No. 18-____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "commercial activity" exception to sovereign immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a)(2), is inapplicable to suits challenging conduct inextricably intertwined with a sovereign act of expropriation.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner YPF S.A. was defendant-appellant below.

Respondent Argentine Republic was defendant-appellant below.

Respondents Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U. were plaintiffs-appellees below.

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INTRODUCTION

There are few more sensitive political issues in Argentina than the operation of petitioner YPF, which controls the country's petroleum resources. YPF started out as a governmental entity, was privatized in the 1990s, and then partially re-nationalized in 2012. The privatization and partial re-nationalization of YPF were landmark events in Argentine political and economic history.

Until now. The Second Circuit treated the partial re-nationalization of YPF in 2012 as mere "commercial activity" outside the scope of the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. 1602 *et seq.*, and thereby allowed this lawsuit to proceed against both Argentina and YPF, now (once again) an instrumentality of the Argentine government. In essence, according to the Second Circuit, this lawsuit is not about the partial re-nationalization of YPF; it is about the alleged failure to honor investor protections in YPF's corporate bylaws that were supposed to accompany the expropriation.

But that is a distinction without a difference. Argentina carried out the partial re-nationalization of YPF in 2012 by removing certain "sticks" from the "bundle" of private property rights that had been created at the time of YPF's privatization in the 1990s. The choice of what "sticks" to remove and how to remove them are classic sovereign decisions that do not become commercial merely because they affect private contractual rights. Let there be no mistake: this case involves a frontal attack on the manner in which Argentina chose to expropriate a controlling stake in YPF. The fact that Argentina

chose to seize control of YPF and expropriate only 51% of YPF's shares in a manner that allegedly impaired contractual rights does not render its sovereign decisions commercial in nature.

There is no mystery what is going on here. The Second Circuit took umbrage at the fact that, in connection with the privatization of YPF in the 1990s, Argentina promised private investors certain protections in the event of a re-nationalization and then engaged in a sovereign act that purportedly failed to honor those promises. But a sovereign act that affects contractual rights is still a sovereign act. It may be that Argentina and YPF can be held liable for the sovereign acts of seizure and expropriation in some other forum, but, consistent with the FSIA, they cannot be subject to the jurisdiction of U.S. courts.

This Court's review is warranted for three reasons. *First*, the Second Circuit's decision deepens an existing split among the courts of appeals. The D.C. Circuit has consistently refrained from extending the FSIA's commercial activity exception to suits concerning actions that directly flow from a sovereign act like expropriation. The Ninth Circuit, and now the Second Circuit, have held that the exception applies to suits based upon such actions. Only this Court's intervention can resolve the conflict.

Second, the Second Circuit's interpretation of the FSIA is wrong. The FSIA's commercial activity exception applies only where a foreign state acted in the manner of a private player in the market, not where, as here, its conduct is inextricably intertwined with quintessentially sovereign acts.

The Second Circuit's rule that every foreign government action that impinges upon contractual rights falls within the commercial activity exception is in conflict with this Court's precedent and undermines the FSIA's separate limited exception to foreign sovereign immunity for expropriations.

Third, the scope of the FSIA's commercial activity exception is a recurring question of great national importance. Permissive and inconsistent standards for actions against foreign sovereigns in U.S. courts implicate sensitive issues of U.S. foreign relations and risk exposing the United States to reciprocal litigation in foreign states.

This case, moreover, presents an excellent vehicle to resolve the question presented, because the complained-of acts flowed directly from a sovereign takeover of YPF's shares. Even if YPF's alleged actions constituted a breach of its bylaws, those acts are not enough, standing alone, to subject YPF to suit in U.S. courts.

This Court should grant the petition.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is reported at 895 F.3d 194 and is reproduced at App. 1a-33a. The district court's unreported opinion is available at 2016 WL 4735367 and is reproduced at App. 34a-71a.

JURISDICTION

The court of appeals denied rehearing on August 30, 2018. App. 72a. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT STATUTORY PROVISIONS

With only narrow exceptions, the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.*, provides foreign states with immunity from suit in U.S. courts. The FSIA reflects a congressional determination to respect the dignity and independence of foreign states, avoid judicial involvement in sensitive issues implicating the foreign relations of the United States, and thereby encourage reciprocal grants of immunity.

The FSIA provides that a foreign state "shall be immune from the jurisdiction of the courts of the United States except as provided" in specifically enumerated statutory provisions. 28 U.S.C. 1604; *see id.* 1603(a) (defining "foreign state" to include an "agency or instrumentality of a foreign state").

The commercial activity exception pertinent here provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States … in any case … in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] 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).

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." *Id.* 1603(d). "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*

STATEMENT OF THE CASE

A. Background

YPF is a publicly-held oil and gas company organized under Argentine law. *See* App. 3a, 35a. Although Argentina currently owns a controlling interest in YPF, the company has a history of both privatization and government control.

YPF was a state-owned enterprise until 1993, when Argentina elected to privatize the company by offering and selling its shares to the public. *See* App. 3a-4a. As part of the privatization process, YPF amended its bylaws to add certain "takeover" provisions. *See* App. 4a. Section 7 of the bylaws provides that any "person wishing to [effect] a Takeover" of YPF's shares "shall … (i) Obtain the prior consent of the special shareholders' meeting of class A shareholders; and (ii) Arrange a takeover bid [*i.e.,* tender offer] for the acquisition of all the shares of all classes of the Corporation …." 2d Cir. J.A. 410 § 7(e). Any party that acquires more than the threshold percentage of YPF shares without making the required tender offer "shall not [have] any right to vote or collect dividends." 2d Cir. J.A. 415 § 7(h). Section 28 of the bylaws states that the takeover provisions from section 7 apply to Argentina in certain circumstances, in the event Argentina

acquires at least 49% of YPF's capital stock. 2d Cir. J.A. 432 § 28; *see* App. 5a-6a.

Nearly twenty years later, on April 16, 2012, the then-President of Argentina proposed legislation that would expropriate 51% of the voting stock of YPF. *See* App. 10a. The same day, the Argentine National Executive Office issued an Executive Decree that appointed an intervenor to seize immediate control of YPF's operations while the Argentine Congress considered the legislation. *See* App. 10a. According to the complaint, the intervenor immediately assumed control of YPF's facilities, replaced top management with government officials, cancelled a shareholders' meeting, and declined to make expected dividend payments. 2d Cir. J.A. 28; *see* App. 10a.

The proposed legislation was enacted into law on May 3, 2012. *See* App. 10a. As enacted, the Expropriation Law declared that it was in Argentina's national public interest to achieve self-sufficiency in hydrocarbon supply by integrating "public and private … capital into strategic alliances aimed at the exploration and exploitation of conventional and unconventional hydrocarbons." 2d Cir. J.A. 166 § 3; *see* App. 11a. To fulfill that objective, the Expropriation Law "declared to be of public use and subject to expropriation … the fifty-one percent (51%) equity interest in [YPF] represented by the same percentage of Class D shares … held by Repsol YPF S.A." 2d Cir. J.A. 167 § 7; *see* App. 11a. The Expropriation Law provided that, immediately upon its effective date of May 7, 2012, "the Argentine Executive Branch … shall exercise all of the rights conferred upon the shares

subject to expropriation ...." 2d Cir. J.A. 168 § 13; *see* 2d Cir. J.A. 167 § 9 ("[T]he Executive Branch … shall exercise all the political rights over all the shares subject to expropriation until the transfer of the political and economic rights related to the said shares … has been completed."); App. 10a-11a.

Shortly after the Expropriation Law went into effect, Argentina exercised its rights, pursuant to its temporary emergency powers, to vote the expropriated shares at a June 2012 shareholder meeting. *See* App. 11a. The former majority shareholder, Repsol, challenged the validity of the Expropriation Law in the Argentine courts and sought an injunction against Argentina's continued operation of YPF. Argentine courts rejected Repsol's legal challenges and held that the Expropriation Law was entitled to a presumption of validity. *See* 2d Cir. J.A. 60-61. The expropriation was finalized two years later, when Argentina compensated Repsol for the expropriated shares. *See* App. 39a. Until that time, Argentina continued to exercise interim control over the controlling shareholder stake in YPF. *See* App. 11a, 39a.

B. Proceedings Below

Respondents Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U. (together, "Petersen") owned a 25% interest in YPF in April 2012. *See* App. 6a-7a. In 2015, Petersen commenced this action against Argentina and YPF in federal district court. 2d Cir. J.A. 13. Petersen alleged that Argentina breached section 7 of the bylaws by acquiring 51% of YPF's shares without making the required tender offer for the remaining 49%, including the shares that Petersen owned. 2d Cir. J.A. 33. The complaint

alleged that YPF had breached its obligations under the bylaws by (1) failing to enforce the tender offer requirements and (2) failing to enforce the penalty provisions of section 7(h) that would have prevented Argentina from voting the expropriated shares. 2d Cir. J.A. 37; *see* App. 26a.

YPF and Argentina moved to dismiss the complaint for lack of subject-matter jurisdiction under the FSIA. The district court (Preska, J.) denied the motions, ruling, as relevant here, that it had subject-matter jurisdiction over the suit because Petersen's complaint satisfied the commercial activity exception to foreign sovereign immunity in 28 U.S.C. 1605(a)(2). *See* App. 41a-49a. Construing Petersen's allegations as challenging "Argentina's failure to issue a tender offer and YPF's failure to enforce the tender offer requirements that are contained in [YPF's] Bylaws," the court determined that the action "concern[ed] the *effects* of sovereign acts on commercial obligations rather than the sovereign acts themselves," and therefore satisfied the jurisdictional requirements of Section 1605(a)(2). App. 44a (emphasis added).

The Second Circuit affirmed (Chin, J., joined by Calabresi, J., and in relevant part, Winter, J.). The court of appeals held that both Argentina's obligation to make a tender offer under the bylaws and Argentina's repudiation of that obligation "were indisputably commercial in nature in that they are 'the *type* of actions by which a private party engages in trade and traffic or commerce.'" App. 20a (quoting *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); emphasis in original). The court acknowledged that "Argentina's obligation to conduct

a tender offer in this case was triggered by its sovereign act of expropriation," but held that there was "nothing unusual about conditioning a commercial obligation on the occurrence of a sovereign act, even when the sovereign itself is one of the parties to the contract." App. 20a. The court thus concluded that Argentina's alleged breach of its obligations "was a commercial act, not a sovereign one." App. 21a.

With respect to Petersen's claims against YPF, the court of appeals held that those, too, were permissible under the commercial activity exception. It determined that YPF's alleged failure to enforce the tender offer provision was "commercial in nature" because "every corporation is obligated to abide by its bylaws." App. 26a. And it concluded that YPF's alleged failure to enforce the penalties in section 7(h) of the bylaws—specifically, its failure to prevent Argentina from voting the expropriated shares—constituted commercial activity because that provision "implicates the commercial affairs of YPF, *i.e.*, what voting rights attach to which shares and which shares are entitled to collect dividends." App. 26a.

The Second Circuit denied YPF's timely petition for rehearing. App. 72a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Deepens A Split Among The Courts Of Appeals Regarding The Scope Of The FSIA's Commercial Activity Exception

This Court has repeatedly held that the FSIA's commercial activity exception abrogates a foreign

state's sovereign immunity where the foreign state has acted as a private player in the market, but not where a foreign state acts in a manner "peculiar to sovereigns." *Saudi Arabia v. Nelson*, 507 U.S. 349, 362-63 (1993); *see Weltover,* 504 U.S. at 614. This Court, however, has never addressed whether the FSIA's commercial activity exception applies to a claim that "consists of both commercial and sovereign elements." *Nelson*, 507 U.S. at 358 n.4. Lacking guidance, the courts of appeals are split.

The D.C. Circuit has correctly and consistently held that the commercial activity exception does not apply to suits based upon actions that directly "flow from" a sovereign act such as expropriation. *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 889 (D.C. Cir. 2006); *see Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) ("Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity."). In *Rong*, a Hong Kong corporation and its former chairman had sued the Laoning Province, a political subdivision of China, challenging the Province's implementation of 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 company's shares "state assets" and demanded they be transferred to the Province. *Id.* at 886. Then, "[a]t the direction of the Province," the board removed the plaintiff from the board, placed provincial officials in his position and other management roles, and formed a new company that purchased the corporation's majority shares for a below-market price. *Id.* at 886-87. Although the Province's acts of removing directors and forming a new company to purchase

shares "seem[ed] commercial," the D.C. Circuit recognized that "all of these acts flow[ed] from the [Province's] 'state assets' declaration—an act that can be taken only by a sovereign." *Id.* at 889.

In declining to extend the commercial activity exception to acts that directly "flow from" sovereign acts, *id.*, *Rong* distinguished situations in which there was "no indication" that a foreign state had nationalized a company "by taking it over through a process of law," *id.* at 890 (distinguishing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990)). Because the Province in *Rong* did not assume control over the shares by purchasing them "as a private party would"—it "declared [them] to be state assets and claimed them as does a sovereign"—the Province did not act as "[a] private party in the market." *Id.* Rather, it acted as a sovereign. *Id.* And the Province's "subsequent acts" of removing directors and forming a new company to acquire shares, however commercial those acts seemed, "did not transform the Province's expropriation into commercial activity." *Id.*[1]

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[1] More recently, in *de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013), the D.C. Circuit correctly held that the commercial activity exception applied to claims based on non-sovereign acts that were purely private in nature. The claims at issue in that case were based upon the foreign state's failure to comply with obligations that arose from a bailment relationship it had entered into with the plaintiffs to retain possession of certain artwork that the Hungarian government had expropriated during World War II. There, unlike in *Rong*, the foreign state was not alleged to have repudiated a pre-existing contractual obligation in connection with a sovereign act. Rather, the Hungarian government had entered into a new

In direct conflict with the D.C. Circuit, the Ninth Circuit and now the Second Circuit have held that acts inextricably intertwined with sovereign acts such as expropriation may fall within the commercial activity exception. *See Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992); App. 22a-27a, 30a. The claim in *Siderman*, much like the claim in *Rong*, alleged that Argentina wrongfully expropriated a hotel and deprived the plaintiffs of the hotel's revenue stream. 965 F.2d at 708-09. Yet unlike the D.C. Circuit, the Ninth Circuit did not recognize Argentina's acts as sovereign. Rather, it held that Argentina could be subject to suit under the commercial activity exception because, in the court's view, Argentina's "operation of the [hotel], and its receipt of profits from the [hotel's management company]" were "clearly activities of a kind in which a private party might engage." *Id.* (internal quotations omitted). Since *Siderman*, the Ninth Circuit has continued to subject foreign states to jurisdiction under the commercial activity exception for conduct that directly flows from indisputably sovereign acts. *See Adler v. Fed. Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997) (applying the commercial activity exception to sovereign acts by the Nigerian government because they were related to commercial acts).

The decision below deepens the existing split by holding, in agreement with the Ninth Circuit and in

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and distinct contractual relationship with the plaintiffs regarding the property at issue long after the sovereign act had occurred. *See id.* at 599-600.

direct conflict with the D.C. Circuit, that an instrumentality of a foreign state may be subject to suit for acts that were "triggered by," and are inseparable from, the sovereign acts of seizure and expropriation. App. 26a. That decision is contrary to *Rong*, which held that acts that "seem commercial" cannot give rise to jurisdiction under the commercial activity exception where they directly flow from a sovereign act, like expropriation, that "[a] private party in the market could not have done." 452 F.3d at 890.

