No. 18-575

IN THE

# Supreme Court of the United States

YPF S.A.,

*Petitioner,*

v.

PETERSEN ENERGÍA INVERSORA S.A.U. AND PETERSEN ENERGÍA, S.A.U.,

*Respondents.*

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

## SUPPLEMENTAL BRIEF FOR PETITIONER

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## INTRODUCTION

The United States' view that certiorari should be denied rests on the erroneous premise that *any* alleged breach of a commercial obligation by a foreign sovereign is subject to suit in U.S. courts. That understanding of the FSIA's commercial activity exception goes even farther than the decision below in expanding federal jurisdiction over foreign states. It also departs from this Court's FSIA precedents and upends the settled expectations of foreign sovereigns, as amici the United Mexican States and the Republic of Chile have explained. The invitation brief thus confirms the need for this Court's review.

This is particularly so given the United States' acknowledgement of the importance of the question presented and the existence of a circuit conflict over its answer. The United States identifies no vehicle concerns that should deter review, and, contrary to the United States' assertion, the decision below exacerbates the existing split. The Court should therefore grant the petition for a writ of certiorari, as it has recently done in other FSIA cases notwithstanding a denial recommendation from the United States. *See, e.g.*, *Bank Markazi v. Peterson*, 136 S. Ct. 26 (mem.) (2015); *OBB Personenverkehr AG v. Sachs*, 135 S. Ct. 1172 (mem.) (2015).

## ARGUMENT

### I. The United States' Argument Conflicts With This Court's FSIA Precedent

In recommending that this Court deny the petition, the United States advocates (Br. 10-11) an expansive interpretation of the commercial activity

exception that would treat every alleged government breach of a commercial obligation as necessarily "commercial" and thus subject to suit under the commercial activity exception to the FSIA. Such a per se rule goes even beyond the decision below in asserting expansive federal jurisdiction over foreign states. And it finds no basis in this Court's precedent or longstanding principles of foreign sovereign immunity codified in the FSIA. *See* Pet. 14-15; Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 Yale Int'l L. J. 489, 504 (1992) (a "per se rule against immunity for any alleged breach of contract" would conflict with the "legislative intent underlying the commercial activity exception"); *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) (contractual breaches pertaining to sovereign prerogatives do not give rise to jurisdiction); *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1393-94 (5th Cir. 1985) (contractual breaches are shielded by sovereign immunity where a sovereign is engaged in an "intrinsically governmental function[]").

Contrary to the government's suggestion (Br. 10), determining if an act is commercial rather than sovereign requires looking beyond the *type* of act performed. As this Court explained in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the key question is whether the foreign state acted "in the *manner* of a private player" in the market. *Id.* at 614 (emphasis added). Thus, in *Weltover*, this Court held that the commercial activity exception applied because the suit was based upon Argentina's act of

refinancing bonds that it had issued to stabilize its currency. *Id.* at 615-16. Although the act complained of—Argentina's attempt to refinance the bonds rather than pay them—was made "[p]ursuant to a Presidential Decree," *id.* at 610, there was "nothing distinctive" about the *manner* in which Argentina did that act, *id.* at 615. The bonds themselves were "garden-variety debt instruments" that "may be held by private parties." *Id.* And, critically, "private parties regularly issue bonds … to refinance debt," as Argentina did. *Id.* at 615-16. It was therefore "irrelevant" in that case "*why* Argentina participated in the bond market" because it did so "*in the manner of a private actor*." *Id.* at 617 (second emphasis added).

The United States ignores the distinction between Argentina's actions in *Weltover* and the acts complained of here. True, both occurred "[p]ursuant to" a governmental decree (Br. 13); but in *Weltover,* that decree directed Argentina to do something any private party could do, *see* 504 U.S. at 615-16. Here, the Expropriation Law directed Argentina to acquire a majority interest in YPF by *expropriating* Repsol's shares, *see* Pet. App. 10a, not by purchasing them on the open market as any private party could do. And, prior to the enactment of the Expropriation Law, the Argentine National Executive Office issued an Executive Decree that directed an intervenor to seize immediate control of YPF's facilities and assume operations of the company, *see* Pet. App. 10a, again something no private party seeking to acquire a controlling stake in YPF could have done. Thus, even if YPF's shares are "garden-variety equity instruments" (Br. 13) like the bonds in *Weltover*, Argentina did not act like a private party in the

manner that it obtained them; instead, it took a series of actions reserved exclusively for the sovereign. That difference is dispositive for purposes of the commercial activity exception.

The United States also misplaces reliance (Br. 11-12) on *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Both cases support YPF because this Court looked past the plaintiffs' artful pleadings to conclude that the suits were *not* based on commercial acts. *See Sachs*, 136 S. Ct. at 396; *Nelson*, 507 U.S. at 358. To the extent the United States seeks to distinguish *Sachs* and *Nelson*, it is only because the plaintiffs in those cases misplaced reliance on commercial acts that were far removed from the acts that caused the alleged injuries. In *Sachs,* the gravamen of the plaintiff's suit was the unsafe condition on a train platform in Austria, not the sale of the train ticket in the United States, which occurred well prior to the injury and had nothing to do with the alleged injury-causing acts. *See* 136 S. Ct. at 396. And in *Nelson,* the plaintiff's claims were based upon a sovereign exercise of police authority—not the defendant's prior and remote commercial activities in recruiting the plaintiff to work at a hospital. *See* 507 U.S. at 358.

