No. 10-___

IN THE

# Supreme Court of the United States

THE REPÚBLICA BOLIVARIANA DE VENEZUELA AND THE VENEZUELAN MINISTRY OF FINANCE,
*Petitioners*,

v.

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

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


DANIEL W. COSTELLO
DAVID S. BLOOMFIELD, JR.
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street, 29th Floor
Columbus, OH 43215
(614) 227-2000

LISA S. BLATT
*Counsel of Record*
DAVID B. BERGMAN
PAOLO DI ROSA
GAELA GEHRING FLORES
ROBERT A. SCHWARTZ
R. STANTON JONES
ARNOLD & PORTER LLP
555 12th Street N.W.
Washington, DC 20004
(202) 942-5000
Lisa.Blatt@aporter.com

*Counsel for Petitioners*



WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTION PRESENTED

Under the commercial activity exception of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11, a foreign state is not immune from suit in U.S. court if a claim is based on the state's act outside the United States in connection with a commercial activity abroad, and that act causes a "direct effect" in the United States. *Id*. § 1605(a)(2). Since this Court's decision in *Republic of Argentina v. Weltover, Inc*., 504 U.S. 607 (1992), the courts of appeals are hopelessly fractured as to what nexus is required between a foreign transaction and the United States to justify the exercise of jurisdiction over a foreign sovereign.

In this case, the plaintiff sued to obtain payment on two promissory notes purportedly issued by a Venezuelan state-owned bank. The notes neither specify the United States as a place of payment nor authorize the plaintiff to designate such place, and no payment has ever been made on the notes. The plaintiff acquired the notes abroad from a foreign entity, brought them into the United States, and demanded payment in Ohio. Petitioners did not honor the demand because the notes are well-known to be fraudulent. In a decision that the dissent warned would "gut the laws of sovereign immunity," the court of appeals held that petitioners' refusal to honor the demand caused a "direct effect" in the United States because the plaintiff was "not precluded from demanding that payment be made in the United States."

The question presented is whether a foreign state's refusal to honor a demand for payment on the state's alleged securities at a U.S. location causes a "direct effect" in the United States based merely on the failure of the securities to exclude the United States as a place of payment.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY PROVISION INVOLVED | 2 |
| STATEMENT | 2 |
| A. Factual Background | 4 |
| B. Proceedings Below | 5 |
| REASONS FOR GRANTING THE PETITION | 9 |
| I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *WELTOVER* AND THE DECISIONS OF OTHER CIRCUITS | 10 |
| II. THE DECISION BELOW IS WRONG | 18 |
| III. THE QUESTION PRESENTED WARRANTS THIS COURT'S IMMEDIATE REVIEW | 24 |
| CONCLUSION | 29 |
| APPENDIX | |
| Appendix A: Opinion of the United States Court of Appeals for the Sixth Circuit Decided September 23, 2010 | 1a |
| Appendix B: Order of the United States Court of Appeals for the Sixth Circuit Dated December 15, 2010 | 22a |

TABLE OF CONTENTS—Continued

Page

Appendix C: Order of the United States Court of Appeals for the Sixth Circuit Dated December 17, 2010 ..... 23a

Appendix D: Opinion of the United States District Court for the Southern District of Ohio Decided February 13, 2009 ..... 24a

Appendix E: Uniform Rules for Collections of the International Chamber of Commerce ..... 52a

TABLE OF AUTHORITIES

CASES Page

*Adler v. Fed. Republic of* Nigeria, 107 F.3d 720 (9th Cir. 1997) ..... 12

*Am. Telecom Co. v. Republic of Lebanon*, 501 F.3d 534 (6th Cir. 2007) ..... 16

*Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993) ..... 12

*Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) ..... 10

*Atl. Tele-Network Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126 (D.D.C. 2003) ..... 13

*Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183 (10th Cir. 2008) ..... 16

*Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) ..... 23

*Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) ..... 14

*DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (2010) ..... 1

*DRFP L.L.C. v. Republica Bolivariana de Venezuela*, No. 2:04-cv-793, 2009 WL 414581 (Feb. 13, 2009) ..... 1

*Falcon Invs., Inc. v. Republic of Venezuela*, No. 00-4123, 2001 WL 584346 (D. Kan. May 22, 2001) ..... 17, 18

*Gathercrest, Ltd. v. First Am. Bank & Trust*, 649 F. Supp. 106 (M.D. Fla. 1985) ..... 20

*Gen. Elec. Capital Corp. v. Grossman*, 911 F.2d 1376 (8th Cir. 1993) ..... 12

*Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108 (D.D.C. 2003) ..... 12, 15

TABLE OF AUTHORITIES—Continued

Page

*Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994) ..... 13, 14
*Guevara v. Republic of Peru*, 608 F.3d 1297 (11th Cir. 2010) ..... 13
*Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69 (2d Cir. 2010) ..... 16
*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) ..... 7
*Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982) ..... 12
*Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543 (11th Cir. 1997) ..... 16
*Idas Resources N.V. v. Empresa Nacional de Diamantes de Angola E.P.*, No. 06-00570, 2006 WL 3060017 (D.D.C. Oct. 26, 2006) ..... 12, 17
*International Shoe Co. v. Washington*, 326 U.S. 310 (1945) ..... 23, 24
*Orient Mineral Co. v. Bank of China*, 506 F.3d 980 (10th Cir. 2007) ..... 15
*Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) ..... *passim*
*Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) ..... 25
*SCADIF, S.A. v. First Union Nat'l Bank*, 208 F. Supp. 2d 1352 (S.D. Fla. 2002) ..... 21
*TermoRio S.A. v. Electrificadora del Atlantico S.A.*, 421 F. Supp. 2d 87 (D.D.C. 2006) ..... 13

TABLE OF AUTHORITIES—Continued

Page

*Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) ..... 13
*United States v. Arjona*, 120 U.S. 479 (1887) ..... 26
*United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232 (10th Cir. 1994) ..... 15
*Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230 (2d Cir. 2002) ..... 13
*Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) .... 14
*Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992) ..... 20, 21
*Westfield v. Fed. Republic of Germany*, --- F.3d ---, 2011 WL 309637 (6th Cir. Feb. 2, 2011) .....14, 15, 16, 24
*Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988) ..... 14

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

U.S. Const. art. I, § 8, cl. 6 ..... 26
28 U.S.C. § 1254(1) ..... 1
28 U.S.C. § 1330(a), (b) ..... 23
28 U.S.C. § 1604 ..... 10
28 U.S.C. § 1605(a)(2) .....2, 6, 10
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 ..... 2
31 C.F.R. § 321.2 (a) ..... 28

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page

Daniel Cancel, *Venezuelan Bonds Drop on Report Government May Owe $8 Billion*, Bloomberg, Dec. 20, 2010 ..... 25, 26
Stephen Fidler, *Debt Crises' New Victims: Rich Developed Economies*, Wall St. J., Apr. 23, 2010 ..... 27
H. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 ..... 22
Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 Chi. J. Int'l L. 675 (2005)..... 16
Jose Orozco, *Venezuela Charges Three in Connection with Bandagro Notes*, Bloomberg, Dec. 21, 2010 ..... 26
Elisabetta Povoledo, *Italy Intercepts Billions in Fake Treasuries*, N.Y. Times, June 26, 2009 ..... 27, 28
Press Release, Skye Ventures, Federal Appeals Court Ruling Hands Bond Investors Major Victory in Suit Against Venezuela (Sept. 23, 2010), *available at* http://tinyurl.com/skyepr. ..... 6
Sarah K. Schano, Note, *The Scattered Remains of Sovereign Immunity for Foreign States After Republic of Argentina v. Weltover, Inc.—Due Process Protection or Nothing*, 27 Vand. J. Transnat'l L. 673 (1994)..... 16, 17

TABLE OF AUTHORITIES—Continued

Page

Ronald J. Silverman & Mark W. Deveno, *Distressed Sovereign Debt: A Creditor's Perspective*, 11 Am. Bankr. Inst. L. Rev. 179 (2003) ..... 27

S. Rep. No. 94-1310 ..... 22

The Economist, *The Global Debt Clock, at* http://www.economist.com/content/global_debt_clock. ..... 27

U.S. Dep't of Treasury, *Frauds, Phonies, and Scams, at* http://www.treasury scams. gov ..... 27

U.S. Dipl. Mission to Italy, *Redemption of United States Savings Bonds Abroad, at* http://italy.usembassy.gov/acs/other/bonds.html ..... 28

Andrew N. Vollmer et al., *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489 (2002) ..... 16

IN THE

# Supreme Court of the United States

No. 10-____

THE REPÚBLICA BOLIVARIANA DE VENEZUELA AND THE VENEZUELAN MINISTRY OF FINANCE,
*Petitioners*,

v.

DRFP L.L.C., d/b/a SKYE VENTURES,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the court of appeals is reported at 622 F.3d 513. Pet. App. 1a-21a. The opinion of the district court is available at 2009 WL 414581. Pet. App. 24a-51a.

## JURISDICTION

The court of appeals issued its decision on September 23, 2010. Pet. App. 1a. The court denied rehearing on December 15, 2010. *Id.* at 22a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The commercial activity exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, states in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States 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.

*Id.* § 1605(a)(2).

## STATEMENT

In the midst of a global sovereign debt crisis, the Sixth Circuit held that U.S. courts may entertain suits against foreign states to enforce their government securities, so long as those securities do not by their terms *preclude* plaintiffs from demanding payment in the United States. As a result, the plaintiff in this case was able to haul a foreign state into a United States district court by the simple expedient of demanding that payment be made in Ohio on the state's alleged securities. The court of appeals held that petitioners' refusal to honor the demand caused a "direct effect" in the United States under the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), because, though the notes do not specify Ohio as a place of payment or authorize the plaintiff to designate such place, the notes also do not explicitly *exclude* Ohio (or any other location) as a place of payment.

This Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), held that a foreign state's refusal to make payments on sovereign bonds caused a direct effect in the United States because the bonds contained an express agreement to pay in New York and there was a history of payments in New York. Since *Weltover*, courts of appeals have sharply disagreed as to the standard for satisfying the direct effect requirement when a foreign state defaults on—or otherwise refuses to honor—a bond or other government security. Some circuits have held that the requirement is satisfied only where, as in *Weltover*, the foreign state's agreement expressly specifies the United States as a place of payment or authorizes the plaintiff to designate the place. By contrast, other circuits have held that a foreign state's implied agreement to pay in this country may suffice to establish a direct effect. Before the decision below, however, no court had gone so far as to find a direct effect based merely on the absence in the relevant agreement of a clause explicitly *excluding* the United States as a place of payment.

The decision below marks an extreme and unreasonable expansion of U.S. jurisdiction over suits against foreign sovereigns, effectively requiring them explicitly to preclude payment in the United States to avoid being hauled into U.S. court, even with regard to claims that have no connection to this country apart from the locus of the plaintiff's demand. As the dissent aptly warned, the majority's rule would "gut the laws of sovereign immunity" by creating an "unwieldy exception to this important protection" for foreign states. Pet. App. 21a (Martin, J., dissenting). And if other countries were to follow the Sixth Circuit's flawed approach, the United States could be forced to defend suits in foreign courts seeking

payment on alleged U.S. government securities, including those that the government contends are fraudulent.

This Court's plenary review is warranted to resolve the deep division of circuit authority regarding this issue of critical importance to foreign sovereigns and U.S. interests.

### A. Factual Background

The Complaint alleges that on December 7, 1981, the Banco de Desarrollo Agropecuario ("Bandagro"), then a state-owned bank in Venezuela, issued a series of zero-coupon promissory notes payable to "bearer." Pet. App. 2a; RE1 at 2.[1] In 2004, the plaintiff, Skye Ventures ("Skye"), acquired two of these so-called "Bandagro notes," each with a purported face value of $50 million, from a Panamanian entity called Gruppo Triad-FCC SPA ("Gruppo Triad"). Pet. App. 3a. The notes state that they are backed by the Republic of Venezuela and its Ministry of Finance. *Id*. at 2a-3a. They contain no provision specifying a place of payment or providing for the designation of such place. *Id.* at 8a.

The notes state that they are governed by Swiss law and the International Chamber of Commerce's Uniform Rules for Collections ("ICC Uniform Rules"). *Id*. at 5a. The ICC Uniform Rules set forth customs and practices that banks may follow in assisting customers with the collection and payment of debts from remote locations. *See id.* at 53a, 58a-78a. Under the ICC Uniform Rules, banks act as proxies for debtors and creditors, allowing them to

[1] Citations to "RE__" refer to the numbered Record Entries on the district court's docket.

settle a debt without either party being required to appear and perform in the location of the other. *Id*. at 59a-60a, 63a-64a, 71a. Nothing in the ICC Uniform Rules speaks to the right of a creditor to demand payment directly from a debtor, in a particular location or otherwise.

Soon after acquiring the Bandagro notes, Skye sent a letter to the Venezuelan Ministry of Finance demanding payment in Columbus, Ohio. *Id.* at 3a. Petitioners did not honor the demand because the notes are fraudulent, part of a well-known, decades-long international scam. *Id.* at 3a-4a. Law enforcement authorities in the United States and abroad have warned about this scam; INTERPOL, for instance, has cautioned that "international fraudsters have committed fraud in a number of countries, including the United States, the United Kingdom, Turkey and Switzerland" using "forged promissory notes purportedly issued by Banco de Desarrollo Agropecuario S.A. (Bandagro) and guaranteed by the Ministry of Finance of Venezuela." RE120-4 at 3. Notably, the principal of Gruppo Triad, the foreign entity from which Skye acquired the notes in this case, has been convicted in the U.K. and Italy of attempting to pass off false Bandagro notes. *See* RE120-5; RE120-11. The notes in this case contain overwhelming indicia of fraud, including bizarre formatting and phraseology as well as specific provisions that the ICC and the U.S. government have associated with fraudulent securities. *See* RE18-10 at 2-5.

### B. Proceedings Below

1. On August 23, 2004, Skye sued petitioners, the República Bolivariana de Venezuela and its Ministry of Finance (together, the "Republic"), in the United

States District Court for the Southern District of Ohio. Pet. App. 24a. The Complaint asserted a single claim for Default on Promissory Notes and sought judgment for the face value of the notes plus accrued interest, allegedly totaling as much as $900 million. *See id.*; Press Release, Skye Ventures, Federal Appeals Court Ruling Hands Bond Investors Major Victory in Suit Against Venezuela (Sept. 23, 2010), *available at* http://tinyurl.com/skyepr.

The district court denied the Republic's motion to dismiss based on foreign sovereign immunity under the FSIA and *forum non conveniens*. First, the court held that the Republic was amenable to suit in U.S. court under the FSIA's commercial activity exception. Specifically, the court held that the alleged issuance of the Bandagro notes was "commercial activity," *id.* at 33a, and that the Republic's refusal to honor Skye's demand for payment in Ohio caused a "direct effect" in the United States. *Id.* at 44a (quoting 28 U.S.C. § 1605(a)(2)).

With regard to direct effects, the court acknowledged that, unlike the bonds at issue in *Weltover*, 504 U.S. at 609-10, the Bandagro notes "did not specifically designate the United States as the place of payment." Pet. App. 36a. The court further recognized that "in almost every case involving the direct effect exception, the existence or absence of an expressly designated place of payment has been decisive." *Id.* at 37a (internal quotation marks omitted). But the court found the choice of law provision in the notes referencing Swiss law and the ICC Uniform Rules enabled Skye "to demand payment essentially anywhere in the world." *Id.* at 40a. The court therefore concluded that the direct effect requirement was satisfied because the notes "did not *exclude* any loca-

tion, much less a United States location, as the place of payment." *Id.* at 44a (emphasis added).

The district court also denied dismissal for *forum non conveniens*, concluding that the Venezuelan courts were "unavailable" to hear the case. *Id.* at 51a.

2. A divided panel of the Sixth Circuit affirmed in part and reversed in part. Pet. App. at 1a-21a. The court held that Skye's claim for default on the notes fell within the FSIA's commercial activity exception, but that the district court erred in holding the Venezuelan courts were unavailable for purposes of the Republic's *forum non conveniens* defense. The court thus remanded the case for consideration of the private and public interest factors under *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Pet. App. 13a.

a. With regard to the FSIA's requirement of a direct effect in the United States, the majority acknowledged that "neither the terms of the [Bandagro] notes nor any other contractual arrangement between the parties explicitly designated the United States as the place of payment of the notes." *Id.* at 8a. Echoing the district court, however, the majority extrapolated from the choice of law provision in the notes that "the parties implicitly agreed to leave it to the bearer to demand payment on the notes anywhere, including, perforce, Columbus, Ohio." *Id.* The majority accordingly concluded that the direct effect requirement was satisfied because nothing in the Bandagro notes "*precluded* [Skye] from demanding that payment be made in the United States." *Id.* at 5a (emphasis added).

b. Judge Martin dissented on the immunity issue. *Id.* at 15a-21a. The dissent explained that under *Weltover* and court of appeals decisions following

*Weltover*, a foreign state's refusal to make payment on its security satisfies the direct effect requirement only where the security (1) "expressly stat[es] a place of performance in the United States," or (2) "expressly grant[s] the plaintiff the right to choose the place." *Id.* at 17a. The dissent further explained that where, as here, a security "is silent on the place of performance, then there is no basis for United States jurisdiction over ensuing claims, even if the injury is somehow felt in the United States." *Id.* at 18a. The dissent emphasized that in this case "it is undisputed that the Notes did not expressly state a place of performance in the United States and that they do not specifically state that their holder can demand payment in the United States." *Id.*

The dissent criticized the majority's reliance on Swiss law and the ICC Uniform Rules to extrapolate an implied agreement that would allow Skye to sue the Republic in any jurisdiction worldwide. The dissent found it "incredible that a country issuing notes would, under any circumstances, waive its sovereign immunity in every country in the world in which a noteholder could take the notes and [demand payment] without expressly so stating in the note." *Id.* at 21a. According to the dissent, any exception to immunity based on such a circuitous "implicit waiver" would be "unwieldy" and "far too broad" and would "gut the laws of sovereign immunity." *Id.*

c. On December 17, 2010, after denying rehearing, the court of appeals granted the Republic's motion to stay its mandate pending the disposition of this petition. *Id.* at 23a.

