395.

In reaching that conclusion, the Court explained that the "one-element approach" was "flatly incompatible," 136 S. Ct. at 396, with the Court's prior decision in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993). *Nelson* involved an action against a foreign state for wrongful arrest and torture; the plaintiff argued that the action was based upon commercial activities that the state had earlier carried out in the United States when it recruited him. *Id.* at 353-354, 358. The *Nelson* Court explained that the "based upon" inquiry requires a court to "identify[] the particular conduct on which the [plaintiff's suit] is 'based.'" *Id.* at 356. That, in turn, requires consideration of the "basis" or the "foundation" of the claim—"those elements of a

claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357; see *ibid.* ("focus should be on the 'gravamen of the complaint'") (citation omitted). The Court held in *Nelson* that the plaintiff's suit seeking recovery for "personal injuries" was not "based upon" the alleged commercial activity that preceded infliction of those injuries. *Id.* at 358.

Sachs explained that *Nelson*'s reference to the "elements" of the plaintiff's claim should not be misunderstood as endorsing a one-element test for determining whether the "based upon" requirement in the commercial-activity exception has been satisfied. *Sachs*, 136 S. Ct. at 395-396; see *id.* at 394, 396-397 ("based upon" requirement is not met merely because a foreign state's commercial activity is "connected with the conduct that gives rise to the plaintiff's cause of action") (citation omitted). Rather, "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit"—and determining the "gravamen" requires "zero[ing] in on the core of the[] suit," by looking to the "acts that actually injured" the plaintiff. *Id.* at 396.

In *Sachs*, the "gravamen" of the plaintiff's claims involved "wrongful conduct and dangerous conditions in Austria." 136 S. Ct. at 396. Because there was "nothing wrongful about the sale of the [train] pass standing alone," *ibid.*, the Court ruled that the plaintiff's claim was not "based upon" that commercial activity, *id.* at 397; see *id.* at 396-397 (cautioning against "allow[ing] plaintiffs to evade the Act's restrictions through artful pleading," as by "recast[ing]" a "claim of intentional tort" in Austria as a "claim of failure to warn" at the point of the ticket sale).

b. In this case, the court of appeals did not expressly analyze any "based upon" question; instead, it simply stated in a single sentence of its opinion that, in applying the third clause of the commercial-activity exception, any "'direct effect' in the United States must arise from the foreign state's allegedly unlawful act—here, the breach of contract." Pet. App. 20a; see *id.* at 18a (stating without discussion that "our analysis focuses on * * * whether Venezuela's breach of the drilling contracts" gave rise to a direct effect in the United States). Nevertheless, to the extent that the court's decision embodies the conclusion that the breach-of-contract claims in this case are "based upon" the alleged breach rather than on some other aspect of the contract or the parties' relationship, that conclusion is correct and fully consistent with this Court's decision in *Sachs*.[4]

The gravamen of the breach-of-contract claims in this case is PDVSA's alleged breach—a failure to pay amounts that PDVSA owed H&P-V under the contracts for work that H&P-V performed.[5] C.A. App. 57-

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[4] The court of appeals' brief statement that any "direct effect * * * must arise from the foreign state's allegedly unlawful act" (Pet. App. 20a) could perhaps be understood as merely referring to the requirement in the third clause that an "act cause[] a direct effect." 28 U.S.C. 1605(a)(2); see *Odhiambo* v. *Republic of Kenya*, 764 F.3d 31, 37 (D.C. Cir. 2014) (stating that "'based upon' means the same thing" as applied to different clauses of the commercial-activity exception), petition for cert. pending, No. 14-1206 (filed Mar. 30, 2015); see also Pet. 20-21.

[5] Although *Sachs* involved clause one of the commercial-activity exception, both petitioners and respondents correctly observe (Reply Br. 4 (quoting Br. in Opp. 16)) that, given the structure of Section 1605(a)(2), "based upon" must mean the same thing with respect to all three clauses of that provision.