Here, the injury-causing acts are part and parcel of Argentina's sovereign, not commercial, acts—namely, Argentina's partial expropriation of YPF. Indeed, both the Second Circuit and United States acknowledge that Argentina's expropriation "triggered" the bylaws' tender offer requirement (Pet. App. 20a) and "led to" the alleged breaches (Br. 12) that underlie this suit. YPF's purported failure to

enforce the bylaws' tender offer requirement or the accompanying penalty provisions cannot be separated from the same sovereign act that indisputably "led to" those alleged breaches in the first instance (Br. 12). *Sachs* and *Nelson* do not suggest otherwise.

In straining to avoid this Court's teachings in *Weltover*, *Nelson*, and *Sachs*, the United States lays bare (Br. 11, 13) its concern that Argentina and YPF are alleged to have reneged on contractual commitments to investors. But Congress enacted the FSIA and transferred "from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit" precisely to avoid such ad hoc immunity decisions. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016).

In any event, a sovereign decision is still sovereign, even if it results in a contractual breach. *Cf. United States v. Winstar Corp.*, 518 U.S. 839, 873-78 (1996) (citing "cases extending back into the 19th century" for the principles that one legislature may not bind the legislative authority of its successors and that a government's contracts do not surrender sovereign power). Sovereigns are entitled to make decisions that change the rules of the game. *See id.* Unless they have engaged in "strictly commercial acts" in the manner of a private party, the FSIA's commercial activity exception does not strip their immunity from suit in U.S. courts. *Bolivarian Republic of Venez. v. Helmerich & Payne*

*Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) (internal quotations omitted).[1]

It may be that Petersen can pursue a remedy for Argentina's and YPF's alleged breaches in another forum, but, consistent with the FSIA's broad grant of sovereign immunity for acts that are "peculiarly sovereign," *Nelson*, 507 U.S. at 361, they cannot be held liable for them in U.S. courts.

## II. The United States Raises No Legitimate Vehicle Problem With Reaching The Concededly Important Question Presented

The United States acknowledges (Br. 9, 18) the importance of the question presented, but fails to address the petition's arguments, echoed by amici Mexico and Chile, that its expansive view of subject matter jurisdiction risks serious interference with U.S. foreign relations and reciprocal treatment of the United States abroad. As amici warn, the Second Circuit's decision, absent this Court's intervention, will create "significant uncertainty" for foreign nations as to "how, whether, and where their sovereign acts may subject them to jurisdiction in the United States," leading to similar uncertainty for the United States regarding the treatment of its actions abroad. Br. of United Mexican States at 3. Indeed,

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[1] The United States also ignores YPF's contention (Pet. 19 n.2), that the investors *could* have ensured a remedy in U.S. courts simply by insisting on a waiver of sovereign immunity from Argentina and YPF. *See* 28 U.S.C. 1605(a)(1) ("A foreign state shall not be immune … in any case (1) in which the foreign state has waived its immunity either explicitly or by implication").

the decision below may "lead[] other countries to reciprocate" against the United States "by granting their courts permission to embroil the United States in expensive and difficult litigation." Br. of Republic of Chile at 7, 11 (internal quotations omitted); *see* Br. of United Mexican States at 2 (the decision below "risk[s] embarrassing key allies and trade partners" and "lead[s] inexorably to a reciprocal expansion of suits against the United States").

Instead, the United States seeks to avoid the serious foreign policy implications of the decision below by erroneously suggesting (Br. 17-18) that this case has vehicle problems that warrant the petition's denial. That is incorrect. This case in fact presents an ideal vehicle to address the application of the commercial activity exception to claims that "consist[] of both commercial and sovereign elements," *Nelson*, 507 U.S. at 358 n.4, because Petersen's claim is that YPF breached its bylaws by failing to prevent Argentina from carrying out an indisputably sovereign act.

Contrary to the United States' assertion (Br. 17), YPF's arguments do not "rest[] on a disagreement with the court of appeals' interpretation of Argentine law and YPF's bylaws." This Court need not resolve any issues of Argentine law to answer the question presented because it makes no difference whether the Expropriation Law required Argentina to acquire exactly 51% of the shares of YPF. What matters is that Argentina made a sovereign decision to effect a partial re-nationalization of YPF, and there is no dispute that Argentina's sovereign choice to expropriate 51% of YPF's shares is itself a sovereign act.

