No. 10-1144

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

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

CHARLES H. COOPER, JR.
Counsel of Record
REX H. ELLIOTT
COOPER & ELLIOTT, LLC
2175 Riverside Drive
Columbus, Ohio 43221
(614) 481-6000
(614) 481-6001 (Facsimile)
chipc@cooperelliott.com

JOHN P. KENNEDY
CRABBE, BROWN & JAMES, LLP
500 South Front Street
Columbus, Ohio 43215
(614) 228-5511
(614) 229-4559 (Facsimile)
Of Counsel
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11, a foreign state is not immune from suit in the United States when the claim is based on an act by the foreign state outside the U.S. in connection with a commercial activity abroad, and that act causes a "direct effect" in the United States. *Id*. § 1605(a)(2). In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), this Court held that a direct effect occurs when a bond issued by a foreign state gives the bondholder discretion to name a U.S. location as the place for payment, and the foreign state fails to remit payment to the U.S. location selected by the holder.

In this case, respondent Skye Ventures purchased bonds that were issued by a Venezuelan state-owned bank and guaranteed by the Republic of Venezuela. The notes explicitly state that they are governed by the laws 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." Pet. App. 5a. Skye presented unrebutted expert testimony that both Swiss law and the pertinent ICC regulations permit Skye to name any place as the place for payment. Skye initiated this action after it demanded payment in Columbus, Ohio and petitioners refused

QUESTION PRESENTED – Continued

to pay. Both the district court and the court of appeals held that Venezuela's refusal to honor Skye's demand caused a direct effect in the United States.

The question presented is whether a foreign state causes a direct effect in the United States when it refuses to pay its bonds at a U.S. location designated by the bondholder, where the bonds explicitly state they are governed by laws and regulations that give the bondholder the discretion to name a U.S. location as the place for payment.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

DRFP L.L.C., d/b/a Skye Ventures, does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 622 F.3d 513. The opinion of the district court (Pet. App. 24a-51a) is not reported but is available at 2009 WL 414581.

JURISDICTION

The court of appeals issued its decision on September 23, 2010. Pet. App. 1a. Thereafter, a petition for rehearing en banc was filed and circulated to all active judges of the Sixth Circuit, none of whom requested a vote on the suggestion for rehearing en banc. As a result, the petition for rehearing was denied on December 15, 2010. Pet. App. 22a. The petition for a writ of certiorari was filed on March 15, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Pertinent to this case, the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, provides as follows:

> 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 OF THE CASE

This case involves bonds issued by a Venezuelan bank. Although the Republic of Venezuela guaranteed payment of the bonds, it subsequently refused to honor its promise. This suit against the Republic of Venezuela and its Ministry of Finance (collectively, "Venezuela") ensued.

Under 28 U.S.C. § 1605(a)(2) and *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the district court has jurisdiction to decide this case. Section 1605(a)(2) eliminates foreign sovereign immunity when a lawsuit against a foreign state is based on an act outside the United States, taken in connection with a commercial activity of the foreign state abroad, that caused a direct effect in the United States. In *Weltover* this Court applied § 1605(a)(2) to a case in which Argentina refused to pay bonds it had issued. The Court held that a U.S. district court had jurisdiction over the dispute because a direct effect occurred in the United States when Argentina failed to remit payment to a U.S. location lawfully designated by the bondholder. *Id*. at 619 ("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."). This case is nearly identical to *Weltover*.

The Venezuelan bonds in this case explicitly state that they are governed by the laws of Switzerland and regulations of the International Chamber of Commerce ("ICC"). Respondent Skye Ventures presented expert testimony that both Swiss law and the ICC regulations entitle the note holder to choose *any* place as the place for payment. Venezuela did not rebut this testimony. Pet. App. 39a, 40a. The Sixth Circuit agreed with the district court that Skye lawfully designated Columbus, Ohio as the place for payment and, applying § 1605(a)(2) and *Weltover*, held that Venezuela caused a direct effect in the United States when it refused to send payment.

