No. 15-698

IN THE

Supreme Court of the United States

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Petitioners,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Under the third clause (called the "direct effect clause") of the Act's commercial activity exception, "[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).

1. Whether, under the direct effect clause of the FSIA's commercial activity exception, the formation of a contract outside the United States is the particular conduct that constitutes the gravamen of a breach-of-contract claim, such that the claim is "based upon" that "act."

2. Whether, under the direct effect clause of the FSIA's commercial activity exception, a foreign state's failure to make contractual payments has a "direct effect in the United States" where the contract provides the foreign state with the absolute discretion to make payments outside the United States.

RULE 29.6 DISCLOSURE STATEMENT

Bolivarian Republic of Venezuela is a sovereign state and is not a corporation.

Petróleos de Venezuela, S.A., is a corporation organized under the laws of Venezuela. It is wholly owned by the Bolivarian Republic of Venezuela. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

PDVSA Petróleo, S.A., is a corporation organized under the laws of Venezuela. Petróleos de Venezuela, S.A. owns all of the outstanding stock of PDVSA Petróleo, S.A., and no publicly held company owns ten percent or more of its stock.

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INTRODUCTION AND SUMMARY

The Helmerich & Payne Petitioners ask this Court to review questions relating to the commercial activity exception of the Foreign Sovereign Immunities Act of 1976 (FSIA). Unlike Respondents' pending petition on the FSIA's expropriation exception, Helmerich & Payne's petition does not raise any issue that meets the Court's criteria for *certiorari*. Petitioners identify no genuine conflict with this Court's precedents or any still-existing circuit split. Rather, the issues on which Petitioners seek *certiorari* concern only the application of now-settled law to the facts of this case. Review of these issues is unwarranted.

Helmerich & Payne's petition concerns the contract claims at issue in this case. Those claims arise out of a wholly localized dispute centered in Venezuela with no connection to the United States. All of the contract claims arise out of agreements between Venezuelan entities. All of the contracts were negotiated, executed, and performed exclusively in Venezuela. All of the contracts are governed by Venezuelan law. And all of the contracts have forum selection clauses identifying Venezuela as the exclusive judicial forum for dispute resolution.

Petitioners allege that agencies or instrumentalities of the sovereign Bolivarian Republic of Venezuela failed to meet their payment obligations under certain oil-drilling contracts. That failure to pay is the gravamen of their breach-of-contract claims. Petitioners argue that U.S. courts have jurisdiction over those claims under the third clause of Section 1605(a)(2) of the FSIA. This clause, known as the "direct effect" clause, denies sovereign immunity to foreign states for claims "based * * * upon an act" that occurs "outside the territory of the United States in connection with a

commercial activity of the foreign state elsewhere," where "that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

A three-judge panel of the D.C. Circuit unanimously disagreed with Petitioners' jurisdictional argument. The court concluded that Petitioners had not identified any direct effect in the United States. App. 18a-23a. It reasoned that "the contracts gave H&P-V no power to demand payment in the United States," and that "PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its 'exclusive discretion' and 'judgment,' it 'deem[ed] it discretionally convenient.'" App. 21a. The court's holding accords with an unbroken and uniform line of direct effect clause jurisprudence since *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

Nevertheless, Petitioners argue that the court's analysis conflicts with the other circuits in two ways. First, they argue that, unlike the court of appeals below, some circuits have adopted a single-element test providing that a breach-of-contract claim is based upon any act necessary to establish an element of the claim. However, that test has never been adopted in the context of the *third*, direct effect, clause of the commercial activity exception—the only clause at issue here. To the contrary, the circuits have uniformly construed the direct effect clause as providing that a breach-of-contract claim is based upon only the particular act that breached the contract.

To the extent any circuit has applied the "based upon" language differently when construing the *other* two clauses of Section 1605(a)(2), this Court's recent decision in *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), has eliminated any putative conflict.