65. The complaint alleges that PDVSA's "failure to timely and completely pay [H&P-V] as required" by the contracts "directly harmed" H&P-V and gave rise to damages. *Id.* at 57. The complaint also alleges that PDVSA acknowledged its debt to H&P-V, even while refusing to pay. See *id.* at 27. And, notably, the complaint does *not* allege that there was anything "wrongful" (*Sachs*, 136 S. Ct. at 396) about the formation of the contracts or about PDVSA's performance under those contracts apart from the non-payment of amounts owed. Under those circumstances, the foundation of the claim is the alleged breach itself, and not any acts that led up to the breach or otherwise were merely connected in some way with the parties' contracts or the performance of their contractual obligations. See Pet. App. 18a, 20a.

2. a. Petitioners suggest that the Court grant, vacate, and remand to give the court of appeals the opportunity to consider the "based upon" issue in light of *Sachs*. Reply Br. 3-5; see Pet. 17. They assert that if the court were to apply *Sachs* here it would ask whether the formation of H&P-V's contracts with PDVSA or the parties' course of performance under those contracts is part of the core of the relevant claims, and "would likely conclude that the 'gravamen' of H&P-V's breach-of-contract claims includes more than PDVSA's breach." Reply Br. 4-5; see *id.* at 3 (pointing to "PDVSA's demands that H&P-V obtain and use specific equipment from U.S. suppliers, PDVSA's long course of making millions of dollars in payments in the United States, and the resulting flow of commerce in the United States"). Indeed, petitioners assert, "the dispute in breach-of-contract cases often focuses on the meaning and enforceability of

each party's contractual obligations in light of the language of the contract and the course of performance." *Id.* at 4.

But even assuming the accuracy of that statement in some cases, petitioners do not explain how the dispute in *this* case can be said to have that kind of focus. H&P-V is suing for PDVSA's failure to make payments owed under the contracts. See Pet. App. 30a n.1. It is not attempting to recover for any acts PDVSA took with respect to third-party suppliers, or taking issue with prior payments PDVSA made in the United States, or claiming that it was induced to enter into the contracts in the first place by some misrepresentation or other wrongful act by PDVSA. Moreover, in this case there appears to be no dispute regarding "the duty that was owed" (Reply Br. 5) to make payments for H&P-V's work. Thus, the acts of contract formation and performance to which petitioners point are not the conduct at the core of the breach-of-contract claims. Because the outcome of the "based upon" analysis in this case under *Sachs* is clear, the remand that petitioners suggest would serve no useful purpose.

b. Alternatively, petitioners contend (Reply Br. 5-9) that the Court should grant the petition to address the application of *Sachs* to breach-of-contract cases more generally. According to petitioners, while *Sachs* "provides important guidance on the application of the 'based upon' test to tort claims," *id.* at 5, it does not resolve a pre-existing difference of opinion about whether a breach-of-contract claim may be considered to be "based upon" contract formation or performance, rather than on the alleged breach itself, for purposes of the commercial-activity exception, see Pet. 14-16; cf.

Sachs, 136 S. Ct. at 397 n.2 (stating that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits under the first clause of § 1605(a)(2)"). This Court's review of that issue is not warranted here.

Even assuming that petitioners were correct about the existence of a split in authority that pre-existed *Sachs* and is not fully resolved by that decision, this case would be a poor vehicle for considering how to apply the "based upon" requirement in breach-of-contract cases. First, as noted above, the court of appeals did not directly analyze that requirement. See Pet. App. 6a-7a (listing "threshold" questions the parties agreed to brief in the district court); *id.* at 18a, 20a. While the court did state that it would consider only effects linked to the alleged breach, whether the court understood that limitation to derive from the "based upon" language (and, if so, what its reasoning was) is unclear. See, *e.g.*, *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) ("Applying our analysis * * * to the facts of a particular case without the benefit of * * * lower court determinations is not a sensible exercise of this Court's discretion."). Second, even if contract formation or performance might be said to be the gravamen of some breach-of-contract claims, petitioners' claims do not appear to be among them. See pp. 10-12, *supra*. Further consideration of that issue therefore would be highly unlikely to change the result in this case. Third, to the extent that the courts of appeals disagreed before *Sachs* about how to apply the "based upon" requirement in breach-of-contract cases, the courts should be given an opportunity to consider the matter further in light

of *Sachs*. That consideration could result in changed or refined views that would obviate any disagreement.