The courts of appeals are thus divided between courts that uphold a foreign state's sovereign immunity from suits that are based upon acts inextricably intertwined with sovereign acts and courts that hold that sovereign immunity is abrogated if such acts "seem commercial." Certiorari is warranted to resolve this split.

II. The Decision Below Is Manifestly Incorrect

This Court's review is also warranted because the Second Circuit was wrong to expand federal court jurisdiction to cover suits against foreign states based on acts that are part and parcel of quintessentially sovereign acts of expropriation. Correctly construed, the FSIA preserves sovereign immunity from such suits.

The FSIA provides "the sole basis" for U.S. courts to obtain subject-matter jurisdiction over a foreign state. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). It preserves a foreign state's immunity from suit "unless one of several statutorily defined exceptions applies." *Weltover*, 504 U.S. at 611; 28 U.S.C. 1604 ("Subject to existing international agreements to which the

United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States … except as provided in sections 1605 to 1607 of this chapter."). Those statutory exceptions are narrowly construed. *See Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000).

Of the limited exceptions in the FSIA, only the "commercial activity" exception has been alleged to apply here. As relevant, that exception authorizes jurisdiction over a foreign state in suits that are "based … upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere," that "causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). Although the FSIA "leaves the critical term 'commercial' largely undefined," this Court has instructed that the key to determining whether an act is "in connection with a commercial activity" is whether the foreign state acted "in the manner of a private player" in the marketplace. *Weltover*, 504 U.S. at 614. Where a foreign state engages in the same kinds of commercial activities in which any private citizen could engage, its acts may form the basis for jurisdiction under the FSIA. *See id.*

Thus, in *Weltover*, this Court held that Argentina was subject to suit under the FSIA's commercial activity exception where the suit was based upon Argentina's act of refinancing "garden-variety" bonds it had issued to stabilize its currency. *Id.* at 615-16. Because the government participated in the bond market in the same way that any private party could have participated, its act of refinancing the bonds was "commercial" within the meaning of the FSIA.

Id. at 617. But this Court likewise has indicated that even acts with commercial characteristics will not support jurisdiction where they derive from acts that are "peculiarly sovereign in nature." *Nelson*, 507 U.S. at 362-63 (acts complained of did not qualify for commercial activity exception, even though they involved reports of hospital safety violations and were "consequently commercial," because they could not "be performed by an individual acting in his own name" but "only by the state acting as such").

It thus cannot be the case that, standing alone, every government action that impinges upon contractual rights falls within the commercial activity exception. *See, e.g.*, *Millen Indus.*, 855 F.2d at 885 (contractual breaches pertaining to sovereign prerogatives do not give rise to jurisdiction); *de Sanchez v. Banco Cent. de Nicar.*, 770 F.2d 1385, 1394 (5th Cir. 1985) ("Where a government enters into a contract in its sovereign capacity, then the breach of that contract partakes of the contract's initial sovereignty."); *see also* Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 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). Indeed, this Court has long recognized that a sovereign decision that allegedly results in a contractual breach is still sovereign. *See 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). Sovereign power entitles sovereigns to change the rules of the game, *see id.*, and unless foreign states 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); *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1030 (D.C. Cir. 1997) ("[T]he fact that … actions may relate in certain respects to commercial activity does not provide a basis for jurisdiction under [the commercial activity exception].").

These principles make clear that the decision below is wrong. Petersen has alleged that YPF breached its bylaws "by (1) failing to enforce the bylaws' tender offer provisions vis-à-vis Argentina and (2) failing to enforce the penalties that section 7(h) imposes on shareholders who have breached their tender offer obligations." App. 26a; *see* 2d Cir. J.A. 37. But even if YPF's alleged acts constituted a breach of the bylaws, they were not done in the manner of a private party and were not "strictly commercial." They were inextricably intertwined with the Expropriation Law and Argentina's unquestionably sovereign acts of seizing control over YPF and expropriating 51% of YPF's shares.

The Second Circuit acknowledged that "Argentina's obligation to conduct a tender offer in this case was triggered by the sovereign act of expropriation," App. 20a, yet it erroneously concluded that YPF's alleged failure to act in response to that sovereign act was nevertheless

"commercial in nature," because "every corporation is obligated to abide by its bylaws," App. 26a. But YPF's purported failure to enforce the tender offer requirement or the accompanying penalty provisions cannot be separated from the same sovereign act that triggered those requirements in the first instance. Indeed, the very thing Petersen claims YPF should have done to enforce the bylaws—prevent Argentina from voting Repsol's shares (2d Cir. J.A. 23, 37)—was exactly what the Expropriation Law *required* Argentina to do. *See* 2d Cir. J.A. 168 § 13 ("the Argentine Executive Branch … shall exercise all of the rights conferred upon the shares subject to expropriation" immediately upon the effective date). Once Argentina assumed control of YPF's operations and mandated that a vote occur—something no private party could have done—YPF's actions were no longer "strictly commercial" actions of the type private parties perform. They were inextricably intertwined with Argentina's sovereign decision to partially re-nationalize YPF.

The fact that YPF's acts can be made to "seem commercial" does not change that conclusion. *Rong*, 452 F.3d at 889. Practically every expropriation of property carries commercial consequences. If the seemingly commercial actions that are inextricably intertwined with a sovereign expropriation gave rise to jurisdiction under the FSIA, "then almost any subsequent disposition of expropriated property could allow the sovereign to be haled into a federal court under [the] FSIA." *Id.* at 890. That construction would thwart the purpose of the FSIA by requiring foreign states to defend against claims based upon conduct that is inextricably linked to

sovereign acts. *See Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000).

That construction also would undermine Congress's intent in enacting a narrow exception to sovereign immunity that *specifically* applies to sovereign acts of expropriation. The FSIA's expropriation exception authorizes jurisdiction over foreign states in suits involving an expropriation of property only where property is "taken in violation of international law." 28 U.S.C. 1605(a)(3). Congress imposed such strict requirements on plaintiffs that challenge expropriations in order to avoid unduly trenching upon a foreign state's sovereign authority to expropriate. By allowing a plaintiff to bring suit against a foreign state for acts that are part and parcel of a sovereign expropriation decision without satisfying those requirements, the Second Circuit's decision ignores the text and structure of the FSIA. Congress would not have enacted the carefully limited expropriation exception if it intended that exception to be undercut, as the Second Circuit did here, by an expansive application of the commercial activity exception. *See* Philippe Lieberman, *Expropriation, Torture, & Jus Cogens Under the Foreign Sovereign Immunities Act: Siderman de Blake v. Republic of Argentina*, 24 U. MIAMI INTER-AM. L. REV. 503, 528-29 (1993); *cf. de Sanchez*, 770 F.2d at 1398 (interpreting the FSIA's tortious activity exception, 28 U.S.C. 1605(a)(5), narrowly in light of the expropriation exception in order to avoid allowing plaintiffs "to rephrase their takings claims in terms of conversion and thereby bring the claims even where the takings are permitted by international law").

The Second Circuit below, in holding that YPF was not immune from suit based on alleged acts inextricably linked with Argentina's legislative and executive acts of seizure and expropriation, appeared troubled by the allegations that Argentina and YPF had promised investors certain protections in the event of a total or partial re-nationalization and then broke that promise. *See, e.g.*, App. 28a. But treating that alleged contractual breach as a "commercial activity" undermines the sovereignty of Argentina's initial seizure and expropriation: a sovereign decision is no less sovereign simply because it results in an alleged contractual breach. *Cf. Winstar*, 518 U.S. at 873-78. It may be that Argentina and YPF can be held liable for their actions in some other 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 subject to suit for those acts in U.S. courts.[2]

The Second Circuit's expansion of the FSIA's commercial activity exception far beyond its intended reach warrants this Court's review.

III. The Decision Below Presents An Important And Recurring Question Of Federal Law

For all the reasons set forth above, certiorari is warranted in this case so that this Court may

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[2] If the investors had wanted to ensure they had a remedy in a U.S. court, they could have insisted 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 ….").

provide an authoritative interpretation of the scope of the FSIA's commercial activity exception. Review is also warranted because the question presented has great importance to U.S. foreign relations and international comity. Indeed, if left undisturbed, the court of appeals' decision in this case will have grave consequences for foreign states, which could be haled into U.S. courts to defend suits that arise from quintessentially sovereign acts, threatening equally grave harm to U.S. foreign relations.

Actions against sovereign entities raise "sensitive issues concerning the foreign relations of the United States." *Verlinden BV. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). Congress thus narrowly crafted the commercial activity exception to maintain sovereign immunity *unless* the foreign state is engaged in commercial conduct as if it were a private player in the marketplace—a circumstance in which the risk to foreign relations would be minimal. *See Nelson*, 507 U.S. at 359-60. Allowing suits to proceed against sovereign entities for seemingly commercial activities that flow directly from sovereign acts is much different, and cuts against the principle of "reciprocal self-interest" underlying the grant of sovereign immunity. *See Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955). It also threatens the intrusion of federal courts into the decisions of foreign states concerning matters of national policy and commerce. *See, e.g.*, Lieberman, *supra*, at 528-29 (explaining that application of the commercial activity exception to claims based on "post-expropriation commercial activities seriously limits" the rights and benefits of expropriation).

Given the importance of respecting sovereign immunity in U.S. courts, and the fact that the FSIA provides the sole basis for jurisdiction over a foreign state, *see Amerada Hess*, 488 U.S. at 434, this Court has not hesitated to review decisions interpreting its provisions, *see, e.g.*, *Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015), *cert. granted* 138 S. Ct. 2671 (2018); *Rubin v Islamic Republic of Iran*, 138 S. Ct. 816 (2018); *Helmerich*, 137 S. Ct. 1312; *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015). This Court has recognized, moreover, that the commercial activity exception is "[t]he most significant of the FSIA's exceptions" to sovereign immunity, *Weltover*, 504 U.S. at 611, making this Court's intervention and guidance here particularly important.

Finally, this case presents an ideal vehicle to address these issues because, at its "core," *Sachs*, 136 S. Ct. at 396, Petersen's claim against YPF alleges that YPF did not do enough to prevent a foreign state from carrying out a sovereign act. Even if YPF's alleged actions constituted a breach of its bylaws, those acts cannot be viewed in isolation from the sovereign acts from which they directly flowed, especially where the alleged breach is based on YPF's failure to prevent Argentina from doing something that Argentina's sovereign act of expropriation explicitly required it to do.

This is not a standard breach of contract case. The alleged breach of YPF's bylaws was the direct result of a sovereign takeover of YPF's operations and a majority of YPF's shares. The actions YPF took or failed to take in connection with those sovereign acts should not give rise to jurisdiction under the FSIA.

Any other result would leave not only Argentina and YPF but also countless other foreign states and their instrumentalities to answer in U.S. courts for actions inextricably intertwined with their sovereign acts, risking serious interference with U.S. foreign relations.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 31, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 16-3303-cv(L),16-3304-cv(Con)

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

Plaintiffs-Appellees,

v.

ARGENTINE REPUBLIC AND YPF S.A.,

Defendants-Appellants.[*]

August Term 2016
(Argued: June 15, 2017 Decided: July 10, 2018)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

Before:

WINTER, CALABRESI, AND CHIN, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York (Preska,

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[*] The Clerk of Court is directed to amend the official caption to conform to the above.

J.), denying defendants-appellants' motion to dismiss under (1) Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction on grounds of foreign sovereign immunity and (2) Federal Rule of Civil Procedure 12(b)(6) pursuant to the act of state doctrine.

AFFIRMED IN PART AND DISMISSED IN PART.

Judge WINTER concurs in part and dissents in part in a separate opinion.

MICHAEL K. KELLOGG (Mark C. Hansen, Derek T. Ho, Benjamin S. Softness, *on the brief*), Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, D.C., *and* Reginald R. Smith, King & Spalding LLP, New York, New York, *for Plaintiffs-Appellees*.

MAURA BARRY GRINALDS, Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York, *and* Martin Domb, Benjamin Joelson, Ackerman LLP, New York, New York, *for Defendant-Appellant Argentine Republic.*

MICHAEL A. PASKIN, Cravath, Swaine & Moore LLP, New York, New York, *and* Thomas J. Hall, Marcelo M. Blackburn, Chadbourne & Parke LLP, New York, New York, *for Defendant-Appellant YPF S.A.*

CHIN, *Circuit Judge*:

Defendants-appellants the Argentine Republic ("Argentina") and YPF S.A. ("YPF") (together, "defendants") appeal an order of the United States District Court for the Southern District of New York (Preska, *J.*), denying defendants' motions to dismiss under (1) Federal Rule of Civil Procedure 12(b)(1) for

lack of subject matter jurisdiction on grounds of foreign sovereign immunity and (2) Federal Rule of Civil Procedure 12(b)(6) pursuant to the act of state doctrine. We affirm the district court's order insofar as it denied the motion to dismiss under the Foreign Sovereign Immunity Act and we dismiss defendants' appeal as to the act of state doctrine.

BACKGROUND

Unless otherwise noted, the facts herein are undisputed. They are drawn from the complaint and the documents submitted by the parties in reference to defendants' motions to dismiss.

I. YPF Becomes a Publicly Traded Company

YPF is a petroleum company that was wholly owned and operated by the Argentine government until 1993. That year, in accordance with broader efforts to reform its economy, Argentina decided to privatize the petrol firm through an initial public offering ("IPO") of nearly 100% of YPF's voting stock (the "shares").[1] Argentina and YPF took a number of steps to entice investors to participate in the IPO and thereby ensure its success,

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[1] Indeed, an article written by the then-Governor of the Central Bank of Argentina notes that "[t]he reforms of the 1990s . . . included financial system reforms, liberalization of trade and the capital account, and far-reaching public sector reforms," including "[p]ublic sector reform, which substantially reduced the scope of [Argentina's] public sector [and] entailed privatizing almost all of the major public enterprises" in the country. Pedro Pou, *Argentina's Structural Reforms of the 1990s*, 37 Fin. & Dev. 13, 13 (2000). Privatizing Argentina's major public enterprises had three main benefits: "Public subsidies to [the formerly public] enterprises were reduced or eliminated; the enterprises' efficiency and provision of services improved dramatically; and funds became available to cover a substantial part of the government deficit while other reforms . . . were underway." *Id.*

two of which are particularly relevant to this case. First, they arranged for YPF to offer shares in the United States as American Depository Receipts ("ADRs") listed on the New York Stock Exchange ("NYSE"). Second, they amended YPF's bylaws – that is, the contract governing the relationship among YPF, Argentina (in its capacity as a shareholder), and other YPF shareholders. In particular, the bylaws were amended to incorporate protections for investors from (1) hostile takeovers and (2) attempts by Argentina to renationalize the company. These takeover protections form the basis of this breach of contract dispute, and so we describe them in some detail.