OBB Personenverkehr brought that contrary jurisprudence in line with the direct-effect-clause case law, by expressly rejecting the single-element test espoused by those courts (and by Petitioners here). The Court clarified that a claim is "based upon" the act that constitutes the gravamen of the suit, *i.e.*, the act by the foreign state that actually injures the plaintiff. *OBB Personenverkehr* thus confirms that the court of appeals properly focused its direct effect analysis on the acts that purportedly breached the oil-drilling contracts.

Second, Petitioners also claim that the D.C. Circuit's analysis concerning whether a direct effect has occurred "in the United States" conflicts with approaches taken by other courts of appeals. That is incorrect. The D.C. Circuit concluded that a breach of a contractual payment obligation has no direct effect in the United States where, as here, the plaintiff had no power to demand performance of the obligation in the United States because the express terms of the contract provide the foreign state with absolute discretion to discharge that obligation outside the United States. No court has held otherwise.

There is no conflict here for the Court to resolve. Helmerich & Payne's petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

The plaintiffs in this case are Helmerich & Payne de Venezuela, C.A. (H&P-V), and Helmerich & Payne International Drilling Co. (H&P-IDC) (collectively, the H&P plaintiffs). The defendants are the Bolivarian Republic of Venezuela (the Republic), Petróleos de Venezuela, S.A. (PDVSA), the Venezuelan national

oil company, and PDVSA Petróleo, S.A. (Petróleo) (PDVSA and Petróleo together, the PDVSA defendants, and collectively with the Republic, the Venezuelan defendants).

H&P-V is a corporation that was incorporated in Venezuela in 1954 and, at all times relevant, has had its principal office in Venezuela. App. 30a. It began performing oil and gas drilling operations for PDVSA or its affiliates in the 1970s and continued to do so until it chose not to renew the contracts in 2009. App. 30a, 33a. H&P-V was a party to the contracts at issue in this case. App. 31a.

H&P-IDC is H&P-V's corporate parent. App. 30a. It was not a party to any of the contracts that form the basis of H&P-V's contractual claims, and it has not asserted any contractual claims in this case.[1] *See* App. 32a-33a, 64a.

H&P-V and Petróleo entered into a series of contracts beginning in 2007 (the Drilling Contracts). App. 3a, 31a. The terms of the Drilling Contracts ranged from five months to one year and the parties repeatedly extended them for additional periods until H&P-V refused to extend them in 2009. App. 3a, 33a.

The Drilling Contracts were negotiated and executed in Venezuela. App. 18a. They provided that H&P-V was to perform drilling services in Venezuela. App. 3a. Under nine of the Drilling Contracts, H&P-V agreed to perform its oil drilling services in the eastern region of Venezuela (the Eastern Contracts). App. 3a, 31a. Under the remaining Drilling Contract, H&P-V agreed to

[1] H&P-IDC has never asserted any contract claim against Respondents. "Plaintiffs concede[d] that H&P-IDC does not have standing regarding the breach of contract claims." App. 64a. H&P-IDC is therefore not a proper Petitioner.

perform oil drilling services in the western region of Venezuela (the Western Contract). App. 3a, 31a.

Under each Drilling Contract, Petróleo had the option either to pay for H&P-V's services "entirely" in bolivars to H&P-V's bank account in Caracas, Venezuela, or to pay in dollars at H&P-V's bank account in Tulsa, Oklahoma. App. 21a; CAJA 76 (¶ 9 § 18.1), 79 (¶ 10), 83 (¶ 14 § 18.1).[2] And that discretion was maintained in the so-called "2008 agreement," which allegedly supplemented the Eastern Contracts. App. 54a; CAJA 82 (¶ 5). Accordingly, the last invoices that were paid by Petróleo under the Drilling Contracts were in bolivars to H&P-V's bank account in Venezuela. CAJA 29 (Compl. ¶ 56).

Each Drilling Contract contained a Venezuelan choice of law clause and forum selection clause whereby the parties agreed to resolve their disputes in the Venezuelan courts. App. 10a.