In any event, petitioners have not identified a meaningful split in authority. See Pet. 18-20; Reply Br. 6-8. One of the decisions on which petitioners rely involved a dispute not only about an alleged breach of contract, but also about whether a binding agreement existed at all. See *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 15, 17-18 (1st Cir. 2013); see *id.* at 17 (stating that the action was "based upon" the "entry into contracts and then breach"). Another involved claims of misrepresentation during contract negotiations. See *Strata Heights Int'l Corp.* v. *Petroleo Brasileiro, S.A.*, 67 Fed. Appx. 247, 2003 WL 21145663, at *2-*4 (5th Cir.) (Tbl.), cert. denied, 540 U.S. 1047 (2003). In cases involving such facts, which are very different than those presented in this case, it would not be surprising for a court of appeals to conclude that the acts upon which the plaintiff's claim is based include the alleged formation of the contract. See *Sachs*, 136 S. Ct. at 396 ("[A]n action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit.").

Other decisions relied upon by petitioners did not expressly address whether formation and course of performance are in themselves acts upon which a plaintiff's breach-of-contract claim might be said to be "based." See *United World Trade, Inc.* v. *Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1236 (10th Cir. 1994) ("The only disputed issue here is whether the defendants' actions caused a 'direct effect' in the United States."), cert. denied, 513 U.S. 1112 (1995); see *id.* at 1237-1239 (analyzing whether defendants'

"alleged breach of contract," including their "refusal to supply any more oil under the contract," caused such a direct effect); see also *Skanga Energy & Marine Ltd.* v. *Petroleos de Venez., S.A.*, 522 Fed. Appx. 88, 89-90 (2d Cir. 2013) (summary order) (affirming district court's direct-effect ruling without any analysis); *UNC Lear Servs., Inc.* v. *Kingdom of Saudi Arabia*, 581 F.3d 210, 213, 218-219 (5th Cir. 2009) (discussing payments due and other financial harms in the United States, in addition to performance), cert. denied, 559 U.S. 971 (2010); *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212, 1216-1218 (11th Cir. 2005) (discussing whether "the government's actions which allegedly constituted a breach" gave rise to a direct effect in the United States). Still another conflated the question of what act the plaintiff's claim was based upon with the separate question of whether that act caused a direct effect in the United States. See *Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 575-576, 581-582 (7th Cir.) (suit for failure to make payments in the United States), cert. denied, 493 U.S. 937 (1989).[6]

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[6] In *Globe Nuclear Services & Supply GNSS, Ltd.* v. *AO Technsnabexport*, 376 F.3d 282 (4th Cir. 2004), in which the court of appeals stated that the action was based upon the "entrance into [the] contract * * * and subsequent repudiation thereof," *id.* at 288, nothing turned on whether the plaintiff's action was based upon the foreign state's breach alone or on both the formation and breach of the contract. The issue at stake was whether the action was based upon the specific relationship between the parties or on some larger "overall context" (in which event that context, involving "the entire framework by which Russia * * * agreed to dismantle * * * nuclear weapons," was more readily characterized as sovereign than commercial). *Id.* at 286-288 (citation omitted); see

Petitioners do cite (Pet. 15) a single, nonprecedential decision in which a court of appeals appears to have ruled that the plaintiff's straightforward breach-of-contract action was "based upon" the parties' course of performance and the negotiations leading to the formation of the contract. See *Transcor Astra Grp. S.A.* v. *Petroleo Brasileiro S.A.-Petrobras*, 409 Fed. Appx. 787, 790-791 (5th Cir.) (per curiam), cert. denied, 132 S. Ct. 113 (2011). But that decision discussed both clauses one and three and relied upon the one-element approach that this Court rejected in *Sachs*. See *ibid.* (identifying acts that "form the basis for at least one element of [the plaintiff's] claim," including "the existence of a valid contract"). In light of *Sachs*, any disagreement among the courts of appeals generated by use of a one-element approach does not have continuing significance.

B. Further Review Of The Court Of Appeals' Ruling On Whether Nonpayment Caused A "Direct Effect" In The United States Is Not Warranted

1. Clause three of the commercial-activity exception applies to an action that is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state" if "that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). In *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992), this Court held that "an effect is 'direct'" under clause three "if it follows 'as an immediate consequence of the defendant's . . . activity.'" *Id.* at 618 (citation omitted).

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id. at 286 (rejecting the more "capacious view" as inconsistent with *Nelson*).