Section 7(d) of the amended bylaws prohibits (with certain exceptions inapplicable here) the direct or indirect acquisition of YPF shares if the acquisition results in the acquirer controlling 15% or more of the shares, unless the acquirer makes a tender offer for all of the outstanding shares in accordance with certain procedures and at a price determined by a formula in the bylaws. Among the prescribed procedures, section 7(f) requires that any such tender offer comply with the rules and regulations imposed by the governments and stock exchanges where YPF's shares are listed. Because YPF's securities were to be listed on the NYSE, those conducting tender offers in accordance with these shareholder protection measures would be compelled by section 7(f) to comply with NYSE and Securities and Exchange Commission ("SEC") rules and regulations. Section 7(f)(iv) further obligates the acquirer to publish notice of its tender offer "in the business section of the major newspapers . . . in the City of New York, U.S.A. and any other city where the shares [of YPF] shall be listed." App. 340. Perhaps most importantly for purposes of this appeal, section

28(A) of the bylaws extends the tender offer requirement of sections 7(e) and 7(f) to:

> all acquisitions made by the [Government of Argentina], whether directly or indirectly, by any means or instrument, of shares or securities of [YPF], 1) if, as a consequence of such acquisition, the [Government] becomes the owner, or exercises the control of, the shares of [YPF], which, in addition to the prior holdings thereof of any class of shares, represent, in the aggregate, at least 49% of the capital stock [of YPF]; or 2) if the [Government] acquires at least 8% of class D outstanding shares of stock, while withholding class A shares of stock amounting at least to 5% of the capital stock.

App. 432.

The penalties for breaching these provisions are drastic. Section 7(h) provides that "[s]hares of stock and securities acquired in breach of [the tender offer requirements] shall not grant any right to vote or collect dividends." App. 342. And section 28(C) extends such treatment to shares acquired by Argentina, unless its breach is accidental. In that case, "[t]he penalties provided for in subsection (h) of Section 7 shall be limited . . . to the loss of the right to vote." App. 355. At bottom, these shareholder protection measures appear to promise investors a compensated exit from their ownership position in the firm if Argentina were to decide to renationalize YPF.

Argentina and YPF touted these protections in the prospectus filed with the SEC in connection with the IPO. That document stated that "[u]nder [YPF's] Bylaws, in order to acquire a majority of [YPF's] capital

stock . . ., the Argentine Government first would be required to make a cash tender offer to all holders of [the shares] on terms and conditions specified in the By-laws." App. 23. The prospectus further stated that "any Control Acquisition carried out by the Argentine Government other than in accordance with th[at] procedure . . . will result in the suspension of the voting, dividend and other distribution rights of the shares so acquired." *Id.* (alteration in original).

By all accounts, Argentina's marketing efforts worked. YPF launched a successful IPO on June 29, 1993. Through the sale of YPF securities, Argentina raised billions of dollars in investment capital with the largest share (more than $1.1 billion in total) coming from the sale of ADRs in the United States on the NYSE. A firm called Repsol S.A. ("Repsol") emerged from the IPO as YPF's majority shareholder. Even after the IPO, however, Argentina continued to participate in YPF's corporate governance as a commercial actor. It remained a holder of YPF's Class A shares, entitling it to elect at least one member of the firm's board of directors. Argentina also retained a veto right over certain third-party acquisitions of YPF's capital stock. After the IPO, YPF's shares, via the ADRs, were traded publicly on the NYSE and other exchanges.

Plaintiffs-appellees Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U. (together, "Petersen") entered the picture in 2008. Between 2008 and 2011, Petersen conducted a series of acquisitions and came to own approximately 25% of YPF's shares, held in the form of ADRs issued by the Bank of New York Mellon in New York City. All of Petersen's acquisitions were made in accordance with YPF's bylaws, including the tender offer provisions in section 7. The bulk of Petersen's shares were purchased from

Repsol and their purchase was financed by Repsol and various financial institutions, which maintained a security interest in the stock as collateral. As part of a shareholder agreement with Petersen, Repsol agreed to cause YPF to make biannual distributions of 90% of its profits to shareholders via dividends in accordance with section 25 of the bylaws. Petersen often used these dividends to make payments on the loans it used to finance the purchase of YPF stock.

All of that changed in 2012. Early that year, members of the Argentine government began publicly criticizing Repsol's and Petersen's management of YPF and started discussing the prospect of renationalizing the company. The value of YPF's ADRs plummeted in response to this news. To put what happened next in the appropriate context, it helps to understand a little about the mechanics of Argentine expropriation law.

II. Argentine Expropriation Law

Expropriation is the "governmental taking or modification of an individual's property rights." *Expropriation*, BLACK'S LAW DICTIONARY (10th ed. 2014). A "classic example" is the government's condemnation of a parcel of land to make way for some public good, like a road. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1939 (2017). The enactment of land use regulations may also, in some cases, constitute an expropriation. *See id.* But these land-based examples understate the breadth of a sovereign's power of expropriation, which can be vast. That is so because *all* types of property can be expropriated, whether tangible or intangible. Personal property, airspace rights, contract rights, even the shares of a corporation – at least in theory, a sovereign can expropriate them all. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 128 (1978)

(discussing a "taking" of airspace rights); *accord* August Reinisch, *Expropriation*, *in The Oxford Handbook of International Investment Law* 407, 410 (Peter Muchlinski et al. eds., 2008) ("It is generally asserted that expropriation may affect not only tangible property but also a broad range of intangible assets of economic value to an investor. Property that may be expropriated by states thus comprises immaterial rights and interests, including in particular contractual rights."). In reality, however, whether a government may expropriate property, what property is subject to expropriation, and how much the government must compensate the individual it expropriated the property from (if at all) are largely questions of law of the expropriating nation. Leo T. Kissam & Edmond K. Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 Fordham. L. Rev. 177, 184 (1959) ("States are at liberty to carry out . . . expropriations in the manner and form they consider best; . . . they are free to operate their municipal system of property according to their own national genius . . . ."); *compare* Org. for Econ. Co-operation & Dev., *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, *in International Investment Law: A Changing Landscape* 43, 43-72 (2005) (discussing limits imposed on expropriations by customary international law). In this case, we look to Argentine law. *See Garb v. Republic of Poland*, 440 F.3d 579, 594-98 (2d Cir. 2006).

Article 17 of Argentina's National Constitution sets the conditions under which property may be expropriated by the Argentine government. To effectuate an expropriation consistent with Article 17, two conditions must be met: (1) the Argentine Congress must declare a public use for the property to be expropriated and (2) the owner of the property must be compensated.

The Argentine government has passed laws to clarify what property is subject to expropriation and to specify the procedures that must be followed to meet the conditions for expropriation.

One such law is Law 21,499, known as the "General Expropriation Law." App. 57. It empowers, among other entities, the Argentine Federal Government to act as an expropriator. As for the declaration of public use required by Article 17 of the National Constitution, section 5 of the General Expropriation Law clarifies that the Argentine Congress "shall particularly refer to specific property" to be expropriated in its declaration and section 1 provides that "[p]ublic use, which is required as legal grounds for expropriation, comprises all cases where public welfare may be involved." App. 185-86. The law further declares that "[a]ll such property as may be convenient or necessary to satisfy [that] 'public use' purpose, whatever the legal nature thereof, whether publicly or privately owned, or be they things or not, may be subject to expropriation . . . ." App. 186. As for compensation for that property, section 10 of the General Expropriation Law provides that the owner shall receive "the objective value of the property plus any direct and immediate damages resulting from expropriation," such amounts to be fixed by agreement of the owner and expropriator or pursuant to a court proceeding. App. 187. And, presumably to prevent the owner's malfeasance while compensation is being fixed, section 16 of the law proclaims that "[n]o contract executed by the owner after the effective date of the law declaring the expropriation of the property and which may imply the creation of any right or interest in the property shall be good as against the expropriator." App. 187.

Accordingly, with this legal backdrop in mind, we return to how Argentina regained control over YPF's affairs in the spring of 2012.

III. Argentina Regains Control of YPF

On April 16, 2012, pursuant to the General Expropriation Law, Argentina proposed legislation that would expropriate directly from Repsol 51% of the voting stock of YPF. On the same day, the Argentine National Executive Office decreed that it was empowering an "Intervenor" to seize immediate control of YPF's operations and to operate the company as a going concern while the Argentine Congress considered the expropriation legislation. Action was swift. Indeed, before some of these measures were even announced publicly, the Intervenor seized control of YPF's facilities, replaced top management with government officials, and escorted YPF's then-CEO off the premises. The Intervenor also cancelled regularly-scheduled meetings of YPF's board of directors and refused to make expected dividend payments.

Argentine officials were also quick to declare that, despite having acquired control of the company, Argentina and YPF had no intention of complying with the tender offer provisions of YPF's bylaws. For example, on April 17, 2012, in a speech before the Argentine Senate, the country's Deputy Economy Minister described as "fools . . . those who think that the State has to be stupid and buy everyone according to YPF's own law, respecting its by-law." App. 29 n.1. He also dismissed the tender offer requirements as "unfair" and a "bear trap." *Id*.

On May 3, 2012, the proposed expropriation legislation was enacted as Law 26,741 with an effective date of May 7, 2012 (the "YPF Expropriation Law"). In

accordance with Article 17 of the National Constitution, the YPF Expropriation Law pronounced Argentina's national public interest in achieving "self-sufficiency in hydrocarbon[] supply," App. 165, by, *inter alia*, integrating "public and private . . . capital into strategic alliances aimed at the exploration and exploitation of conventional and unconventional hydrocarbons," App. 166. The law further provided that:

> to ensure the fulfillment of the objectives of this law, the fifty-one percent (51%) equity interest in YPF Sociedad Anónima represented by the same percentage of Class D shares of the said Company, held by Repsol YPF S.A., its controlled or controlling entities, directly or indirectly, is hereby declared to be of public use and subject to expropriation.

App. 167. The YPF Expropriation Law also extended the Intervenor's control over the firm's operations and granted the Argentine executive branch the right to "exercise all the political rights over all the shares subject to expropriation" until the expropriation, including compensation of Repsol, was finalized. App. 167.

Argentina did indeed exercise the rights of Repsol's shares, using them to cancel YPF's previously-scheduled dividend payment and board meeting in April 2012, and voted the shares at a shareholder meeting in June 2012, in contravention of section 7(h) of the bylaws. Unable to meet its loan obligations without the dividend payment, Petersen entered insolvency proceedings in July 2012 and its lenders foreclosed on the YPF ADRs that Petersen had pledged as collateral. Repsol was eventually compensated for its expropriated shares to the tune of $4.8 billion.

IV. Procedural History

Petersen commenced this action in the district court on April 8, 2015, alleging, *inter alia*, breach of contract on grounds that (1) Argentina repudiated its obligation to make the tender offer in accordance with sections 7(e) and (f) and 28 of the bylaws, (2) YPF breached its obligation to ensure Argentina made such a tender offer in light of its acquisition of Repsol's shares, and (3) YPF permitted Argentina to exercise the voting rights of Repsol's shares and other corporate governance powers in contravention of section 7(h) of the bylaws. Defendants moved to dismiss the complaint, arguing, *inter alia*, that the district court lacked subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et seq*. (the "FSIA"), and that Petersen's claims were barred by the "act of state doctrine." As is relevant here, the district court denied defendants' motions to dismiss with respect to the FSIA and act of state issues. They timely appealed the FSIA ruling and the district court subsequently certified the act of state issue for our interlocutory review.

DISCUSSION

Two issues are presented. First, we consider whether the federal courts have subject matter jurisdiction over this case under the FSIA. Second, we address defendants' arguments based on the act of state doctrine.

I. Subject matter jurisdiction under the FSIA

A. Applicable law

Our jurisdiction over the district court's FSIA ruling is premised on the collateral order doctrine, which "allows an immediate appeal from an order denying immunity under the FSIA." *Kensington Int'l Ltd. v.*

Itoua, 505 F.3d 147, 153 (2d Cir. 2007) (citation omitted). We review *de novo* "a district court's legal determinations regarding its subject matter jurisdiction, such as whether sovereign immunity exists," and its factual determinations for clear error. *Filler v. Hanvit Bank*, 378 F.3d 213, 216 (2d Cir. 2004). "In determining whether an exception to the FSIA applies, the district court can and should consider matters outside the pleadings relevant to the issue of jurisdiction," and we do the same on appeal. *Kensington*, 505 F.3d at 153.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). "The Act states that a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607.'" *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 136 (2d Cir. 2012) (quoting 28 U.S.C. § 1604). Here, the parties do not dispute that Argentina is a foreign state and YPF is an instrumentality of Argentina and therefore Petersen has "the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted." *Kensington*, 505 F.3d at 153 (citation omitted). "Where the plaintiff satisfies [its] burden that an FSIA exception applies, the foreign sovereign then bears the ultimate burden of persuasion that the FSIA exception does not apply." *Swarna v. Al-Awadi*, 622 F.3d 123, 143 (2d Cir. 2010).

The exception relevant here, the commercial activity exception, provides as follows:

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

> in any case . . . in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] 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). As for these conditions "[a] plaintiff need only show that one of [them] is met for the commercial activities exception to apply." *Kensington*, 505 F.3d at 154.

Below, the district court held that Petersen's claims satisfy the third condition, known as the "direct-effect clause." To establish jurisdiction on that basis, 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 Argentina outside this country; and (3) that cause[d] a direct effect in the United States." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (alteration in original) (internal quotation marks omitted).

As to the first element, "we must identify the act of the foreign sovereign State that serves as the basis for plaintiffs' claims." *Garb*, 440 F.3d at 586. What matters for this inquiry is that the challenged "action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015). The Supreme Court has instructed us to "zero[] in on the core of [the plaintiffs'] suit: the . . . acts that actually injured them." *Id.*

As to the second element, "the Act defines 'commercial activity' as 'either a regular course of commercial conduct or a particular commercial transaction or act,' and provides that '[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.'" *Saudi Arabia v. Nelson*, 507 U.S. 349, 358-59 (1993) (quoting 28 U.S.C. § 1603(d)). A state engages in "commercial activity . . . only where it acts 'in the manner of a private player within' the market" or, put differently, "where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'" *Id.* at 360. For example, "a foreign state's repudiation of a contract is precisely the type of activity in which a private player within the market engages." *De Csepel v. Republic of Hungary*, 714 F.3d 591, 599 (D.C. Cir. 2013) (citation and internal quotation marks omitted). By contrast, "expropriations . . . do not fall within the 'commercial activity' exception of the FSIA [because] [e]xpropriation is a decidedly sovereign – rather than commercial – activity." *Garb*, 440 F.3d at 586.

As to the third element, "a direct effect in the United States," "to be direct, an effect need not be substantial or foreseeable, but rather must simply follow[] as an immediate consequence of the defendant's . . . activity." *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108 (2d Cir. 2016) (alteration in original) (internal quotation marks omitted).

B. Application

With these principles in mind, we turn to defendants' arguments that this case does not fall within the FSIA's commercial activity exception. We first

consider Argentina's contention that Petersen's claims are in fact based on sovereign acts, rather than commercial ones, and then we address YPF's arguments that it too is entitled to immunity under the FSIA.

1. Argentina

Argentina does not challenge the district court's conclusion that its breach of the bylaws' tender offer requirements caused a direct effect in the United States. And we agree with that conclusion because those provisions required Argentina to tender for ADRs listed on the NYSE and "courts have consistently held that, in contract cases, a breach of a contractual duty causes a direct effect in the United States sufficient to confer FSIA jurisdiction [if] the United States is the place of performance for the breached duty." *Id.* at 108-09.