According to Petitioners, Petróleo and PDVSA failed to pay a number of invoices for oil drilling services that were performed by H&P-V in Venezuela pursuant to the Drilling Contracts. App. 3a, 33a-34a. Therefore, in 2009, Petitioners announced that H&P-V would cease operations on rigs upon expiration of the Drilling Contracts and not renew those contracts. App. 33a. "[U]pon completion of each contract, H&P-V disassembled the drilling rig and components, transported it, and stacked it in H&P-V's yards . . . ." CAJA 28 (Compl. ¶ 24); *see* App. 33a.

In June 2010, the Venezuelan National Assembly published a Bill of Agreement declaring that H&P-V's

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[2] All references herein to CAJA are to the court of appeals' Joint Appendix.

oil rigs and associated property were of "public benefit and good" and recommending that the National Executive expropriate that property. App. 4a-5a, 12a, 34a. The National Executive did so that same day. App. 34a. Expropriation proceedings were commenced in the Venezuelan courts in July 2010 to effectuate transfer of title, determine the fair value of the assets to be expropriated, and provide compensation to all interested parties. App. 6a. These proceedings are ongoing.

B. Procedural History

In September 2011, the H&P plaintiffs sued the Venezuelan defendants in the United States District Court for the District of Columbia, alleging jurisdiction under the FSIA, and asserting two claims for damages. App. 35a-36a. H&P-V asserted claims against PDVSA and Petróleo—but not the Republic—based on their contractual dispute. App. 6a. And both H&P plaintiffs brought a joint claim against the Republic, PDVSA and Petróleo for a taking in violation of international law. *Id*.

The H&P plaintiffs pleaded their claims under the FSIA because the Republic is a "foreign state" under 28 U.S.C. § 1603(a), and PDVSA and Petróleo are each an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b). Accordingly, the district court could have subject-matter jurisdiction only if one of the FSIA's exceptions to the Venezuelan defendants' foreign-sovereign immunity applied. For the contract claims, H&P-V invoked the third clause of the commercial activity exception, 28 U.S.C. § 1605(a)(2), and for the takings claim, the H&P plaintiffs relied on the expropriation exception, *id.* § 1605(a)(3). App. 35a-36a.

The Venezuelan defendants moved to dismiss all claims for lack of subject-matter jurisdiction. App. 6a. The district court granted the motions in part and denied them in part. App. 71a.

On the contract claims, the disputed question was whether plaintiffs had sufficiently alleged a direct effect in the United States within the meaning of the third clause of the commercial activity exception, 28 U.S.C. § 1605(a)(2). App. 50a. The district court held that the case was controlled by *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661 (D.C. Cir. 2010). App. 59a-60a. It interpreted *Cruise Connections* to hold that a direct effect occurs in the United States—and therefore the commercial activity exception to sovereign immunity applies—where the plaintiff alleges a breach of a contract that contemplates that third-party agreements may be performed in the United States. App. 59a-60a. And based on allegation by H&P-V that the Drilling Contracts contemplated such third-party agreements, the district court held that H&P-V had sufficiently alleged a direct effect under the commercial activity exception to sovereign immunity. App. 60a.

As for the takings claims, the district court denied in part and granted in part the Venezuelan defendants' motion to dismiss. App. 71a. It granted the motion with respect to H&P-V, App. 46a, and denied the motion with respect to H&P-IDC. App. 69a-70a.

Both sides appealed. App. 7a. The Venezuelan defendants appealed under the collateral-order doctrine. And H&P-V cross-appealed after the district court entered partial final judgment against it under Fed. R. Civ. P. 54(b).

The D.C. Circuit affirmed in part and reversed in part. App. 23a. A unanimous panel reversed the district court's finding of jurisdiction over the contract claims, holding that the alleged breaches did not cause a "direct effect" in the United States under the FSIA's commercial activity exception. *Id*.