## REASONS FOR GRANTING THE PETITION

The court of appeals erroneously held that a foreign state's implied agreement to make a payment to a creditor in any location in the world was a sufficient nexus to the United States to justify jurisdiction under the FSIA's commercial activity exception. That holding distorts this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), which held that jurisdiction was appropriate when the foreign state had expressly agreed to pay sovereign bonds in New York and in fact had made payments in New York. Neither of those factors is present in this case.

The decision below also exacerbates considerable confusion in the courts of appeals and deepens an entrenched division among the circuits. Since *Weltover*, the courts of appeals are hopelessly perplexed and divided with regard to the question of direct effects under the FSIA, particularly in cases where the foreign state's only action is its refusal to honor the plaintiff's demand for payment at a U.S. location.

In the context of this confusion, the decision below adopts the most extreme approach to date. The Sixth Circuit found a direct effect in the United States not because the alleged promissory notes at issue *specify* the United States as the place of payment or because they allow the plaintiff to designate the place of payment, but rather simply because they do not specifically *preclude* payment in the United States (or anywhere else). That decision dramatically expands jurisdiction over foreign states, especially in sensitive cases involving government securities that the state itself contends are fraudulent. If other countries were to follow the Sixth Circuit's flawed approach,

moreover, the United States could be exposed to suits in foreign courts seeking to enforce alleged U.S. government securities, including those that the United States contends are fraudulent.

This Court's review is warranted to correct the erroneous decision below and to resolve conflicting circuit authority as to what nexus is required between a foreign transaction and the United States to satisfy the FSIA's "direct effect" requirement and thereby justify jurisdiction over a foreign sovereign.

## I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *WELTOVER* AND THE DECISIONS OF OTHER CIRCUITS

1. The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in a civil action brought in U.S. court. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). Under the FSIA, a foreign state is immune from suit unless a claim falls within one of several specified exceptions. 28 U.S.C. § 1604. The "most significant" of the FSIA's exceptions—and the one at issue in this case—is the "commercial activity" exception. *Weltover*, 504 U.S. at 611. As relevant here, that exception provides that a foreign state is not immune from suit where a claim is based on "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

In *Weltover*, this Court held that "an effect is direct if it follows as an immediate consequence of the defendant's activity." 504 U.S. at 618 (internal quotation marks and alteration omitted). Applying

that standard, the Court concluded that Argentina's unilateral rescheduling of sovereign bond payments satisfied the direct effect requirement. The bonds expressly required Argentina to make payment in one of four locations, including New York, "at the election of the creditor," *id.* at 609-10; the plaintiffs "designated their accounts in New York as the place of payment"; and Argentina "made some interest payments into those accounts before announcing that it was rescheduling the payments." *Id.* at 619. The Court thus had "little difficulty" concluding that Argentina's unilateral rescheduling of payments caused a direct effect in the United States, because "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 618-19.

The decision below turns *Weltover* on its head. Whereas the Court in *Weltover* found a direct effect based on an express provision specifying New York as a place of payment, the court of appeals in this case relied upon the *failure* of the Bandagro notes specifically to *preclude* payment in the United States. And whereas Argentina already had made payments in New York in accordance with its express agreement to do so, no payment has ever been made on the Bandagro notes in the United States (or, for that matter, anywhere else).

The court of appeals wrongly equated this case to *Weltover* on the theory that the Republic "implicitly agreed" to make payment in any location in the world based on the choice of law clause in the notes. Pet. App. 8a. *Weltover* did not sanction the exercise of jurisdiction over a foreign sovereign based on a tortuous and merely implied agreement of this sort.

The Sixth Circuit's decision basing jurisdiction on such a thin reed extends *Weltover* beyond reason.

2. The Court's decision in *Weltover* has engendered one of the most entrenched divisions—and some of the greatest confusion—currently confounding lower courts. Since *Weltover*, courts of appeals are irreconcilably fractured as to the circumstances in which a foreign state's refusal to honor a demand for payment at a U.S. location can be deemed to cause a direct effect in the United States. The decision below exacerbates this confusion and is inconsistent with decisions of other courts of appeals.

Some courts of appeals "apply a 'legally significant act' test that requires a plaintiff to allege the existence of a contract provision *expressly* requiring payment in the United States (or, at a minimum, a contract provision authorizing the designation of a specific place of payment at some later date)." *Idas Resources N.V. v. Empresa Nacional de Diamantes de Angola E.P.*, No. 06-00570, 2006 WL 3060017, at *8 n.11 (D.D.C. Oct. 26, 2006) (emphasis added); *accord Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 112 (D.D.C. 2003) (observing that "'legally significant act' test requires *express* provision of payment in the U.S." (emphasis added)); *see also* Pet. App. 17a-18a (Martin, J., dissenting). The Second, Eighth, Ninth, and Eleventh Circuits apply a "legally significant act" test in determining whether a foreign state's actions caused a direct effect in the United States. *See Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997); *Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993); *Gen. Elec. Capital Corp. v. Grossman*, 911 F.2d 1376, 1385 (8th Cir. 1993); *Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344, 1351 (11th Cir. 1982).

Those courts have found no direct effect from a foreign state's refusal to honor a payment demand where, as here, the relevant agreement does not expressly specify the United States as a place of payment or authorize the plaintiff to designate the place. *See Guevara v. Republic of Peru*, 608 F.3d 1297, 1309-10 (11th Cir. 2010) (finding no direct effect from Peru's refusal to honor a demand for payment of a reward where the reward offer did not specify payment in the United States); *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 239 (2d Cir. 2002) (stating that the finding of a direct effect in *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), "depended on the fact that the contract stipulated performance in New York"). In the absence of such an express agreement, the courts have held that the effect from a state's refusal to honor a demand is not "sufficiently 'direct'" or "sufficiently 'in the United States.'" *Guevara*, 608 F.3d at 1309. The decisions make clear that had this case been brought in one of those circuits, the Republic would have been found to be immune from suit.

The D.C. Circuit likewise interprets the direct effect requirement "to require a clause in a contract mandating the fulfillment of contractual obligations *in the United States*." *Atl. Tele-Network Inc. v. InterAm. Dev. Bank*, 251 F. Supp. 2d 126, 134 (D.D.C. 2003) (emphasis in original); *accord TermoRio S.A. v. Electrificadora del Atlantico S.A.*, 421 F. Supp. 2d 87, 95-96 (D.D.C. 2006) (quoting same). For instance, in *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994), the D.C. Circuit held that an Iraqi state-owned bank's failure to make payments under letters of credit had no direct effect in the United States. *Id.* at 1146-47. The court explained that the

situation was "quite different" from *Weltover* because "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid." *Id.* at 1146; *see also Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 n.2 (D.C. Cir. 1988) (pre-*Weltover* decision stating that to establish a direct effect, an agreement would "at the very least, have to specify a particular location in the United States, even perhaps the particular bank through which payment was to be made").

By contrast, the Fifth and Sixth Circuits have squarely rejected the "legally significant act" test and accordingly have taken a more expansive view of *Weltover*. *See Westfield v. Fed. Republic of Germany*, --- F.3d ---, 2011 WL 309637, at *3 (6th Cir. Feb. 2, 2011) ("Unlike some of our sister circuits, we have expressly rejected the requirement that a 'legally significant act' take place in the United States in order to establish a direct effect."); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 894-95 (5th Cir. 1998) (same); Pet. App. 16a n.1 (Martin, J., dissenting) (same). In *Voest-Alpine*, 142 F.3d at 890, the Fifth Circuit found a direct effect where a Chinese state-owned bank refused the plaintiff's demand to pay a letter of credit in Texas. The letter "did not designate a particular place of payment, though it did state that it was to be governed by [certain ICC procedures]." *Id.* Rejecting the bank's argument that "the United States was [not] the 'place of payment,'" *id.* at 893, the court stated that "arcane doctrines regarding the place of payment are largely irrelevant." *Id.* at 895 (quoting *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1112 (5th Cir. 1985) (bracketing omitted)). Prior to the decision below, *Voest-Alpine* was described as "the most

expansive interpretation of direct effect." *Global Index*, 290 F. Supp. 2d at 115. Similarly, in this case, the Sixth Circuit by its own account "liberally interpreted 'direct effect.'" *Westfield*, 2011 WL 309637, at *4.

The Tenth Circuit appeared to apply the "legally significant act" test in *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232 (10th Cir. 1994), stating that "courts often look to the place where legally significant acts giving rise to the claim occurred in determining the place where a direct effect may be said to be located." *Id.* at 1239 (internal quotation marks omitted). There, the court found no direct effect from Kazakhstan's refusal to honor a payment demand, even though the plaintiff had designated a U.S. bank "for conversion of the proceeds into U.S. dollars." *Id.* at 1236-37. The court held that an "entire series of banking transactions . . . cannot be considered an 'immediate consequence of the defendant's activity' under any common sense reading of that phrase." *Id.* at 1238 (quoting *Weltover*, 504 U.S. at 618). More recently, however, the Tenth Circuit has stated that it "never adopted the 'legally significant act' test, and we now explicitly reject [it]." *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007). The court accordingly "will consider the legally significant acts, as well as other relevant facts under the circumstances of a given case," but such acts are not "a prerequisite for jurisdiction." *Id.*

In light of the numerous incongruent approaches to the FSIA's direct effect requirement, it is no surprise that courts of appeals repeatedly have acknowledged the confusion. *See Westfield*, 2011 WL 309637, at *4 ("Courts have struggled to announce objective stan-

dards and clear rules for determining what does and does not qualify as a direct effect in the United States."); *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 75-79 (2d Cir. 2010) (describing "confusion" over the "legally significant act" test); *Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183, 1190 (10th Cir. 2008) (calling the direct effect determination a "slippery business"); *Am. Telecom Co. v. Republic of Lebanon*, 501 F.3d 534, 539 (6th Cir. 2007) ("Lower courts . . . have found this 'immediate consequences' test difficult to apply."); *id.* at 540 ("circuits have framed the inquiry differently"); *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 549 (11th Cir. 1997) (declining to "try to reconcile" the cases in this area).

Scholars and others likewise have discussed the post-*Weltover* confusion surrounding the direct effect requirement. *See, e.g.*, Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 Chi. J. Int'l L. 675, 687 (2005) ("The Weltover decision ignited confusion and controversy over whether the direct effect clause mandates a finding of a legally significant act in the United States."); Andrew N. Vollmer et al., *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 558 (2002) (*Weltover* "created confusion and disarray over whether . . . a contract must require some performance in the United States . . . or whether some other 'legally significant act' must occur in the United States."); Sarah K. Schano, Note, *The Scattered Remains of Sovereign Immunity for Foreign States After Republic of Argentina v. Weltover, Inc.—Due Process Protection or Nothing*, 27 Vand. J. Transnat'l L. 673, 705 (1994) ("*Weltover*'s

spartan direct effect test has already caused disagreement among lower courts.").

3. Contrary to court of appeals decisions requiring an express agreement as to the place of payment, the Sixth Circuit in this case held that Skye had established a direct effect on the theory that the Republic, by failing explicitly to *exclude* particular places of payment, had "implicitly agreed" to pay the Bandagro notes anywhere in the world. Pet. App. 8a. Unlike government securities in other cases finding a direct effect, the Bandagro notes do not specify the United States as a place of payment, nor do they specifically authorize Skye to designate such place, and no payment has ever been made on the notes in any location (let alone the United States). The decision below thus deepens an entrenched division among the lower courts.

Skye's complaint would have been dismissed in circuits that apply the "legally significant act" test, because Skye did not—and could not—"allege the existence of a contract provision *expressly* requiring payment in the United States" or even a provision "authorizing the designation of a specific place of payment at some later date." *Idas Resources*, 2006 WL 3060017, at *8 n.11 (emphasis added). Skye did not even allege that the Republic implicitly agreed to make payment specifically in the United States, but only that Skye has unfettered discretion because the notes fail to *preclude* collection in the United States.

There is no need to speculate as to whether Skye's complaint would have been dismissed in another circuit, because a virtually identical suit already has been. In *Falcon Investments, Inc. v. Republic of Venezuela*, No. 00-4123, 2001 WL 584346 (D. Kan. May 22, 2001), another plaintiff claiming to hold

Bandagro notes demanded payment from the Republic in Topeka, Kansas. *Id.* at *1. The Republic did not honor the demand, and the plaintiff sued in the U.S. District Court for the District of Kansas. *Id.* The district court dismissed the suit on immunity grounds, rejecting the plaintiff's argument that the Republic's refusal to honor its demand caused a direct effect in the United States. *Id.* at *6. The court explained that under *Weltover* and Tenth Circuit precedent, a direct effect can result only from "direct language in the contract [requiring payment in the United States] or from a designation exercised in favor of the United States expressly granted by the contract." *Id.* at *4. Skye, of course, did not sue in the Tenth Circuit, but rather in the Sixth, so that *Falcon Investments* was hastily discarded with other "cases from other circuits." Pet. App. 9a.

This Court should grant review to resolve the deep division of the circuit authority as to what nexus is required between a foreign sovereign's act and the United States before a plaintiff may haul the sovereign into a U.S. court.

## II. THE DECISION BELOW IS WRONG

With only these confused precedents to guide it, the majority below failed to undertake the proper inquiry as specified in the FSIA, echoed throughout its legislative history, and confirmed by this Court in *Weltover*: whether the alleged effect in the United States—the non-arrival of funds in Ohio—was a sufficiently "direct" and "immediate" consequence of an alleged act by the Republic.

1. In *Weltover*, Argentina's violation of an express agreement to make payment in New York formed the basis for jurisdiction, supplying the requisite "direct"

connection to the United States. Here, the Bandagro notes contain no place of performance clause whatsoever. Nonetheless, the Sixth Circuit found it sufficient that, in its view, "money that was supposed to have been delivered to Skye at its office in Columbus was not forthcoming." Pet. App. 9a. Although the majority below purported to draw this language from *Weltover*, it ignored *Weltover*'s holding that the commercial activity exception must be applied strictly according to its terms, and that courts must inquire whether the alleged effect is direct. The question presented in *Weltover* was whether the FSIA's direct effect requirement "contains any unexpressed requirement of 'substantiality' or 'foreseeabilty.'" 504 U.S. at 618. The Court held that it does not, and that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." *Id*. (internal quotation marks and alteration omitted).

The causal mechanism in this case fails the *Weltover* directness test. The notes contain no requirement for the Republic to perform in the United States. The only ostensible requirement is that Skye and the Republic use the procedures set forth in the ICC Uniform Rules. *See* Pet. App. 5a-6a. The dissent below described those procedures as follows:

> The noteholder goes to its bank and asks the bank to demand payment. Using a series of wires, the bank requests payment from a Venezuelan bank and receives the payment in that bank. The payment is then wired back to the noteholder's bank. Essentially, the bank uses wire transfers to act as the noteholder's proxy in going to Venezuela and requesting payment . . . .

Pet. App. 20a. Indeed, the ICC Uniform Rules explicitly provide that this series of wires may involve participation by a sequence of intermediary banks that physically transfer the notes to the maker's location (here, Venezuela) and, if the request for payment is honored, pass the funds from bank to bank until they eventually arrive at the bearer's bank. *See* Pet App. 59a-60a.[2] In other words, rather than burdening the creditor with a requirement of travel to a distant location for in-person collection, the ICC Uniform Rules enable parties simply to transact with separate banks in their respective locations. This is quite the opposite of a requirement that the Republic perform directly in the noteholder's location of choice. In this case, if Skye were to demand payment under the ICC Uniform Rules, and the Republic were not to pay, the effect would be felt first by the bank presenting the Bandagro notes and requesting payment in Venezuela, and then by any intermediary banks, and would reach the United States only indirectly through a series of proxies.

That series of transactions contrasts sharply with *Weltover*, where Argentina failed "to make payments *in New York*," and "[t]he effect occurred, *in the first instance, in New York*, when the plaintiffs' accounts were not credited." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 504

---

[2] *See also id.* at 64a ("The documents and collection instructtion may be sent directly by the remitting bank to the collecting bank or through another bank as intermediary."); *id.* at 71a ("Amounts collected . . . must be made available without delay to the party from whom the collection instruction was received."); *Gathercrest, Ltd. v. First Am. Bank & Trust*, 649 F. Supp. 106, 115 (M.D. Fla. 1985) (discussing the roles of various banks under the ICC Uniform Rules).

U.S. 607 (1992) (emphases added). Under the ICC Uniform Rules, by contrast, "[t]here is no recognized or established means by which a foreign bank may present an item for immediate payment." *SCADIF, S.A. v. First Union Nat'l Bank*, 208 F. Supp. 2d 1352, 1364 (S.D. Fla. 2002). Thus, in this case, as in *United World Trade*, an "entire series of banking transactions . . . cannot be considered an 'immediate consequence of the defendant's activity' under any common sense reading of that phrase." 33 F.3d at 1238 (quoting *Weltover*, 504 U.S. at 618).

Here, the Sixth Circuit reached the wrong result because, rather than analyzing the degree of immediacy of the alleged effect, the court of appeals relied on this Court's statement in *Weltover* that "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." Pet. App. 7a (quoting *Weltover*, 504 U.S. at 619). That was an accurate statement of fact in *Weltover*, but it was not the test the Court articulated. Laboring under that misinterpretation of *Weltover*, the majority below applied nothing more than a "but for" standard. Accordingly, unbound from the FSIA's core requirement of directness, the majority found it dispositive that the Republic allegedly failed to place restrictions preventing bearers of the Bandagro notes from initiating collection and receiving payment in the United States (or any other location). The FSIA, however, requires a direct effect, not merely factual causation. The majority below failed to undertake the proper inquiry.