Instead, Argentina argues that Petersen's claims are "based on" the sovereign act of expropriation, rather than any commercial activity, thereby rendering the FSIA's commercial activity exception inapplicable. It premises this argument on three claims about the nature of Petersen's lawsuit. First, Argentina asserts that the complaint misinterprets the bylaws, obscuring that the breach Petersen complains of is actually Argentina's sovereign expropriation of Repsol's 51% ownership stake in YPF, rather than the failure to conduct a tender offer. Second, Argentina contends that it could not have complied with both the YPF Expropriation Law and the bylaws' tender offer requirement because the former required Argentina to acquire 51% ownership of YPF and no greater amount. Third, Argentina characterizes Petersen's claims as an impermissible effort to "enforce the bylaws." Argentina Reply Br. 2. We discuss each argument, in turn.

Argentina first contends that the district court erred in accepting Petersen's interpretation that YPF's bylaws permitted Argentina to conduct a tender offer *after* it acquired a controlling interest in YPF. According to Argentina, the bylaws instead required Argentina to acquire its majority ownership position *through* the tender offer process contemplated in the bylaws. Argentina, in this view, breached the bylaws (if at all) by acquiring Repsol's stock through the expropriation instead of a tender offer. So understood, Petersen's lawsuit is not "based on" Argentina's commercial activity; rather, it is based on a decidedly sovereign act, *i.e.*, the expropriation of Repsol's shares. Consequently, Argentina argues that Petersen's lawsuit falls outside of the FSIA's commercial activity exception.

We are not persuaded. Looking, as we must, to "the core of [the plaintiffs'] suit," *i.e.*, "the . . . acts that actually injured them," *OBB Personenverkehr*, 136 S. Ct. at 396, we conclude that Petersen seeks relief for injuries caused by commercial, rather than sovereign, activity.

To start, we agree with the district court that, under the bylaws, Argentina's expropriation triggered an obligation to make a tender offer for the remainder of YPF's outstanding shares. Argentina's contrary interpretation, *i.e.*, that the bylaws required Argentina to conduct a tender offer *in order to acquire* Repsol's 51% stake in YPF (meaning that the expropriation itself was Argentina's breach, rather than its subsequent failure to make a tender offer) rests on a misreading of the bylaws. To recap, section 28(A) of the bylaws provides in its totality that:

> The provisions of subsections e) and f) of Section 7 (with the sole exception of the provisions of paragraph B of the said Section)

> shall apply to all acquisitions made by the National Government, whether directly or indirectly, by any means or instrument, of shares or securities of the Corporation, 1) if, as a consequence of such acquisition, the National Government becomes the owner [of], or exercises the control of, the shares of the Corporation, which, in addition to the prior holdings thereof of any class of shares, represent, in the aggregate, at least 49% of the capital stock; or 2) if the National Government acquires at least 8% of class D outstanding shares of stock, while withholding class A shares of stock amounting at least to 5% of the capital stock provided for in subsection (a) of section 6 of these By-laws upon registration thereof with the Public Registry of Commerce. Should class A shares represent a lower percentage than the one previously mentioned, the provisions set forth in point 2) of this Section shall not be applicable. Instead, the general criteria set forth in subsection d) of Section 7 shall apply.

App. 432. Admittedly, the wording of this bylaw is not a paragon of clarity, a defect that is no doubt exacerbated by the provision's translation into English from the Spanish language original. But we can divine its meaning if, for the sake of simplicity, we unpack some of the cross references and omit certain clauses that do not apply to this case. Recall, for example, that the tender offer requirements are found in "[t]he provisions of subsections e) and f) of Section 7," App. 432, and that we are concerned only with Argentina's expropriation of Repsol's 51% ownership stake. With these facts in mind, section 28(A) can be fairly rephrased as follows:

> The [obligation to make a tender offer] shall apply to [Argentina's acquisition of YPF's shares] . . . by any means or instrument . . . if, as a consequence of such acquisition, [Argentina] becomes the owner [of], or exercises the control of, . . . at least 49% of the capital stock [of YPF] . . . .

App. 432. Simply put, section 28(A) compels Argentina to make a tender offer in accordance with the procedures set forth in the bylaws if "by *any means* or instrument" it "becomes the owner [of], or exercises the control of," at least 49% of YPF's capital stock. App. 432 (emphasis added).

This interpretation is bolstered by the language of section 7(d), which determines whether acquirers *other than Argentina* must make a tender offer. That bylaw provides that "[i]f the terms of subsections e) and f) of this section are not complied with, *it shall be forbidden to acquire shares or securities of the Corporation* . . . if, as a result of such acquisition, the purchaser becomes the holder of," *inter alia*, "[15%] or more of the capital stock." App. 338 (emphasis added). As the italicized language demonstrates, when the drafters of the bylaws, namely, YPF and Argentina, wanted to ensure that certain acquisitions would proceed only *through* a tender offer process, they used language that flatly forbade non-conforming acquisitions. By contrast, the absence of any similar prohibitory language in section 28(A) suggests that Argentina's acquisition of a control position is different in that it merely triggers a separate obligation to make a tender offer. In other words, in contrast to a hostile takeover by a private actor, Argentina's acquisition of a control position, as such,

did not have to be accomplished *through* the tender offer.

Under this reading of the contract, we conclude that Petersen's lawsuit is "based on" Argentina's breach of a commercial obligation. The gravamen of Petersen's claim is that Argentina denied Petersen the benefit of the bargain promised by YPF's bylaws when Argentina repudiated its obligation to tender for Petersen's shares. As the district court noted, when Argentina expropriated Repsol's 51% stake in YPF, it incurred the obligation under section 28(A) of YPF's bylaws to make a tender offer for the remainder of YPF's outstanding shares. That obligation and Argentina's subsequent repudiation of it were indisputably commercial in nature in that they are "the *type* of actions by which a private party engages in trade and traffic or commerce." *Weltover*, 504 U.S. at 614 (citation and internal quotation marks omitted); *accord De Csepel*, 714 F.3d at 599 ("[A] foreign state's repudiation of a contract is precisely the type of activity in which a private player within the market engages." (citation and internal quotation marks omitted)). Indeed, as noted above, the bylaws impose similar obligations on others who seek to acquire large ownership stakes in YPF, and the record shows that those commercial actors, including Petersen, conducted tender offers when so required. Although Argentina's obligation to conduct a tender offer in this case was triggered by its sovereign act of expropriation, *see Garb*, 440 F.3d at 586 ("Expropriation is a decidedly sovereign – rather than commercial – activity."), there is nothing unusual about conditioning a commercial obligation on the occurrence of a sovereign act, even when the sovereign itself is one of the parties to the contract, *see, e.g.*, *Guevara v. Republic of Peru*, 468 F.3d 1289, 1300 (11th Cir. 2006)

(discussing a hypothetical contract wherein a sovereign conditioned its payment on a contract "to buy bullets from a private manufacturer . . . on it declaring war on a neighbor before the scheduled date of delivery" and concluding that "[t]he condition precedent of a declaration of war . . . does not change the commercial nature of the acts of purchasing and paying" for the bullets); Restatement (Second) of Contracts § 264, ill. 3. Moreover, as the district court correctly observed, "[t]he commercial contractual obligations at issue here could just as easily have been triggered by Argentina's acquisition of a controlling stake in YPF in open-market transactions." S. App. 17. Accordingly, for these reasons, we conclude that Argentina's breach of those obligations was a commercial act, not a sovereign one.

We turn next to Argentina's contentions that (1) it could not have complied with both the bylaws and the YPF Expropriation Law at the time of its breach and (2) Petersen's lawsuit is an *ex post facto* attempt to "enforce the bylaws." Argentina Reply Br. 2. Both arguments fail.

As to the first argument, we see no reason why Argentina could not have complied with both the bylaws' tender offer requirements and the YPF Expropriation Law. In support of its argument to the contrary, Argentina relies on the declaration of an expert witness who opines that "the YPF Bylaws cannot validly restrict, limit, or in any way affect the exercise of sovereign powers of the National Government in general and regarding expropriations in particular." App. 214. Because its expropriation powers trump the bylaws and "requiring any post-expropriation tender for the remaining YPF shares would be inconsistent with the [YPF] Expropriation Law's requirement that

Argentina acquire *exactly* 51% ownership in YPF," Argentina Br. 39, Argentina contends that it could not have complied with both obligations and thus the YPF Expropriation Law prevails. Finally, Argentina avers that, pursuant to our opinion in *In re Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016), we must defer to its expert's interpretation of Argentine law. Again, we are not persuaded.

Starting with the latter argument, *In re Vitamin C Antitrust Litigation* has now been reversed by the Supreme Court, in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018). The Supreme Court in *Animal Science* rejected our ruling in *Vitamin C* that federal courts are "bound to defer" to a foreign government's construction of its own law, 837 F.3d at 189, and instead held that "[a] federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements." *Animal Sciences*, 138 S. Ct. at 1869.

Here, even according respectful consideration to Argentina's views, we do not find that the expert's interpretation supports Argentina's argument that "any post-expropriation tender for the remaining YPF shares would be inconsistent with the [YPF] Expropriation Law's requirement that Argentina acquire *exactly* 51% ownership in YPF." Argentina Br. 39. In particular, there is no provision in the YPF Expropriation Law itself and no statement in the expert's opinion that the law compelled Argentina to "acquire *exactly* 51% ownership in YPF" and no greater ownership position. Argentina Br. 39 (emphasis in original).

To the contrary, as noted above, the YPF Expropriation Law declares only that to ensure "self-sufficiency

in hydrocarbon[] supply," App. 165, and to integrate "public and private . . . capital into strategic alliances aimed at the exploration and exploitation of conventional and unconventional hydrocarbons," App. 166, "the fifty-one percent (51%) equity interest in YPF Sociedad Anónima represented by the same percentage of Class D shares of the said Company, held by Repsol YPF S.A., its controlled or controlling entities, directly or indirectly, is hereby declared to be of public use and subject to expropriation," App. 167. The law further provides that YPF shall remain a publicly-traded company after the expropriation and "shall not be subject to any legislation or regulation applicable to the administration, management and control of companies or entities partly owned by the national or provincial governments" of Argentina, confirming that YPF would continue its normal commercial activities after the expropriation. App. 169. At bottom, the YPF Expropriation Law does not prohibit a post-expropriation tender offer under YPF's bylaws; indeed, it says absolutely nothing about Argentina's acquisition of additional YPF shares in a subsequent market transaction.

Similarly, Argentina's expert opines only that (1) Argentina's sovereign power of expropriation cannot be limited by private agreement, (2) "the expropriation of YPF shares for reasons of public use . . . prevails over clauses in . . . a private corporate agreement" such as the bylaws, and (3) "in [his] opinion, [he did] not perceive, in the process of intervention of YPF or in the temporary occupation and subsequent expropriation of shares, that there was any violation of constitutional or legal norms under Argentine law." App. 218. Again, none of these opinions support the proposition that Argentina was required by law to acquire exactly 51% of YPF, no more and no less. Accordingly, even if we were to accord deference to Argentina's legal expert

pursuant to *In re Vitamin C Antitrust Litigation*, we conclude that his opinion does not establish what Argentina says it does. Although we are mindful of the deference we owe to foreign sovereigns as to the construction of their laws, we simply see no basis in the record for concluding that Argentina could not have complied with both the YPF Expropriation Law and the bylaws' tender offer requirements by launching a post-expropriation tender offer.

As to Argentina's last argument on the FSIA issue, it is unclear what Argentina means when it characterizes Petersen's lawsuit as an attempt to "enforce the bylaws." Argentina Reply Br. 2. To the extent that Argentina is suggesting that Petersen wants a court to order Argentina to conduct a tender offer now, such argument is baseless. Petersen's complaint does not seek a specific performance remedy. Nor could it for Petersen is no longer a YPF shareholder and therefore could not perform its obligation to tender shares in the event of a court-ordered tender offer. Restatement (Second) Contracts § 363, cmts. a & b (plaintiff's ability to perform its obligations under the contract is a prerequisite to a specific performance remedy). Rather, Petersen merely seeks compensatory damages for Argentina's breach of its tender offer obligation in 2012. The award of such damages would no more "enforce the bylaws" than an award of damages in any breach of contract case would enforce the contract forming the basis of the plaintiff's suit.

In sum, we conclude that when Argentina asserted control over Repsol's 51% stake in YPF via expropriation, it incurred a separate commercial obligation under the bylaws to make a tender offer for the remainder of YPF's outstanding shares. Because Petersen claims it was injured by Argentina's repudiation of that

commercial obligation and we conclude that the repudiation was an act separate and apart from Argentina's expropriation of Repsol's shares, we hold that Petersen's action against Argentina falls within the "direct-effects clause" of the FSIA.

2. YPF

As a threshold matter, we note that although YPF became an instrumentality of Argentina by virtue of the expropriation of Repsol's shares, *see* 28 U.S.C. § 1603(b)(2) (an "instrumentality of a foreign state" is, *inter alia*, "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state"), that fact does not render all of its subsequent conduct "sovereign," rather than "commercial," in nature. *See Gemini Shipping, Inc. v. Foreign Trade Org. for Chems. & Foodstuffs*, 647 F.2d 317, 318-20 (2d Cir. 1981) (noting that a foreign instrumentality can engage in commercial activity sufficient to bring such conduct within FSIA's commercial activity exception). Instead, the inquiry remains whether YPF "act[ed] in the manner of a private player within the market," or whether "it exercise[d] . . . powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360 (citations and internal quotation marks omitted).

YPF raises two objections to maintaining subject matter jurisdiction over this case under the FSIA. First, it argues that the gravamen of Petersen's claims against it is its alleged failure to stop Argentina from voting Repsol's expropriated shares and that such act was in compliance with Argentina's sovereign expropriation and thus not a commercial activity. Second, YPF contends that its failure to stop Argentina from exercising corporate governance powers conferred by Repsol's shares had no direct effect in the United States.

Petersen responds, correctly in our view, that YPF's arguments ignore that Petersen alleges two separate breaches of YPF's bylaws. The complaint alleges that YPF breached the bylaws by (1) failing to enforce the bylaws' tender offer provisions vis-à-vis Argentina and (2) failing to enforce the penalties that section 7(h) imposes on shareholders who have breached their tender offer obligations. As for Petersen's first theory of the case, we conclude that the claim against YPF falls within the "direct-effect clause" of FSIA's commercial activity exception for the same reasons that the analogous claim against Argentina does. That is, YPF's obligation to enforce the tender offer provision triggered by Argentina's expropriation of Repsol's 51% ownership stake is commercial in nature – indeed, every corporation is obligated to abide by its bylaws, *see, e.g.*, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 938-40 (Del. Ch. 2013) – and YPF's failure to do so caused a direct effect in the United States, namely, the required tender for ADRs listed on the NYSE never took place. *See Atlantica Holdings*, 813 F.3d at 108-09 ("[C]ourts have consistently held that, in contract cases, a breach of a contractual duty causes a direct effect in the United States sufficient to confer FSIA jurisdiction [if] the United States is the place of performance for the breached duty.").