The claims in *Weltover* were based upon Argentina's failure to make payments on government bonds that provided for payment "through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor." 504 U.S. at 609-610. As the bonds began to mature, Argentina determined that it lacked sufficient funds to make payment, and it unilaterally extended the bonds' maturity dates. *Id.* at 610. Certain bondholders who had designated their accounts in New York as the place of payment and received some interest payments there rejected that extension and demanded full payment in New York. *Ibid.* When Argentina failed to make payment, the bondholders sued, relying on the third clause of the commercial-activity exception. *Ibid.* This Court had "little difficulty concluding" that Argentina's extension had a "'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 618-619.

The conclusion of the court of appeals in this case that PDVSA's alleged failure to pay on the contracts did not have a "direct effect" in the United States (Pet. App. 20a-22a) is fully consistent with *Weltover*. Unlike the bonds in *Weltover*, the contracts here did not give the payee the unqualified right to demand payment in the United States. Instead, under the contracts, "PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its 'exclusive discretion' and 'judgment,' it 'deem[ed] it discretionally convenient.'" *Id.* at 21a (quoting C.A. App. 78, 82, 85).[7] Because the "alleged effect" in this case of non-

[7] In the courts below, petitioners questioned whether the PDVSA in fact had discretion to make payment in bolivars in

receipt of payment in the United States thus "depends solely on a foreign government's discretion," the court correctly concluded that the effect cannot be said to be "direct" within the meaning of the third clause—that is, to "flow[] in a straight line without deviation or interruption," *id.* at 22a (quoting *Princz* v. *Federal Republic of Ger.*, 26 F.3d 1166, 1172 (D.C. Cir. 1994), cert. denied, 513 U.S. 1121 (1995)), as "an immediate consequence" of the defendant's activity, *Weltover*, 504 U.S. at 618 (citation omitted).

2. Petitioners contend (Pet. 24-26) that the court of appeals' ruling diverges from the approach taken in the First, Second, and Sixth Circuits, where—petitioners say—"the parties' understanding of how they intended the contract to be performed and the parties' prior course of dealing" is "tak[en] into account" (Pet. 24) in determining whether payment was "supposed to" have been made in the United States, *Weltover*, 504 U.S. at 619. This case does not implicate any such divergence, however. None of the decisions on which petitioners rely involved a contract expressly reserving to a foreign state the discretion to choose a place of payment outside the United States, let alone a ruling that failure to make payment pursuant to such a contract nevertheless had a "direct effect" in the United States.

Venezuela under the circumstances. See, *e.g.*, D. Ct. Doc. 39, at 47 (Feb. 22, 2013). But petitioners do not ask this Court to disturb the court of appeals' interpretation of the parties' contracts in this regard, which was the premise of its ruling on "direct effect." Petitioners do not, for example, argue that as a legal matter the parties' expectations or course of conduct modified PDVSA's contractual right to make payment in Venezuela. It must therefore be taken as given for present purposes that PDVSA had the contractual discretion that the court of appeals described.

Following this Court's decision in *Weltover*, the courts of appeals—including the Second and Sixth Circuits—have consistently concluded that a foreign state's failure to make a payment under a contract does not cause a "direct effect" in the United States if the contract did not require payment in the United States or give the payee the right to designate the United States as the place of payment. See *Rogers* v. *Petroleo Brasileiro, S.A.*, 673 F.3d 131, 139-140 (2d Cir. 2012) (holding that nonpayment did not cause a direct effect because "there was no requirement that payment be made in the United States nor any provision permitting the holder to designate a place of performance"); *American Telecom Co.* v. *Republic of Leb.*, 501 F.3d 534, 540 (6th Cir. 2007) (finding no direct effect because "Lebanon never promised to pay American Telecom anything, and even the eventual contract payments to the winning bidder were to be deposited in a Lebanese bank"), cert. denied, 552 U.S. 1242 (2008); see also *Lu* v. *Central Bank of Republic of China (Taiwan)*, 610 Fed. Appx. 674, 675 (9th Cir. 2015) (finding no direct effect where "[t]he bonds did not require performance—i.e., payment of the bonds—in the United States"); *United World Trade*, 33 F.3d at 1237-1239 ("the payment provision of [the contract] does not provide a basis for finding that the defendants' activity had a 'direct effect' in the United States" because Paris was specified as the place of payment); *Samco Global Arms*, 395 F.3d at 1217 (finding no direct effect because under the contract "no monies or goods were due in the United States"); cf. *Virtual Countries, Inc.* v. *Republic of S. Afr.*, 300 F.3d 230, 239 (2d Cir. 2002) ("Every circuit court of which we are aware * * * has held * * * that an anticipa-

tory contractual breach occurs 'in the United States' * * * if performance could have been required in the United States and then was requested there.").[8]