In its effort to convince the Court to review this case, Venezuela mischaracterizes the Sixth Circuit's decision. Venezuela suggests that the Sixth Circuit found "a direct effect based merely on the absence . . . of a clause explicitly *excluding* the United States as a place of payment." Petition for Cert., p. 3. Not so. The Sixth Circuit held that U.S. jurisdiction is appropriate because (1) the Venezuelan bonds Skye purchased explicitly state that they are governed by the laws of Switzerland and by ICC regulations, and (2) Skye presented unrebutted expert testimony that both Swiss law and the ICC regulations entitle Skye to

demand payment anywhere in the world. In short, U.S. jurisdiction exists in this case because of the *presence* of a clause that explicitly incorporates standards giving Skye the right to choose the United States as the place for payment – not because of the absence of a clause excluding the United States as a place of payment – and because Skye selected Ohio.

As a result of this explicit language, "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." *Id*. at 6a. Skye chose Columbus, Ohio, as the place for payment, and Venezuela refused to send payment to the lawfully designated location. Pet. App. 5a-6a. Venezuela's action, just like Argentina's refusal to remit payment in *Weltover*, caused a direct effect in the United States for purposes of § 1605(a)(2).

Venezuela similarly mischaracterizes the district court's decision. At pages 6-7 of its petition, Venezuela claims the district court "concluded that the direct effect requirement was met because the notes 'did not exclude any location, much less a United States location, as the place of payment.'" The language Venezuela quotes in its petition is taken out of context.

When the district court observed that the Venezuelan notes "did not exclude any location, much less a United States location, as the place of payment," it was distinguishing *Morris v. People's Republic of China*, 478 F. Supp. 2d 561 (S.D.N.Y. 2007), a case Venezuela had cited. The district court noted that

Venezuela's reliance on *Morris* was misplaced because there "[t]he 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." Pet. App. 44a. Comparing the notes in *Morris* with the Venezuelan bonds Skye purchased, the district court held "[t]his 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." *Id*. In short, U.S. jurisdiction could not exist in *Morris* because the notes *expressly excluded* the U.S. as a place for payment, thereby precluding a "direct effect" from ever occurring in the United States. The district court was merely observing that Skye's bonds did not contain a similar exclusion, rendering *Morris* inapposite. Venezuela has extracted a few lines from the district court's explanation to make the words support the petition for certiorari.

Finally, as discussed below, the "issue" Venezuela uses to make its essential split-among-the-circuits argument – that courts are divided over whether to apply a "legally significant acts" test – is an "issue" that was never raised before the Sixth Circuit. Venezuela is merely dangling an argument it hopes will catch the Court's eye.

Venezuela suggests that the circuits are struggling, citing *Honduras Aircraft Registry, Ltd. v. Gov't*

of Honduras, 129 F.3d 543 (11th Cir. 1997), as a case in which the Eleventh Circuit purportedly gave up "try[ing] to reconcile" direct effect cases. In fact, in *Honduras Aircraft* the Eleventh Circuit merely noted that because direct effect cases "turn on their own facts . . . it is not necessary to try to reconcile them." *Id*. at 549. In sum, there is no "deep division of circuit authority" or "substantial confusion in the lower courts," as Venezuela claims. Thus, it is no surprise that the Court has recently declined to review two cases in which the petitioners, like Venezuela, suggested such a split exists. *See Guirlando v. T.C. Ziraat Bankasi, A.S.*, 602 F.3d 69 (2d Cir. 2010), *cert. denied*, ___ S. Ct. ___ (2011); *Guevara v. Republic of Peru*, 608 F.3d 1297 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 651 (2010).

A. Factual Background

The bonds in dispute were issued in 1981 by the Banco de Desarrollo Agropecuario ("Bandagro") and guaranteed by the Republic of Venezuela. Although Venezuela now claims the bonds are fraudulent, its argument is immaterial; for purposes of determining jurisdiction under the FSIA, Venezuela agreed the bonds are valid. Pet. App. 25a at n. 1.

Venezuela stipulated to the bonds' validity for good reason: the notes are, in fact, genuine. At the request of the Venezuelan National Assembly and the Office of the President of Venezuela, these particular bonds were investigated by the Venezuelan Ministry

of Finance in 2003. Pet. App. 26a. After carefully reviewing government records and conducting a physical examination of the bonds, the Ministry of Finance concluded that the notes are genuine. *Id*. In its extensive report, the Ministry of Finance acknowledged instances in which certain Bandagro notes had been found invalid in the past and observed what it called a "pattern of opinion" that all Bandagro promissory notes were forgeries. RE 18-3. The investigative team concluded, however, that the particular notes under investigation were different and were, in fact, authentic. *Id*.