As for Petersen's second theory of liability, we conclude that YPF's failure to enforce the penalties imposed by section 7(h) is of a piece with its failure to enforce the tender offer provisions. Like those latter provisions, section 7(h) implicates the commercial affairs of YPF, *i.e.*, what voting rights attach to which shares and which shares are entitled to collect dividends, and thus its enforcement or non-enforcement constitutes commercial activity. To be sure, the YPF Expropriation Law granted Argentina the right to

exercise the voting rights associated with Respsol's shares, but YPF has not explained how that fact transforms its own failure to enforce the bylaws into an exercise of "powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360. What is more, as noted, the YPF Expropriation Law explicitly stated that the firm would remain a publicly-traded company, subject to laws applicable to private, rather than government-owned companies. This fact cuts against YPF's contention that it was somehow acting as a sovereign. Furthermore, YPF's refusal to enforce section 7(h)'s penalties had a direct effect in the United States because (1) it enabled Argentina to cancel planned dividend payments, some of which would have been made to investors based in the United States, and (2) it precipitated Petersen's default on its loan obligations and the subsequent foreclosure of Petersen's ADRs, which were held by the Bank of New York Mellon in New York City.

Accordingly, we conclude that Petersen's claims against YPF also fall within the "direct-effect clause" of the FSIA's commercial activity exception.

* * *

The thrust of defendants' arguments on appeal is that Petersen has engaged in a form of artful pleading that we have previously rejected. They contend that Petersen has re-characterized Argentina's expropriation of Repsol's shares as a commercial act, rather than a sovereign one, so as to trigger application of the FSIA's commercial activity exception. *See Garb*, 440 F.3d at 588 ("Federal courts have repeatedly rejected litigants' attempts to establish subject matter jurisdiction pursuant to . . . FSIA exceptions when their claims are in essence based on disputed takings of property."). Based on our review of the complaint and the record

before us, however, we are satisfied that Petersen is not challenging the expropriation.

As noted above, Argentina's expropriation powers are vast. Indeed, it could have expropriated the entirety of YPF, some smaller portion of the firm such as the 25% stake owned by Petersen, or even just the contractual rights of shareholders to receive tender offers in accordance with the bylaws. Of course, had Argentina done any of these things, it would have been obligated by its own law to compensate Petersen for "the objective value of the property" it expropriated, "plus any direct and immediate damages resulting from expropriation." App. 187. And we agree that a lawsuit based on such expropriations would fall outside of the FSIA's commercial activity exception.

Argentina, however, did not expropriate anything from Petersen. To be sure, it did expropriate Repsol's 51% stake in YPF. But, Petersen does not challenge that, or any other sovereign act. Instead, Petersen wants a court to award it the benefit of the bargain that Argentina and YPF struck with each shareholder who purchased YPF shares on the open market. Petersen claims that defendants repudiated that bargain when they refused to conduct a tender offer in accordance with YPF's bylaws, despite having incurred the obligation to do so by virtue of Argentina's acquisition of a controlling stake in the firm. The "gravamen" of Petersen's lawsuit is thus the defendants' repudiation of a contract that had a direct effect in the United States. *OBB Personenverkehr*,136 S. Ct. at 396. Sovereigns are not immune from such lawsuits under the FSIA. *See Weltover*, 504 U.S. at 614-15.

II. The Act of State Doctrine

As noted, we have appellate jurisdiction over the issue of the defendants' immunity from suit under the FSIA under the collateral order doctrine, pursuant to which the district court's order denying such immunity was immediately appealable. *See Atlantica Holdings*, 813 F.3d at 105. By contrast, the district court's denial of defendants' motions to dismiss under the act of state doctrine, which were brought pursuant to Federal Rule of Civil Procedure 12(b)(6), is not immediately appealable. *See Will v. Hallock*, 546 U.S. 345, 351 (2006); *see also Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) ("As a general matter, denials of a motion to dismiss are not appealable as 'final decisions' of the district courts under 28 U.S.C. § 1291.").

Interlocutory orders that are otherwise non-appealable, however, may be reviewed under 28 U.S.C. § 1292(b) if the district court is "of the opinion that [the relevant] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co.*, 849 F.2d 761, 764 (2d Cir. 1988). If, as here, the district court certifies an appeal, the Court of Appeals may then, "in its discretion, permit an appeal to be taken from such order." 28 U.S.C. § 1292(b).

We exercise our discretion not to accept jurisdiction over this aspect of the appeal. The act of state doctrine provides an affirmative defense and was raised below on a motion to dismiss pursuant to Rule 12(b)(6). Dismissal was warranted only if the doctrine's applicability was "shown on the face of the complaint." *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 146

(2d Cir. 2012); *accord Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 755 (S.D.N.Y. 2004) ("As a substantive rather than a jurisdictional defense, the Act of State doctrine is more appropriately raised in a motion for summary judgment than in a motion to dismiss."). As discussed above, the face of Petersen's complaint makes clear that it is not challenging Argentina's official acts – the expropriation of property – and the complaint's allegations that Argentina and YPF breached their obligations by failing to engage in a tender offer did not require the district court to rule on the validity of any of Argentina's official acts. At this juncture of the proceedings, the act of state doctrine does not present the kind of legal question that normally constitutes a "controlling question of law." Whether the act of state doctrine bars Petersen's claims is a merits determination that turns on the facts. In these circumstances, we decline to reach the issue. Accordingly, we dismiss the portion of this appeal challenging the district court's ruling on the defendants' act of state defense.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order holding that Argentina and YPF are not immune from suit under the FSIA and DISMISS the portion of this appeal challenging the district court's ruling on the defendants' act of state defense.

WINTER, *Circuit Judge*, concurring in part and dissenting in part:

I agree entirely with the excellent discussion and ruling as to whether FSIA immunizes Argentina and YPF. I dissent from the disposition of the act-of-state issue.

Having rejected the Section 1292(b) motion that we hear an interlocutory appeal – otherwise non-appealable – from the district court's rejection on the pleadings of the act-of-state defense, my colleagues' opinion is quite clear that we lack jurisdiction over the act-of-state issue. It is less clear in stating that the reason for rejecting the motion is that the issue depends on "facts." The district court ruled that the facts alleged in the complaint stated a claim that was not subject to the act-of-state defense. My colleagues' conclusion that fact-finding is needed to rule on the issue is a merits decision going to the nature and contours of the act-of-state defense. Such a conclusion seems, therefore, inconsistent with the ruling that we lack jurisdiction over the issue. Because the reasons we give for rejecting FSIA immunity are that the harm to plaintiffs was not caused by a sovereign, rather than commercial, act of the Argentinian state, that portion of the opinion's reasoning also calls for a rejection of the act-of-state defense to the claim as alleged.

A brief review of the relevant procedural history is in order. The defendants moved to dismiss the complaint on the basis that the district court lacked subject matter jurisdiction under the FSIA and that Petersen's claims were barred by the act-of-state doctrine. The district court denied the defendants' motion on both fronts. The first issue – FSIA immunity – was immediately appealable under the collateral order doctrine. *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147,

153 (2d Cir. 2007). The rejection of the act-of-state defense was interlocutory and not immediately appealable. The district court, believing the conditions of Section 1292(b) had been met, certified the appeal so that we could decide both issues in tandem. Argentina and YPF then moved this court to grant leave for immediate appeal of the act-of-state issue. 2d Cir. Dkt. Nos. 16-3510, 16-3512. No opposition was filed to these motions. The motions were referred to a motions panel, which then referred them to the merits panel – this panel – so that "[t]hat panel can decide, in the first instance, whether the act-of-state issue is appropriate for immediate appeal pursuant to . . . § 1292(b)." Motion Order, 2d Cir. Dkt. No. 16-3510 (Feb. 14, 2017).

Pursuant to 28 U.S.C. § 1292(b), we have discretion to allow an appeal to be taken from an order not otherwise appealable when the district judge states in writing "that such order [1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." (brackets added). In my view, the established standards under Section 1292(b) are satisfied.

First, a controlling question of law is present. Reversing the district court's holding that the act-of-state doctrine "does not preclude inquiry into contractual obligations related to or arising out of [acts of expropriation]," would result in dismissal of the case. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) ("[I]t is clear that a question of law is 'controlling' if reversal of the district court's order would terminate the action."); *In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978).

Second, there is substantial ground for difference of opinion; in particular, whether Argentina's obligation under the bylaws to make a tender offer was independent of Argentina's sovereign acts of intervention and expropriation.

Finally, an immediate appeal would materially advance the ultimate termination of the case. Judicial efficiency would be served by deciding both this issue and the FSIA question simultaneously. My colleagues' conclusion as to the lack of immunity under FSIA is that the facts alleged in the complaint do not state a claim that implicates a sovereign, rather than commercial, act of the Argentinian state. This conclusion resolves both the FSIA issue and the act-of-state defense. Only a paragraph, if that, would be necessary to explain an affirmance of the certified appeal if we took jurisdiction. We need say only that assertion of an act-of-state defense requires that a sovereign, rather than commercial, act has caused the harm to the plaintiffs, and no such act occurred here.

Instead, my colleagues deny the motion, hold that we lack appellate jurisdiction, and explain these rulings on the grounds that unspecified "facts" are needed to adjudicate the act-of-state defense. While the reason given suggests a remand for further proceedings, my colleagues' jurisdictional ruling leaves the dismissal of the act-of-state defense in place and governed by the law of the case doctrine in the district court. *See Am. Hotel Int'l Grp., Inc. v. OneBeacon Ins. Co.*, 611 F. Supp. 2d 373, 378-79 (S.D.N.Y. 2009) *aff'd*, 374 F. App'x 71 (2d Cir. 2010).

I therefore concur in the affirmance on the FSIA issue. I dissent from the denial of the Section 1292(b) motion and would affirm the dismissal of the act-of-state defense to the claim alleged in the complaint.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed 09/09/16]

15-cv-2739 (LAP)

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

Plaintiffs,

v.

ARGENTINE REPUBLIC and YPF S.A.,

Defendants.

OPINION & ORDER

LORETTA A. PRESKA, United States District Judge:

Plaintiffs Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U. (collectively, "Petersen" or "Plaintiffs"), bring this action against the Republic of Argentina ("Argentina") and YPF S.A. ("YPF") (collectively, "Defendants"), alleging that the Defendants breached obligations arising out of YPF's bylaws upon Argentina's expropriation of YPF shares. Defendants move to dismiss the action on various grounds, including: lack of subject matter jurisdiction and personal jurisdiction, the act of state doctrine, violation of New York State champerty law, lack of standing, the doctrine of *forum non conveniens*, and failure to state a claim. On July 20, 2016, the Court held oral argument on Defendants' motions. For the reasons stated

below, Defendants' motions (dkt. nos. 23, 32) are granted in part and denied in part.

I. BACKGROUND[1]

Plaintiffs are limited-liability companies organized under the laws of the Kingdom of Spain. (Complaint, dated Apr. 8, 2015 [dkt. no. 1] ("Compl."), ¶ 6.) Defendant Argentina is the controlling shareholder of Defendant YPF, a publicly-held limited liability stock company organized under the laws of Argentina. (Compl. ¶¶ 7-8.)

A. Privatization

Until 1993, YPF was an entirely state-owned and state-run enterprise. (*Id*. ¶¶ 11-13.) In the early 1990s, Argentina decided to privatize YPF and, eventually, to sell its shares in an initial public offering ("IPO"). (*Id*. ¶¶ 12-13.) As part of this privatization process, Argentina adopted certain provisions in YPF's Bylaws (the "Bylaws"), which took effect in May 1993 and have remained in effect since that date. (*Id*. ¶ 16.)

Particularly relevant to the instant action are Sections 7 and 28 of the Bylaws. Section 7(d) forbids the acquisition of YPF shares if it would cause the acquirer to own more than a stated percentage of YPF's capital stock or Class D shares, unless the acquirer complies with Sections 7(e) and (f) of the Bylaws. (Bylaws § 7(d).) These subsections require that the acquirer arrange for a takeover bid of all other YPF shares at a price calculated as provided therein and that a takeover bid must be conducted in accordance with certain procedures. (*Id*. §§ 7(e)(ii), 7(f)(v).)

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[1] The following facts, which are undisputed except where otherwise indicated, are drawn from the Complaint and the parties' submissions on these motions.

These procedures include publication of notice in New York City and compliance with Securities and Exchange Commission ("SEC") and New York Stock Exchange ("NYSE") rules, such as SEC filings detailing the tender offer and delivery of tender offer materials to the NYSE. (*Id*. § 7(f); Compl. ¶¶ 23, 44.)

Section 28 of the Bylaws extends the takeover bid requirements of Sections 7(e) and (f) to "all acquisitions made by the National Government, whether directly or indirectly, by any means or instrument, of shares or securities of [YPF]" if, as a consequence of such acquisition, "the National Government becomes the owner, or exercises the control of, the shares of [YPF] which, in addition to the prior holdings thereof of any class of shares, represent, in the aggregate, at least 49% of the capital stock." (*Id*. § 28(A).)

The Bylaws further provide that, if shares are acquired in breach of the requirements for a takeover bid, the holder of those shares shall be deprived of voting, dividends, and other rights corresponding to such shares. (*Id*. §§ 7(h).) These penalties are extended to acquisitions made by Argentina. (*Id*. § 28(C)).

After adopting these provisions in YPF's Bylaws, on June 29, 1993, Argentina and YPF launched an IPO of YPF's Class D shares, which were offered on multiple stock exchanges, including the NYSE. (Compl. ¶ 13.) The largest portion of the public offering was in the United States, which generated proceeds of more than $1.1 billion to Argentina as a selling shareholder. (*Id*.) The offering was registered through registration statements filed with the SEC and effectuated by means of a United States IPO prospectus. (*Id*.) The prospectus described the tender offer requirement and its applicability to acquisitions made by Argentina, noting that,

> Under the Company's By-laws, in order to acquire a majority of the Company's capital stock or a majority of the Class D shares, the Argentine Government first would be required to make a cash tender offer to all holders of Class D shares on terms and conditions specified in the By-laws.

(*Id*. ¶ 24.)

Following the IPO, YPF was owned, managed, and controlled by private shareholders. (*Id*. ¶ 7.) YPF's Class D shares were listed and traded in Buenos Aires and in New York as American Depositary Receipts ("ADRs") issued by the Bank of New York Mellon, a New York banking corporation, from its offices in New York City. (*Id.* ¶¶ 1, 8, 14.) Argentina remained a minority, non-controlling shareholder and continued to participate in YPF's management through a designated representative on YPF's Board of Directors. (*Id*. ¶¶ 7, 26.)

Between 2008 and 2011, Petersen purchased NYSE-listed and SEC-registered shares of YPF stock amounting to just over 25% of the company. (*Id*. ¶ 6.) These purchases were financed by two sets of loans, one by a group of financial institutions and the other by Repsol YPF, S.A. ("Repsol"), YPF's majority shareholder at the time. (*Id*.) Both of these loans were secured in part by Petersen's YPF shares. (*Id*.) Because Petersen intended to service the interest under those loans using the dividend payments associated with the acquired stock (*id*.), Repsol and Petersen entered into a shareholder's agreement in which Repsol agreed to cause YPF to distribute dividends twice per year, amounting to 90% of YPF's profits, and to cause YPF to pay a single "extraordinary dividend" of $850,000 (*id*. ¶ 30). Argentina and YPF were aware

of the agreement, which YPF subsequently described in an SEC filing, and participated in the agreement's implementation. (*Id*. ¶ 30.)