2. The FSIA's legislative history confirms that Congress did not intend the jurisdiction of U.S. courts to reach cases where the only connection to the United States is that the plaintiff allegedly

attempted to use the international banking system to collect payment here. First, a House reports provides examples of disputes that the exceptions were designed to reach, each of which illustrates an unmistakably "direct" connection to the United States: (1) "when U.S. businessmen sell goods to a foreign state trading company"; (2) "when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity"; and (3) "a citizen crossing the street may be struck by an automobile owned by a foreign embassy." H. Rep. No. 94-1487, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. Those representative examples are a far cry from this case, in which Skye reached out internationally to transact with a foreign entity—not the Republic—and returned to Ohio simply to initiate litigation.

Second, in enacting the FSIA, Congress specifically considered the question of immunity for sovereign debt transactions and stated its expectation that there would be no jurisdiction absent a clear waiver. An earlier draft of the bill provided explicit immunity for "any case relating to debt obligations incurred for general governmental purposes unless . . . the foreign state has waived its immunity explicitly" or "the case arises under" the federal securities laws. S. Rep. No. 94-1310, at 2. The House Judiciary Committee eliminated the provision, explaining that it "would have had virtually no effect" because sovereign debt instruments "invariably" would be drafted to "include an express waiver of immunity." H. Rep. No. 94-1487, at 5. It is clear, therefore, that Congress intended for debt transactions not otherwise connected to the United States to be outside of U.S. jurisdiction unless the parties agreed otherwise. The holding in *Weltover* is perfectly consistent with that

intent, inasmuch as the bonds there specified New York as a place of performance. 504 U.S. at 609-10. But there are no equivalent jurisdictional facts here.

Third, the decision below conflicts with congressional intent that a court have subject-matter jurisdiction under the FSIA only where personal jurisdiction over the foreign state is also proper. The FSIA contains a long-arm statute establishing personal jurisdiction over a foreign sovereign "as to every claim for relief over which the district courts have jurisdiction"—*i.e.*, where "the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a), (b). Thus, the provision for personal jurisdiction is coextensive with the FSIA's immunity exceptions. Congress explained that the immunity exceptions therefore apply the same limitations as *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny—*i.e.*, this Court's precedents on personal jurisdiction. As a result of this design by Congress, the drafters explained, exceptions to sovereign immunity apply only where there are "minimum jurisdictional contacts" that also "must exist before our courts can exercise personal jurisdiction." H. Rep. No. 94-1487, at 13. *Weltover* held that those requirements were satisfied because, by issuing bonds that were "payable in New York and by appointing a financial agent in that city, Argentina 'purposefully availed itself of the privilege of conducting activities within the United States." 504 U.S. at 619-20 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

In this case, the Bandagro notes are silent as to the place of payment, and Skye does not allege that the Republic engaged in any business with any U.S. party or directed any activity at the United States.

There is no allegation that the Republic purposefully availed itself of the benefits of doing business in Ohio. To the contrary, the Sixth Circuit's decision offends "traditional notions of fair play and substantial justice," *Int'l Shoe*, 326 U.S. at 316, by allowing Skye to hale the Republic into district court in Ohio on the theory the Republic "implicitly agreed," Pet. App. 8a, to make payment in Ohio simply by virtue of the fact that the notes did not explicitly *exclude* the United States as a place of payment.

## III. THE QUESTION PRESENTED WARRANTS THIS COURT'S IMMEDIATE REVIEW

This case raises a recurring issue of far-reaching national and international importance involving the exercise of jurisdiction over foreign sovereigns based on transactions that have no connection to the United States apart from a plaintiff's payment demand. Whether a foreign state's mere refusal to honor a demand for payment at a U.S. location causes a direct effect in the United States has been a recurring issue in this Court and in the courts of appeals. *See Weltover*, 504 U.S. at 618-19; cases cited *supra* at section I. And since this Court's decision in *Weltover*, courts of appeals repeatedly and explicitly have acknowledged their confusion surrounding the issue. *See* cases cited *supra* at 13-14. The Sixth Circuit itself recently lamented that "[c]ourts have struggled to announce objective standards and clear rules for determining what does and does not qualify as a direct effect in the United States." *Westfield*, 2011 WL 309637, at *4.

This case presents an ideal context for the Court to delineate more clearly the contours of the direct effect requirement and the limits it imposes on jurisdiction

under the FSIA's commercial activity exception. In this case, the Republic refused to pay a demand relating to alleged promissory notes that do not specify the United States as a place of payment or specifically authorize the plaintiff to designate the place, and on which no payment has ever been made. The only purported connection to this country is the notes' failure to *preclude* the United States as a place of payment. That the notes are notoriously fraudulent makes the exercise of jurisdiction by U.S. courts even more improper.

This Court has rejected interpretations of the commercial activity exception that would "swallow the rule of foreign sovereign immunity Congress enacted in the FSIA." *Saudi Arabia v. Nelson*, 507 U.S. 349, 371 (1993) (Kennedy, J., concurring in part and dissenting in part). Those are the stakes in this case. As the dissent below correctly warned, the Sixth Circuit's decision, if allowed to stand, would "gut the laws of sovereign immunity" by creating an "unwieldy exception to this important protection" for foreign states in U.S. courts. Pet. App. 21a (Martin, J., dissenting).

For one, the decision below opens U.S. courts to suits against foreign states seeking to enforce fraudulent government securities such as the Bandagro notes. This concern is not merely hypothetical. Since the district court rejected the Republic's immunity defense in this case, additional foreign entities seeking payment on false Bandagro notes have sought to intervene as plaintiffs. *See, e.g.*, RE158. The Sixth Circuit's decision encourages such opportunism and could make Ohio the preferred venue for lawsuits reportedly seeking as much as $8 billion from the Republic. *See* Daniel Cancel, *Venezu-*

*elan Bonds Drop on Report Government May Owe $8 Billion*, Bloomberg, Dec. 20, 2010.

The sovereign interests at stake in this case are particularly compelling because Venezuela categorically denies the Bandagro notes' legitimacy. A state's control over its currency and government securities is one of the most fundamental attributes of sovereignty. The Constitution authorizes Congress, among its few enumerated powers, to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U.S. Const. art. I, § 8, cl. 6. And this Court has long recognized "the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation." *United States v. Arjona*, 120 U.S. 479, 484 (1887). It is therefore "incumbent on the United States as a nation to use due diligence to prevent any injury to another nation or its people by counterfeiting its money or its public or *quasi* public securities." *Id.* at 488. The Republic currently is prosecuting several individuals in Venezuelan courts for their criminal involvement in connection with the Bandagro notes. *See* Jose Orozco, *Venezuela Charges Three in Connection with Bandagro Notes*, Bloomberg, Dec. 21, 2010. But rather than assist the Republic, the decision below provides sanctuary in U.S. courts to those who, like Skye Ventures, seek to enforce foreign government securities that the sovereign itself has determined are fraudulent.

In addition to suits involving false securities such as those at issue in this case, the decision below also unduly exposes U.S. courts to suits by plaintiffs seeking payment on genuine foreign government securities, so long as they do not preclude payment in the United States. The global sovereign debt market

amounts to more than $39 trillion. *See* The Economist, *The Global Debt Clock*, *at* http://www.economist.com/content/global_debt_clock. And defaults on such debt have occurred frequently, as "[t]he 1980's and 1990's bore witness to a series of financial crises that proliferated throughout Latin America, Asia, Russia, and other emerging markets." Ronald J. Silverman & Mark W. Deveno, *Distressed Sovereign Debt: A Creditor's Perspective*, 11 Am. Bankr. Inst. L. Rev. 179, 179 (2003). The current sovereign debt crisis—which already has impacted Greece, Spain, Portugal, and Ireland, among others countries—heightens the risk of a flood of lawsuits. *See* Stephen Fidler, *Debt Crises' New Victims: Rich Developed Economies*, Wall St. J., Apr. 23, 2010. Under the Sixth Circuit's approach, plaintiffs could thrust upon foreign sovereigns a virtually unlimited number of claims in U.S. courts for alleged debt default, simply by demanding payment in this country.

By the same token, it would be damaging to U.S. interests if other countries were to follow the Sixth Circuit's approach to immunity. Like the Republic, the United States has experienced persistent problems with fraudulent government securities in circulation abroad. The Treasury Department maintains a website devoted to warning of these scams. *See* U.S. Dep't of Treasury, *Frauds, Phonies, and Scams*, *at* http://www.treasuryscams.gov. Phony U.S. securities, similar to the Bandagro notes, typically purport to be bearer bonds issued decades ago in large denominations. *Id*. In June 2009, for instance, two people were arrested in Italy attempting to smuggle $134.5 billion in counterfeit U.S. bearer bonds into Switzerland. Elisabetta Povoledo, *Italy Intercepts Billions in Fake Treasuries*, N.Y. Times, June 26, 2009, at B2. Italian authorities confiscated 249

paper bonds, each supposedly worth $500 million, and 10 bonds with a face value of $1 billion each. *Id.* The Treasury Department described the purported bonds as a "total fraud." *Id.*

Under the Sixth Circuit's rule, the United States would be susceptible to criminals attempting to use foreign courts to swindle our own Treasury out of U.S. taxpayer funds. A typical valid U.S. debt instrument is redeemable abroad, either at an embassy or consulate or even at a foreign branch of a U.S. bank. 31 C.F.R. § 321.2(a); U.S. Dipl. Mission to Italy, *Redemption of United States Savings Bonds Abroad*, *at* http://italy.usembassy.gov/acs/other/bonds.html. Of course, a fraudulent security can be crafted according to the counterfeiter's wishes. It goes without saying that unscrupulous individuals would prefer to litigate such securities in foreign rather than U.S. courts. So too, Skye and others claiming to hold Bandagro notes would prefer to litigate the legitimacy of those forgeries anywhere other than Venezuela. This Court's review is warranted not only to resolve the substantial confusion in the lower courts, but also to confine the jurisdiction of U.S. courts over a foreign state to the circumstances delineated by Congress in the FSIA.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL W. COSTELLO
DAVID S. BLOOMFIELD, JR.
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street, 29th Floor
Columbus, OH 43215
(614) 227-2000

LISA S. BLATT
*Counsel of Record*
DAVID B. BERGMAN
PAOLO DI ROSA
GAELA GEHRING FLORES
ROBERT A. SCHWARTZ
R. STANTON JONES
ARNOLD & PORTER LLP
555 12th Street N.W.
Washington, DC 20004
(202) 942-5000
Lisa.Blatt@aporter.com

*Counsel for Petitioners*

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

Nos. 09-3424/3725

---

DRFP L.L.C., dba SKYE VENTURES,
*Plaintiff-Appellee*,

v.

THE REPUBLICA BOLIVARIANA DE VENEZUELA;
THE VENEZUELAN MINISTRY OF FINANCE,
*Defendants-Appellants*.

---

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 04-00793—John D. Holschuh, District Judge.

---

Argued: June 9, 2010
Decided and Filed: September 23, 2010

---

Before: MARTIN, RYAN, and
KETHLEDGE, *Circuit Judges*.

---

RYAN, J., delivered the opinion of the court, in which KETHLEDGE, J., joined. MARTIN, J. (pp. 12-17), delivered a separate opinion concurring in part and dissenting in part.

---

## OPINION

RYAN, Circuit Judge. This case presents questions concerning federal courts' jurisdiction over foreign nations and the doctrine of *forum non conveniens*.

DRFP L.L.C., doing business as Skye Ventures, is the holder of two promissory notes allegedly issued by the government of Venezuela. Skye demanded payment on the notes, and when it was refused, Skye filed suit against Venezuela and its Ministry of Finance in the federal district court in Columbus, Ohio. Venezuela sought dismissal of the case, claiming immunity from United States federal court jurisdiction and the defense of *forum non conveniens*. The district court held that dismissal was not warranted because Venezuela was not immune from jurisdiction by virtue of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602, and that the doctrine of *forum non conveniens* did not apply. Venezuela now appeals.

For reasons we shall explain, we will hold that Venezuela is not immune from federal court jurisdiction, but that the district court must reconsider the *forum non conveniens* question.

### I.

According to the plaintiff's complaint, on December 7, 1981, a state-owned bank in Venezuela, the Banco de Desarrollo Agropecuario, issued some no-coupon bearer promissory notes. The notes stated that they were payable to the holder ten years and one day after the date of issue, although the maturity date was later extended to December 1999. The notes also stated that the Venezuelan Ministry of Hacienda (the precursor to the Ministry of Finance) guaranteed

payment of the notes, and that the government of Venezuela backed the notes.

A Panamanian corporation, Gruppo Triad-FCC SPA, acquired the two promissory notes with which we are concerned in this case, each in the amount of $50 million. After Gruppo demanded payment on the notes in 2001, the Venezuelan Ministry of Finance conducted an investigation into their validity. In October 2003, the Venezuelan Attorney General issued an opinion declaring that the notes were valid. Based on this opinion, the plaintiff, Skye, an Ohio limited liability company whose principal office is in Columbus, Ohio, obtained the two notes from Gruppo and demanded payment of the notes at its office in Columbus. When Venezuela refused to honor the notes on the ground that the instruments were forgeries, Skye filed suit to collect on the notes in the federal district court in Columbus.

On January 31, 2005, while continuing to insist that the notes were invalid forgeries, Venezuela filed a motion requesting dismissal of the case on two grounds: (1) lack of jurisdiction due to sovereign immunity and (2) *forum non conveniens*. Without deciding the motion, the magistrate judge ordered that discovery proceed, and the motion remained undecided for four years. On July 24, 2007, Venezuela notified the district court that the Venezuelan Supreme Court had issued a decision that affected the issues in the case. The magistrate judge then modified his earlier order concerning discovery and, on May 27, 2008, directed the parties to file supplemental briefs addressing the issues of sovereign immunity and *forum non conveniens*.

On February 13, 2009, the district court issued an opinion denying Venezuela's motion to dismiss.

Specifically, the district court held: (1) that Venezuela was not immune from suit pursuant to the FSIA's commercial activity exception and the court had jurisdiction of the case; and (2) that the doctrine of *forum non conveniens* did not apply.

II.

Despite Venezuela's insistence that the notes are forgeries, we must assume, for purposes of deciding the jurisdictional issues before us, that they are valid.

We review questions of subject matter jurisdiction, including issues of sovereign immunity, *de novo*. *O'Bryan v. Holy See*, 556 F.3d 361, 372 (6th Cir.), *cert. denied*, 130 S. Ct. 361 (2009).

Generally, a foreign state is immune from suit in the United States. *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2186 (2009). The FSIA, however, sets out several statutory exceptions to jurisdiction, including the "commercial activity exception" of Section 1605(a)(2). *Am. Telecom Co. v. Republic of Lebanon*, 501 F.3d 534, 537-39 (6th Cir. 2007). The FSIA provides, in part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (2) 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) (emphasis added). The party claiming an exception to immunity bears the burden of production to demonstrate that an exception applies. *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815

(6th Cir. 2002). The party asserting immunity bears the ultimate burden of persuasion. *Id*. Here, the district court held that the commercial activity exception to Venezuela's immunity applied to the facts of this case, and that the district court would exercise jurisdiction.

It is undisputed that Venezuela is a foreign state normally entitled to sovereign immunity. The parties do not dispute that the activities involving the two promissory notes can be characterized as a "commercial activity." 28 U.S.C. § 1605(a)(2). The dispositive question at this stage of the case is whether the "commercial activity of the foreign state" caused a "direct effect in the United States." *Id*.

There are really two aspects to the "direct effect" question. The first is whether the bearer of the notes, Skye, is restricted by contract or by the terms of the notes in selecting the United States as a jurisdiction in which to seek and enforce payment of the notes. The second is whether, if Skye is not precluded from demanding that payment be made in the United States, the defendants' refusal to honor Skye's demand for payment in Ohio is an "act [that] causes a direct effect in the United States." *Id*. Our answer to the first question is no, and to the second, yes.

Both notes explicitly state that the terms and conditions of the notes are governed by the law of Switzerland and "by the regulations of the International Chamber of Commerce in Paris and the United States Council of the International Chamber of Commerce [(ICC)] Brochure '322' last revised edition." Skye introduced the affidavit of an expert, Professor Marco Villa, a Swiss lawyer, whose qualifications to testify as to Swiss law were not challenged by the defendants. Professor Villa, after examining the two

promissory notes, testified that under Swiss law, and the ICC Rules on Collection which are recognized under Swiss law, the bearer of the notes may sue for collection in the jurisdiction of his choice, including the United States of America.

Another witness, Gary Post, accepted by the district court as qualified to give an opinion as to "the ICC's regulations in its Rules on Collection," stated in an affidavit that in his opinion, the ICC regulations permit Skye to seek collection on the notes in the jurisdiction of its choice, including Ohio. *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, No. 2:04-cv-793, 2009 WL 414581, at *8 (S.D. Ohio Feb. 13, 2009). Therefore, it would appear that by the terms of the notes, including the provision that Swiss law govern any dispute over terms and conditions, Skye was entitled to demand and enforce payment in Ohio.

The second aspect of Venezuela's immunity argument—the question whether Venezuela's refusal to honor Skye's demand for payment in Ohio caused a direct effect in the United States—is at the heart of the parties' dispute.

In ruling that Venezuela's refusal to honor the promissory notes caused a direct effect in the United States, the district court relied on the Supreme Court case of *Republic of Argentina v. Weltover, Inc*., 504 U.S. 607 (1992). In *Weltover*, the Supreme Court stated that "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity." *Id*. at 618 (internal quotation marks and citation omitted). The Court rejected any requirement that the effect be either foreseeable or substantial. *Id*.

