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

SUPPLEMENTAL REPLY BRIEF FOR PETITIONERS

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
BLAKE C. ROBERTS
MARIA L. BANDA
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

STATUTES

INTRODUCTION

As a direct result of the formation and performance of petitioners' drilling contracts with respondents, petitioners "routinely entered into third-party agreements with vendors, suppliers, and services companies in the United States"; respondents "approved many invoices requiring payment in U.S. Dollars to [petitioners'] Tulsa, Oklahoma bank account"; and respondents made dozens of payments totaling tens of millions of dollars to that U.S. account. Pet. App. 55a-56a. Despite these substantial direct effects, the court of appeals concluded that petitioners' breach-of-contract claims have no nexus to the United States.

To reach that conclusion, the court held that petitioners' contract claims are not "based upon" the contracts' formation or performance, and that the direct effects of those acts therefore cannot support jurisdiction under the commercial-activity exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1605(a)(2). Instead, the court held that petitioners' claims are "based upon" only respondents' "allegedly unlawful act—here, the breach of contract." Pet. App. 20a.

The government concedes (at 8) that *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015)—decided after the petition was filed—"governs the analysis of which 'act' the breach-of-contract claims in this case are 'based upon.'" Under this Court's ordinary practice, the parties should have an opportunity to litigate the jurisdictional question under that newly announced standard, and the court of appeals should be permitted to apply it. *Cf. Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) (noting "ordinary practice of remanding" for consideration "under the proper standard").

The government urges the Court to depart from that ordinary practice based on its supposition that petitioners' claims "do not appear" to satisfy *Sachs*. *E.g.*, U.S. Br. 12, 13. But the government's assumptions about the facts of this case are simply wrong, and cannot be relied upon. Moreover, the government's contentions vacillate between conflicting interpretations of *Sachs*, misapply those interpretations to this case, and mischaracterize petitioners' position. The government's erroneous analysis confirms that applying *Sachs* requires more careful evaluation.

Fairness dictates that petitioners—to whom respondents owe tens of millions of dollars—should have the opportunity to show that their claims satisfy the new standard articulated in *Sachs*. The proper application of *Sachs* to a breach-of-contract claim is a novel and important question. There is good reason to expect that the D.C. Circuit will find that under *Sachs*, petitioner's breach-of-contract action is "based upon" the contract. The Court should remand for the court of appeals to decide that issue. Alternatively, the Court should grant review to resolve the circuits' disagreements concerning the application of the "based upon" and "direct effects" tests.

I. THE JUDGMENT SHOULD BE VACATED FOR CONSIDERATION UNDER *SACHS*

The government surmises (at 12) that remanding for application of *Sachs* would "serve no useful purpose." That is wrong, and the government's errors illustrate why a more considered examination is necessary.

First, the government's interpretation of *Sachs* is internally inconsistent. At times, the government argues (at 9, 10-11) that *Sachs*'s "gravamen" test focuses

on the acts of the defendant that are alleged to be "wrongful" or injurious. Elsewhere, the government says (at 11-12, 14) the "gravamen" test turns on what issues are in "dispute." Even if those characterizations could be reconciled, neither correctly applies *Sachs*.

Sachs does not hold that in all actions claims are "based upon" only the conduct alleged to be "wrongful." The opinion's references to "wrongful" or "negligent" conduct accompany discussion of the underlying tort claim, *see* 136 S. Ct. at 396, and cannot be reflexively superimposed on breach-of-contract claims—particularly given this Court's disclaimer of any intention to resolve situations not before it. *Id.* at 397 n.2. As the government acknowledged in *Sachs*, "[t]he focus of tort claims is ordinarily on the breach of a duty of care and on the resulting injury, rather than on the circumstances giving rise to the duty in the first instance." U.S. Br. 29, *Sachs*, No. 13-1067 (April 24, 2015). In contract disputes like this one that is often not the case. Moreover, *Sachs* nowhere suggests that the gravamen of a claim turns on which issues the defendants happen to contest. That approach would be difficult to administer consistently or predictably—certainly a plaintiff at the outset will not necessarily know which of its allegations will be disputed—and would render jurisdiction susceptible to post-filing manipulation by defendants.