B. Intervention and Expropriation

In late January 2012, the Argentine press began reporting that Argentina was considering nationalizing YPF. (*Id*. ¶ 33.) In the month following this initial report, the price of YPF's ADRs dropped by over 20% (*id*.) and, over the course of a few months, the price of YPF shares was cut nearly in half (*id*. ¶¶ 33-34). During this period, Argentine officials made public statements acknowledging the decline in share price and linking the decline to the public good. (*Id.* ¶ 34.)

On April 16, 2012, Argentina announced legislation that would expropriate 51% of YPF's Class D shares. (*Id*. ¶ 35.) Also on April 16, 2012, by Emergency Decree No. 530/12, Argentina declared that it would take immediate and complete control of YPF by appointing an "Intervenor" vested with all of the powers of YPF's board of directors and president. (*Id*.) That same day, Argentine government officials entered YPF's headquarters, seized control of YPF facilities, and began exercising control of YPF's operations. (*Id*. ¶ 36.) Certain executives, including Sebastian Eskanazi, then-CEO of YPF and an owner of Petersen, were removed from the premises. (*Id*.)

On April 17, 2012, Deputy Economy Minister Axel Kicillof, who was appointed Vice-Intervenor in YPF by Emergency Decree No. 532/12, delivered a speech before the Argentine Senate regarding Argentina's takeover of YPF, in which he declared that Argentina and YPF did not intend to issue a tender offer. (*Id*. ¶ 38.)

On May 3, 2012, the Argentine Legislature passed Law 26,741, signed May 4, 2012 and effective May 7, 2012, declaring a public need for expropriation of 51% of YPF's shares, which were then owned by Repsol. (*Id*. ¶¶ 35, 40; Arg.'s Mem. of Law in Supp. of Mot. to Dismiss, dated Sept. 8, 2015 [dkt. no. 28] ("Arg. Mem. of Law"), at 6.) Article 9 of Law 26,741 granted the National Executive office authority to "exercise all the political rights associated with the shares subject to expropriation until the transfer of political and economic rights is completed." (Decl. of Martin Domb, dated Sept. 8, 2015 [dkt. no. 27], ("Domb Decl.") Ex. 12 ("Law 26,741") at Art. 9.) According to Argentina, the expropriation was completed in May 2014, at which time Argentina formally acquired and paid Repsol for its shares. (Arg. Mem. of Law [dkt. no. 28] at 6-7.)

C. Period Following Intervention

The value of YPF shares decreased substantially during the period following the Emergency Decree. (Compl. ¶¶ 6, 37.) On April 23, 2012, YPF did not make an expected dividend distribution to shareholders following the Intervenor's cancellation of a meeting of the YPF Board of Directors. (*Id*. ¶ 39.) YPF did not hold a shareholder meeting until June 4, 2012 (Def. YPF's Mem. of Law in Supp. of its Mot. to Dismiss [dkt. no. 33] ("YPF Mem. of Law"), at 24) and did not issue a dividend until November 2012 (Compl. ¶ 39). Argentina voted in the June 4, 2012 meeting. (YPF Mem. of Law [dkt. no. 33] at 24.)

In May 2012, after Petersen defaulted on its loan obligations, Petersen's institutional lenders foreclosed on Petersen's Class D shares of YPF. (Compl. ¶¶ 6, 42.) In July 2012, Petersen entered into insolvency proceedings in Spain, and it is currently undergoing liquidation in an effort to satisfy its outstanding creditor

claims. (*Id*. ¶¶ 6, 46.) In November 2014, a Spanish Bankruptcy Court approved a plan to liquidate Petersen. (*Id.* ¶ 46.) That plan contemplated sale of indemnification rights for €15 million or for a lower price combined with a percentage of the total amount obtained from a lawsuit against Argentina. (Domb Decl., Ex. 15 pt. 1 at 11-12.)

In accordance with the liquidation plan, Petersen's bankruptcy administrator entered into an agreement on behalf of Petersen with Prospect Investments LLC ("Prospect"), a Delaware limited liability company and a wholly owned subsidiary of Burford Capital LLC ("Burford"), to provide financing for Petersen's claims in the instant case. (Compl. ¶ 47.) The agreement stated, in relevant part, that "nothing in this Agreement shall be interpreted to constitute an assignment or transfer by the Counterparty of the Claims." (Domb Decl. Ex. 16 pt. 1 at ¶ 2.2.) Under the agreement, Prospect made an initial, non-refundable payment to Petersen in the amount of C15,101,000 (*id*. at ¶ 2.1) and agreed Petersen would receive 30% of the total amount obtained in the lawsuit (*id*. at ¶ 3.1). Petersen granted Prospect an irrevocable power of attorney in this matter (*id*. at annex III), with Prospect to fund all litigation (*id*. at ¶ 2.3), and Petersen to "not take actions in connection with the Claims absent the direction of" Prospect (*id*.) and to "reasonably defer" to Prospect "in selecting the course of action that is best for" both parties (*id*. at ¶ 4.3(c)).

Plaintiffs are represented in this matter by King & Spalding LLP ("K&S"). According to Plaintiffs, on September 14, 2015, Argentina announced the initiation of criminal proceedings against K&S and Burford, alleging that they had defrauded Argentina by participating in an arbitration on behalf of international

investors whose interest in two Argentine airlines was expropriated by Argentina. (Pl's Mem. of Law in Opp'n to Arg.'s Mot. to Dismiss, dated Oct. 19, 2015 [dkt. no. 44] ("P1. Opp'n to Arg."), at 2, 9; *see also* Decl. of Derek T. Ho, dated Oct. 19, 2015 [dkt. no. 45], Ex. A.) Argentina's Attorney General indicated that the instant case raised similar concerns. (*Id*.) At oral argument on Defendants' motions to dismiss, Argentina asserted that "whatever investigation may be taking place is not public . . . What I have been told is that the attorney general has never included King & Spalding in her allegations" and that "[n]o charges have been brought . . . At most, there was an accusation." (Tr. of Oral Arg., dated July 20, 2016 ("Tr."), at 59:10-14, 61:1-2.) Plaintiffs responded that K&S staff had attended a proceeding in Argentina where "[n]ames were taken down, and every one of those people, including paralegals . . . were told they were the subject of criminal investigation . . . in Argentina." (*Id*. at 61:24-62:2.)

II. DISCUSSION

Argentina moves for an order dismissing the claims alleged against it (1) pursuant to Fed. R. of Civ. P. ("Rule") 12(b) (1) and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, for lack of subject-matter jurisdiction, and accordingly, pursuant to Fed. R. Civ. P. ("Rule") 12(b)(2) and the FSIA, for lack of personal jurisdiction; (2) under the act of state doctrine; (3) on the ground that this action violates New York's champerty statute, N.Y. Judiciary Law § 489; (4) under the doctrine of *forum non conveniens*; and (5) pursuant to Fed. R. Civ. P. ("Rule") 12(b)(6) for failure to state a claim.

YPF moves for an order dismissing the claims alleged against it (1) pursuant to Rule 12(b)(1) and the

FSIA; (2) under the act of state doctrine; (3) on the ground that Plaintiffs lack standing prior to recognition of the Spanish bankruptcy proceeding in United States courts under Chapter 15 of the Bankruptcy Code; and (4) pursuant to Rule 12(b)(6) for failure to state a claim.

A. FSIA

"The FSIA is the sole source for subject matter jurisdiction over any action against a foreign state." *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 153 (2d Cir. 2007) (quoting *Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999)) (internal quotation marks omitted). Under the FSIA, a foreign state[2] is immune from the jurisdiction of the courts of the United States unless one of several statutorily defined exceptions applies. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610-11 (1992); *see also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983) ("[I]f none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction.").

In deciding a challenge to jurisdiction under the FSIA, a "court must look at the substance of the allegations to determine whether one of the exceptions to the FSIA's general exclusion of jurisdiction over foreign sovereigns applies." *Robinson v. Gov't of*

[2] For the purposes of the FSIA, a "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Kensington*, 505 F.3d at 153 (2d Cir. 2007) (citing 28 U.S.C. § 1603(a)). "Instrumentality status is determined at the time of the filing of the complaint." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003). Plaintiffs do not dispute that Defendants are foreign states within the meaning of the FSIA. (Compl. ¶¶ 7-8.)

Malaysia, 269 F.3d 133, 140 (2d Cir. 2001) (internal quotation marks and citation omitted). In doing so, the court "must review the pleadings and any evidence before it . . . including affidavits" in order to resolve factual disputes. *Id*. at 140-41 (citation omitted).

Plaintiffs contend that this action falls within the FSIA's commercial-activity exception, which provides that a foreign state is not immune from suit in any case:

> [I]n which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] 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.

§ 1605(a)(2). This exception applies if the plaintiff shows that any one of these three conditions is met. *See Kensington*, 505 F.3d at 154. In the instant case, Plaintiffs rely on the first and third clauses to argue that Defendants are not immune from this Court's jurisdiction. (*See* Pl. Opp'n to Arg. [dkt. no. 44] at 10-22.) Because this Court agrees that the third clause applies to the instant case, Plaintiffs' arguments regarding the first clause are not addressed here.

Under the third clause of the commercial-activity exception, this Court has jurisdiction if the claim is "(1) 'based . . . upon an act outside the territory of the United States'; (2) that was taken 'in connection with a commercial activity' of Argentina outside this country; and (3) that 'cause[d] a direct effect in the

United States.'" *Weltover*, 504 U.S. at 611 (alterations in original) (quoting 28 U.S.C. § 1605(a)(2)). All three factors are met in the instant case.

1. Plaintiffs' Claims are Based Upon Acts Outside of the United States

First, Plaintiffs' claims are based on acts outside the territory of the United States. *See* 28 U.S.C. § 1605(a)(2). "As a threshold step in assessing plaintiffs' reliance on the 'commercial activity' exception, [a court] must identify the act of the foreign sovereign State that serves as the basis for plaintiffs' claims." *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006). A claim "is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 107 (2d Cir. 2016) (quoting *OBB Personenverkehr AG v. Sachs*, 136 S.Ct. 390, 396 (2015)).

Defendants argue that the instant claim is "based upon" Argentina's sovereign acts of intervention and expropriation. (Arg. Mem. of Law [dkt. no. 28] at 11-14; YPF Mem. of Law [dkt. no. 33] at 7-8.) However, the particular conduct that constitutes the gravamen of the Complaint is Argentina's failure to issue a tender offer and YPF's failure to enforce the tender offer requirements that are contained in the Bylaws. The Complaint alleges a breach of contract [3] and concerns the effects of sovereign acts on commercial obligations rather than the sovereign acts themselves.

[3] "[A] company's . . . bylaws in substance are a contract between the corporation and its shareholders and among the shareholders." *M+J Savitt, Inc. v. Savitt*, No. 08 CIV. 8535 (DLC), 2009 WL 691278, at *9 (S.D.N.Y. Mar. 17, 2009).

Additionally, as is required under the relevant FSIA exception, the disputed acts took place outside the United States. In the FSIA context, "[t]he decision by a foreign sovereign not to perform [a contractual obligation] is itself an act . . . in the foreign state." *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2d Cir. 2010) (discussing immunity under third clause of commercial activity exception). Accordingly, the decisions not to make a tender offer or enforce the tender offer requirements occurred in Argentina. Further, Argentina exercised shareholder rights associated with its shares, including voting, which took place in Argentina. Plaintiffs' claim, therefore, is 'based . . . upon an act outside the territory of the United States." *See* 28 U.S.C. § 1605(a)(2).

2. Defendants' Acts Were Taken in Connection with Commercial Activity

Second, these acts were taken in connection with commercial activity. *See id*. An act "in connection with commercial activity" is one with "a substantive connection or a causal link" with commercial activity. *Hanil Bank v. PT. Bank Negara Indon*., 148 F.3d 127, 131 (2d Cir. 1998) (internal quotation marks omitted). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," with the "commercial character" of such activity to be determined by reference to its "nature . . . rather than by reference to its purpose." 28 U.S.C. § 1603(d). Under the FSIA, a foreign state engages in commercial activity "where it acts in the manner of a private player within the market" and "exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Saudi Arabia v.*

Nelson, 507 U.S. 349, 360 (1993) (internal quotation marks and citation omitted).

Applying this standard, entering into or repudiating a contract fails within the commercial activity exception. *See* De *Csepel v. Republic of Hungary*, 714 F.3d 591, 599 (D.C. Cir. 2013) ("[A] foreign state's repudiation of a contract is precisely the type of activity in which a private player within the market engages." (internal quotation marks omitted)); *see also Guevara v. Republic of Peru*, 468 F.3d 1289, 1229 (11th Cir. 2006) (noting that FSIA permits litigants to "use the courts of this country to compel [a foreign state] to keep its contractual promise" where "[t]he underlying activity at issue . . . is commercial in nature and of the type negotiable among private parties." (internal quotation marks omitted)).

Further, although "[e]xpropriation is a decidedly sovereign-rather than commercial-activity," *Garb*, 440 F.3d at 586, claims closely related to expropriation may nonetheless be based on commercial activity. For example, claims arising out of subsequent commercial activity involving expropriated property may fall within the commercial activity exception. *See Smith Rocke Ltd. v. Republica Bolivariana de Venezuela*, No. 12 CV. 7316 LGS, 2014 WL 288705, at *5 (S.D.N.Y. Jan. 27, 2014) ("If an expropriated bank, operated by a sovereign, repudiated loans in its function as an operating bank . . . the commercial activity exception would apply, as the claim would be based on the commercial activity, and relief could be granted solely upon the breach of contract."). Similarly, claims arising out of a contract that is conditioned on a sovereign action may fall within the commercial-activity exception. *See Guevara*, 468 F.3d at 1300 (noting contract for purchase of bullets conditioned on declaration of

war falls within commercial activity exception because "the condition precedent of a declaration of war speaks to the purpose or motivation for buying the bullets, but it does not change the commercial nature of the acts of purchasing and paying for them").

In this case, once Argentina expropriated the YPF shares, it assumed certain contractual obligations in the Bylaws. Section 28 of the Bylaws state that "*all* acquisitions made by the National Government, whether directly or indirectly, by *any means or instrument*, of shares or securities of [YPF]" that result in Argentina's acquiring a specified percentage of shares must comply with the takeover bid requirements. (Bylaws § 28(A) (emphasis added).) By entering into and repudiating contractual obligations—even ones acquired by sovereign acts—Defendants acted as ordinary market players and engaged in commercial activity. *See Guevara*, 468 F.3d at 1300. Expropriation is merely the method by which Argentina acquired the shares (a method fully anticipated by Section 28 of the Bylaws). The commercial contractual obligations at issue here could just as easily have been triggered by Argentina's acquisition of a controlling stake in YPF in open-market transactions. Thus, the FSIA permits this Court to inquire into the effects of sovereign acts on otherwise commercial obligations.