The court of appeals found *Cruise Connections* inapposite. It explained that its holding in *Cruise Connections* rested not on the mere formation of third-party contracts in the United States, but rather on "*losses* caused by the *termination of* [the] contract with [Royal Canadian Mounted Police]." App. 19a (alteration in original) (emphasis in original) (quoting *Cruise Connections*, 600 F.3d at 664). Here, the court noted, H&P-V had conceded that none of the third-party contracts was breached. *Id*. Therefore, the court concluded that no "direct effect" occurred in the United States. App. 19a-20a.

The court was similarly unpersuaded by H&P-V's argument that its inability to renew the third-party contracts constituted a direct effect. App. 20a. H&P-V had already performed all of its obligations under the existing third-party contracts. *Id*. Its claim of third-party loss was therefore based on an expected loss from future contracts. *Id*. But H&P-V had not alleged any obligation to renew its contracts. *Id*.

The court distinguished *Kirkham v. Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), because that case involved the commercial activity exception's first clause. *Id*. And the court held that under the third clause the "direct effect" in the United States must "arise from the foreign state's allegedly unlawful act—here, the breach of contract." *Id*. (citing *Weltover*, 504 U.S. at 609).

Next, the court distinguished *Weltover*, because there Argentina was contractually obligated to pay in the United States. App. 20a-21a. Here, the court found, "the contracts gave H&P-V no power to demand payment in the United States. . . . PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its 'exclusive discretion' and 'judgment,' it 'deem[ed] it discretionally convenient.'" App. 21a. The court therefore concluded that, "where, as here, the alleged effect depends solely on a foreign government's discretion, we cannot say that it 'flows in a straight line without deviation or interruption.'" App. 22a.

Finally, the court distinguished this case from *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995). *Id*. Unlike in *McKesson*, here any interruption in commerce to and from the United States occurred not as a result of a breach by the PDVSA defendants, "but rather from Helmerich & Payne's decision to cease business in Venezuela." App. 22a-23a. And since the contracts had expiration dates of five months or one year, there was no guarantee of future business for H&P-V. App. 23a.

With respect to the expropriation claim, the court rendered a 2-1 decision. App. 8a-18a. The majority held that the district court erred in dismissing H&P-V's expropriation claim. *Id*. Relying on the Second Circuit's 53-year-old decision in *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962), the court held that the "domestic taking" rule did not apply where the complaint contained non-frivolous allegations that the taking was motivated by a discriminatory animus toward the sole shareholder of H&P-V. App. 11a-13a. Furthermore, the majority affirmed the district court's refusal to dismiss H&P-

IDC's expropriation claim, finding that H&P-IDC sufficiently alleged rights in the expropriated property, even though it did not own, possess, or have contractual rights to that property. App. 17a. Those rulings on the expropriation claim are not at issue here. The Venezuelan defendants have separately petitioned for this Court's review of those rulings on October 5, 2015. *See Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, No. 15-423 (Oct. 5, 2015).

REASONS FOR DENYING THE PETITION

THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENT, AS WELL AS THE DECISIONS OF OTHER COURTS OF APPEALS.

The FSIA establishes a presumption that a foreign state and its instrumentalities are immune from the jurisdiction of the courts of the United States unless one of the statutorily defined exceptions applies. *Weltover*, 504 U.S. at 610-11.

To overcome that presumption, H&P-V has relied exclusively on the exception to immunity under the third clause of Section 1605(a)(2) of the FSIA. Under that clause, foreign sovereign immunity can only be set aside if the cause of action is (1) "based . . . upon an act . . . in connection with a commercial activity of the foreign state elsewhere," and (2) that "act cause[d] a direct effect in the United States." *Weltover*, 504 U.S. at 611.

Contrary to Petitioners' view, the court of appeals' analysis with respect to both of those elements adheres to the jurisprudence of this Court and all of the other

circuits that have construed the direct effect clause, 28 U.S.C. § 1605(a)(2).