The decisions on which petitioners rely (Pet. 24-26) are not to the contrary. In those decisions, courts of appeals simply attempted to ascertain, through a variety of means, whether or not a place of payment was ultimately agreed upon by the parties (either directly or through agreement that one party had the right to select a place). Thus, in *DRFP L.L.C.* v. *Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010), cert. denied, 132 S. Ct. 1140 (2012), the Sixth Circuit ruled that "by the terms of the [promissory] notes," as construed under the applicable Swiss law, the payee "was entitled to demand and enforce payment in Ohio." *Id.* at 516. In *Universal Trading & Investment Co.*, *supra*, the First Circuit looked to evidence that the defendant "would have performed its obligations under the Agreements in Massachusetts." 727 F.3d at 26; see *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887, 890, 896 (5th Cir.), cert. denied, 525 U.S. 1041 (1998). And in *United States Fidelity & Guaranty Co.* v. *Braspetro Oil Services Co.*, 199 F.3d 94 (2d Cir. 1999) (per curiam), the Second Circuit ruled that a foreign state's triggering of indemnity agreements (by giving notice that other parties had defaulted) had a direct effect in the United States because "[t]he indemnity agreements require payment in the United States, are governed by New York law, and invoke the jurisdiction of

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[8] See also, *e.g.*, *Hanil Bank* v. *PT. Bank Negara Indon.*, 148 F.3d 127, 129-130, 132 (2d Cir. 1998); *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811, 817-818 (6th Cir. 2002), abrogated on other grounds by *Samantar* v. *Yousuf*, 560 U.S. 305 (2010).

the United States District Court for the Southern District of New York."[9] *Id.* at 99; see *Skanga Energy*, 522 Fed. Appx. at 90 (affirming without analysis district court's decision concluding that a purchaser's pre-payment to a foreign state's New York bank accounts, at the request of the foreign state's agent, qualified as "direct effect" in the United States); see also *Skanga Energy & Marine Ltd.* v. *Arevenca S.A.*, 875 F. Supp. 2d 264, 267, 271-272 (S.D.N.Y. 2012) ("The direct effect requirement is satisfied where the parties to a transaction, including the sovereign defendant, specifically agree or specifically contemplate that payment will be made to a United States bank account, and the plaintiff's cause of action arises out of that transaction.").

Those decisions do not suggest that nonpayment causes a "direct effect" in the United States when a contract expressly reserves to the payor discretion to locate the place of payment outside of this country. None of those decisions involved such a circumstance, or intimated that the "the parties' understanding of how they intended the contract to be performed and the parties' prior course of dealing" (Pet. 24) trumped the existence of that kind of express contractual right. Accordingly, there is no reason to believe that the First, Second, or Sixth Circuit—or any other court of appeals—would reach a different result than that reached by the court below concerning the existence of a "direct effect" on the facts here.

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[9] Relying on the district court's decision in *United States Fidelity & Guaranty Co.*, petitioners contend that payment in New York was only "one potential vehicle" by which the defaulting parties could satisfy their obligations. Pet. 25. That is not how the court of appeals described the agreements.

3. Petitioners express concern (Pet. 31-32) that the court of appeals' decision will permit foreign states to "evade the jurisdiction of U.S. courts by including in the contract an escape clause reserving some unexercised discretion to perform elsewhere," even "where the parties' course of dealing indicates that performance was in fact reasonably expected to be made in the United States." But a company wishing to ensure that a foreign state's failure to make contractually required payments may be litigated in the United States need only insist upon a contract provision requiring payment in the United States. Thus, no change in the law is necessary to avoid "gamesmanship and abuse" (Pet. 32) or to give companies entering into contracts with foreign states "assurance that relief may be available in U.S. courts in predictable circumstances" (Pet. 30).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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