3. Defendants' Acts Caused a Direct Effect in the United States

Third, Defendants' acts caused a "direct effect in the United States." *See* 28 U.S.C. § 1605(a)(2). "In order to be direct, an effect need not be substantial or foreseeable, but rather must simply follow as an immediate consequence of the defendant's . . . activity." *Atlantica Holdings*, 813 F.3d at 108 (quoting *Weltover*, 504 U.S. at 618) (internal quotation marks omitted)); *see also*

I.T. Consultants, Inc. v. Republic of Pakistan, 351 F.3d 1184, 1190 (D.C. Cir. 2003) (Roberts, C.J.) ("Neither *Weltover* nor the subsequent case law of this circuit suggests that only 'important' contractual terms may give rise to a direct effect."). A consequence is "immediate" where there is no "intervening element" "between the foreign state's commercial activity and the effect." *Guirlando*, 602 F.3d at 74-75 (quoting *Weltover* 941 F.2d at 152)).

As is relevant here, "courts have consistently held that, in contract cases, a breach of a contractual duty causes a direct effect in the United States sufficient to confer FSIA jurisdiction so long as the United States is the place of performance for the breached duty." *Atlantica Holdings*, 813 F.3d at 108-09. There is a direct effect on the place of performance even where the plaintiffs are all foreign corporations, *see Weltover*, 504 U.S. at 619, and where effects are also felt elsewhere, *see Hanil Bank*, 148 F.3d at 133 (noting United States "need not be the location where the *most* direct effect is felt, simply a direct effect" to confer FSIA jurisdiction).

Here, the United States was the place of performance for certain contractual obligations under the Bylaws required to implement a tender offer, including the publication of the tender offer notices in New York, SEC filings detailing the tender offer, the delivery of tender offer materials to the NYSE, and, if demanded, the purchase of shares held in the United States. (*See* Compl. ¶¶ 23, 44; Bylaws § 7(f).) Defendants' failure to perform these contractual obligations necessarily had an immediate and direct effect in the United States. *See Weltover*, 504 U.S. at 619 ("Because New York was thus the place of perfor-

mance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States.")

Accordingly, for the reasons stated above, Plaintiffs' claims fall within the third clause of the FSIA's commercial activity exception, and, therefore, Defendants' motion to dismiss on the basis of lack of subject matter and personal jurisdiction is denied.

B. Act of State Doctrine

Defendants also argue that the act of state doctrine bars consideration of Plaintiffs' claims. (Arg. Mem. of Law [dkt. no. 28] at 18-21; YPF Mem. of Law [dkt. no. 33] at 13-15.) Under this doctrine, "the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders." *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004); *see also Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985) ("If adjudication would embarrass or hinder the executive in the realm of foreign relations, the court should refrain from inquiring into the validity of the foreign state's act.").

Unlike an assertion of foreign immunity, the act of state doctrine is not a jurisdictional defense but rather a substantive defense on the merits that "requires courts to accept, as a rule for their decision, that the acts of foreign sovereigns taken within the foreign borders are valid." *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 754 (S.D.N.Y. 2004), *opinion clarified on denial of reconsideration*, No. 02 CIV. 6356 (SHS), 2005 WL 2585227 (S.D.N.Y. Oct. 13, 2005). "Although . . . the act of state doctrine is an affirmative defense as to which the [defendant] ha[s] the burden, a court may properly grant a motion

to dismiss on the basis of that doctrine when its applicability is shown on the face of the complaint." *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 146 (2d Cir. 2012); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1534 (D.C. Cir. 1984) (Before granting a motion to dismiss based on the act of state doctrine, the court must be satisfied that there is no set of facts favorable to the plaintiffs and suggested by the complaint which could fail to establish the occurrence of an act of state").

Act of state issues arise when the outcome of a case turns upon a court's decision regarding the validity of a public act of a foreign sovereign within its territory. *See W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990) ("Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."). This doctrine may be applied even if the effects of the foreign sovereign's acts within its own territory are also felt in the United States. *See Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 955 (5th Cir. 2011). The doctrine does not, however, apply to the purely commercial conduct of a foreign sovereign. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976) ("[T]he concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."). It also permits adjudication of cases concerning the commercial consequences of sovereign action. *See, e.g., Lyondell-Citgo Ref., LP v. Petroleos de Venezuela, S.A.*, No. 02 CIV. 0795 (CBM), 2003 WL 21878798, at *8 (S.D.N.Y. Aug. 8, 2003) (finding act of state doctrine inapplicable in action concerning whether an official

act constitutes *force majeure* under the terms of a contract).

Defendants rely on *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985), to argue that the act of state doctrine bars judicial review of contractual claims arising out of a foreign sovereign's expropriation within its own territory. (*See* YPF Mem. of Law [dkt. no. 33] at 13-15; Arg. Mem. of Law [dkt. no. 28] at 19-21.) In *Braka*, several United States citizens purchased peso- and dollar-denominated certificates of deposits ("CDs") from a private Mexican bank. 726 F.2d at 223. After these purchases were made, the Mexican government issued a series of decrees, nationalizing Mexico's banks and mandating that all deposits be repaid in Mexican pesos at a specified rate of exchange. *Id.* The purchasers of the CDs filed suit against the Mexican bank in federal district court in New York, alleging breach of contract and seeking compensation for damages that resulted from the bank's payment of their CDs at the exchange rates prescribed by the Mexican government instead of at the market exchange rate. *Id*. The Court of Appeals held that the act of state doctrine barred Plaintiffs' claims because "the situs of defendant's obligation existed wholly within the boundaries of the foreign sovereign" and, "[w]ere we to issue the order [plaintiffs] seek, we would find ourselves directing a state-owned entity to violate its own national law with respect to an obligation wholly controlled by Mexican law." *Id*. at 225. This case is inapposite to the instant action, however, because Defendants have not shown that performance of the alleged obligations would constitute a violation of Argentine law.

Indeed, as described earlier, the outcome of this case does not turn on the validity of Argentina's official acts

but rather on the operation of YPF's Bylaws in light of those acts. For the following reasons, it does not appear from the face of the Complaint that Defendants' failure to comply with or enforce those Bylaws either constituted an official act or was compelled by an official act. *See Konowaloff*, 702 F.3d at 146.

First, the expropriation and intervention laws did not explicitly preclude tendering for shares. Law 26,741 stated a public need to expropriate 51% of YPF shares. (Law 26,741 [dkt. no. 27-121] at Art. 7.) The law did not address the acquisition of additional shares in the marketplace, including by tender offer. (*Id.*) Accordingly, the tender offer provisions of Bylaws §§ 7(e), (f) and 28 are not necessarily inconsistent with the sovereign act of expropriation.

Second, the expropriation law provided that Argentina would "exercise all political rights associated with the shares subject to expropriation" until the transfer of rights was completed. (*Id*. at Art. 9.) This provision placed Argentina in the position of Repsol with respect to the shares subject to expropriation, leaving commercial rights and obligations intact, including Bylaw § 7(h), which prohibited exercise of certain rights associated with shares acquired in breach of the tender offer requirement. Therefore, it does not appear from the face of the Complaint that Bylaw § 7(h) was inconsistent with Argentina's sovereign acts.

Accordingly, performance under the contract by both Argentina and YPF does not appear to be inconsistent with Argentina's official actions, and therefore the outcome of this action does not "turn on" a determination regarding the validity of an official act. Although the act of state doctrine requires that this Court proceed under the assumption that the

intervention and expropriation in Argentina were valid acts, it does not preclude inquiry into contractual obligations related to or arising out of those acts. Because this assumption of validity does not compel a finding for the Defendants, and because the Court does not have to inquire into the validity of the sovereign acts of intervention and expropriation, dismissal under the act of state doctrine is not warranted. Thus, Defendants' motion to dismiss on this ground is denied.

C. Identity of Party Bringing Suit in this Action

Although the two Petersen entities are the named plaintiffs in this action, a factual dispute exists concerning whether the action is brought on Petersen's behalf by its bankruptcy receiver or whether these claims have been assigned to Prospect. If the suit is brought by Prospect, Argentina argues the claim should be dismissed for violation of the New York champerty statute (*see* Arg. Mem. of Law [dkt. no. 28] at 22-25); if brought by Petersen's receiver, YPF argues the receiver lacks standing under Chapter 15 of the United States Bankruptcy Code (*see* YPF Mem. of Law [dkt. no. 33] at 15-18).

1. New York Champerty Statute

Although Petersen is the named Plaintiff in the instant action, Argentina claims that Petersen's receiver sold its interest in this lawsuit to Prospect and that the suit should be dismissed because this arrangement violates New York's champerty statute. (Arg. Mem. of Law [dkt. no. 28] at 22-25.) Petersen, in turn, disputes the existence of an assignment and argues, in the alternative, that such an assignment would fall within an exception to the statute. (Pl. Opp'n to Arg. [dkt. no. 44] at 25-28.) As is explained

below, Argentina's motion to dismiss on this basis is denied.

Under New York's champerty statute, it is prohibited to "solicit, buy or take an assignment of . . . [a] thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon," with the exception that "things in action may be solicited, bought, or assignment thereof taken, from any . . . receiver in bankruptcy." N.Y. Judiciary Law § 489(1). A claim acquired in violation of this statute may not be enforced by the assignee. *See Elliott Associates, L.P. v. Republic of Peru*, 948 F. Supp. 1203, 1208 (S.D.N.Y. 1996). Champerty is an affirmative defense, and a motion to dismiss will be granted on this basis only if the facts establishing the defense are shown in the complaint, documents attached to the complaint, and matters of which the Court may take judicial notice. *See CIBC Bank & Trust Co. (Cayman) v. Banco Cent. do Brasil*, 886 F. Supp. 1105, 1108 (S.D.N.Y. 1995).

The champerty law is intended to "prevent[] the strife, discord and harassment that would be likely to ensue from permitting attorneys and corporations to purchase claims for the purpose of bringing actions thereon." *Trust For the Certificate Holders of Merrill Lynch Mortgage Inv'rs, Inc. v. Love Funding Corp.*, 918 N.E.2d 889, 893 (2009) ("*Love Funding*") (internal quotation marks omitted). Accordingly, "violation of Section 489 turns on whether 'the primary purpose of the purchase [was] . . . to bring a suit,' or whether 'the intent to bring a suit [was] . . . merely incidental and contingent.'" *Elliott Associates, L.P. v. Banco de la Nacion*, 194 F.3d 363, 378 (2d Cir. 1999) (quoting *Moses v. McDivitt*, 88 N.Y. 62, 65 (1882)). "[T]he champerty statute does not apply when the purpose of

an assignment is the collection of a legitimate claim." *Love Funding*, 918 N.E.2d at 895. Although this inquiry into intent is "decidedly fact-specific," courts have granted motions to dismiss on the basis of assignments violating the New York champerty statute. *See CIBC Bank & Trust Co. (Cayman)*, 886 F. Supp. at 1111.

Here, the facts sufficient to establish a champertous assignment are not clear from the face of the Complaint. *See id*., 886 F. Supp. at 1108. Far from conceding that Prospect acquired the rights to Plaintiffs' claims for the purpose of profiting from the litigation rather than collecting a legitimate claim, Plaintiffs dispute that the claim was assigned and assert that the instant action was brought by Petersen's receiver. (*See* Compl. ¶¶ 6, 47.) Plaintiffs allege that, in accordance with the liquidation plan approved by the Spanish bankruptcy court, the bankruptcy administrator entered into an agreement on behalf of Petersen with Prospect "to provide financing for Petersen's claims." (*Id*. ¶ 47.) The relevant agreement, which is incorporated by reference in the Complaint, states that, "[t]he parties agree that nothing in this Agreement shall be interpreted to constitute an assignment . . . of the Claims," (Domb Decl. Ex. 16 pt. 2 at 1) and that Petersen retains an interest in the outcome of the case, (*see id.* at ¶ 3.1).

Further, even if facts sufficient to establish an assignment were present, the arrangement would fall within the bankruptcy exception of the New York champerty statute, *see* N.Y. Judiciary Law § 489(1), as the relevant agreement was made between Prospect and Petersen's receiver in bankruptcy. (*Id*. ¶ 47.) Argentina's motion to dismiss on this basis is therefore denied.

2. Chapter 15 of the U.S. Bankruptcy Code

If, as Plaintiffs contend, the claim is brought by Petersen's receiver, YPF argues that the claim should be dismissed for lack of standing because the receiver in Plaintiffs' Spanish bankruptcy proceeding did not first obtain recognition for the foreign insolvency proceedings by United States courts pursuant to Chapter 15 of the U.S. Bankruptcy Code. (YPF Mem. of Law [dkt. no. 33] at 15-18.) The motion to dismiss on this ground is also denied, however, because the instant matter falls within an exception to the Chapter 15 recognition requirement.

Under Chapter 15, a "foreign representative" must obtain recognition of a foreign proceeding pursuant to 11 U.S.C. § 1517 prior to "apply[ing] directly to a court in the United States" and before "a court in the United States shall grant comity or cooperation to the foreign representative." *See Reserve Int'l Liquidity Fund, Ltd. v. Caxton Int'l Ltd.*, No. 09 CIV. 9021 (PGG), 2010 WL 1779282, at *4 (S.D.N.Y. Apr. 29, 2010) (quoting 11 U.S.C. § 1509(a), (b)(2), (b)(3)). However, § 1509(f) establishes an exception to this requirement, providing that a foreign representative's failure to obtain recognition "does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor." 11 U.S.C. § 1509(f).

The legislative history of § 1509(f) indicates that it is intended to be a "limited exception" and provides an "account receivable" as an example of "a claim which is property of the debtor." H.R. REP. 109-31, pt. 1, at 110-11 (2005). The exception, however, encompasses those claims of the debtor that existed prior to the bankruptcy or are independent of the bankruptcy and that, therefore, do not involve the cooperation

and comity of United States courts with a foreign bankruptcy proceeding. *See In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 665, 684 (S.D.N.Y. 2011) (where a claim is "independent" of the bankruptcy because the redemptions at issue preceded it, "[h]ad the foreign representatives declined to file a Chapter 15 case, that choice also would not have limited the foreign representatives' ability to pursue their claims in the United States" under § 1509(f)); *see also Varga v. McGraw Hill Financial Inc.*, No. 652410/2013, 2015 WL 4627748, at *13 (N.Y. Sup. Ct. July 31, 2015) (lack of Chapter 15 recognition did not affect standing in a fraud case because "Plaintiffs . . . did not bring this case with the express purpose of assisting or facilitating their insolvency proceedings. . . .").

Here, Plaintiffs are not requesting comity or cooperation from this Court with respect to their foreign insolvency proceedings. Rather, Plaintiffs are seeking to recover on a claim that is independent from the insolvency proceedings and that is property of their receivership. *See Varga*, 2015 WL 4627748, at *13. As such, prior recognition of the Spanish bankruptcy proceeding is not necessary to confer standing on the Plaintiffs' foreign representative. The motion to dismiss for lack of standing is therefore denied.

D. Forum Non Conveniens

Argentina also moves for dismissal on the basis of the doctrine of *forum non conveniens*, which provides courts discretion to decline to exercise jurisdiction "whenever it appears that such [a] case may be more appropriately tried in another forum, either for the convenience of the parties or to serve the ends of justice." *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 67 (2d Cir. 2003). District courts are permitted to consider and credit any evidence

in the record, including affidavits, when ruling on motions to dismiss for *forum non conveniens*. *Alcoa S. S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 149 (2d Cir. 1980).