Nor must this Court interpret YPF's bylaws to answer the question presented. Rather, in resolving that question, this Court may accept Petersen's allegations that YPF's failure to require a tender offer or enforce the accompanying penalty provisions constituted a breach of the bylaws. For *even if* those alleged actions constituted a breach, they cannot be viewed in isolation from the sovereign manner by which Argentina obtained control of Repsol's shares. YPF's alleged actions were inextricably intertwined with the expropriation and thus are not the kind of "strictly" commercial behavior that may be subject to suit in U.S. courts. *See Helmerich*, 137 S. Ct. at 1320 (internal quotations omitted).

## III. The United States Fails To Dispel The Circuit Split Deepened By The Decision Below

The United States rightly acknowledges (Br. 17) that the courts of appeals are split as to whether the commercial activity exception applies to acts that are inextricably intertwined with sovereign acts. The D.C. Circuit has repeatedly held that the commercial activity exception does not apply to purportedly commercial acts that flow directly from a sovereign act like expropriation. *See, e.g.*, *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 889 (D.C. Cir. 2006); *Millen Indus.*, 855 F.2d at 885. The Ninth Circuit, by contrast, has concluded that similar conduct is "clearly … of a kind in which a private party might engage." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708 (9th Cir. 1992); *see Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 725 (9th Cir. 1997).

The United States errs in arguing (Br. 17) that petitioners "overstate the conflict." The D.C. Circuit and Ninth Circuit have consistently reached opposite conclusions on the very question presented in this case. In *Rong*, a Hong Kong corporation and its former chairman sued a Chinese province for implementing a scheme to acquire the majority interest in the corporation and maintain control of it. 452 F.3d at 885, 887. The province had declared the corporation's shares "state assets," demanded that the shares be transferred to it, and then formed a new company that purchased the corporation's majority shares at a below-market price. *Id.* at 886-87. And like Petersen here, the plaintiff in *Rong* challenged the province's "post-expropriation acts," including putting government officials in charge of the corporation and transferring its shares after the expropriation. *Id.* at 889. The D.C. Circuit held that, although those post-expropriation actions "seem[ed] commercial," they were nevertheless immune from suit because they all "flow[ed] from" the province's "'state assets' declaration—an act that can be taken only by a sovereign," *id.* at 889, and thus is something a "private party in the market could not have done," *id.* at 890.

In direct conflict with the D.C. Circuit, the Ninth Circuit, and now the Second Circuit, have held that acts directly flowing from sovereign acts such as expropriation may fall within the commercial activity exception. *See Siderman*, 965 F.2d at 708-09; Pet. App. 22a-27a. Thus, in *Siderman,* the Ninth Circuit held that the government's operation of a hotel it had expropriated and the government's receipt of profits from the hotel management company were "commercial," not sovereign, in

nature, even though they derived from indisputably sovereign acts, because they were "clearly activities of a kind in which a private party might engage." 965 F.2d at 708-09.[2]

Contrary to the United States' assertion (Br. 17), the conflict between the D.C. Circuit and Ninth Circuit on this issue is not just a "disagreement with the application of a legal standard." When presented with similar facts, those courts reached opposite conclusions about the existence of subject matter jurisdiction over a foreign sovereign based on substantively different interpretations of the FSIA. That conflict goes to the heart of the question presented and alone is a reason to grant review.

The Second Circuit has now deepened the split, and the United States errs (Br. 14-15) in suggesting otherwise. In agreement with *Siderman* and in conflict with *Rong*, the court of appeals' decision in this case holds that an instrumentality of a foreign state may be subject to suit for acts that were "triggered by" and directly flow from sovereign acts of seizure and expropriation. Pet. App. 26a. That decision conflicts with *Rong,* which held that acts that "seem commercial" cannot give rise to jurisdiction where they directly flow from a sovereign

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[2] The Ninth Circuit continues to rely on *Siderman* in applying the commercial activity exception. *See, e.g.*, *Sukyas v. Romania*, ___ F. App'x ___, 2019 WL 1513998, *2 (9th Cir. Mar. 19, 2019) (unpub.) (citing *Siderman* for proposition that Romanian government's expropriation of plaintiff's film company and its "continued use of [the company's] assets" are "clearly … of a kind in which a private party might engage").

act that (as here) a "private party in the market could not have done." 452 F.3d at 889-90.

The United States also wrongly suggests (Br. 16) that *de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013), undermines this conflict—never engaging with YPF's distinctions of that case (Pet. 11 n.1; Reply 10). The claim in *de Csepel* was based on the Hungarian government's failure to comply with a bailment agreement that arose years after, and was entirely independent of, the government's expropriation of artwork during World War II. *Id.* at 599-600. Because that case involved *purely* commercial activity that was temporally and causally remote from a sovereign act of expropriation, the D.C. Circuit properly concluded that the commercial activity exception applied. *See id.* Here, however, as in *Rong*, the claims "consist[] of *both* commercial and sovereign elements." *Nelson*, 507 U.S. at 358 n.4 (emphasis added). In this context, there is no question the D.C. Circuit would have held that YPF is immune from suit. *See, e.g.*, *Millen Indus.*, 855 F.2d at 885 ("Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity."). The circuit split is thus both real and deepened by the decision below.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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