In *Weltover*, Argentina issued bonds, and the bondholders designated New York as one place where

payment could be made. *Id*. at 607. When Argentina refused to pay and "rescheduled" the bonds, the bondholders sued to collect. The Supreme Court concluded that Argentina's refusal to pay caused a "direct effect" in the United States. The Court explained: "Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily 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 619. Skye argues that the analysis in *Weltover* can be directly applied to the circumstances of this case.

To add weight to its argument, Skye cites *Woodsrite Investments Ltd. v. Gruppo Triad-FFC-SPA-Panama*, a case from Switzerland involving similar Venezuela promissory notes. At our request, the parties have submitted additional supplemental briefing on the *Woodsrite* case. After a review of the *Woodsrite* case, we are not persuaded to follow the case, as it is a decision from a foreign jurisdiction which based its final ruling on the unrelated procedural question of timeliness. The *Woodsrite* case's consideration of the immunity issue was not the central holding of the case. We therefore disagree with Skye's position regarding the preclusive effect of the *Woodsrite* decision.

In opposition, Venezuela argues that the commercial activity exception of Section 1605(a)(2) does not apply because the terms of the promissory notes do not create a contractual right to compel payment of the notes in the United States. Venezuela attempts to distinguish the *Weltover* case by arguing that the foreign state in *Weltover* had more connections to the United States than Venezuela had in this case: for example, the foreign state in *Weltover* specifically

designated New York as a possible place of payment. Venezuela contends that Skye is claiming jurisdiction based solely on Skye's pre-suit demand for payment, and nothing more, and that this is insufficient to establish the commercial activity exception. We find this argument unpersuasive.

Certainly neither the terms of the notes nor any other contractual arrangement between the parties explicitly designated the United States as the place of payment of the notes. But as we have explained, under the terms of the notes, including the provision that Swiss law will be applied, the parties implicitly agreed to leave it to the bearer to demand payment of the notes anywhere, including, perforce, Columbus, Ohio, the bearer's place of business. We do not read *Weltover* as creating an additional requirement that the United States be specifically mentioned in the terms of the notes, as suggested by Venezuela. The Second Circuit Court of Appeals came to a similar conclusion in *Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127 (2d Cir. 1998), where the court found that although a letter of credit did not specifically designate New York as the place of payment, the parties had implicitly agreed that the bank could designate the place of its choice for payment. *See id*. at 132.

We agree with the district court that the cases cited by Venezuela in support of its position are distinguishable. In *American Telecom*, 501 F.3d 534, this court's ruling was simply that including or excluding an American company from bidding for a telephone network in Lebanon does not cause a direct effect in the United States. *Id*. at 541. The other cases cited by Venezuela (*Morris v. People's Republic of China*, 478 F. Supp. 2d 561, 570-71 (S.D.N.Y. 2007); *Global Index,*

*Inc. v. Mkapa*, 290 F. Supp. 2d 108, 114-15 (D.D.C. 2003); *Falcon Invs., Inc. v. Republic of Venezuela*, No. 00-4123, 2001 WL 584346, at *5 (D. Kan. May 22, 2001)), besides being trial court cases from other circuits, are also distinguishable because, although they involve instances in which a place of payment in the United States was not specified in the notes or other obligations, they are not cases in which the court found that there was a provision implicitly permitting the note holder to designate a place of payment, as is the case here.

In short, we hold that Skye had the right to designate the United States as a place of payment of the notes. Skye designated Columbus, Ohio, and when Venezuela refused to pay the promissory notes, money that was supposed to have been delivered to Skye at its office in Columbus was not forthcoming, causing a direct effect in the United States. *See Weltover*, 504 U.S. at 619. Therefore, Skye has successfully satisfied its burden of production in establishing that the commercial activity exception of Section 1605(a)(2) of the FSIA applies, and Venezuela has not carried its burden of persuasion that the exception does not apply.

III.

Venezuela claims that the district court erred in denying its motion to dismiss on *forum non conveniens* grounds.

A district court's denial of a motion to dismiss for *forum non conveniens* is generally reviewed for an abuse of discretion. *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 215 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1689 (2010), *and cert. denied*, 130 S. Ct. 1713 (2010). Venezuela argues, however,

that since the district court rejected the *forum non conveniens* argument on the purely legal basis that there was no "available and adequate alternative forum," which is the first part of the *forum non conveniens* analysis, the proper standard of review is *de novo*. *See Murray v. British Broad. Corp.*, 81 F.3d 287, 292 (2d Cir. 1996). We agree with Venezuela and conduct a *de novo* review.

"[A] plaintiff's choice of forum should rarely be disturbed." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). However, a dismissal of a case for *forum non conveniens*

> is appropriate when the defendant establishes, first, that the claim can be heard in an available and adequate alternative forum and, second, that the balance of private and public factors listed in *Gulf Oil [Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)], reveals that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court.

*Duha v. Agrium, Inc.*, 448 F.3d 867, 873 (6th Cir. 2006).

Skye argued in the district court, and argues here, that Venezuela's courts cannot provide "an available and adequate alternative forum" because a 2007 decision of the Venezuela Supreme Court has foreclosed Skye's right to litigate its case. Some background is necessary to understand Skye's argument and Venezuela's response.

In an opinion issued in October 2003 and addressed to the Venezuelan Ministry of Finance, the Venezuelan Attorney General stated that the notes involved in the case were valid. Although the Attorney General withdrew the opinion within weeks of its issuance, assertedly based upon "new evidence," Skye's litigating

position has been that by reason of the opinion declaring the notes valid, the defendants are now estopped from asserting they are not.

In the meantime, in July 2007, the Venezuelan Supreme Court issued an "interpretative opinion," as permitted under the Venezuelan Constitution, declaring that Attorney General opinions of the kind issued in 2003 and relied upon by Skye are not final and binding determinations of the rights of private claimants, but are "merely consultative" opinions "incapable of creating subjective rights on the part of private individuals." *Decision of the Constitutional Chamber of the Supreme Court of Venezuela*, Nos. 07-0068/0501 (July 12, 2007) (Translation of Venezuelan Supreme Court Opinion at District Court Docket Entry #118-3, p.23). With that, Skye argues, it is now precluded from arguing that Venezuela is estopped from claiming the notes are invalid. With the loss of its estoppel theory, Skye argues further, it "would not be permitted to litigate the subject matter of its dispute [in a Venezuelan court], and the Republic of Venezuela therefore is not an 'available' forum." The district court agreed. The court stated that Venezuela is not "an available and adequate alternative forum" for forum non conveniens purposes because in eliminating Skye's estoppel argument (at least in Venezuela), the Venezuelan Supreme Court "effectively decided the issue of the Notes' validity against the Plaintiff in the present case." *DRFP L.L.C.*, 2009 WL 414581, at *12. The district court went on to explain that since "[t]he Venezuelan courts have addressed the exact factual scenario presented by this case and have conclusively decided an issue central to Plaintiff's case adversely to Plaintiff's stated position[,] . . . Venezuela is not available to Plaintiff as a forum in which to litigate its case." *Id.*

We think the district court has read too much into the Venezuelan Supreme Court opinion. We read the Supreme Court's opinion as limited, as we have said, to the holding that certain Attorney General opinions, including those issued in 2003 in this dispute, are not binding on private parties and are subject to change. Neither the first Attorney General opinion (that the notes are valid) nor the second (that the notes are not valid) is settled law in Venezuela binding the parties to this litigation. The Venezuelan Supreme Court's opinion says nothing that has the effect of denying Skye the right to litigate the subject matter of the lawsuit in Venezuela.

The requirement of an available and adequate alternative forum is ordinarily "satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper Aircraft*, 454 U.S. at 254, n.22 (quoting *Gilbert*, 330 U.S. at 506-07). "[D]ismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Id*. The district court found that for practical purposes Venezuela does not permit litigation on the subject matter of the dispute because it gutted Skye's case by foreclosing its estoppel theory. In support of its ruling, the district court cited to the case of *Norex Petroleum, Ltd. v. Access Indus., Inc*., 416 F.3d 146 (2d Cir. 2005). In *Norex*, the Second Circuit Court of Appeals found that a forum was unavailable because the possibility of litigating the plaintiff's claim was entirely precluded by a prior default judgment. *Id*. at 159-60. We think *Norex* is distinguishable because unlike the circumstances in *Norex*, Skye is not precluded from litigating its claims in Venezuelan courts. Even if the Venezuelan Supreme Court decision can properly be read as eliminating Skye's claim of estoppel, and we emphatically do not express an

opinion about that, such a ruling would weaken Skye's case in Venezuela, but that is not the same as denying Skye the right to litigate the subject matter of the dispute.

Moreover, Venezuela presented an affidavit provided by Professor Carlos Enrique Mourifio Vaquero, apparently accepted by both sides as an authority on Venezuelan law, supporting the position that Venezuela is an available forum for claims made against the government of Venezuela. The availability of the administrative and judicial procedures in Venezuela, as described in the affidavit, is not contested. A forum is not unavailable merely because the law applied in that forum is less favorable to a plaintiff than the law of the plaintiff's chosen forum. *Piper Aircraft*, 454 U.S. at 250. The fact that the law in Venezuela *may* not be favorable to Skye, based on the current legal precedents following the July 2007 Venezuelan Supreme Court decision, does not render the administrative and judicial procedures in Venezuela unavailable and inadequate as a matter of law. Skye is not precluded from litigating its claims in the Venezuelan courts, and the district court's ruling to the contrary was mistaken.

Because the district court's ruling was based upon the first part of the *forum non conveniens* rule, the court did not reach the second step of the analysis, the balancing of private and public interests. We express no opinion with regard to the correct resolution of this second step and we remand the case to the district court for a full consideration of the question whether the doctrine of *forum non conveniens* applies.

## IV.

We AFFIRM the district court's judgment on the issue of sovereign immunity, REVERSE its judgment on the issue of *forum non conveniens*, and REMAND for further proceedings consistent with this opinion.

CONCURRING IN PART AND
DISSENTING IN PART

BOYCE F. MARTIN, JR., *Circuit Judge*, concurring in part and dissenting in part. While I concur in full with the majority's reasoning and holding on the issue of *forum non conveniens*, I must disagree with its holding on the issue of jurisdiction over this claim.

The facts of this case are extraordinarily complicated. Essentially, Skye, an American corporation, went abroad and purchased Venezuelan notes, known as "Bandagro notes," from a Panamanian corporation, Gruppo Triad, and demanded payment from Venezuela in Columbus, Ohio. Venezuela did not pay. The district court found that this constituted a sufficient "direct effect" on United States commerce to create federal jurisdiction and defeat sovereign immunity. The majority affirms the holding of the district court, and I respectfully dissent.

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-11, "grants federal district courts jurisdiction over civil actions against foreign states 'as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity' under either another provision of the FSIA or 'any applicable international agreement.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 681 (2004) (quoting 28 U.S.C. § 1330(a)). Essentially, the court first presumes immunity, pursuant to section 1604, but looks for an exception, found in sections 1605-07; then, only if the court finds that the "foreign state is not entitled to immunity" will the court have subject matter jurisdiction, pursuant to section 1330(a).

Skye contends that the "commercial activity exception" to the FSIA divests Venezuela of foreign sove-

reign immunity. That exception states, in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States 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) (emphasis added). "[A]n effect is direct if it follows as an immediate consequence of the defendant's activity." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). "Of course the generally applicable principle de minimis non curat lex ensures that jurisdiction may not be predicated on purely trivial effects in the United States. But we reject the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id.*[1] In *Weltover*, the Supreme Court held that there was a direct effect when the Argentinian bonds specified for payment locations, one of which was New York, and Argentina had begun making payments to the plaintiffs in New York before unilaterally rescheduling its debts and suspending payments. *Id.*

We recently held that "the mere act of including an American company in or excluding an American company from the process of bidding on a contract, where both parties' performance is to occur entirely

---

[1] This Court has rejected the "legally significant act" test that is required in the Eighth, Ninth, and Tenth Circuits, and expressly renounced in the Fifth Circuit. *See Am. Telecom Co. v. Republic of Lebanon*, 501 F.3d 534, 540 (6th Cir. 2007) (citing *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002)).

in a foreign locale, does not, standing alone, produce an immediate consequence in the United States, and thus does not have a direct effect in the United States. *Am. Telecom Co.*, 501 F.3d at 541. We also held that, "even if [the payment of $30,000 from an American bank to enter a bid] produced a direct effect, that effect was not *caused* by [the country]. American Telecom was not required to submit payment from an American bank; it chose to do so, and to the extent that making that payment had a direct effect in the United States, the effect was the direct result of American Telecom's action, not [the country's]." *Id*. (emphasis in original).

In this case, Skye, an American corporation, went abroad and purchased Venezuelan notes from a Panamanian corporation, Gruppo Triad. Skye then brought the bonds to a bank in Columbus, Ohio and demanded payment. Venezuela refused to pay. That Skye chose to use an American bank from which to request payment is not sufficient to defeat sovereign immunity under *American Telecom*. If it were sufficient, everyone would request payment here so as to gain access to local federal courts. Thus, I agree with the majority that the pre-suit demand for payment is not enough to create federal jurisdiction and defeat sovereign immunity.

However, this does not end the inquiry. The note itself may create federal jurisdiction in the United States and concede sovereign immunity by expressly stating a place of performance in the United States, *see Weltover*, 504 U.S. at 618, or by not specifying a place of performance but instead expressly granting the plaintiff the right to choose the place. In that case, if the plaintiff designates the United States, then failure to pay can constitute a direct effect. *See,*

*e.g., Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 818 (6th Cir. 2002) (plaintiff was to set up escrow account for payment anywhere); *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998) (plaintiff "was entitled under the letter of credit to indicate how it would be reimbursed, and it designated payment to its bank account in New York"). However, if the bond is silent on the place of performance, then there is no basis for United States jurisdiction over ensuing claims, even if the injury is somehow felt in the United States. *See, e.g., Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183, 1191 (10th Cir. 2008) (no jurisdiction where "the joint venture did not require any action in the United States, the failure of which to occur could constitute a direct effect"); *Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 91 (D.C. Cir. 2005) (no direct effect where "Saudi Arabia 'might well have paid' [the American plaintiff] or another employee in the United States 'but it might just as well have done so' outside the United States").

Here, it is undisputed that the Notes did not expressly state a place of performance in the United States and that they do not specifically state that their holder can demand payment in the United States. However, the parties dispute whether the Notes grant the holder the right to state the place of performance and specifically on what the concept of a "place of payment" means.

I find this issue to be most clearly crystalized in the dueling translations of a case from a Swiss court that examined Bandagro bonds, including those at issue here, to determine whether jurisdiction over Venezuela existed in Switzerland, that were submitted by the

parties here.[2] *Woodsrite Investments Ltd. v. Gruppo Triad, et al*., File No. OA200487 (District Court of Mendrisio Sud, Canton of Ticino, Switzerland) (R.E. 137-1 and 137-2). Venezuela purports that the relevant paragraph of *Woodsrite* is accurately translated:

> In addition to the above, there is no connection between the legal business regarding the promissory notes, as well as the guarantee they represent, and Switzerland; and, since the legal relationship has no connection with the Swiss territory, it would seem, according to what has been stated, that the securities can be redeemed anywhere, and paid in any requested currency.

(Affidavit of Aura Colmanni, July 26, 2010, at 3). On the other hand, Skye purports that the relevant section is most accurately translated as:

---

[2] The Notes state that they are governed by the laws of Switzerland and the ICC Brochure 322. The district court found that this means that the "Notes clearly include the United States as a place of payment because of Bandagro's agreement that its obligations under the Notes, which would include the obligation to make payment, will be governed and construed in accor[d]ance with the laws of Switzerland and by the regulations of the [ICC]." *DRFP LLC v. Republica Bolivariana de Venezuela*, No. 2:04-cv-793, 2009 WL 414581, at *7 (S.D. Ohio Feb. 13, 2009). Skye's expert testified that "there is no prohibition under Swiss law denying a creditor the right to initiate a demand for payment through the ICC Uniform Rules for Collection Process." This expert's affidavit also stated that the Notes could not have been sold in the international market unless payment could be demanded outside of Venezuela. The district court interpreted these statements to mean that "it was foreseeable and intended by Bandagro that payment on the Notes would be demanded in the United States because: the Notes are bearer notes and are freely transferable, they are written in English, and the amount is listed in United States dollars." *Id.*

> The BANDAGRO promissory notes make express reference to the applicability of Swiss law and according to the rules of issue, which refer to the ICC rules, they may be called for payment in any part of the world. . . . Indeed, the court fails to see how the connection with Switzerland cannot be established, because payment of the notes, in accordance with the clauses they contain, is requested in the place in which they are found, by bringing an action before a Swiss court which must apply Swiss law.

(Skye's letter brief, July 1, 2010, at 2). If I did not know better, I would assume that these were translations from two different cases. As presented here, they demonstrate the fundamental difference in the understanding of payment in these cases: if it matters where the payment is demanded or from where the payment is demanded. In other words, is the fact that a noteholder may go to a bank anywhere in the world to request payment the same as designating every location as a place of payment, an action that waives sovereign immunity as to every country in which a noteholder may take a note after its purchase?

The method by which a noteholder may demand payment of the Notes at issue seems complicated. The noteholder goes to its bank and asks the bank to demand payment. Using a series of wires, the bank requests payment from a Venezuelan bank and receives the payment in that bank. The payment is then wired back to the noteholder's bank. Essentially, the bank uses wire transfers to act as the noteholder's proxy in going to Venezuela and requesting payment, which makes sense; it would be extraordinarily in-

efficient to require noteholders to purchase a plane ticket in order to request payment on their notes.[3]

It seems likely that the bonds would not be easily negotiable internationally if a noteholder had to go to the country that issued the note in order to demand payment. However, it is incredible that a country issuing notes would, under any circumstances, waive its sovereign immunity in every country in the world in which a noteholder could take the notes and find a bank to act as its proxy without expressly so stating in the note. Such a waiver is far too broad to read into a document. Our laws presume sovereign immunity; unless there is an obviously implicit waiver, we ought not to create such an unwieldy exception to this important protection. To so find would gut the laws of sovereign immunity.