A. Courts Are Not Divided on How to Apply the "Based Upon" Test.

1. Courts Have Uniformly Applied the "Based Upon" Language in the Third Clause of Section 1605(a)(2) for Decades.

1. Petitioners' first question presented rests on the premise that the courts of appeals are in conflict over how to apply the "based upon" language in the commercial activity exception. They are not. Since this Court's decision in *Weltover*, the courts of appeals have consistently construed the "based upon" language in the third clause of Section 1605(a)(2). Under that clause, a claim is "based upon" the conduct that injures the plaintiff—in a breach-of-contract case, the breaching act. Thus, the focus of the direct effect inquiry in a breach-of-contract case is "whether the complaint alleges that [the foreign state] promised to perform specific obligations in the United States." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 600-01 (D.C. Cir. 2013) (analyzing whether Hungary had an obligation to return paintings to the United States); *see also Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 26 (1st Cir. 2013); *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1138 (9th Cir. 2012); *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 622 F.3d 513, 518 (6th Cir. 2010); *Samco Glob. Arms, Inc. v. Arita*, 395 F.3d 1212, 1217 (11th Cir. 2005); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 1000-01 (10th Cir. 2007); *Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 132 (2d Cir. 1998); *Rush-*

Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 582 (7th Cir. 1989).

Consistent with this rule, where a foreign state was obligated to *perform* in the United States, and fails to do so, courts have held that there is a direct effect in the United States based on the breach of that obligation. *de Csepel*, 714 F.3d at 601; *Universal Trading*, 727 F.3d at 26; *DRFP*, 622 F.3d at 518; *Hanil Bank*, 148 F.3d at 132; *Rush-Presbyterian*, 877 F.2d at 582. Conversely, where there is no obligation to perform in the United States, courts have recognized that there is no direct effect in the United States. *Terenkian*, 694 F.3d at 1138; *Samco*, 395 F.3d at 1217; *Orient Mineral*, 506 F.3d at 1000.

2. Petitioners contend that the D.C. Circuit's decision below conflicts with decisions from other courts of appeals. But even a cursory review of the supposedly conflicting cases disproves any conflict. The courts in Petitioners' cited cases applied Petitioners' preferred single-element test only under the *first* clause of the commercial activity exception, never the *third* clause. *See Kirkham*, 429 F.3d at 290; *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 891 (7th Cir. 1991); *Transcor Astra Grp. S.A. v. Petroleo Brasileiro S.A.-Petrobras*, 409 F. App'x 787, 790 (5th Cir. 2011); *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 686 (8th Cir. 2002). More to the point, whatever conflict may have existed on that front has since been resolved by this Court in *OBB Personenverkehr*. 136 S. Ct. at 396. *See infra* at 15 (Section A.2).

As for the cases that Petitioners cite where the direct effect clause was also at issue, they do not help Petitioners either. The courts in those cases, just like the court of appeals below, determined the existence of a direct effect in the United States by looking to the

act by the foreign state that allegedly caused the plaintiff's injury. *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 41 (D.C. Cir. 2014) (Kenya's failure to pay a reward to plaintiff); *Terenkian*, 694 F.3d at 1138 (Iraq's cancellation of the contracts); *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007) (Congo's alleged execution of agreements as part of an "elaborate scheme to thwart legitimate creditors"); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998) (Bank of China's failure to remit funds to plaintiff's bank account). Contrary to Petitioners' contention, no court has ever held that the formation of a contract outside of the United States—as opposed to the action that constitutes the breach of that contract—can by itself give rise to a "direct effect" in the United States.

3. Petitioners' position also happens to be wrong. If their view were the law, a foreign state could be subject to jurisdiction even in a case where all of its performance obligations were outside the United States. (So, according to Petitioners, even where the PDVSA defendants did nothing at all in the United States, and were not required to perform any obligations in the United States, jurisdiction still lies because the creation of the contracts created some economic activity between the plaintiff and third parties in the United States.) Yet all of the case law since *Weltover* has uniformly focused on "whether the complaint alleges that [the foreign state] promised to perform specific obligations in the United States." *de Csepel*, 714 F.3d at 600-601. Petitioners would render that jurisprudence a nullity. And that outcome would have serious ramifications.