The Attorney General of Venezuela reviewed the Ministry of Finance's investigation file and decision. On October 3, 2003, she issued a decree declaring the bonds at issue to be valid and binding obligations of the Republic of Venezuela. *Id*. After this confirmation by the government of Venezuela that the bonds are valid and enforceable, Skye purchased two of the notes that had been inspected by the Ministry of Finance. However, when Skye demanded payment in Columbus, Ohio, Venezuela refused to pay the bonds.

B. The Proceedings Below

Skye filed suit against Venezuela in the United States District Court for the Southern District of Ohio. Venezuela filed a motion to dismiss the complaint, asserting sovereign immunity and seeking dismissal under the doctrine of *forum non conveniens*. The district court denied the motion. Pet. App. 24a-51a.

Regarding immunity, the court held that the Bandagro notes allowed Skye to designate a place of payment in the United States and Venezuela was contractually obligated under the terms of the notes to pay at Skye's chosen location. *Id*. at 44a. Once Skye designated Columbus, Ohio, Venezuela's refusal to pay meant funds that were supposed to arrive in Columbus did not. Under *Weltover*, this refusal caused a direct effect in the United States for purposes of 28 U.S.C. § 1605(a)(2), and eliminated Venezuela's sovereign immunity. *Id*. at 45a. Regarding the issue of *forum non conveniens*, the district court held that the Venezuelan courts were "unavailable" under *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981). Pet. App. 45a-51a.

The Sixth Circuit affirmed in part and reversed in part. Pet. App. 1a-21a. The court held that the district court has jurisdiction over this dispute, agreeing that the Bandagro bonds explicitly incorporate laws and regulations that permit Skye to require payment in the United States. The court also agreed that Venezuela's failure to send payment to Columbus in response to Skye's demand caused a direct effect in the United States. The court concluded, however, that the district court erred when it found Venezuelan courts to be unavailable without first analyzing the private and public interest factors described in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Pet. App. 13a. The case was remanded for further proceedings, including such an analysis.

The Sixth Circuit clearly held that under either the ICC procedures *or* Swiss law Skye had the discretion to demand payment in Ohio. Pet. App. 6a. Although Venezuela argues – erroneously – in its petition that utilization of the ICC procedures would not result in a "direct" effect, it makes *no* argument about the effect of Swiss law, tacitly conceding that Swiss law authorizes Skye to demand payment in Ohio. This concession that Swiss law permits Skye to name Columbus, Ohio, as the place for payment leads to the inevitable conclusion that Venezuela caused a direct effect in the U.S. when Skye made its demand and Venezuela failed to pay Skye's bonds.

REASONS FOR DENYING THE PETITION

Venezuela asks the Court to review an issue that was never addressed below: whether courts should apply a "legally significant act" test when deciding if a foreign state's actions caused a direct effect in the United States. Venezuela makes this issue the keystone of its petition, asserting that the circuits are "entrenched" and "hopelessly divided" over whether to apply such a test. Petition for Cert., pp. 12-18.

Venezuela did not address the "legally significant act" "issue" in its merit brief or reply brief below, and since the topic was never raised it was not addressed by the Sixth Circuit. The issue is being presented now solely because Venezuela finds it necessary to

identify an FSIA issue that might attract the Court's attention.

Moreover, and contrary to Venezuela's suggestion, the circuits are not confused about how to apply *Weltover*. It is true that prior to *Weltover*, and for a year or so thereafter, a few circuits applied what they referred to as a "legally significant acts" test to determine whether jurisdiction existed under § 1605(a)(2). Venezuela claims that the Eleventh, Ninth, Eighth and Second Circuits still apply such a test. A closer review demonstrates otherwise. In *Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982), a case cited by Venezuela that preceded *Weltover*, the Eleventh Circuit did *not* adopt a "legally significant acts" test; indeed, it never used such words. And, in *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385 (8th Cir. 1993), the Eighth Circuit merely observed that the Second Circuit had applied such a test but never indicated that *it* was doing likewise.