Thus, I disagree with the majority and would find that, while a noteholder may request that a bank anywhere in the world demand payment on its behalf, this does not waive Venezuela's sovereign immunity. The effect on the United States is not direct because it is not "an immediate consequence of the defendant's activity" as required by *Weltover*. It was a consequence of Skye's choice of the United States and the choice of an American bank as its proxy to acquire the payment from the Venezuelan bank—not of Venezuela's express or implied waiver of sovereign immunity.

I therefore respectfully dissent from the majority's holding that this Court has jurisdiction to consider this claim.

---

[3] This situation is different from that discussed in *Weltover*, where the funds could be requested from a bank in New York—the payment was not actually being paid out of the country of origin. *Weltover*, 504 U.S. at 618.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Dec 15, 2010]

---

Nos. 09-3424/3725

---

DRPF L.L.C., Doing Business As SKYE VENTURES,
*Plaintiff-Appellee*,

v.

THE REPUBLIC BOLIVARIANA DE VENEZUELA, *et al.*,
*Defendants-Appellants*.

---

BEFORE: MARTIN, RYAN, and KETHLEDGE, Circuit Judges.

---

ORDER

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Leonard Green, Clerk

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

Case No. 09-3424/09-3725

---

DRPF L.L.C., dba SKYE VENTURES
*Plaintiff - Appellee*

v.

THE REPUBLIC BOLIVARIANA DE VENEZUELA;
THE VENEZUELAN MINISTRY OF FINANCE
*Defendants - Appellants*

---

BEFORE: MARTIN, *Circuit Judge*; RYAN, *Circuit Judge*; KETHLEDGE, *Circuit Judge*;

ORDER

Upon consideration of motion to stay mandate,

It is ORDERED that the mandate be stayed to allow appellants time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Issued: December 17, 2010

**APPENDIX D**

UNITED STATES DISTRICT COURT,
S.D. OHIO, EASTERN DIVISION.

---

No. 2:04-cv-793.

---

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

v.

THE REPUBLICA BOLIVARIANA DE VENEZUELA, *et al*.,
*Defendants*.

---

Feb. 13, 2009.

---

MEMORANDUM OPINION AND ORDER

JOHN D. HOLSCHUH, *District Judge*.

This action for default on promissory notes brought by DRFP L.L.C., d/b/a Skye Ventures ("Plaintiff") against The Republica Bolivariana de Venezuela ("Venezuela") and the Venezuelan Ministry of Finance ("the Ministry") (collectively, "Defendants") is before the Court pursuant to Magistrate Judge Kemp's Order of May 27, 2008 (doc. # 135). That Order amended the discovery schedule in this case to allow the Court to resolve the issues of subject matter jurisdiction and *forum non conveniens*, originally raised in Defendants' Motion to Dismiss (doc. # 13), before requiring the parties to engage in potentially lengthy discovery regarding the validity of the promissory notes at issue. For the following reasons the Court

concludes that, assuming the promissory notes in question are valid, Defendants are not immune from this Court's jurisdiction under Foreign Sovereign Immunities Act. Additionally, the Court concludes that the doctrine of *forum non conveniens* does not require dismissal of the case. Defendants' Motion to Dismiss (doc. # 13) on the grounds of subject matter jurisdiction and *forum non conveniens* is thus DENIED.

I. Relevant Background

On December 7, 1981, the Banco de Desarrollo Agropecuario SA ("Bandagro"), a state-owned agricultural assistance bank in Venezuela that is now defunct, issued a series of no coupon bearer promissory notes.[1] The notes state that they are payable to holder 10 years and 1 day after the date of issue (December 8, 1991), and also state: "The terms and conditions of this Promissory Note will be governed by and construed in accordance with the laws of Switzerland and additional thereto by the regulations of the International Chamber of Commerce in Paris and the United States Council of the International Chamber of Commerce Brochure '322' last revised edition." (Compl. ex. 1A, 1B, doc. # 1.) Additionally, the notes state that the Minister of Hacienda (the precursor to

[1] Defendants vigorously contest the validity of these notes, and argue that they are forgeries and were never issued by Bandagro. For the purposes of resolving the threshold issue of jurisdiction, however, the Court and the parties assume that the notes are valid, which will allow the Court to focus only on the legal issues involved. (*See* Order, May 27, 2008, doc. # 135; Def. Supp. Br. p. 6, 26, doc. # 136 (arguing that even if notes are valid Plaintiff cannot establish jurisdiction); Pl. Supp. Br. p. 8, doc. # 137 (noting that the Court assumes the notes are valid for the purpose of resolving the jurisdictional issue).)

the Ministry) guarantees payment of the notes, and that the notes are backed by Venezuela.

The notes were initially acquired by Gruppo Triad-FCC SPA ("Gruppo"), a Panamanian corporation. Although the notes state on their face that their maturity date would be December 8, 1991, in early December 1991 the Ministry extended the notes' maturity date until December 1999. Gruppo demanded payment on the notes in 2001, and in March 2003 the Ministry began an investigation into Gruppo's demands, part of which included the Ministry sending a representative to inspect the notes which were then being held in Miami, Florida. This investigation led to an opinion by the Venezuelan Attorney General, issued in October 2003, that the notes were valid and that Venezuela was obligated to pay the notes. Relying on this opinion, Plaintiff acquired two notes from Gruppo in 2004, numbers 7/12 and 8/12, each in the amount of $50 million U.S. dollars (the "Notes"). Plaintiff subsequently from Columbus, Ohio made a demand for payment on the Notes. Defendants, however, had since conducted a further investigation into the notes and had now concluded that the Notes Plaintiff holds are forgeries, were invalid and consequently revoked the Attorney General's opinion. Defendants refused Plaintiff's demand for payment, and Plaintiff brought this action on August 23, 2004.

Defendants filed a Motion to Dismiss the Complaint on January 31, 2005 (doc. # 13) and raised several grounds that allegedly support dismissal, including lack of subject matter jurisdiction due to sovereign immunity and *forum non conveniens*. After a lengthy period of motion practice before two magistrate judges addressing the proper sequencing and scope of the discovery necessary to resolve Defendants'

Motion to Dismiss, on July 16, 2007 Magistrate Judge Kemp ordered the parties to continue their already-begun discovery related to the validity of the Notes, and denied Defendants' request for a stay of that discovery and their suggestion that the Court should address subject matter jurisdiction issues and the doctrine of *forum non conveniens*. (Doc. # 117.)

On July 24, 2007, however, Defendants informed the Court that the Venezuelan Supreme Court had recently issued a decision addressing the issues in this case, and objected to Magistrate Judge Kemp's July 16, 2007 order on the ground that the recent Venezuelan Supreme Court opinion indicated that the best course of action would be to stay discovery and address subject matter jurisdiction and *forum non conveniens*. (Docs. # 118, 119, 120.) This Court then overruled Defendants' objections because Magistrate Judge Kemp's order was not clearly erroneous, but referred the issue back to Magistrate Judge Kemp to determine if the new Venezuelan Supreme Court opinion constituted good cause to modify the previous pretrial order. (Doc. # 132.) Over Plaintiff's opposition, on May 27, 2008 Magistrate Judge Kemp decided that the Venezuelan Supreme Court opinion was indeed good cause to modify the July 16, 2007 order, and directed the parties to file supplemental briefs addressing the issues of whether, assuming the Notes are valid, subject matter jurisdiction exists, and if subject matter jurisdiction exists, whether the case should be dismissed pursuant to the *forum non conveniens* doctrine. (Doc. # 135.) The parties have filed their supplemental briefs (docs. # 136-38, 141-42), and these issues are ripe for adjudication.

II. Subject Matter Jurisdiction under the Foreign Sovereign Immunities Act

A. Applicable Law

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*., together with 28 U.S.C. § 1330, "grants federal district courts jurisdiction over civil actions against foreign states 'as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 685, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). The FSIA is the sole basis for establishing federal court jurisdiction over a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434-39, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). Once a defendant makes a *prima facie* showing that it is a foreign state or an agency or instrumentality of a foreign state, as those terms are defined by § 1603, § 1604 creates a presumption that the foreign state is immune from the jurisdiction of United States courts. See 28 U.S.C. § 1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002). Plaintiff agrees that Venezuela is a foreign state, and that the Ministry is an agency or instrumentality of Venezuela (Compl. ¶¶ 4, 5, doc. # 1), and so Defendants are presumptively immune from this Court's jurisdiction. Plaintiff now bears a burden of production to show that an exception to FSIA immunity applies. *Keller*, 277 F.3d at 815. The ultimate burden of persuasion, however, rests at all times on the party claiming FSIA immunity: in this case, Defendants. *Id*.

Two exceptions to FSIA immunity are at issue, contained in the second and third clauses of § 1605(a)(2). Section 1605(a)(2) states, in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-
>
> * * *
>
> (2) in which the action is based . . . ; [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; [3] or 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).[2] Section 1605(a)(2) as a whole is known as the "commercial activity exception," *see*

---

[2] In its supplemental brief following Magistrate Judge Kemp's May 27, 2008 order, Plaintiff argued that both of these exceptions apply. Defendants argue that the Court should address only jurisdiction under the third clause of § 1605(a)(2) because jurisdiction under the second clause is not within the scope of the issues Magistrate Judge Kemp's order allowed the parties to brief (p. 2, doc. # 138), but the Court does not agree. In its initial brief in response to Defendants' Motion to Dismiss, Plaintiff clearly stated that it believed that the exception contained in the second clause of § 1605(a)(2) applied in this case. (P. 19-20, doc. # 20). Although the majority of the parties' subsequent briefs have focused on the exception in the third clause of § 1605(a)(2), the issue of whether the second clause creates FSIA jurisdiction was properly raised and is still at issue. Magistrate Judge Kemp's May 27, 2008 order is not to the contrary; it does, at times, specifically reference only the third clause of § 1605(a)(2) and does not mention the second clause, but at other times speaks broadly of the Court addressing "subject matter jurisdiction" with no qualifiers. Finally, Defendants have submitted a second supplemental brief addressing Plaintiff's arguments with respect to the second clause of § 1605(a) (2) and the Court GRANTS Defendants' Motion for Leave to file this supplemental brief (doc. # 138). Therefore, Defendants will be

*Republic of Argentina v. Weltover, Inc*., 504 U.S. 607, 611, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), because all the exceptions set forth in the section are rooted in the idea that when a foreign state engages in purely private commercial transactions, as opposed to sovereign acts, immunity is not appropriate. *See id*. at 613-14. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act[,]" 28 U.S.C. § 1603(d), and in *Weltover* the Supreme Court clarified that the terms "commercial conduct" or a "commercial act" mean actions by a foreign state that are in the nature of a private player participating in a market, as opposed to actions in the nature of a governmental actor regulating the market. *Weltover*, 504 U.S. at 614.

To establish that the exception in the second clause of § 1605(a) (2) applies, the action must 1) be "based upon" an act that was performed in the United States; and 2) the act in the United States must have

---

heard on this issue and Plaintiff will suffer no prejudice by having the Court consider and rule on the issue of whether the second clause of § 1605(a)(2) creates subject matter jurisdiction.

> In its supplemental brief, however, Plaintiff also argued that Defendants have implicitly waived their FSIA immunity. (Pl Supp. Br. p. 28-34, doc. # 137.) Defendants also objected to Plaintiff raising this new issue, and in this case the Court agrees with Defendants. Unlike the second clause of § 1605(a)(2), this is the first time that Plaintiff has raised the issue of waiver, and it is not within the scope of the issues that Magistrate Judge Kemp ordered the parties to brief. Plaintiff acknowledges that this argument went beyond Magistrate Judge Kemp's May 27, 2008 order (p. 4, doc. # 141), and has offered to strike that portion of its supplemental brief. Plaintiff's suggestion is appropriate, and the Court will not address Plaintiff's newly-raised waiver argument.

been taken in connection with commercial activity by the foreign state outside the United States. 28 U.S.C. § 1605(a)(2). "Based upon" means that the act performed in the United States must establish one of the elements of the plaintiff's cause of action: "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. The act in the United States upon which a plaintiff bases its claim need not itself be commercial, but it must have been taken "in connection with" the commercial activity conducted elsewhere: it must have some substantive connection or causal link to the commercial activity. *See Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 726 (9th Cir. 1997).

To establish that the exception in the third clause of § 1605(a) (2) applies, the action must be "1) 'based . . . upon an act outside the territory of the United States'; 2) that was taken 'in connection with a commercial activity' of [the foreign state] outside this country; and 3) that 'cause[d] a direct effect in the United States.'" *Weltover*, 504 U.S. at 611 (*quoting* 28 U.S.C. § 1605(a)(2)). The tests for the "based upon" and "in connection with" elements are the same under the third clause as they are under the second clause of § 1605(a)(2), but under the third clause the plaintiff must also show that the act outside of the United States had a "direct effect" in the United States.

The "direct effect" element does not "contain[ ] any unexpressed requirement of 'substantiality' or 'foreseeability'[,]" *id*. at 618, and the Sixth Circuit has rejected the "legally significant act" test, adopted by other circuits, that would require the plaintiff to show that "something legally significant actually happened

in the U.S.[,]" *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989), to establish FSIA jurisdiction under the third clause of § 1605(a)(2). Instead, the Supreme Court and the Sixth Circuit both state that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" *Keller*, 277 F.3d at 817 (*quoting Weltover*, 504 U.S. at 618). "Of course the generally applicable principle *de minimus non curat lex*[3] ensures that jurisdiction may not be predicated on purely trivial effects in the United States[,]" *American Telecom Co., L.L.C. v. Republic of Lebanon*, 501 F.3d 534, 539 (6th Cir. 2007) (*quoting Weltover*, 504 U.S. at 618). To establish a direct effect under the third clause of § 1605(a) (2), therefore, a plaintiff must show that the effect was not a trivial effect and that it was the immediate consequence of a foreign state's activity.

B. Analysis

1. The Second Clause of § 1605(a)(2)

Plaintiff argues that the exception in the second clause of § 1605(a)(2) applies because the Ministry's investigation into Gruppo's demands for payment included inspecting the Notes in Miami, Florida; Plaintiff argues that this is an "act performed in the United States" taken in connection with Defendants' commercial activity of issuing and guaranteeing the Notes in Venezuela. (Pl. Supp. Br. p. 26, doc. # 137.) Plaintiff further argues that its case is "based upon" the Ministry's investigation in Miami because Plaintiff relied on the investigation and the Attorney General's opinion that the Notes were valid when it purchased

[3] "The law does not care for, or take notice of, very small or trifling matters." BLACK'S LAW DICTIONARY 224 (Abridge. 5th ed. 1983).

the Notes from Gruppo and, from Columbus, made demand for payment: "Venezuela's investigation of the Notes in the United States began an unbroken chain of events beginning with the [Attorney General's] investigation, which enticed Plaintiff to purchase the Notes, and ending with Venezuela's failure to remit payment in Columbus, Ohio." (*Id*. p. 27-28.) Defendants respond by arguing that Plaintiff's claim is not "based upon" the Ministry investigation in Miami because establishing that the investigation occurred does not prove any of the elements of Plaintiff's claim. (Def. Supp. Br. p. 3-7, doc. # 138.)

Bandagro's issuance of the Notes, and Defendants' guarantee of them, were certainly "commercial activity" under § 1603(d) and *Weltover*, because Defendants were acting in the nature of a private player participating in a market by issuing and guaranteeing such "garden variety debt instruments," *see Weltover*, 504 U.S. at 614, and the noncommercial act of inspecting the Notes was taken "in connection with" that commercial activity. This satisfies the second requirement for establishing that the exception in the second clause of § 1605(a)(2) applies, but the question is whether Plaintiff's action is "based upon" an act performed in the United States: the primary, fundamental requirement for the application of the second clause of § 1605(a)(2).

As noted above, in *Saudi Arabia v. Nelson* the Supreme Court interpreted the "based upon" requirement to mean that an action is based upon the "elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357. What, then, are the elements of Plaintiff's claim for default on these Notes?

Defendants state that "[t]he elements [of Plaintiff's claim] are Plaintiff's ownership of the (allegedly genuine) notes and the refusal of the Venezuelan government to pay." (2d Supp. Br. p. 4, doc. # 138.). Ohio law includes these same elements-in Ohio, the elements of an action for default on a promissory note are: (1) the defendant must have signed the note; (2) the plaintiff must be the holder of or be entitled to enforce the note; and (3) the note must be due and unpaid. OHIO REV.CODE ANN. §§ 1303.36(A), (B), 1303.41 (LexisNexis 2002); 71 OH. JUR.3DD *Negotiable Instruments and Other Commercial Paper* § 342 (2008).

Furthermore, the Bandagro Notes specifically state that the obligations of the bank and Defendants will be governed by "the laws of Switzerland and additional thereto by the regulations of the International Chamber of Commerce Brochure '322' last revised edition." As discussed in section II.B.2 *infra*, these provisions allow the holder of the Notes to designate the place where the bank would remit payment, and in this case Plaintiff designated Columbus, Ohio.

Having thus determined what the elements of Plaintiff's cause of action are, the Court now asks whether Plaintiff's action is "based upon" Defendant's act of investigating and examining the Notes in Miami. The Court concludes that it is not. Evidence that a Ministry representative traveled to Miami to inspect the Notes, and that the results of this inspection helped to support the Attorney General's initial opinion that the Notes were valid, would certainly be *evidence* that the Notes were valid, *i.e.* that Defendants signed the Notes and that they are genuine, which is the first element of Plaintiff's claim. However, that does not mean that the act of

inspecting the Notes in Miami conclusively *established* the first element of Plaintiff's claim, as *Nelson* requires. *See* 507 U.S. at 357. Under Plaintiff's theory of the case, the act that conclusively established the validity of the Notes and the act upon which Plaintiff relied in purchasing the Notes was the Attorney General's October 2003 opinion concluding that the Notes were valid debt obligations. That act occurred in Venezuela, not the United States.