It would subject a foreign state to jurisdiction in every case where its counterparty performed some

activity in the United States, regardless of whether the sovereign defendant had any contacts with the United States or performed any acts here itself. That would turn the jurisdictional analysis on its head, making the actions of the *plaintiff* in the United States the focus of the inquiry, rather than the activities by the *defendant*, and the effects of those activities, in the United States. And it would overturn well-established precedent, which provides that courts may only look to "the foreign sovereign's actions, and not the plaintiff's" to determine whether there was a direct effect in the United States. *Westfield v. Fed. Republic of Germany*, 633 F.3d 409, 417 (6th Cir. 2011), *accord Am. Telecom Co. v. Republic of Lebanon*, 501 F.3d 534, 540-41 (6th Cir. 2007); *see also United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994) (applying the well-established due process principle that unilateral activity by a plaintiff or a third party cannot form the basis of jurisdiction under the direct effect clause).

Furthermore, Petitioners' rule would be in direct conflict with well-settled due process principles—principles that Congress had in mind when drafting the FSIA. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 90 (D.C. Cir. 2002). In fact, the legislative history of the FSIA specifically states that "[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied" in the commercial activity provision. H.R. Rep. No. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). And the law was then, and continues to be, that the plaintiff's own actions cannot be the basis for jurisdiction. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("Jurisdiction is proper . . .

where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection with the forum State.'" (emphasis in original)); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."). That is what Congress intended when it drafted the statute. Petitioners' theory flouts that intention. The court of appeals did not.

Consistent with that legislative intent, and in harmony with every circuit decision since *Weltover*, the court of appeals' direct effect analysis turned on the act by the PDVSA defendants that purportedly caused injury on H&P-V—their alleged failure to make payments required by the Drilling Contracts. That is the act upon which the contract claims are based.

2. In Any Event, the Court's Recent Decision in *OBB Personenverkehr* Has Settled Any Issue Regarding the "Based Upon" Language.

Petitioners' arguments suffer another fatal flaw: they have just been rejected by this Court in *OBB Personenverkehr*.

In *OBB Personenverkehr*, an individual, who had suffered injuries when trying to board a train in Austria, sued the Austrian railway operator, asserting a series of tort claims. 136 S. Ct. at 393. To establish commercial activity by the foreign state in the United States under the first clause of § 1605(a)(2), the plaintiff relied exclusively on the train pass (the "Eurail pass") that she purchased in the United States to board the train in Austria. *Id.* That purchase, she

claimed, was the act upon which her tort claims were based. The Ninth Circuit *en banc* court agreed. Relying on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1985), the court held that the plaintiff's tort claims were based upon the sale of the Eurail pass because the sale of the pass established one of the elements of each of the claims. *Id.* at 394-95.

This Court disagreed. It held that the Ninth Circuit had misinterpreted *Nelson*—a decision that "is flatly incompatible with a one-element approach." *Id.* at 396. "*Nelson* instead teaches that an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Id*. In *Nelson*, the gravamen of the suit had been "the Saudi sovereign acts that actually injured [the plaintiffs]." *Id*. Applying *Nelson*'s rationale to the facts before it, the *OBB Personenverkehr* Court found that, although the purchase of the Eurail pass was *an element* of the plaintiff's tort claims, the claims were not *based upon* that purchase. *Id.* at 395. The claims instead were based upon the injuries suffered by the plaintiff at the railway in Austria. *Id.* at 396. That was the "gravamen" of the claims. *Id*.

OBB Personenverkehr has now clarified that the "based upon" language should be applied to the first clause in the same way that courts have long applied it in relation to the third clause. Thus, "based upon" should have the same meaning under each clause of the commercial activity exception. Indeed, the syntactic structure of the provision does not allow for a different interpretation with respect to each clause.

Consistent with *OBB Personenverkehr*, the "act" that is alleged to have caused a direct effect under the third clause must be the "gravamen" of the claim, *i.e.*, the act by the foreign state that actually injured the

plaintiff. The mere formation of a contract cannot be the gravamen of a breach-of-contract case—in the same way that, in *OBB Personenverkehr*, the purchase of the Eurail pass was not the gravamen of the tort claims—because that was not the act that injured the plaintiff. The act that is alleged to have injured a plaintiff in any breach-of-contract case is the act constituting the breach.

