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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition remains accurate.

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Respondents do not dispute that PDVSA availed itself of U.S. markets by requiring H&P-V to obtain specified equipment from American manufacturers, or that the contracts contemplated involvement of U.S. personnel. To fund that U.S. commerce, PDVSA promised to make payments in U.S. dollars to H&P-V's U.S. bank accounts; never exercised its discretion to rescind that agreement; routinely approved invoices requiring payments in the United States; and in fact paid approximately $65 million to H&P-V's U.S. account. When PDVSA stopped making payments due under the contract that H&P-V needed to pay U.S. vendors, it left H&P-V's U.S. parent to foot the bill.

These facts—undisputed for present purposes, App. 30a—present two important questions concerning the FSIA's commercial activity exception as to which the courts of appeals are divided. The first question (what conduct H&P-V's claims are "based upon") should be decided under the standard this Court articulated in *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015). Respondents offer no reason why this case should not be remanded for that purpose. Respondents similarly fail to refute the circuit conflict as to the second question (whether PDVSA's missed payments in the United States were a "direct effect" of its breach).

Respondents also do not dispute the importance of the questions presented and the need for uniformity in the application of the commercial activity exception. Indeed, respondents' cramped reading of *Sachs* and their suggestion that this dispute has "no connection to the United States" underscore the need for review. Under respondents' view, a foreign sovereign can form a contract in the United States that establishes a continuous course of commerce with the United States, but evade U.S. jurisdiction so long as it breaches the contract abroad without a direct effect in the United States. And under respondents' view, a foreign sovereign can promise and make millions of dollars of payments in the United States, but then stop making payments without causing a direct effect in the United States—so long as its promise as to place of payment includes a loophole. The Court should grant the petition to confirm that the FSIA does not permit the abuse and gamesmanship respondents' view would yield.

I. THE JUDGMENT SHOULD BE VACATED AND THE CASE REMANDED IN LIGHT OF *SACHS*

To apply the commercial activity exception, a court must first "identify[] the particular conduct on which the [plaintiff's] action is 'based.'" *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 356 (1993) (quoting 28 U.S.C. § 1605(a)(2)). In *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015)—decided after the petition in this case was filed—this Court held that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Id.* at 396; *see also id.* (court should look to the "core of the[] suit"); *id.* at 395 ("the 'basis' or 'foundation' for a claim"); *id.* at 397 ("the 'essentials' of [the] suit"). Applying that standard to the tort suit before it, the Court concluded that the "core of the[] suit" comprised the acts of the foreign sovereign that actually injured the plaintiffs. *Id.* at 396. At the same time—and contrary to respondents' reading, Opp. 16-17—the Court "cautioned" that the "gravamen" of a claim might differ in other cases: "Domestic conduct with respect to different types of commercial activity may play a more significant role in other suits[.]" 136 S. Ct. at 397 n.2.

Here, the court of appeals never examined the "gravamen" or "core" or "'essentials'" of H&P-V's breach-of-contract action. Had it done so, the court would have had to consider whether the formation of the drilling contracts—including 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—were part of the "core" or "gravamen" of H&P-V's efforts to enforce PDVSA's contractual obligations. Instead, the court asserted without explanation that H&P-V's claim could be "based upon" only "the foreign state's alleged-

ly unlawful act—here, the breach of contract." Pet. App. 20a. In doing so, the court disregarded circuit precedent suggesting a different approach solely on the ground that the precedent concerned the first clause of the commercial activity exception while this case concerns the third, *id.*—an analysis that even respondents concede was erroneous, Opp. 16 ("'[B]ased upon' should have the same meaning under each clause of the commercial activity exception."). Remand is therefore necessary so that the standard articulated in *Sachs* can be applied to this case. Pet. 17 (remand warranted "if this Court were to hold [in *Sachs*] that a claim is 'based upon' those acts that form the 'gravamen' of a claim or some similar subset of significant elements").

Applying *Sachs*, there is good reason to think the court of appeals would decide in H&P-V's favor. Unlike the tort suits at issue in *Sachs* and *Nelson*—in which the duties were imposed by law and the dispute focused on the tortious conduct and resulting injury, *Sachs*, 136 S. Ct. at 396-397—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. *See, e.g.*, *Frigaliment Importing Co.* v. *B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (Friendly, J.) ("The issue is, what is chicken?").

Choice-of-law principles illustrate this distinction between tort and contract. Under the *Restatement (Second) of Conflict of Laws*, courts determine the jurisdiction with the most significant relationship to the dispute by examining particular contacts between the dispute and each relevant jurisdiction. *Restatement (Second) of Conflict of Laws* §§ 6, 145, 188 (1971). In tort cases, the relevant contacts include "the place

where the injury occurred" and "the place where the conduct causing the injury occurred," but not the place where the duty of care arose. *Id.* § 145(2). In contract cases, in contrast, relevant contacts include "the place of contracting" and "the place of negotiation of the contract." *Id.* § 188(2). These distinctions illustrate that, for breach-of-contract cases, establishing the duty that was owed—through contract formation and performance—forms part of the basis of the claim. Under *Sachs*, the court of appeals would likely conclude that the "gravamen" of H&P-V's breach-of-contract claims includes more than PDVSA's breach. *Cf. Nelson*, 507 U.S. at 358 (contract leading to plaintiffs' injuries was "not the basis for" their tort suit where plaintiffs "ha[d] not, after all, alleged breach of contract"). The case should be remanded for that inquiry.