With respect to the two remaining circuits on Venezuela's list, it is apparent that both would find jurisdiction in this case. In *Hanil Bank v. Pt. Bank Negara*, 148 F.3d 127, 132 (2d Cir. 1998), for example, a letter of credit gave the plaintiff the discretion to choose the place for payment "wherever that might be." After the plaintiff chose a bank in the United States, the defendant foreign state failed to send payment to the designated location. The Second Circuit held that U.S. jurisdiction was appropriate, concluding that "the most legally significant act – the

breach of contract – occurred in the United States when defendant BNI failed to make good on its financial obligation." *Id*. at 133. Similarly, in *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997), the agreement at issue required the plaintiff to provide Nigeria with access to "a non-Nigerian bank," giving the plaintiff broad discretion to name *any* non-Nigerian bank – including one in the U.S. – as the place where money was to be deposited. The Ninth Circuit found jurisdiction because Adler requested defendants to make payment in New York and Nigeria failed to remit payment. *Id*. at 727. In short, even though the Second and Ninth Circuits apply a "legally significant acts" test, their application of such a test would lead to the same result the Sixth Circuit reached in this case. Thus, even if Venezuela's claimed "circuit split" existed, this outcome in this case would not be impacted by addressing the issue.

Clearly, the Sixth Circuit's decision does not conflict with *Weltover* or the decisions of other circuits. In similar cases, other circuits, like the Sixth Circuit, have adhered to *Weltover*. They have consistently held that a foreign state causes a "direct effect" to occur in the United States when a note holder is permitted to demand payment in the U.S. on a note issued or guaranteed by the foreign state and the foreign state refuses to pay.

I. THE ISSUE VENEZUELA NOW RAISES WAS NOT PRESENTED TO, OR DECIDED BY, THE SIXTH CIRCUIT

Venezuela never suggested in its merit brief or reply brief that jurisdiction can be established only if it engaged in a "legally significant act" that caused a direct effect in the United States, or that the issue was important to this case, or that the circuits are split over the topic. To the contrary, in its petition for en banc and panel rehearing Venezuela asserted that the Sixth Circuit's decision created a *different* conflict than the conflict Venezuela now claims exists. In its petition for en banc rehearing, Venezuela merely argued that the Sixth Circuit's decision conflicted with *one* decision, *Guevara v. Republic of Peru*, 608 F.3d 1297 (11th Cir. 2010), *cert. denied*, 131 S.Ct. 651 (2010). A conflict with one other circuit hardly constitutes "one of the most entrenched divisions – and some of the greatest confusion – currently confounding lower courts," as Venezuela now asserts in its petition for certiorari. Moreover, the Sixth Circuit's decision does not conflict with *Guevara*. *Guevara* involved Peru's failure to pay a reward for information leading to the arrest of a fugitive. Because the reward was offered in Peru, payment was to be made in Peru from funds the Peruvian government had placed in escrow in a Peruvian bank, and the only nexus with the United States was a single telephone call to Peru, the Eleventh Circuit had little difficulty concluding that Peru had not engaged in an act that caused a direct effect in the United States. *Id*. at

1308-10. *Guevara* bears no similarity to this case, because nothing gave the plaintiff an express or implied right to demand payment in the United States.

Because this Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005), Venezuela overreaches when it asks the Court to address an issue that was never addressed below. *See*, *e.g.*, *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2995 (2010) ("Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance.").

II. THE DECISION BELOW DOES NOT CONFLICT WITH *WELTOVER* OR THE DECISIONS OF OTHER CIRCUITS

The Sixth Circuit's decision adheres to *Weltover* and is consistent with the decisions of other circuits addressing similar facts. In *Weltover*, this Court addressed what is required to establish that a foreign state's conduct has had a "direct effect" in the United States. Jurisdiction cannot be predicated on "purely trivial" effects. 504 U.S. at 618. However, § 1605(a)(2) does not require a substantial or foreseeable effect. *Id*. Rather, "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 this standard, the Court had "little difficulty" concluding that Argentina's failure to pay money to a properly designated U.S. location caused a direct effect in the United States. Argentina's bonds gave holders the discretion to choose from among four cities – one of which was New York – as the place for payment. Even though the bondholders in *Weltover* were citizens of foreign countries, they demanded that payment be made to a bank in New York. When Argentina failed to send payment, a direct effect occurred 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 Sixth Circuit correctly concluded that the same type of direct effect occurred here. Skye had the discretion to name a U.S. location as the place for payment and it selected Columbus, Ohio. Venezuela failed to honor the demand. As a result, money that was supposed to have been delivered to an Ohio bank for deposit was not forthcoming. The facts are similar to those in *Weltover* and lead to the same result.