Second, in applying its different characterizations of *Sachs*, the government is simply wrong about the record in this case. The government assumes (at 12) that respondents do not dispute the enforceability of the drilling contracts or their obligation to make payments, but no answer has been filed, and respondents have not conceded either point. The government also appears to assume (*id.*) that respondents' breach *is* in

dispute; but respondents have never denied that they failed to make the payments at issue. Indeed, there is no possible factual defense to that claim. So far, respondents dispute only whether there is a jurisdictional nexus with the United States. The government's focus on the issues in dispute, untenable as a general matter, is thus particularly incoherent here. Certainly, an issue of this importance—to petitioners and all U.S. companies doing business with foreign sovereigns—should not be decided on the basis of the government's hastily formed and mistaken impression of what the gravamen of this case "appears" to be, particularly when the parties have not briefed that question. U.S. Br. 12, 13.

Third, even while stretching to scuttle petitioners' claims, the government cannot avoid describing the "gravamen" of this case without reference to the very acts of contract formation and performance that petitioners contend are foundational. The government describes the gravamen as respondents' "failure to pay amounts that *PDVSA owed H&P-V under the contracts for work that H&P-V performed.*" U.S. Br. 10 (emphasis added).

The duties PDVSA owed and H&P-V's performance under the contracts are foundational to petitioners' claims because respondents' failure to pay, "standing alone," "entitle[s] [H&P-V] to nothing under [its] theory of the case." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358 (1993). As the government tacitly recognizes, petitioners must also show that respondents had a contractual duty to make the payments. Because proving that duty is central to petitioners' claim, this case is fundamentally different from *Sachs* and *Nelson*, where the acts the plaintiffs put at issue were peripheral. *See Sachs*, 136 S. Ct. at 136; *Nelson*, 507 U.S. at 358. Con-

tract formation and performance here are the very heart—the gravamen—of the claim.

Finally, the government mischaracterizes petitioners' position by conflating the acts petitioners identify as the basis of their claims with the asserted direct effects of those acts, analytical imprecision that further confirms the unreliability of its "based upon" analysis. For example, the government suggests (at 11) that petitioners view the gravamen of the claims as including respondents' repeated payments to the United States, their demands that H&P-V obtain American equipment, and the resulting flow of commerce in the United States. That is wrong. Petitioners pled those facts as some of the many *direct effects* in the United States *caused by* the formation and performance of the contract. It is the latter acts of contract formation and performance that petitioners' claims are "based upon."

Interpreting *Sachs* and applying it in this case is thus more complicated than the government's facile treatment would suggest. Just as choice-of-law principles governing contract disputes differ markedly from those governing tort claims due to important distinctions between tort and contract, the "gravamen" test will almost certainly apply differently in this case than in *Sachs*. Cert. Reply 4-5.

Moreover, the issue is important, particularly in light of the government's concession (at 10 n.5) that—contrary to the D.C. Circuit's view (Pet. App. 20a)—"based upon" carries the same meaning in the third clause of the commercial-activity exception as in the first two. That recognition significantly elevates the implications of the D.C. Circuit's rule—implications the government completely ignores. For example, if breach-of-contract actions are not "based upon" the

contract, as the D.C. Circuit holds and the government contends, then U.S. courts would have no jurisdiction under the first or second clauses of the commercial-activity exception even where a foreign sovereign enters into and performs a contract on U.S. soil, so long as the breach occurs abroad without direct effects in the United States. *See* Pet. 31; 28 U.S.C. §1605(a)(2) (conferring jurisdiction when action is based upon "commercial activity carried on in the United States" or "an act performed in the United States"). Consistent with the Court's normal procedures, the parties and the court of appeals should address those issues in the first instance.