Plaintiff's "chain of events" argument is unpersuasive, because *Nelson* and the second clause of § 1605(a)(2) require that a specific act occurring in the United States must actually establish one of the elements of the plaintiff's claim, not that an act in the United States leads to or supports the establishment of an element of the claim. Under Plaintiff's theory of the case, *see id*., proving that the Ministry representative inspected the Notes in Miami does not entitle the Plaintiff to relief on its cause of action for default on the Notes, because Plaintiff has consistently argued that the Attorney General's October opinion is what actually established the Notes' validity. The inspection in Miami certainly supported and formed a basis for the Attorney General's decision, but it did not conclusively establish that Defendants signed the Notes, because the Miami inspection was just a facet of a larger and broader investigation that ultimately culminated in an opinion rendered in Venezuela, not the United States.

Plaintiff has not satisfied its burden of production to demonstrate that the exception to FSIA immunity in the second clause of § 1605(a)(2) applies, and Plaintiff's claim is not "based . . . upon an act performed in the United States." This Court does not have subject matter jurisdiction pursuant to the

second clause of § 1605(a)(2)'s commercial activity exception.

2. The Third Clause of § 1605(a)(2)

Plaintiff also argues that the exception contained in the third clause of § 1605(a)(2) applies in this case. Plaintiff's claim is "based upon" an act outside of the United States, as all of Defendants' commercial activity took place outside the United States. Assuming for the purposes of this ruling that the Notes are valid, the parties agree that Defendants engaged in commercial activity, *see Weltover*, 504 U.S. at 614 (issuing debt instruments that a private entity could issue is commercial activity), and all of Defendants' actions had a substantial connection to that commercial activity. The basic issue, therefore, is whether Defendants' failure to pay on the Notes had a direct effect in the United States.

Plaintiff argues that Defendants' refusal to pay on the Notes had a direct effect in the United States because Plaintiff had validly designated a bank in Columbus, Ohio as the place of payment. Once Plaintiff did so, Plaintiff argues that Defendants had a contractual obligation to pay on the Notes in Columbus. Plaintiff argues that when Defendants refused to pay, money that should have been coming to Columbus did not arrive, causing a direct effect in the United States. (Pl. Supp. Br. p. 12, doc. # 137.) Plaintiff primarily relies on *Weltover* for this argument. Defendants respond by arguing that Plaintiff's unilateral acts of holding the Notes in the United States, demanding payment in Columbus, and designating Columbus as the place of payment do not create a direct effect in the United States because the Notes did not specifically designate the United States as the place of payment. (Def. Supp. Br. p. 25-33, doc. # 136.)

Defendants rely primarily on circuit and district court opinions applying *Weltover* for their argument.

To determine if a foreign sovereign's commercial act had a direct effect in the United States, courts frequently ask whether the foreign sovereign had a contractual obligation to pay money in the United States pursuant to a designation of the United States as the place of payment. *See, e.g.*, *Weltover*, 504 U.S. at 619; *Keller*, 277 F.3d at 818; *Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 113 (D.D.C. 2003) (stating that relevant case law does not "specifically require[ ] express designation of the United States as the place of payment[,]" but "[a]s a factual matter, however, in almost every case involving the direct effect exception, the existence or absence of an expressly designated place of payment has been decisive").

Such a designated place of payment was decisive for the Supreme Court in *Weltover*, which involved Argentina's issuance of government-backed bonds. The bonds stated that they were payable in United States dollars and allowed the holder to elect to demand payment through either the London, Frankfurt, Zurich, or New York markets. 504 U.S. at 610. When the bonds matured the holders designated New York as the place of payment, and after Argentina attempted to reschedule the debts and then defaulted on the bonds, the holders sued in federal court. The Supreme Court, affirming both the district court's and the Second Circuit's finding that the exception in the third clause of § 1605(a)(2) applied, held that "[b]ecause New York [pursuant to the holders' designation] was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily 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 619.

The Sixth Circuit has also relied on a foreign sovereign's contractual obligation to pay at a designated location in the United States to find that the third clause of § 1605(a)(2) created an exception to FSIA immunity. In *Keller* the plaintiff, a Michigan businessman, entered into a contract with defendants, representatives of the Nigerian government, to distribute prefabricated hospital and emergency care facilities in Nigeria. 277 F.3d at 814. Plaintiff and defendants agreed in the contract that defendants would transfer funds to plaintiff's bank account in Cleveland, Ohio as payment for the facilities, but when no funds were transferred plaintiff filed suit. *Id*. The Sixth Circuit, after surveying decisions from other circuits finding "a direct effect when a defendant agrees to pay funds to an account in the United States and then fails to do so[,]" *id*. at 818, found that defendants' actions had a direct effect in the United States because "defendants agreed to pay but failed to transmit the promised funds." *Id*. Other circuits have relied on similar reasoning, even when the debt instrument in question does not specifically indicate any one place of payment but rather allows the holder to designate a place of payment. *See, e.g., Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998) (where letter of credit allowed plaintiff to designate any place of payment and plaintiff designated a New York bank account, defendant's failure to pay on the letter of credit resulted in direct effect in United States); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) (where plaintiff designated Houston bank account as place of payment on a letter of credit that

allowed plaintiff to designate any place of payment, defendant's failure to remit funds to Houston bank had direct effect in the United States).

The question, then, is whether the Notes allowed Plaintiff to validly designate Columbus as the place of payment, and thus imposed upon Defendants a contractual obligation to pay on the Notes in the United States. Although Defendants argue to the contrary, the Court finds that Plaintiff has demonstrated that the Notes allowed Plaintiff to designate Columbus as the place of payment pursuant to Defendants' specified contractual obligations in the Notes.

As noted *supra* in § I, the Notes state: "The terms and conditions of [these] Promissory Note[s] will be governed by and construed in accordance with the laws of Switzerland and additional thereto by the regulations of the International Chamber of Commerce in Paris and the United States Council of the International Chamber of Commerce Brochure '322' last revised edition." (Compl. ex. 1A, 1B, doc. # 1.) While the Notes themselves do not specifically state that their holder can demand payment in the United States, the Notes clearly include the United States as a place of payment because of Bandagro's agreement that its obligations under the Notes, which would include the obligation to make payment, will be governed and construed in accorance with the laws of Switzerland and by the regulations of the International Chamber of Commerce ("ICC"). Plaintiff has produced the unrebutted affidavit of Marco Villa, an expert in Swiss law who specializes in banking and commerce, who states that Swiss law, as applied to the Notes, would allow a demand for payment and suit to obtain payment on the Notes in any

jurisdiction, including the United States. (Aff. of Marco Villa ¶¶ 2, 5, Pl. Br. re: Disc. ex. 3, doc. # 20.)

Plaintiff has also produced the unrebutted affidavit of Gary M. Post, an expert in financial matters and the ICC's regulations in its Rules on Collection, which he states "allow the holder of a debt instrument, such as promissory notes, to demand payment essentially anywhere in the world." (Aff. of Gary M. Post ¶ 2, Pl. Supp. Br. ex. 3, doc. # 137 ("Post Aff.").) The reason for this broad payment provision is that it benefits both the creditor and the purchaser of promissory notes. Post states that the Notes could not have been sold in the international market unless payment could be demanded outside of Venezuela: "If buyers were required to either go to Venezuela to collect the notes or were subject to the Venezuelan legal system to collect the notes, such notes could not have been sold." (*Id*. ¶ 9.) Furthermore, Post states that it was foreseeable and intended by Bandagro that payment on the Notes would be demanded in the United States because: the Notes are bearer notes and are freely transferable, they are written in English, and the amount is listed in United States dollars. (*Id*. ¶¶ 3, 10.) He also states that "[i]t is common knowledge that Venezuela has made regular use of the United States [m]arkets to place and settle debt instruments." (*Id.* ¶ 11.) Post unequivocally concludes that demand for payment from Columbus, Ohio was proper under the ICC regulations, and that Plaintiff validly designated a bank in Columbus, Ohio as the place of payment. (*Id*. ¶ 8.)

Defendants do not refute Post's Affidavit, and instead argue that the ICC regulations are irrelevant to this case because they are voluntary guidelines. (Def. 2d Supp. Br. p. 21-22, doc. # 138.) The fact that

Defendants may consider the ICC regulations to be voluntary guidelines, however, does nothing to detract from the undisputed fact that Bandagro voluntarily and contractually agreed when issuing the Notes that their terms and conditions would be governed by Swiss law and the ICC regulations.[4] The reason for doing so is obvious; according to Post's Affidavit, Bandagro could not have sold the Notes if it had not included this contractual obligation in the Notes.

To establish that an exception to F SIA immunity applies, Plaintiff has a burden of production only, not a burden of ultimate persuasion (which falls on the entity claiming immunity), *see Keller*, 277 F.3d at 815, and this unrefuted affidavit testimony is sufficient to establish that under the negotiated terms of the Notes, including the ICC regulations and Swiss law, Plaintiff was entitled to designate any place of payment it desired, including Columbus. And once Plaintiff designated Columbus as the place of payment, Defendants had a contractual obligation to pay on the Notes in Columbus. Their failure to do so caused a direct effect in the United States, because "[m]oney that was supposed to have been delivered to a [Columbus] bank for deposit was not forthcoming." *Weltover*, 504 U.S. at 619; *see also Keller*, 227 F.3d at 818.

Defendants argue that *Weltover* and *Keller* are distinguishable because in those cases the bonds and contracts at issue specifically designated a United States place of performance, unlike the Notes at issue in this case. That fact, however, is not determinative. The Court finds the Second Circuit's rejection of a similar argument to be persuasive:

---

[4] Again, assuming for the purposes of this Opinion that the Notes are not forgeries and were in fact issued by Bandagro.

> Although the letter of credit did not itself specify New York as the place of payment, it authorized the negotiating bank to designate the place of payment. In so doing, [defendant] consented to pay the relevant amount at a location chosen by plaintiff . . . , wherever that might be. Accordingly, when [plaintiff] specified New York in its correspondence, [defendant] had already impliedly agreed to New York as the place of payment. Moreover, the distinction defendant draws with *Weltover* is off-target because the bonds in *Weltover* did not specify New York as the sole place of payment, but rather listed New York as only one of four places that could be chosen by creditors for payment. *See* 504 U.S. at 609-10. The plaintiff creditors elected New York, which, rather than distinguishing *Weltover* from the facts of the case at hand, makes the two quite similar. Hence, we see no real factual difference between *Weltover* and the present case regarding the parties' agreement as to place of payment. Because [plaintiff] specified a New York bank account into which the funds were to be deposited-and because [defendant] had not eliminated New York as an option in the letter of credit it issued-its breach resulted in the failure of funds destined for New York to arrive there.

*Hanil Bank*, 148 F.3d at 132. Just so in the present case; the Notes themselves did not specify Columbus, Ohio as the place of payment, but by stating that the terms of the Notes-terms such as the place of payment—would be governed by Swiss law and the ICC regulations, the Notes authorized Plaintiff to designate a bank in Columbus, Ohio as the place of payment. As in *Hanil Bank*, the maker of the Notes in the present case "consented to pay the relevant

amount at a location chosen by plaintiff, wherever that might be." *Id*. Defendants' failure to pay on the Notes thus "resulted in the failure of funds destined for [Columbus] to arrive there[,]" causing a direct effect in the United States. *Id*.

Defendants also rely on *Global Index*, 290 F. Supp. 2d at 112-16 and *Morris v. People's Republic of China*, 478 F.Supp.2d 561 (S.D.N.Y.2007), but those cases are distinguishable. *Global Index* involved promissory notes allegedly issued by a political subdivision of Tanzania. The notes in that case contained no designated place of payment, but also contained no provision allowing the holder to designate a place of payment. 290 F.Supp.2d at 114-15. In finding that subject matter jurisdiction did not exist, the *Global Index* court relied on the fact that "[p]laintiff points to no evidence, or even potential evidence to be uncovered in discovery, that tends to show that the parties had even impliedly agreed on payment in the United States." *Id*. at 115. That is not the situation in this case, however, where Plaintiff has presented evidence demonstrating that the terms of the Notes specifically allowed the Plaintiff to designate a place of payment, including a place in the United States. Defendants point to the Global Index court's statement that "there is no direct effect if the creditor-plaintiff chooses, unilaterally, the U.S. as a place of payment without any prior agreement with the debtor[,]" *id*., but again that is not the case here. Defendants, when guaranteeing the Notes, agreed to the inclusion of Swiss law and the ICC regulations that allow a holder to designate its preferred place of payment, and thus agreed to pay on the Notes wherever the holder so designated. *Global Index* is clearly factually distinguishable.

*Morris* involved defaulted bonds, issued in 1913 by a predecessor Chinese government, that the plaintiff had acquired in 2000 and attempted to obtain payment on. 478 F.Supp.2d at 564. The terms of the bonds specifically excluded United States banks as places of payment on the bonds, a fact that the *Morris* court noted and relied upon in finding that default on the bonds could not have a direct effect in the United States, because the United States could never have been the designated place of payment. *Id*. at 570-71. This alone is sufficient to distinguish *Morris* from the Notes at issue here, which did not exclude any location, much less a United States location, as the place of payment. Defendants also argue that the *Morris* court relied on the fact that the bonds had been defaulted for 60 years before the plaintiff acquired them, which would attenuate any "direct effect," and that Plaintiff in this case similarly acquired the Notes after the maturity date. In this case, however, Plaintiff acquired the Notes less than 5 years after the extended maturity date and soon after Defendants had themselves acknowledged in the Attorney General's opinion that the Notes were valid debt obligations. This is clearly distinguishable from the long-defaulted bonds at issue in *Morris*.

In sum, the Court finds that Defendants' failure to pay on the Notes caused a direct effect in the United States, because the Notes allowed Plaintiff to designate a place of payment in the United States and Defendants were contractually obligated under the terms of the Notes to pay at that location. Once Plaintiff designated Columbus, Ohio as the place of payment, Defendants' refusal to pay meant that funds that were supposed to arrive in Columbus failed to do so. Under *Weltover*, this is a direct effect in the United States for the purposes of the exception

in the third clause of § 1605(a)(2). Plaintiff has satisfied its burden of production to establish that an exception to FSIA immunity applies, *see Keller*, 277 F.3d at 815; Defendants have failed to satisfy their burden of persuasion, and the Court finds that, assuming the Notes are valid, it has subject matter jurisdiction over this action pursuant to the exception in the third clause of 28 U.S.C. § 1605(a) (2). Defendants' Motion to Dismiss (doc. # 13) on the issue of subject matter jurisdiction is DENIED.

III. *Forum Non Conveniens*

A. Applicable Law

The doctrine of *forum non conveniens* allows a federal court to "dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp*., 549 U.S. 422, 127 S.Ct. 1184, 1188, 167 L.Ed.2d 15 (U.S. 2007). A plaintiff's choice of forum, particularly when that plaintiff is a United States citizen and has chosen its home forum, is entitled to a heightened degree of deference, *see Duha v. Agrium, Inc*., 448 F.3d 867, 873-74 (6th Cir. 2006), and "a plaintiff's choice of forum should rarely be disturbed." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). If the defendant can show, however, that another forum has jurisdiction to hear the case and that retaining the case in the plaintiff's chosen forum would "'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case." *Id*. (*quoting*

*Koster v. Am. Lumbermens Mut. Cas. Co*., 330 U.S. 518, 524, 67 S.Ct. 828, 91 L.Ed. 1067 (1947)).

The *forum non conveniens* analysis is thus a two-pronged inquiry: the defendant must establish 1) that an "available and adequate alternate forum" can hear the case, *Duha*, 448 F.3d at 873; and 2), "that the balance of private and public factors listed in *Gulf Oil [Corp. v. Gilbert*, 330 U.S. 501, 508-9, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)] reveals that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court." *Duha*, 448 F.3d at 873. A defendant must satisfy both prongs of the test to warrant a *forum non conveniens* dismissal, and "[t]he defendant bears the burden of proof on all elements of the forum non conveniens analysis." *Stalinski v. Bakoczy*, 41 F. Supp. 2d 755, 758 (S.D.Ohio 1998) (Dlott, J.)

B. Analysis

Although the parties spend much of their briefs addressing Venezuela's adequacy as a forum and the *Gulf Oil* public and private factors, the Court can resolve this issue by examining Venezuela's availability as a forum. *See Stalinski*, 41 F. Supp. 2d at 759 (the first prong "is a two-part inquiry: availability and adequacy"); 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828.3 (3d ed. 2007) ("Although some courts conflate these issues, the availability and adequacy of the supposed alternative forum are better seen as raising independent issues that warrant separate consideration by the court").

Defendants argue that Venezuela is an available forum because they are amenable to service of process there, and because "the Venezuelan courts are open

and available to review administrative actions" such as Plaintiff's. (Def. Supp. Br. p. 8-9, doc. # 136.) Plaintiff responds by arguing that Venezuela is not an available forum because the recent Venezuelan Supreme Court opinion has conclusively resolved in Venezuela the issue of the binding effect of the Attorney General's 2003 opinion, which in effect precludes Plaintiff from arguing in Venezuela that the Notes are valid obligations of the Defendants. (Pl. Supp. Br. p. 36-37, doc. # 137.)