Like the Sixth Circuit, other circuits have had little difficulty understanding and applying *Weltover*'s instruction. In some cases, as in *Weltover*, a contractual provision identified a place in the United States as the place for payment. *See*, *e.g.*, *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994) (because agreements required Iraqi banks "to make payments in U.S. dollars into accounts in New York City," direct effect occurred when foreign state failed to pay); *I.T. Consultants, Inc. v. Republic of*

Pakistan, 351 F.3d 1184 (D.C. Cir. 2003) (because memorandum of understanding expressly required payments to be made to bank in Virginia, direct effect occurred when foreign state failed to pay).

In other cases, the contract or financial instrument gave the plaintiff discretion to name a U.S. location as the place for payment. Courts have consistently found a direct effect in these cases based on the foreign state's failure to send payment to the designated place. *See*, *e.g.*, *Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002) (because plaintiff was entitled to establish escrow account anywhere and set up the account in Ohio, direct effect occurred in the United States when Nigeria failed to deposit funds); *Hanil Bank v. Pt. Bank Negara*, 148 F.3d 127 (2d Cir. 1998) (because 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," direct effect occurred in the United States when foreign state failed to pay); *Voest-Alpine Trading USA v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) (because letter of credit did not specify place for payment but stated it would be governed by ICC rules, and bank indicated its practice would have been to send payment to location designated by presenting party, direct effect occurred when foreign state failed to send payment to U.S. location designated by presenting party); *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997) (because contract required plaintiff to provide Nigeria with access to a non-Nigerian bank and plaintiff chose bank in

U.S. as place for payment; direct effect occurred when foreign state failed to pay).

The cases Venezuela relies on involve contracts or financial instruments that either explicitly excluded the United States as the place for payment, or did not identify a U.S. location as the place for payment and did not give the plaintiff the discretion to name a U.S. location. In those cases, courts have consistently held that a direct effect did not occur when the foreign state failed to send payment to a location in the United States. For example, in *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232 (10th Cir. 1994), the contract required payment "through a European/USA Bank." *Id*. at 1237. Because a European bank, rather than a U.S. bank, was selected to receive payment, the court recognized that the case "differs in a significant respect from *Weltover*: no part of the contract . . . was to be performed in the United States." *Id*. As a result, no direct effect occurred. Similarly, in *Guevara* no direct effect occurred as a result of Peru's failure to honor a demand to send a reward payment to the United States, because the reward was offered in Peru and payment was to be made in Peru from funds the Peruvian government had placed in escrow in a Peruvian bank. 608 F.3d at 1308; *see also Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994) (foreign state's failure to send payment to U.S. location had no direct effect where letters of credit did not designate any place in the United States as place for payment and complaint contained no allegation

that plaintiff had discretion to name the place for payment).

These cases demonstrate consistent, not confused, application of *Weltover* by lower courts. *Falcon Investments, Inc. v. Republic of Venezuela*, No. 00-4123, 2001 WL 584346 (D. Kan. May 22, 2001) – the sole case Venezuela trumpets as being a "virtually identical" case that was dismissed – is plainly distinguishable. Although *Falcon* also involved Bandagro notes (that, unlike Skye's notes, were *not* examined and validated by the Ministry of Finance and the Attorney General), "neither party [ ] presented to the court the issue of applying foreign law" to the dispute. *Falcon*, 2001 WL 584346 at *5. Because no one supplied the district court "with the particulars of any foreign law nor advocated its use," the trial court never "consider[ed] the applicability of any foreign law but instead appl[ied] forum law." *Id*. Unable to consider the laws and regulations that gave the note holder the discretion to name the place for payment, the district court was left "unconvinced" that Venezuela was obligated to make payment at the plaintiff's requested location.