II. Alternatively, This Court Should Grant The First Question To Provide Needed Guidance In Breach-Of-Contract Cases

While *Sachs* provides important guidance on the application of the "based upon" test to tort claims, it does not resolve existing division over what acts a breach-of-contract action is "based upon." *See Sachs*, 136 S. Ct. at 397 n.2; Pet. 17-21. Rather than remanding, the Court might wish to grant review to remedy this conflict and address the application of *Sachs* in the breach-of-contract context.

As the petition shows (at 18-20), lower courts have reached divergent results in assessing what conduct a breach-of-contract claim is "based upon," with some courts treating breach-of-contract claims as based solely upon acts that breached the contract, and other courts considering additional acts such as contract formation or performance.

Respondents seek to minimize the split (Opp. 11-13), but they fail to acknowledge that while the D.C. Circuit and Ninth Circuit have held breach-of-contract actions to be "based upon" only the breach, decisions from the First, Fourth, Fifth, Seventh, and Eleventh Circuits have found that such actions are also "based upon" the formation or performance of the contract, Pet. 18-20. PDVSA itself was a defendant in one such case. *Skanga Energy & Marine Ltd.* v. *Arevenca S.A.*, 875 F. Supp. 2d 264 (S.D.N.Y. 2012), *aff'd sub nom. Skanga Energy & Marine Ltd.* v. *Petróleos de Venezuela, S.A.*, 522 F. App'x 88 (2d Cir. 2013). There, the plaintiff sued PDVSA and its agent to obtain a refund of millions of dollars the plaintiff had paid in advance for oil that PDVSA never delivered. *Id.* at 267-268. PDVSA had instructed the plaintiff to make those advance payments to PDVSA's bank accounts in the United States so that PDVSA could use the funds in its U.S. operations. *Id.* at 267. Finding the commercial activity exception applicable, the district court held that the advance payments constituted a direct effect in the United States of the parties' agreement. *Id.* at 267, 271-272. "For substantially the reasons stated by the District Court," the Second Circuit agreed. *Skanga*, 522 F. App'x at 90. The advance payments could not have been the direct effect of the breach—the failure to deliver the promised oil—because they were made before PDVSA breached the contract.

Similarly, in *Strata Heights International Corp.* v. *Petroleo Brasileiro, S.A.*, 67 F. App'x 247 (5th Cir. 2003), the Fifth Circuit found a direct effect in the United States in the form of "reliance, expectancy, and restitution damages" the U.S. plaintiff suffered when the defendant—Brazil's national oil company—entered into agreements that required the plaintiff to "spen[d]

considerable sums" and "perform[] valuable services" for which it was never compensated. *Id.* at *3-4. The court underscored that the defendant had targeted U.S. companies as joint venture partners and required them to perform work using American resources. The court held that the defendant's "representations of its intent to enter into the [agreement]" was "conduct upon which [the plaintiff's] claims are based," and that "some undetermined but nontrivial amount of [the plaintiff's] losses followed as an immediate consequence of such conduct." *Id.* at *4; *see also Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 581-582 (7th Cir. 1989) (contract claim was "based upon" defendant's execution of a contract, and the execution caused direct effects in the United States). In these cases, the courts did not rely on the conduct that breached the contract to find jurisdiction.

Respondents note that "where a foreign state was obligated to *perform* in the United States, and fails to do so, … there is a direct effect in the United States based on the breach of that obligation." Opp. 12; *see id.* at 11-12. Respondents do not explain the relevance of that unremarkable proposition. Instead, respondents appear to blur the line between the "based upon" analysis (examined in *Sachs* and *Nelson*) and the "direct effect" requirement (discussed in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992)). For example, respondents assert (at 12) that "where there is no obligation to perform in the United States, … there is no direct effect in the United States," but the cases respondents cite for that proposition address whether alleged effects are sufficiently "direct"—not what conduct a claim is "based upon." *See Terenkian* v. *Republic of Iraq*, 694 F.3d 1122, 1138 (9th Cir. 2012); *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212, 1217 (11th

Cir. 2005); *Orient Mineral* v. *Bank of China*, 506 F.3d 980, 999-1000 (10th Cir. 2007). Those cases do not bear on the circuit split.[1]

Respondents also seek to dismiss the circuit split on the ground that any conflicting cases arose under the first or second clauses of the commercial activity exception rather than the third. *See* Opp. 2, 12. Respondents are mistaken. A number of courts have found breach-of-contract actions to be "based upon" conduct other than the breach under the third clause. *See, e.g.*, *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17, 25 (1st Cir. 2013) ("entry into contracts and then breach" is "the commercial activity [plaintiff's] action is 'based upon'"); *United World Trade, Inc.* v. *Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1236, 1239 (10th Cir. 1994) ("[t]he basis or foundation of the action … was a contract entered into by the parties"). In any event, as noted, respondents correctly concede that "based upon" "should have the same meaning under each clause." Opp. 16. Under respondents' own view, the cases cannot be reconciled based on which clause they apply.