II. ALTERNATIVELY, THE COURT SHOULD GRANT REVIEW

Instead of remanding for consideration under *Sachs*, the Court may wish to grant the petition to remedy circuit splits regarding (1) what acts a breach-of-contract claim is "based upon," and (2) when a "direct effect" results from a party's failure to make payments or perform in the United States. The government's discussion confirms rather than dispels the lower courts' disagreements.

A. The First Question Should Be Granted

The government concedes that some circuits hold that breach-of-contract claims can be "based upon" the formation of the contract. U.S. Br. 14; *see also* Pet. 18 (discussing *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10 (1st Cir. 2013); *Strata Heights Int'l Corp.* v. *Petroleo Brasileiro, S.A.*, 67 F. App'x 247 (5th Cir. 2003)). For example, in *Skanga Energy & Marine Ltd.* v. *Petróleos de Venezuela, S.A.*, 522 F. App'x 88, 90 (2d Cir. 2013), the Second Circuit affirmed the district

court's holding that the plaintiff's advance payments to PDVSA and its agent constituted a 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 advance payments—made before PDVSA breached the contract—obviously could not have been the direct effect of the breach. Cert. Reply 6. Similarly, and contrary to the government's assertion (at 14), the Tenth Circuit expressly stated in *United World Trade, Inc.* v. *Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1239 (10th Cir. 1994), that "[t]he basis or foundation of the action in [a breach-of-contract] case was a contract entered into by the parties in Moscow." *See also Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 582 (7th Cir. 1989) (considering contract execution in the "based upon" analysis).

That some courts have considered breach-of-contract claims to be based upon contract formation, performance, *and* breach does not mitigate the circuit split. *Cf.* U.S. Br. 14-15. In those courts, direct effects in the United States of acts of contract formation can support jurisdiction under the commercial-activity exception. In the D.C. Circuit, they cannot. Pet. 18-20; Cert. Reply 6-8.

For example, in *Globe Nuclear Services & Supply (GNSS), Ltd.* v. *AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004), the Fourth Circuit considered the "particular conduct" on which the plaintiffs' claim was "based." *Id.* at 285, 286. Reasoning that the plaintiff would "need to prove that a valid contract exists …, that [the defendant] has unilaterally declared that it will no longer perform its obligations under the contract, *and* that this declaration … constitutes a breach," the Fourth Circuit concluded that "[f]or purposes of section

1605(a)(2), [the plaintiff's] action is 'based upon' nothing more *or less* than [the defendant's] entrance into [the] contract … and subsequent repudiation thereof." *Id.* at 287, 288 (emphases added). The government's dismissal (at 15 n.6) of that decision contravenes the Fourth Circuit's emphatic language, which cannot be squared with the D.C. Circuit's analysis in this case.

Finally, the government concedes (at 16) that in *Transcor Astra Grp. S.A.* v. *Petroleo Brasileiro S.A.-Petrobras*, 409 F. App'x 787, 790-791 (5th Cir. 2011) (per curiam), the Fifth Circuit "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." The government notes (*id.*) that *Transcor* "discussed both clauses one and three" of the commercial-activity exception, but that distinction makes no difference; as the government concedes (at 10 n.5), "based upon" carries the same meaning across each clause. The fact that *Transcor* applied a pre-*Sachs* understanding of *Nelson* (*cf.* U.S. Br. 16) only begs the question presented—how *Sachs* applies in a breach-of-contract case.

This case is a compelling vehicle for resolving that question. Contrary to the government's suggestion (at 10, 13), the panel necessarily considered the "based upon" issue in holding that the only "direct effects" that could support jurisdiction in this case are those resulting from respondents' breach. Pet. App. 20a. That holding was wrong, and its implications extend to any American business that faces a commercial dispute with a foreign sovereign's enterprise. If the Court does not remand for application of *Sachs*, it should grant review to consider this question outright.