Defendants are correct that an alternate forum is generally considered to be "available" when the defendants are amenable to service of process there. *See Piper Aircraft*, 454 U.S. at 254 n. 22. However, the *Piper Aircraft* Court also recognized that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute," *id*., and the Court agrees with Plaintiff that, in light of the Venezuelan Supreme Court's recent opinion, the Venezuelan courts effectively would not permit litigation of one of the essential issues of Plaintiff's complaint. *See also Norex Petroleum Ltd. v. Access Industries, Inc*., 416 F.3d 146, 157 (2d Cir. 2005) (stating that an alternative forum is available if it permits litigation of the subject matter of the dispute and resolving the case on the ground that Russian courts would not permit the plaintiff to litigate disputed issues due to the preclusive effects of prior Russian court judgments).

The Venezuelan Supreme Court's recent opinion was rendered in response to a request filed by the current Venezuelan Attorney General, as well as the former Attorney General who gave the October 2003 opinion upon which Plaintiff relies, asking the Venezuelan Supreme Court to interpret the constitutional

and statutory powers of the Attorney General to issue opinions on the validity of Venezuela's debt obligations, as well as to interpret the binding nature of such opinions. (Translation of Venezuelan Supreme Court Opinion p. 16-17, Def. Emergency Mot. Vacate ex. B, doc. # 118.) The Venezuelan Supreme Court first noted that this request for interpretation specifically arose because of the former Attorney General's 2003 opinion that stated the Notes were valid debt obligations and because of Gruppo's demands for payment on the Notes, and then turned to the merits of the request for interpretation. After setting forth the relevant constitutional and statutory provisions and considering the evidence surrounding the former Attorney General's 2003 opinion, the Venezuelan Supreme Court concluded that the 2003 opinion was not rendered in the context of an administrative proceeding, and thus had absolutely no binding effect. The court further concluded that the 2003 opinion did not create any rights in favor of private individuals, and recognized that the Ministry and the former Attorney General later revoked the initial opinion and issued binding opinions rejecting the Notes' validity. (*Id*. p. 23.)

The Venezuelan Supreme Court's opinion finding that the Attorney General's initial 2003 opinion that the Notes were valid was illegal and the Venezuelan Supreme Court's further recognition of the subsequent rejection of that opinion and the later issuance of binding opinions by the Ministry and the new Attorney General finding the Notes to be invalid effectively decided the issue of the Notes' validity against the Plaintiff in the present case. Defendants argue that Venezuela is an available forum because "the decision reflects a process of considering various positions and acknowledging them in reaching a deci-

sion that is announced and explained" (Def. Supp. Br. p. 9, doc. # 136), but the problem is that this process has already finished and there is no indication that the Venezuelan courts would allow it to begin again. The Venezuelan courts have addressed the exact factual scenario presented by this case and have conclusively decided an issue central to Plaintiff's case adversely to Plaintiff's stated position. This clearly shows that Venezuela is not available to Plaintiff as a forum in which to litigate its case.

The Second Circuit's opinion in *Norex* is instructive and persuasive. In that case plaintiff Norex, a Cypriot corporation, was the majority shareholder of a Russian oil company, Yugraneft, and faced a takeover attempt from another company, TNK. 416 F.3d at 151. As part of the takeover attempt, TNK filed lawsuits in Russia that sought to invalidate Norex's interest in Yugraneft. The Russian courts, allegedly under TNK's control, entered default judgments against Norex and reduced its ownership share in Yugraneft to 20%. These judgments prevented Norex from challenging the legality of TNK's takeover of Yugraneft in the Russian courts. *Id.* at 152. Thereafter, TNK stripped Yugraneft of its assets and Norex brought a RICO action based on fraud, extortion, and money laundering against numerous defendants, including TNK, in the Southern District of New York.

Reversing the district court's *forum non conveniens* dismissal, the Second Circuit recognized that Russian law provided for reasonable alternatives for a civil RICO claim, but found that

> these alternative actions are not practically available to [Norex] at present because the factual crux of any fraud or conspiracy claims that it would pursue in Russia would necessarily

> be based-like Norex's pending RICO action-on the illegality of defendants' actions in depriving Norex of its controlling equity interest in Yugraneft[,]
>
> which issue Norex was precluded from litigating in Russia by the Russian court judgments. *Id*. at 158. The district court had recognized that Norex was precluded from litigating this issue in Russia but reasoned that the absence of an available forum was excusable in light of the fact that Norex had not pa-ticipated in the Russian litigation. The Second Circuit rejected that reasoning, however, and
>
> clarif[ied] that a case cannot be dismissed on grounds of *forum non conveniens* unless there is presently available to the plaintiff an alternative forum that will permit it to litigate the subject matter of its dispute. . . . [The available forum] analysis does not concern itself with the reason why an alternative forum is no longer available; its singular concern is the fact of present availability.

*Id*. at 159. The *Norex* court also noted that defendants bore the burden of demonstrating that Russia was an available forum, and that defendants had not satisfied their burden. *Id*.

In this case, Defendants have provided no evidence that would tend to show that Venezuelan courts would continue to entertain the issue of the validity of the Notes as set forth in the Attorney General's 2003 opinion. Similar to the situation in *Norex*, the "factual crux" of any claim Plaintiff might bring in Venezuela regarding the validity of the Notes would include its reliance on the Attorney General's 2003 opinion that the Notes are valid: an issue that the

Venezuelan Supreme has already decided. Venezuela is thus not a currently available forum in which Plaintiff could completely litigate its claims, and a *forum non conveniens* dismissal would be inappropriate. Defendants' Motion to Dismiss (doc. # 13) on the issue of *forum non conveniens* is DENIED.[5]

IV. Conclusion

Defendants' Motion to Dismiss (doc. # 13) is DENIED as to the issues of subject matter jurisdiction and *forum non conveniens*. The Court finds that the exception to a foreign sovereign's FSIA immunity contained in the second clause of 28 U.S.C. § 1605(a)(2) does not apply in this case, but assuming the Notes in question are valid the exception in the third clause does. The Court therefore has subject matter jurisdiction under 28 U.S.C. §§ 1605(a)(2) and 1330. Additionally, because the Court finds that Venezuela is not a currently available alternate forum, this case cannot be dismissed pursuant to the doctrine of *forum non conveniens*. This matter is referred back to Magistrate Judge Kemp for further proceedings in accordance with this Memorandum Opinion and Order.

---

[5] This ruling should not be construed to conclusively resolve the issue of what binding effect the Venezuelan Supreme Court opinion may have on *this* Court. *Norex* again is instructive: "It may well be that a plaintiff that is precluded from litigating a matter in a foreign jurisdiction because of an adverse earlier judgment by [the foreign] courts will not be able to pursue the claim further in the United States, but the reason for dismissal in such circumstances is our recognition of the foreign judgment in the interest of international comity, not *forum non conveniens*." 416 F.3d at 159. Federal courts may, but are not required to, recognize and enforce the judgment of a foreign country due to comity considerations. *See, e.g., Taveras v. Taveraz*, 477 F.3d 767, 783 (6th Cir. 2007).

## APPENDIX E

ICC Uniform Rules for Collections
URC 522

The ICC Uniform Rules for Collections were first published in 1956. Revised versions were issued in 1967 and 1978.

This present revision was adopted by the Council of the ICC in June 1995, for issue as ICC Publication N°522.

This English language edition gives the official text of the 1995 Revision. Translations in other languages may be available from ICC National Committees.

First published in July 1995 by

ICC PUBLISHING S.A. (Paris) and

ICC PUBLISHING, INC. (New York)



Designed by: Rebus (cover), ICC Publishing (interior)-France Printed by: Boekhoven Bosch Netherlands

# FOREWORD

The *raison d'être* for the existence of the ICC is to facilitate trade among the world's trading countries, within which one of our core tasks is an ongoing review of international trade practices in various fields.

Accordingly, the ICC undertook a review of the *Uniform Rules for Collections* in March 1993, and these revised rules, which represent the culmination of the revision work, were drafted by international experts drawn from the private sector who have worked in ICC Commissions over the last two years.

The review covered changes in collection procedures, technology, and laws and regulations, both national and international.

From the perspective of the ICC, a significant achievement of the revision is that National Committees and experts from all parts of the world took an active part in the discussions and made a positive contribution to the work.

These revised rules and their unanimous adoption by members of the ICC Banking Commission, which has a wide international representation, are a source of pride to us all, and the extensive and fruitful international consultation which preceded this work is the hallmark of the ICC.

Jean-Charles Rouner
Secretary General of the ICC

# PREFACE

In keeping with the ICC policy of staying abreast of changes in international commerce, the ICC Banking Commission initiated a revision of *Uniform Rules for Collections* in March 1993, and these revised rules represent the work of the ICC Working Party entrusted with the revision project since that time.

The revised rules, which come into effect on 1 January, 1996, replace the *Uniform Rules for Collections*, ICC publication N°322, in force since January 1979. There is a separate new ICC publication, N°550, containing a comprehensive commentary covering relevant discussions that took place during the revision process. The commentary, which is intended to give guidance on practical issues and to provide an insight into the thinking of the Working Party, is not meant to replace the rules in any way.

The objectives of the Working Party were to review changes in international collection procedures, technology, and laws and regulations both national and international since 1979. Similarly, issues that continue to cause problems to practitioners were to be examined to see the extent to which the revision could assist in their resolution.

Additionally, the text and language of UCP 500 were to be examined in order to achieve a degree of harmonization within the revision.

In the course of its work over the last two years, the Working Party examined approximately 2,500 comments from over 30 countries. In certain cases, such as in considering Electronic Data Interchange, the Working Party felt that uncertainty on legal issues precluded any attempt to draft rules to cover this aspect at the present time.

Similarly, while the importance of local practices and requirements in certain countries were fully appreciated by the Working Party, it was considered unwise to draft rules to cover such practices and requirements, as they might not be acceptable to the rest of the international community.

In considering an extensive range of views and comments, the Working Party had considerable difficulty in evaluating some of them, and, where conflicting views were expressed, the Working Party adopted the point of view closest to, and most consistent with, accepted international practice.

The Working Party, in achieving its objectives, did not seek to make change for the sake of change and often left the wording of the old rules substantially unchanged. Changes were made only in response to altered practices and requirements and to resolve practical difficulties encountered by practitioners.

The Working Party would like to express its sincere thanks to ICC National Committees and the members of the Banking Commission for their helpful and constructive comments and their continuous participation in the revision.

I list below in alphabetical order the members of the Working Party:

| | |
|---|---|
| JUNEID M. BAJUNEID | Assistant Manager Trade Services, the National Commercial Bank, Jeddah |
| CARLO DI NINNI | Documentary Credit Dpartment, Associazione Bancaria Italiana, Rome |
| STEFAN DRASZCZYK | Former Head of Division, International Chamber of Commerce, Paris |
| BERND HOFFMANN | Direktor, Trinkaus & Burkhardt KGaA, Dusseldorf |
| ROB F. LANTING | Senior Manager, Documentary Trade Department, ING Bank, Amsterdam |
| PETER OSTWALD | Vice President Trade Finance Department, Nordbanken, Gothenburg |
| PAUL C. RUSSO | Vice President, United States Council on International Banking, New York |
| SIA CHEE-HONG | Vice President Bills and Remittances, Overseas Union Bank Ltd, Singapore and |
| CARLOS VELEZ-RODRIGUEZ | Head of Division, International chamber of Commerce, Paris |

The undersigned had the pleasure of chairing the Working Party.

As Chairman, I extend my deep appreciation to the ICC National Committees, the Banking Commission and the individual members of the Working Party. It was through the generous contribution of their time and the sharing of their knowledge that this revision was accomplished so successfully. I also wish to convey the gratitude of the ICC for their selfless commitment to this work.

LAKSHMAN, Y. WICKREMERATNE ACIB

Chairman, ICC Working Party on Collections

Former Manager Services, The Hongkong and Shanghai

Banking Corporation Ltd, London

Chairman, British Bankers' Association Trade Facilitation Group, 1992-1994

## A. General Provisions and Definitions

### Article 1

### Application of URC 522

a. The Uniform Rules for Collections, 1995 Revision, ICC Publication No. 522, shall apply to all collections as defined in Article 2 where such rules are incorporated into the text of the collection instruction referred to in Article 4 and are binding on all parties thereto unless otherwise expressly agreed or contrary to the provisions of a national, state or local law and/or regulation which cannot be departed from.

b. Banks shall have no obligation to handle either a collection or any collection instruction or subsequent related instructions.

c. If a bank elects, for any reason, not to handle a collection or any related instructions received by it, it must advise the party from whom it received the collection or the instructions by telecommunication or, if that is not possible, by other expeditious means, without delay.

### Article 2

### Definition of Collection

For the purposes of these Articles:

a. "Collection" means the handling by banks of documents as defined in sub-Article 2(b), in accordance with instructions received, in order to:

   i. obtain payment and/or acceptance,

   or

ii. deliver documents against payment and/or against acceptance,

or

iii. deliver documents on other terms and conditions.

b. "Documents" means financial documents and/or commercial documents:

i. "Financial documents" means bills of exchange, promissory notes, cheques, or other similar instruments used for obtaining the payment of money;

ii. "Commercial documents" means invoices, transport documents, documents of title or other similar documents, or any other documents whatsoever, not being financial documents.

c. "Clean collection" means collection of financial documents not accompanied by commercial documents.

d. "Documentary collection" means collection of:

i. Financial documents accompanied by commercial documents;

ii. Commercial documents not accompanied by financial documents.

## Article 3

## Parties to a Collection

a. For the purposes of these Articles the "parties thereto" are:

i. the "principal" who is the party entrusting the handling of a collection to a bank;

ii. the "remitting bank" which is the bank to which the principal has entrusted the handling of a collection;

iii. the "collecting bank" which is any bank, other than the remitting bank, involved in processing the collection;

iv. the "presenting bank" which is the collecting bank making presentation to the drawee.

b. The "drawee" is the one to whom presentation is to be made in accordance with the collection
instruction.

B. Form and Structure of Collections

Article 4

Collection Instruction

a. i. All documents sent for collection must be accompanied by a collection instruction indicating that the collection is subject to URC 522 and giving complete and precise instructions. Banks are only permitted to act upon the instructions given in such collection instruction, and in accordance with these Rules.

ii. Banks will not examine documents in order to obtain instructions.

iii. Unless otherwise authorized in the collection instruction, banks will disregard any instructions from any party/bank other than the party/bank from whom they received the collection.

b. A collection instruction should contain the following items of information, as appropriate.

i. Details of the bank from which the collection was received including full name, postal and SWIFT addresses, telex, telephone, facsimile numbers and reference.

ii. Details of the principal including full name, postal address, and if applicable telex, telephone and facsimile numbers.

iii. Details of the drawee including full name, postal address, or the domicile at which presentation is to be made and if applicable telex, telephone and facsimile numbers.

iv. Details of the presenting bank, if any, including full name, postal address, and if applicable telex, telephone and facsimile numbers.

v. Amount(s) and currency(ies) to be collected.

vi. List of documents enclosed and the numerical count of each document.

vii. a. Terms and conditions upon which payment and/or acceptance is to be obtained.

b. Terms of delivery of documents against:

1) payment and/or acceptance

2) other terms and conditions

It is the responsibility of the party preparing the collection instruction to ensure that the terms for the delivery of documents are clearly and unambiguously stated, otherwise banks will not be responsible for any consequences arising therefrom.

viii. Charges to be collected, indicating whether they may be waived or not.

ix. Interest to be collected, if applicable, indicating whether it may be waived or not, including:

a. rate of interest
b. interest period
c. basis of calculation (for example 360 or 365 days in a year) as applicable.

x. Method of payment and form of payment advice.

xi. Instructions in case of non-payment, nonacceptance and/or non-compliance with other instructions.

c. i. Collection instructions should bear the complete address of the drawee or of the domicile at which the presentation is to be made. If the address is incomplete or incorrect, the collecting bank may, without any liability and responsibility on its part, endeavour to ascertain the proper address.

ii. The collecting bank will not be liable or responsible for any ensuing delay as a result of an incomplete/incorrect adress being provided.

## C. Form of Presentation

### Article 5

### Presentation

a. For the purposes of these Articles, presentation is the procedure whereby the presenting bank makes the documents available to the drawee as instructed.

b. The collection instruction should state the exact period of time within which any action is to be taken by the drawee.

   Expressions such as “first”, “prompt”, “immediate”, and the like should not be used in connection with presentation or with reference to any period of time within which documents have to be taken up or for any other action that is to be taken by the drawee. If such terms are used banks will disregard them.

c. Documents are to be presented to the drawee in the form in which they are received, except that banks are authorised to affix any necessary stamps, at the expense of the party from whom they received the collection unless otherwise instructed, and to make any necessary endorsements or place any rubber stamps or other identifying marks or symbols customary to or required for the collection operation.

d. For the purpose of giving effect to the instructions of the principal, the remitting bank will utilise the bank nominated by the principal as the collecting bank. In the absence of such nomination, the remitting

bank will utilise any bank of its own, or another bank's choice in the country of payment or acceptance or in the country where other terms and conditions have to be complied with.

e. The documents and collection instruction may be sent directly by the remitting bank to the collecting bank or through another bank as intermediary.

f. If the remitting bank does not nominate a specific presenting bank, the collecting bank may utilise a presenting bank of its choice.

Article 6

Sight/Acceptance

In the case of documents payable at sight the presenting bank must make presentation for payment without delay.

In the case of documents payable at a tenor other than sight the presenting bank must, where acceptance is called for, make presentation for acceptance without delay, and where payment is called for, make presentation for payment not later than the appropriate maturity date.

Article 7

Release of Commercial Documents

Documents Against Acceptance (D/A) vs. Documents Against Payment (D/P)

a. Collections should not contain bills of exchange payable at a future date with instructions that commercial documents are to be delivered against payment.

b. If a collection contains a bill of exchange payable at a future date, the collection instruction should state whether the commercial documents are to be released to the drawee against acceptance (D/A) or against payment (D/P).