The district court's failure to apply Swiss law and/or the ICC regulations is significant, because it is through Swiss law and the ICC regulations explicitly incorporated in Skye's notes that Skye had the discretion to name Columbus as the place for payment. Had the district court in *Falcon* considered and applied Swiss law or the ICC regulations, it would have reached the same conclusion the district court and the Sixth Circuit reached in this case.

III. REVIEW IS UNWARRANTED

This case does not present the sort of issue conflict that warrants review by this Court. In *Weltover* courts and litigants alike were reminded that § 1605(a)(2)'s requirements are straightforward: section 1605(a)(2) provides for U.S. jurisdiction when a foreign state's actions outside the U.S., taken in connection with a commercial activity abroad, have a direct effect in the United States. There is no dispute that bonds such as those issued by Bandagro, like Argentina's bonds in *Weltover*, are "garden-variety debt instruments" typical of the commercial markets. *Weltover*, 504 U.S. at 615. As a result, when Venezuela guaranteed the bonds it acted not as a sovereign but as a private player in the financial markets, engaging in commercial activity as that term is used in the FSIA. *Id*. at 614.

Skye instructed Venezuela to send payment to Skye's bank in Ohio because Venezuela had guaranteed payment of the commercial bonds. Just as it was "obvious" that Argentina's refusal to pay its bonds was an act taken in connection with a commercial activity, *id*. at 612, it is equally clear that Venezuela's refusal to pay the bonds it guaranteed was "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere."

When the bondholders in *Weltover* demanded payment there was an immediate consequence in the U.S. when Argentina refused to pay: "money that was

supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id*. at 619. In short, there was a direct effect in the United States as a result of Argentina's conduct.

If Skye had the right to demand payment in the U.S. – and it did – there was an immediate consequence in the U.S. when Venezuela refused to pay: money that was supposed to be delivered to an Ohio bank for deposit was not forthcoming. As in *Weltover*, there was a direct effect in the United States as a result of the foreign state's conduct.

The district court and the Sixth Circuit correctly concluded that Skye had the right to demand payment in the United States. Skye's Bandagro notes expressly state that they are governed by certain laws and rules, and according to unrebutted expert testimony those laws and rules permit Skye to demand payment anywhere. It is hardly surprising that Venezuela, eager to establish credibility in the international financial markets in the early 1980s, would issue bonds that gave the holders broad discretion to choose the place for payment. To market its bonds to international investors skeptical of Venezuela's stability and wary of its financial institutions and government, it was essential that Venezuela give bond purchasers the right to demand payment anywhere in the world. Had Venezuela insisted that bondholders travel to Venezuela to obtain payment, Venezuela likely would not have been able to sell any bonds at all.

In a final effort, Venezuela attempts to support its position by arguing what it believes Congress intended in enacting the FSIA. "The question, however, is not what Congress 'would have wanted' but what Congress enacted in the FSIA," *Weltover*, 504 U.S. at 618. Section 1605(a)(2)'s text is clear. Although Venezuela may wish otherwise, just as the FSIA contains no "unexpressed requirement[s] of 'substantiality' or 'forseeability,'" *id*., it contains no unexpressed requirement that a foreign state's contract or bond expressly identify a U.S. location as the place for payment as a condition of jurisdiction.

In today's global economy, nations issue and guarantee debt instruments and act as private players in the market in numerous ways that impact the United States. With increasing frequency the actions of foreign states, taken in connection with commercial activities, have direct effects in the United States. It is appropriate that U.S. courts have jurisdiction over claims that arise from such conduct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES H. COOPER, JR.
Counsel of Record
REX H. ELLIOTT
COOPER & ELLIOTT, LLC
2175 Riverside Drive
Columbus, Ohio 43221
(614) 481-6000
(614) 481-6001 (Facsimile)

JOHN P. KENNEDY
CRABBE, BROWN & JAMES, LLP
500 South Front Street
Columbus, Ohio 43215
(614) 228-5511
(614) 229-4559 (Facsimile)

Of Counsel

Counsel for Respondent