B. The Second Question Should Be Granted

As to the direct effects of respondents' breach, the panel concluded that—despite the parties' shared expectations and course of performance—respondents' missed payments caused no direct effect in the United States because respondents would have had discretion to pay elsewhere under certain conditions, had they ever invoked that discretion (which they did not). That holding conflicts with decisions in other circuits holding that a failure to pay or perform in the United States can constitute a "direct effect in the United States" even where no contract unequivocally required payment or performance in the United States. Pet. 22-26.

In opposing review of this question, the government asserts (at 19) that, following *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), courts "have consistently concluded that a foreign states' 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." This argument conflates what courts have treated as *sufficient* with what they have treated as *necessary*. To be sure, many decisions recognize that breach of an unequivocal contractual mandate to pay in the United States would cause a direct effect in the United States; where the D.C. Circuit diverges from other circuits is in treating that fact as a necessary prerequisite to jurisdiction. Pet. 22-26; Cert. Reply 9-11. Unlike the D.C. Circuit, other circuits look beyond the express contractual duties to determine whether a sovereign defendant's breach of contract caused a direct effect in the United States. *See* Pet. 24-25; *see also, e.g.*, *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998) (finding direct ef-

fect from defendant's failure to make payments in United States; although contract was conditional as to place of payment, defendant's "customary practice" was to make payments wherever payee specified).

In attempting to reconcile the circuits' approaches, the government misconstrues the decisions it cites. For example, the government characterizes *Rogers* v. *Petroleo Brasileiro, S.A.*, 673 F.3d 131 (2d Cir. 2012), as 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.'" U.S. Br. 19. But the Second Circuit did not treat that factor as dispositive. In the *very next sentence*, not quoted by the government, the court considered whether anything in the bonds' language "suggest[ed] a reasonable understanding that the United States *could be a possible place of performance*." 673 F.3d at 140 (emphasis added). The court found no direct effect because "payment was not *contemplated* in the United States." *Id.* (emphasis added).

The government similarly misconstrues *American Telecom Co.* v. *Republic of Lebanon*, 501 F.3d 534 (6th Cir. 2007). There, Lebanon disqualified American Telecom from consideration for a contract. The Sixth Circuit held that Lebanon's nonpayment of funds under the contract was not a direct effect of the disqualification. *Id.* at 540. The court reasoned that "the only immediate consequence of Lebanon's activity was American Telecom's disqualification from the short list of qualified bidders; everything else [wa]s entirely derivative of that action, and therefore not an 'immediate consequence' and not a direct effect." *Id.* at 541. Where the hypothetical contract would have been performed was thus irrelevant to the court's analysis.

The government also relies on cases that had no plausible tie to the United States at all, let alone the pattern of repeated payments present here. In *Lu* v. *Central Bank of Republic of China (Taiwan)*, 610 F. App'x 674, 675 (9th Cir. 2015), the plaintiff theorized that redeeming bonds in Taiwan would have a direct effect in the United States because the defendant bank would have to "access gold in the United States." The Ninth Circuit rightly dismissed this as "implausible." *Id.* Similarly, in *United World Trade*, 33 F.3d at 1238-1239, the contracts required payment in locations *outside* the United States; the fact that the payments were to be made in U.S. dollars did not create a direct effect. And in *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212, 1218 (11th Cir. 2005), the "only tie" to the United States was "the plaintiff, a non-contracting party, who purchased the rights to the contract some 15 years after its execution."

These decisions contrast sharply with this case, where the drilling contracts contemplated payment in the United States, both parties understood that payment in the United States was necessary to the success of the enterprise, and respondents in fact paid tens of millions of dollars to petitioners' U.S. bank account. Pet. 5-7. On these facts, the result would almost certainly have been different had this case arisen in a circuit that considers the parties' practices and expectations—not merely the unequivocal contractual requirements—to determine whether money "was supposed to have been delivered" in the United States, *Weltover*, 504 U.S. at 619.

CONCLUSION

The petition should be granted, the judgment vacated, and the case remanded for application of *Sachs*. Alternatively, the petition should be granted.

Respectfully submitted.

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
BLAKE C. ROBERTS
MARIA L. BANDA
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

JUNE 2016