   In the absence of such statement commercial documents will be released only against payment and the collecting bank will not be responsible for any consequences arising out of any delay in the delivery of documents.

c. If a collection contains a bill of exchange payable at a future date and the collection instruction indicates that commercial documents are to be released against payment, documents will be released only against such payment and the collecting bank will not be responsible for any consequences arising out of any delay in the delivery of documents.

Article 8

Creation of Documents

Where the remitting bank instructs that either the collecting bank or the drawee is to create documents (bills of exchange, promissory notes, trust receipts, letters of undertaking or other documents) that were not included in the collection, the form and wording of such documents shall be provided by the remitting bank, otherwise the collecting bank shall not be liable or responsible for the form and wording of any such document provided by the collecting bank and/or the drawee.

## D. Liabilities and Responsibilities

### Article 9

### Good Faith and Reasonable Care

Banks will act in good faith and exercise reasonable care.

### Article 10

Documents vs. Goods/Services/ Performances

a. Goods should not be despatched directly to the address of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank.

   Nevertheless, in the event that goods are despatched directly to the address of a bank or consigned to or to the order of a bank for release to a drawee against payment or acceptance or upon other terms and conditions without prior agreement on the part of that bank, such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party dispatching the goods.

b. Banks have no obligation to take any action in respect of the goods to which a documentary collection relates, including storage and insurance of the goods even when specific instructions are given to do so. Banks will only take such action if, when, and to the extent that they agree to do so in each case. Notwithstanding the provisions of sub-Article 1(c), this rule applies even in the absence of any specific advice to this effect by the collecting bank.

c. Nevertheless, in the case that banks take action for the protection of the goods, whether instructed or not, they assume no liability or responsibility with regard to the fate and/or condition of the goods and/ or for any acts and/or omissions on the part of any third parties entrusted with the custody and/or protection of the goods. However, the collecting bank must advise without delay the bank from which the collection instruction was received of any such action taken.

d. Any charges and/or expenses incurred by banks in connection with any action taken to protect the goods will be for the account of the party from whom they received the collection.

e. i. Notwithstanding the provisions of sub-Article 10(a), where the goods are consigned to or to the order of the collecting bank and the drawee has honoured the collection by payment, acceptance or other terms and conditions, and the collecting bank arranges for the release of the goods, the remitting bank shall be deemed to have authorized the collecting bank to do so.

ii. Where a collecting bank on the instructions of the remitting bank or in terms of sub-Article 10(e)i, arranges for the release of the goods, the remitting bank shall indemnify such collecting bank for all damages and expenses incurred.

## Article 11

### Disclaimer For Acts of an Instructed Party

a. Banks utilising the services of another bank or other banks for the purpose of giving effect to the instructions of the principal, do so for the account and at the risk of such principal.

b. Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank(s).

c. A party instructing another party to perform services shall be bound by and liable to indemnify the instructed party against all obligations and responsibilities imposed by foreign laws and usages.

## Article 12

### Disclaimer on Documents Received

a. Banks must determine that the documents received appear to be as listed in the collection instruction and must advise by telecommunication or, if that is not possible, by other expeditious means, without delay, the party from whom the collection instruction was received of any documents missing, or found to be other than listed.

   Banks have no further obligation in this respect.

b. If the documents do not appear to be listed, the remitting bank shall be precluded from

disputing the type and number of documents received by the collecting bank.

c. Subject to sub-Article 5(c) and sub-Articles 12(a) and 12(b) above, banks will present documents as received without further examination.

## Article 13

### Disclaimer on Effectiveness of Documents

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s), or for the general and/or particular conditions stipulated in the document(s) or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any document(s), or for the good faith or acts and/or omissions, solvency, performance or standing of the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever.

## Article 14

### Disclaimer on Delays, Loss in Transit and Translation

a. Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any message(s), letter(s) or document(s), or for delay, mutilation or other error(s) arising in transmission of any telecommunication or for error(s) in translation and/or interpretation of technical terms.

b. Banks will not be liable or responsible for any delays resulting from the need to obtain clarification of any instructions received.

Article 15

Force Majeure

Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars, or any other causes beyond their control or by strikes or lockouts.

E. Payment

Article 16

Payment Without Delay

a. Amounts collected (less charges and/or disbursements and/or expenses where applicable) must be made available without delay to the party from whom the collection instruction was received in accordance with the terms and conditions of the collection instruction.

b. Notwithstanding the provisions of sub-Article 1(c) and unless otherwise agreed, the collecting bank will effect payment of the amount collected in favour of the remitting bank only.

Article 17

Payment in Local Currency

In the case of documents payable in the currency of the country of payment (local currency), the presenting bank must, unless otherwise instructed in the collection instruction, release the documents to the drawee against payment in local currency only if such currency is immediately available for disposal in the manner specified in the collection instruction.

## Article 18

### Payment in Foreign Currency

In the case of documents payable in a currency other than that of the country of payment (foreign currency), the presenting bank must, unless otherwise instructed in the collection instruction, release the documents to the drawee against payment in the designated foreign currency only if such foreign currency can immediately be remitted in accordance with the instructions given in the collection instruction.

## Article 19

### Partial Payments

a. In respect of clean collections, partial payments may be accepted if and to the extent to which and on the conditions on which partial payments are authorised by the law in force in the place of payment. The financial document(s) will be released to the drawee only when full payment thereof has been received.

b. In respect of documentary collections, partial payments will only be accepted if specifically authorised in the collection instruction. However, unless otherwise instructed, the presenting bank will release the documents to the drawee only after full payment has been received, and the presenting bank will not be responsible for any consequences arising out of any delay in the delivery of documents.

c. In all cases partial payments will be accepted only subject to compliance with

the provisions of either Article 17 or Article 18 as appropriate.

Partial payment, if accepted, will be dealt with in accordance with the provisions of Article 16.

F. Interest, Charges and Expenses

Article 20

Interest

a. If the collection instruction specifies that interest is to be collected and the drawee refuses to pay such interest, the presenting bank may deliver the document(s) against payment or acceptance or on other terms and conditions as the case may be, without collecting such interest, unless sub-Article 20(c) applies.

b. Where such interest is to be collected, the collection instruction must specify the rate of interest, interest period and basis of calculation.

c. Where the collection instruction expressly states that interest may not be waived and the drawee refuses to pay such interest the presenting bank will not deliver documents and will not be responsible for any consequences arising out of any delay in the delivery of document(s). When payment of interest has been refused, the presenting bank must inform by telecommunication or, if that is not possible, by other expeditious means without delay the bank from which the collection instruction was received.

## Article 21

### Charges and Expenses

a. If the collection instruction specifies that collection charges and/or expenses are to be for account of the drawee and the drawee refuses to pay them, the presenting bank may deliver the document(s) against payment or acceptance or on other terms and conditions as the case may be, without collecting

   Whenever collection charges and/or expenses are so waived they will be for the account of the party from whom the collection was received and may be deducted from the proceeds.

b. Where the collection instruction expressly states that charges and/or expenses may not be waived and the drawee refuses to pay such charges and/or expenses, the presenting bank will not deliver documents and will not be responsible for any consequences arising out of any delay in the delivery of the document(s). When payment of collection charges and/or expenses has been refused the presenting bank must inform by telecommunication or, if that is not possible, by other expeditious means without delay the bank from which the collection instruction was received.

c. In all cases where in the express terms of a collection instruction or under these Rules, disbursements and/or expenses and/or collection charges are to be borne by the principal, the collecting bank(s) shall be entitled

to recover promptly outlays in respect of disbursements, expenses and charges from the bank from which the collection instruction was received, and the remitting bank shall be entitled to recover promptly from the principal any amount so paid out by it, together with its own disbursements, expenses and charges, regardless of the fate of the collection.

d. Banks reserve the right to demand payment of charges and/or expenses in advance from the party from whom the collection instruction was received, to cover costs in attempting to carry out any instructions, and pending receipt of such payment also reserve the right not to carry out such instructions.

G. Other Provisions

Article 22

Acceptance

The presenting bank is responsible for seeing that the form of the acceptance of a bill of exchange appears to be complete and correct, but is not responsible for the genuineness of any signature or for the authority of any signatory to sign the acceptance.

Article 23

Promissory Notes and Other Instruments

The presenting bank is not responsible for the genuineness of any signature or for the authority of any signatory to sign a promissory note, receipt, or other instruments.

## Article 24

### Protest

The collection instruction should give specific instructions regarding protest (or other legal process in lieu thereof), in the event of non-payment or non-acceptance.

In the absence of such specific instructions, the banks concerned with the collection have no obligation to have the document(s) protested (or subjected to other legal process in lieu thereof) for non-payment or non-acceptance.

Any charges and/or expenses incurred by banks in connection with such protest, or other legal process, will be for the account of the party from whom the collection instruction was received.

## Article 25

### Case-of-Need

If the principal nominates a representative to act as case-of-need in the event of non-payment and/or non-acceptance the collection instruction should clearly and fully indicate the powers of such case-of-need. In the absence of such indication banks will not accept any instructions from the case-of-need.

## Article 26

### Advices

Collecting banks are to advise fate in accordance with the following rules:

a. Form of Advice

   All advices or information from the collecting bank to the bank from which the collection instruction was received, must bear appro-

priate details including, in all cases, the latter bank's reference as stated in the collection instruction

b. Method of Advice

It shall be the responsibility of the remitting bank to instruct the collecting bank regarding the method by which the advices detailed in (c)i, (c)ii and (c)iii are to be given. In the absence of such instructions, the collecting bank will send the relative advices by the method of its choice at the expense of the bank from which the collection instruction was received.

c. i. ADVICE OF PAYMENT

The collecting bank must send without delay advice of payment to the bank from which the collection instruction was received, detailing the amount or amounts collected, charges and/or disbursements and/or expenses deducted, where appropriate, and method of disposal of the funds.

ii. ADVICE OF ACCEPTANCE

The collecting bank must send without delay advice of acceptance to the bank from which the collection instruction was received.

iii. ADVICE OF NON-PAYMENT AND/OR NONACCEPTANCE

The presenting bank should endeavour to ascertain the reasons for non-payment and/or non-acceptance and advise accordingly, without delay, the bank from which it received the collection instruction.

The presenting bank must send without delay advice of non-payment and/or advice of nonacceptance to the bank from which it received the collection instruction.

On receipt of such advice the remitting bank must give appropriate instructions as to the further handling of the documents. If such instructions are not received by the presenting bank within 60 days after its advice of nonpayment and/or non-acceptance, the documents may be returned to the bank from which the collection instruction was received without any further responsibility on the part of the presenting bank.

ACKNOWLEDGEMENTS

The Working Party would like to take this opportunity to thank all National Committees and others for their participation in this work. Over 2500 comments were painstakingly examined and analysed and, in so doing, the WP was able to obtain an insight into problems and practices worldwide—this proved to be of great value and assistance in completing this work.

In particular, the WP would like to thank the following National Committees, Associations, Organisations and individuals, by name.

ICC National Committees:

Australia, Austria, Colombia, Cyprus, Denmark, Finland, France, Germany, Iran, Israel, Italy, Japan, Norway, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

Associations and Organisations:

Akbank (Turkey), Antiochian Commercial Bank, AsociaciOn de Bancos del Uruguay, Association of Banks in Singapore, Association of Cyprus Commercial Banks, Associazione Bancaria Italiana, Banco Bancoquia (Colombia), Banco Anglo Colombiano (Colombia), Banco de Bogota (Colombia), Banco de Brasil S.A., Banco del Estado (Colombia), Banco Nacional de Cuba, Banco Popular Espanol, Banco Sabadell (Spain), Banco Union Colombiano (Colombia), Bank Association of Slovenia, Bankhaus Trinkaus & Burkhardt (Germany), British Bankers' Association (Trade Facilitation Consultative Group), Canadian Bankers' Association, Central Hispano (Spain), Chemical Bank (USA), Citibank (USA), Clearing Bankers Association (South Africa), Council on Southern African Bankers, Courtaulds Export (UK), Den Danske Bank (Denmark), Deutscher Sparkassenund Giroverband (Germany), DG Bank (Germany), Emlak Bankasi (Turkey), FELABAN (Federation of Latin American Banks), Finansradet (Denmark), Foreign Exchange Dealers' Association of India, Forex Club Argentino, German Banking Federation, German Savings Banks

Organisation, Hellenic Bank Association, The Hong Kong Association of Banks, Internationale Nederlanden Bank, Israel Discount Bank, Japan Foreign Trade Council, Nederlandse Vereniging van Banken, Nordbanken (Sweden), Overseas United Bank Ltd

(Singapore), Serf in Financial Group (Mexico), State Bank (Colombia), Swiss Bank Corporation, T.O. Lee Consultants Ltd (Hong Kong), Texas Commerce Bank N.A. (USA), Turk Ekonomi Bankasi (Turkey),

Udruzenje Banaka Jugoslavije, Unibank (Denmark), United States Council on International Banking, Inc., Westpac Banking Corporation (Australia).

Individuals:

Ferdinand Muller, Technical Advisor, ICC Banking Commission, Deutsche Bank AG (Germany)

Bernard Wheble, CBE (UK)

Charles del Busto, Chairman, ICC Banking Commission

Sia Chee-Hong, Overseas Union Bank Ltd

(Singapore).

The WP would also like to express their appreciation for the assistance of:

Stefan Draszczyk, former Head of Banking

Division, ICC Paris

Carlos Velez-Rodriguez, Head of Banking Division, ICC Paris

Secretaries, ICC Paris

Bob Mansell and Sue Davis, The Hongkong and Shanghai Banking Corporation Ltd (London) and

Members of the ICC Banking Commission.

## ICC ARBITRATION

Contracting parties that wish to have the possibility of resorting to ICC Arbitration in the event of a dispute with their contracting partner should specifically and clearly agree upon ICC Arbitration in their contract or, in the event no single contractual document exists, in the exchange of correspondence which constitutes the agreement between them. The following standard arbitration clause is recommended by the ICC:

"All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

THE ICC AT A GLANCE

The ICC is a non-governmental organisation serving world business. ICC members in more than 130 countries represent tens of thousands of companies and business organisations. ICC National Committees or Councils in some 60 countries coordinate activities at the national level.

The ICC

- represents the world business community at national and international levels;
- promotes world trade and investment based on free and fair competition;
- harmonises trade practices and formulates terminology and guidelines for importers and exporters;
- provides a growing range of practical services to business.

Through its subsidiary, ICC Publishing S.A., the ICC produces a wide range of publications. It also holds vocational seminars and business conferences in cities throughout the world.

Some ICC Services

The ICC International Court of Arbitration (*Paris*)
The ICC International Commercial Policy and Techniques Department (*Paris*)

The ICC International Maritime Bureau (*London*)
The ICC Centre for Maritime Co-operation (*London*)
The ICC Counterfeiting Intelligence Bureau (*London*)

The ICC Commercial Crime Bureau (*London*) The ICC International Bureau of Chambers of Commerce (Paris)

The ICC Institute of International Business Law and Practice I

For more detailed information on ICC publications and on the above-listed activities, and to receive the programme of ICC events, please contact ICC Headquarters in Paris or the ICC National Committee in your country.

SELECTED ICC PUBLICATIONS

Documentary Credits

Documentary Credits Insight

This ICC newsletter, published four times a year, gives the reader a direct connection to the ICC experts who analyse how UCP 500 is implemented in everday situations. Contains analytical commentary and up-to-the-mi-nute information on the UCP from the same experts who drafted UCP 500.

Periodical/subscription 4 issues a year
Case Studies on Documentary Credits under UCP 500

By Charles del Busto

The first presentation to analyse, in detail, real-life cases involving UCP 500. Taken from queries answered by the ICC's Group of Experts, or structured from other cases, Case Studies links the UCP Articles with factual explanations concerning their implementation. Each of the 33 case studies in this book is referenced to a specific Article of UCP 500.

ISBN 92-842-1183.2 N° 535

Documentary Credits UCP 500 and 400
Compared Edited by Charles del Busto

A highly effective vehicle with which to train managers, supervisors and international trade practitioners in critical areas of the new UCP 500 Rules. A vital companion guide for all concerned with Documentary Credits.

ISBN 92-842-1157-3 N° 511

ICC Standard Documentary Credit Forms
Edited by Charles del Busto

A series of forms designed for bankers, attorneys, importers/exporters and others involved in documentary credit transactions around the world.

ISBN 92-842-1160-3 N° 516

ICC Uniform Customs and Practice for Documentary Credits (1993 Revision)

The UCP 500 is a practical and comprehensive set of 49 Rules that address the major issues in documentary credit usage. They also reflect the major legal decisions on documentary credits by the courts in the last ten years.

ISBN 92-842-1155-7 N° 500

HOW TO OBTAIN ICC PUBLICATIONS

These publications are available from ICC National Committees in some sixty countries, or from:

ICC Publishing S.A.
38 Cours Albert 1er
75008 Paris
France
Tel: (33.1) 49.53.29.23
Fax: (33.1) 49.53.29.02
Telex: 650 770

ICC Publishing, Inc.
156 Fifth Avenue,
Suite 308
New York, N.Y. 10010 USA
Tel: (1.212) 206.1150
Fax: (1.212) 633.6025

ICC *Uniform Rules for Collections* (URC), the widely used Rules affecting one of the basic international payment procedures, have been revised for the first time since 1979. The revision addresses problems practitioners have faced in using collections over the last 15 years.

The 26 Articles of the new Rules are dearly stated, indispensable tools in international trade. Banks, sellers and buyers will find in the revised URC a highly useful handbook to facilitate international commercial transactions.

An Article-by-Article commentary on the ICC *Uniform Rules for Collections*, by the Working Party which elaborated them, provides the indispensable complement tab's booklet (ICC publication No 550).

ICC Publishing, Inc.
156 Fifth Avenue
New York, NY 10010
212-206-1150
ICC Publication No. 622
ISBN 92 842-1184 0