Thus, *OBB Personenverkehr* has settled any supposed conflict with respect to how the "based upon" language should be applied under the commercial activity exception. And it confirms that the court of appeals below got it right when it found that the "direct effect" must arise from the purported breach of the Drilling Contracts.

B. There Is Also No Circuit Split Over Whether There Can Be a Direct Effect When There Is No Obligation to Perform in the United States.

Petitioners ask the Court to review a second question about whether a failure to make a payment can have a "direct effect" in the United States where the contract provides the foreign state with the discretion to make that payment elsewhere. There is no basis for this Court to grant review of that question because the courts are not divided on the question.

In line with *Weltover*, the courts of appeals consistently hold that, where performance cannot be required in the United States, a breach of that obligation cannot constitute a "direct effect" in the United States. *Odhiambo*, 764 F.3d at 40; *Lu v. Cent. Bank of Republic of China (Taiwan)*, 610 F. App'x 674, 675 (9th Cir. 2015); *Westfield*, 633 F.3d at 417-18; *Kensington*, 505 F.3d at 158; *United World Trade*, 33

F.3d at 1237. *Compare Universal Trading*, 727 F.3d at 26 (finding a direct effect where performance was required in the United States); *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 218-19 (5th Cir. 2009) (same); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1305 (11th Cir. 2000) (same); *Rush-Presbyterian*, 877 F.2d at 581-82 (same).

Petitioners argue otherwise, claiming that what matters is the parties' course of past performance or subjective expectations. Their authorities do not support their argument. No court has ever found a "direct effect" in the United States based on the breach of an obligation where, as in this case, the plaintiff had no power to demand performance in the United States and the foreign state had complete discretion to discharge its obligations outside the United States. Where the contract speaks to the place of performance, that language controls.

In the one case cited by Petitioners where the court assessed the expectations of the parties in order to determine the place of performance, the contract was silent on where performance was due. The court therefore had to look beyond the language of the contract to supply the missing term. *Universal Trading*, 727 F.3d at 26.

None of the other cases cited by Petitioners contains an analysis of the parties' past performance or expectation to determine the place of performance. Instead, in each of those cases, there was a distinct variable—such as an independent implicit agreement or wrongful act—that connected the payment obligation to the United States. *See DRFP*, 622 F.3d at 517 (finding the parties implicitly agreed to leave it to plaintiff to demand payment anywhere); *Skanga Energy & Marine Ltd. v. Petróleos de Venezuela, S.A.*,

522 F. App'x 88, 90 (2d Cir. 2013) (plaintiff sought refund of funds deposited in New York at defendant's instruction); *U.S. Fidelity & Guar. Co. v. Braspetro Oil Servs. Co.*, 199 F.3d 94, 97-98 (2d Cir. 1999) (defendant's alleged wrongful act triggered plaintiff's obligation to pay indemnity in the United States); *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147 (D.C. Cir. 1994) (focusing on the absence of a contractual obligation to perform in the United States). Petitioners simply lack support for their argument that an express agreement entitling the foreign state to decide the place of payment can be overridden by the counterparty's expectations or by past performance.

In any event, Petitioners' argument on the parties' intent or understanding that dollar payments in the United States were expected in the United States is not borne out by the facts. According to the complaint, the last payments by the PDVSA defendants under the drilling contracts were in bolivars in Venezuela. CAJA 29 (Compl. ¶ 56). The PDVSA defendants made those payments in accordance with their absolute right to choose to deposit payments in bolivars in Venezuela. App. 21a. Thus, Petitioners have never claimed that those payments should have been made in the United States. To the extent that Petitioners allege that H&P-V needed dollars to pay its U.S. suppliers, that allegation is contradicted by the admission in the complaint that H&P-V was able to fulfill its payment obligations with those suppliers and fully perform the drilling contracts. *See* App. 20a.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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