Finally, this Court's review of the first question presented would be warranted absent a remand in light of the importance of the issue—which respondents do not dispute, *compare* Pet. 27-33, *with* Opp. 1-19—and the consequences portended by respondents' reading of

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[1] Respondents' proffered rule requiring a promise to perform in the United States, Opp. 11-12, 13-14, would also read the third clause—which applies only to acts *outside* the United States—out of the commercial activity exception. *See Guirlando* v. *T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2d Cir. 2010); *Orient Mineral*, 506 F.3d at 998; *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887, 895 (5th Cir. 1998).

Sachs. If, as respondents read *Sachs*, the gravamen of a breach-of-contract claim can consist solely of the breach, then a foreign sovereign could execute a contract in the United States, require its counterparty to perform in the United States, and make regular deposits in U.S. banks, but evade the jurisdiction of U.S. courts by simply breaching the contract outside the United States without causing a direct effect here. That cannot be what the FSIA intended.

III. THE SECOND QUESTION WARRANTS REVIEW

Once a court has identified the conduct a suit is "based upon," application of the third clause of the commercial activity exception turns on whether that conduct caused a "direct effect" in the United States. 28 U.S.C. § 1605(a)(2). As the petition explains (at 22-26), the circuits are split in their application of the "direct effect" requirement in a common situation: Whether the breach of a contract causes direct effects in the United States when the parties' expectations and course of dealing have established the United States as the place of performance, or only when the contract unconditionally mandates performance in the United States. *Sachs* did not address that question.

Although respondents purport to deny the circuit conflict, they concede that some courts have relied on "distinct variable[s]" outside the contractual language to find direct effects in the United States even when the contract itself did not mandate payment in the United States. Opp. 18. For example, respondents concede that the Sixth Circuit has held that an "implicit agreement" outside the contract terms can "connect[] the payment obligation to the United States." *Id.* (citing *DRFP L.L.C.* v. *República Bolivariana de Venezuela*, 622 F.3d 513, 517 (6th Cir. 2010)); *see also Skan-*

ga, 875 F. Supp. 2d at 271-272, *aff'd*, 522 F. App'x 88, 90 (2d Cir 2013) (party's compliance with instruction to make payment in New York satisfied the direct-effect requirement even though payment in New York was "not an essential feature of [the] transaction"); Pet. 24-26.

In contrast, the D.C. Circuit takes a more rigid approach under which a party's failure to perform in the United States does not cause direct effects there—regardless of the parties' expectations, course of dealing, or other "distinct variables"—unless the contract unconditionally demands performance in the United States. *See* App. 20a-21a (no direct effect because contracts did not give H&P-V power to "demand payment in the United States"); *see also Peterson* v. *Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 90-91 (D.C. Cir. 2005); *Goodman Holdings* v. *Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994) (no direct effect where contract did not specify from where payments were to be made, despite defendant's previous payments from U.S. accounts).

Respondents do not dispute the importance of the second question presented or deny the unique need for uniformity and predictability under the commercial activity exception, which parties must take into account whenever they engage in commerce with foreign sovereigns. Pet. 27-33. Respondents contend only that the second question is not properly presented on the facts. Opp. 19. That is incorrect. First, it is irrelevant that PDVSA made its final payments in bolivars in Venezuela. *Cf. id.* The contracts stated payment rates in dollars and required that all dollar payments be made to H&P-V's account in Tulsa, Pet. App. 31a-33a, 53a-55a; CAJA 35-36; PDVSA agreed to make at least 61% of its payments on dollar-based invoices in dollars in the United

States unless respondents cancelled that commitment (which they never did), CAJA 25-26; and PDVSA in fact made 55 dollar payments to H&P-V's U.S. bank account totaling tens of millions of dollars, Pet. App. 34a. Those facts present the "direct effect" question regardless of the location of PDVSA's final payment. Respondents also assert that H&P-V was able to fulfill its own obligations under its contracts with third-party suppliers. Opp. 19. But the complaint alleges that as a result of respondents' breach, H&P-V lacked the U.S. dollars it needed to operate the business and that its U.S. parent therefore had to pay the U.S. vendors from its own U.S. accounts. Pet. 7; CAJA 46.

Notwithstanding PDVSA's supposed discretion to elect a different place of payment, the parties' shared understanding as reflected in the drilling contracts and the course of performance was that payment of the invoices in dollars in the United States was essential to the success of the enterprise, and PDVSA routinely followed that practice until it breached the contracts. Those facts squarely present the direct-effects question.

CONCLUSION

The petition should be granted, the judgment vacated, and the case remanded for reconsideration in light of *Sachs*. In the alternative, the petition should be granted.

Respectfully submitted.

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JANUARY 2016