In evaluating a motion to dismiss for *forum non conveniens*, a court must determine: (1) the degree of deference owed to the plaintiff's choice of forum, (2) whether the defendant's proposed forum is adequate, and (3) if an adequate alternative forum exists, whether the balance of private and public interest weighs in favor of the alternative forum. *See Pollux*, 329 F.3d at 70. A defendant moving for dismissal on this basis bears the burden of proof and must demonstrate "that an adequate alternative forum exists and that, considering the relevant private and public interest factors[,] . . . the balance of convenience tilts strongly in favor of trial in the foreign forum." *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991).

In the instant case, deference to Plaintiffs' choice of forum is not at its greatest height. Although "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum . . . the presumption applies with less force when the plaintiff or real parties in interest are foreign." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). Here, the forum is not home to Defendants, Plaintiffs, or Plaintiffs' owners or receiver. (Compl. ¶¶ 6, 7, 8, 46; Arg. Mem. of Law [dkt. no. 28] at 4.)

Nonetheless, Defendants have not shown that Argentina is an adequate alternative forum for resolution of the instant controversy. *See R. Maganlal & Co.*, 942 F.2d at 167. In general, "[a]n alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject

matter of the dispute." *Pollux*, 329 F.3d at 75. An alternative forum meeting these requirements may be found inadequate, however, "[i]n rare circumstances . . . where the remedy offered by the other forum is clearly unsatisfactory." *Piper Aircraft*, 454 at 255 n.22.

Courts generally have found Argentina to be an adequate alternative forum. *See, e.g., Satz v. McDonnell Douglas Corp*., 244 F.3d 1279, 1283 (11th Cir. 2001) ("The plaintiffs' concerns about Argentine filing fees, the lack of discovery in Argentine courts, and their fear of delays in the Argentine courts do not render Argentina an inadequate forum."); *Warter v. Boston Sec., S.A*., 380 F. Supp. 2d 1299, 1311 (S.D. Fla. 2004) (collecting cases finding Argentina an adequate forum); *MasterCard Int'l Inc. v. Argencard Sociedad Anonima*, No. 01 CIV. 3027 (JGK), 2002 WL 432379, at *7 (S.D.N.Y. Mar. 20, 2002) (finding Argentina an adequate forum but denying motion on other grounds). However, this determination has not been universal, including where Argentina is itself a party. *See Weltover, Inc. v. Republic of Argentina*, 753 F. Supp. 1201, 1209 (S.D.N.Y.), *aff'd*, 941 F.2d 145 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992) (declining to find Argentina an adequate alternative forum).

Plaintiffs argue that Argentina is an inadequate forum for the instant action because of the Argentine government's threats of criminal prosecution against K&S and Burford, prohibitive court fees and awards, frequent delay and insufficient process, and lack of judicial independence. (P1. Opp'n to Arg. [dkt. no. 44] at 29-31.) Plaintiffs' concerns regarding fees, delay, process, and judicial independence have not prevented other courts from finding Argentina an adequate forum. *See Warter* at 1311. However, the facts as alleged give rise to a well-founded fear of prosecution

of parties' counsel if the instant action were brought in Argentina. *See Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1199 (S.D.N.Y. 1996) (denying motion to dismiss on *forum non conveniens* where Ghanian plaintiff had well-founded fear of prosecution if he brought action in Ghanian courts). Plaintiffs also have submitted a partial transcript from a news conference held on September 14, 2015, during which Argentina's former Attorney General stated that K&S and Burford were being accused of unlawful conduct and that a complaint had been filed. (Ho Decl., Ex. A at 3-5.) Argentina did not address these statements made by the former Attorney General or otherwise respond to Plaintiffs' arguments on this matter in its submissions to the Court.

At oral argument on this motion, counsel for Argentina conceded that, in February of 2015, Argentina's then-Attorney General filed a "criminal complaint in connection with [another case] against Burford and some of the principals in that case." (Tr. at 58:22-59:1.) Counsel further stated that "whatever investigation may be taking place is not public" and that "[t]here have been no charges filed to [his] knowledge," but that "there may be an ongoing investigation." (Tr. at 59-61.) While the particular facts remain in dispute between the parties, Argentina has not met its burden to establish that an adequate alternative forum exists.

Further, Argentina has not shown that the balance of private and public interest factors[4] "tilts strongly in

[4] "The private interests concern the 'practical problems that make trial of a case easy, expeditious and inexpensive' (ease of access to proof, availability of compulsory process, cost of obtaining willing witnesses' attendance), the likelihood of obtaining an enforceable judgment and the 'relative advantages

favor of trial in the foreign forum." *See R. Maganlal & Co.*, 942 F.2d at 167; *see also Gulf Oil*, 330 U.S. at 508 ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."). Argentina argues that several private interests—the ability to compel witnesses, the costs of travel, and the inconvenience of translating documents—favor adjudication in Argentina. (Arg. Mem. of Law [dkt. no. 28] at 27.)

However, Defendants have not identified witnesses they would call at trial who would be unwilling to appear. *See Metito (Overseas) Ltd. v. Gen. Elec. Co.*, No. 05 CIV. 9478(GEL), 2006 WL 3230301, at *6 (S.D.N.Y. Nov. 7, 2006) (noting "such identification is generally required for a forum non conveniens dismissal") (internal quotation marks and citation omitted); *see also Shtofmakher v. David*, No. 14 CIV. 6934 (AT), 2015 WL 5148832, at *3 (S.D.N.Y. Aug. 17, 2015) ("Although . . . putative witnesses are beyond the Court's subpoena power, there is no evidence that they would be unwilling to testify, which renders the lack of a subpoena power a less compelling consideration.") Indeed, Argentina conceded at oral argument that they "have not asked" potential witnesses if they would be willing to appear. (Tr. at 64:5-8.)

The costs and inconvenience associated with the potential witnesses' travel also do not weigh strongly in favor of dismissal. Although Argentina asserts that virtually all of the witnesses to the relevant events

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and obstacles to a fair trial.' The public interest factors involved include the problems of court congestion, jury duty, local interest in the controversy and the advantages of having a court familiar with the law which is being applied." *Manu Intl, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 64-65 (2d Cir. 1981) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)).

reside in Argentina, "modern technologies . . . make the location of witnesses and evidence less important to the *forum non conveniens* analysis." *See Metito (Overseas) Ltd.*, 2006 WL 3230301, at *6. Further, while travel costs are a "legitimate part of the *forum non conveniens* analysis," Defendants have not shown that these costs are "excessively burdensome." *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 107 (2d Cir. 2000).

Argentina also asserts, and Plaintiffs do not dispute, that many of the relevant documents are written in Spanish and have not been translated to English. (Arg. Mem. of Law [dkt. no. 28] at 30.) Although the costs of translating documents may be an important factor in the Court's *forum non conveniens* analysis, it is not a dispositive one in the instant case. *See Varnelo v. Eastwind Transp. Ltd.*, No. 02 CIV 2084 (KMW), 2003 WL 230741, at *2 (S.D.N.Y. Feb. 3, 2003). Argentina concedes that some of the relevant documents have been translated already (*see* Arg. Mem. of Law [dkt. no. 28] at 30), and the Court finds that the cost of translating the remaining documents in this case would not be such an unreasonable burden on the parties that the Plaintiffs' choice of forum should be disturbed.

Finally, none of the public interest factors in this case weigh strongly in Defendants' favor and, therefore, on balance do not warrant dismissal on the basis of *forum non conveniens*. In particular, both of the proposed fora appear to have an interest in adjudicating this dispute. Additionally, to the extent the Court must apply Argentine law in reaching a determination, it is not a justification for dismissal under *forum non conveniens. See R. Maganlal*, 942 F.2d at 169 ("[T]he need to apply foreign law is not alone sufficient

to dismiss under the doctrine of *forum non conveniens*."). The Defendants have not shown that application of foreign law "would be unusually difficult or burdensome to this Court." *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 209 (S.D.N.Y. 2002).

Accordingly, for the foregoing reasons, Argentina has failed to demonstrate that there would be an adequate alternative forum and that, even if there were, the balance of public and private factors tilts strongly in favor of disturbing the Plaintiffs' choice of forum. Argentina's motion to dismiss on this basis is, therefore, denied.

E. Failure to State a Claim

1. Standard of Review

"When considering a motion to dismiss pursuant to Rule 12(b)(6), the district court . . . is required to accept as true the facts alleged in the complaint, consider those facts in the light most favorable to the plaintiff, and determine whether the complaint sets forth a plausible basis for relief." *Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437, 443 (2d Cir. 2015). Although a complaint is not required to contain "detailed factual allegations," a plaintiff must provide "more than labels and conclusions," such that "[f]actual allegations . . . raise a right to relief above the speculative level," to survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"In adjudicating a motion to dismiss, a court may consider only the complaint, any written instrument attached to the complaint as an exhibit, any statements or documents incorporated in it by reference, and any document upon which the complaint heavily relies." *ASARCO LLC v. Goodwin*, 756 F.3d 191, 198

(2d Cir. 2014), *cert. denied*, 135 S. Ct. 715 (2014) (quoting *In re Thelen LLP*, 736 F.3d 213, 219 (2d Cir. 2013)). However, "[i]n determining foreign law, the court may consider any relevant material or source . . . whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. Accordingly, the Court may consider the parties' expert reports to the extent that those reports assist the court in determining issues of Argentine law. *See In re Petrobras Sec. Litig.*, No. 14-CV-9662 (JSR), 2016 WL 929346, at *5 n.3 (S.D.N.Y. Mar. 12, 2016).

2. Choice of Law

Here, the parties dispute whether Argentine or New York law applies to this matter. (*See* Arg. Mem. of Law [dkt. no. 28] at 32 n.14; YPF Mem. of Law [dkt. no. 33] at 18-21; Pls.' Mem. of Law in Opp'n to YPF, dated Oct. 23, 2015 [dkt. no. 49] at 2021.) "When subject matter jurisdiction is based on the Foreign Sovereign Immunities Act (the 'FSIA') . . . [courts in this circuit] apply the choice-of-law rules of the forum state, here New York, with respect to all issues governed by state substantive law." *Bank of New York v. Yugoimport*, 745 F.3d 599, 608-09 (2d Cir. 2014). Where New York choice-of-law rules apply, courts must first determine whether there is an "actual conflict" between the proposed laws and, if a conflict exists, "classify the conflicting laws by subject matter with reference to New York law." *Booking v. Gen. Star Mgmt. Co.*, 254 F.3d 414, 419-20 (2d Cir. 2001).

"Under New York law, issues relating to the internal affairs of a corporation are decided in accordance with the law of the state of incorporation." *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 60 F. Supp. 2d 123, 129 (S.D.N.Y. 1999), *aff'd*, 205 F.3d 1321 (2d Cir. 2000); *see also Winn v. Schafer*, 499 F. Supp. 2d 390, 393

(S.D.N.Y. 2007) (applying New York choice of law rules, the Cayman Islands law governs claim concerning the internal affairs of a corporation incorporated in the Cayman Islands). The internal affairs doctrine generally applies to breach of contract claims brought by shareholders. *See Druck Corp. v. Macro Fund (U.S.) Ltd.*, No. 02 CIV. 6164(R0), 2007 WL 258177, at *1 (S.D.N.Y. Jan. 29, 2007), *aff'd sub nom. Druck Corp. v. Macro Fund Ltd.*, 290 F. App'x 441 (2d Cir. 2008) (applying law of place of incorporation where shareholders alleged mishandling of redemption fees by directors constituted a breach of contract). Therefore, here, the internal affairs doctrine directs application of Argentine law to Plaintiffs' breach of contract claims where a conflict between New York and Argentine law exists.

3. Substantive Claims

a. Breach of Contract by Argentina[5]

Plaintiffs allege that Argentina breached the Bylaws by, among other things, failing to comply with the requirement in Sections 7 and 28 of the Bylaws that any acquisition of a controlling stake in YPF be conditioned on a tender offer for all Class D shares. (Compl. ¶ 53). Plaintiffs allege that, as a direct and proximate result of Argentina's breach, (1) the value of Petersen's shares was significantly reduced, (2) Petersen defaulted on its loans, the structure of which was known to Defendants, and (3) because the

[5] Plaintiffs also bring a claim for anticipatory breach, alleging that Defendants repudiated their contractual obligations by declaring they would not comply with the Bylaws. (Compl. at ¶¶ 58, 76.) Plaintiffs' anticipatory breach claims rest on the same facts as the breach of contract claims and, therefore, for the reasons set forth below, this claim also is not dismissed.

value of shares was depressed, the foreclosure failed to satisfy Petersen's debts, resulting in Petersen's bankruptcy. (*Id*. at ¶ 42.)

Argentina counters that, even if there was an obligation to make a tender offer, Plaintiffs' claim must be dismissed for failure to show causation. (Arg. Mem. of Law [dkt. no. 28] at 31-35.) Argentina asserts, and Plaintiffs do not dispute that, under both New York and Argentine law, "[c]ausation is an essential element of damages in a breach of contract action; and, as in tort, a plaintiff must prove that a defendant's breach directly *and proximately caused* his or her damages." *Nat'l Mkt. Share, Inc. v. Sterling Nat. Bank*, 392 F.3d 520, 525 (2d Cir. 2004); see Arg. Mem. of Law [dkt. no. 28] at 32 n.14.

Argentina argues that the timeline alleged in the Complaint establishes that Plaintiffs' claimed losses could not have been caused by Argentina's failure to make a tender offer or any other conduct for which Argentina could be held liable. (Arg. Mem. of Law [dkt. no. 28] at 31.) Relying on its own expert's opinion concerning the timing of a tender offer (Decl. of Javier Errecondo in Supp. of Mot. to Dismiss, dated Sept. 8, 2015 [dkt. no. 26], ¶¶ 13-16), Argentina argues that such an offer would have taken "at least several months" and, therefore, would not have been completed until long after Plaintiff defaulted on its loans (Arg. Mem. of Law [dkt. no. 28] at 34). Instead, according to Argentina, Plaintiffs' alleged harm was caused by events for which Argentina cannot be held liable, such as Argentina's decision to defer a shareholder vote on the anticipated May 2012 dividend payment. (*Id.* at 32-33.)

Plaintiffs, in turn, counter that Argentina's "competing theory of causation . . . raise[s] factual questions

not suitable for resolution on a motion to dismiss." (Pl. Opp'n to Arg. [dkt. no. 44] at 34 (quoting *Acticon AG v. China N.E. Petroleum Holdings Ltd*., 692 F.3d 34, 39 (2d Cir. 2012).) Plaintiffs argue that Argentina's timeline is incorrect and that, based on their own expert's opinion, the tender offer requirement was triggered in April 2012, when Argentina reacquired control of YPF. (*Id*. at 35.) Further, Plaintiffs argue that it is "unrealistic to think that Petersen's creditors would have foreclosed based on a technical default had they known that Petersen would soon receive the tender offer price" and, even if foreclosure still had occurred, the price Plaintiffs would have received in a tender offer would have allowed them to pay off their outstanding loans following foreclosure. (*Id*.)

However, this Court cannot consider these experts' opinions on factual issues on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Further, the Bylaws do not clearly establish when a takeover bid would occur or whether Petersen could have received the tender offer price in time to satisfy its creditors. Accordingly, accepting the facts alleged in the Complaint as true and considering those facts in the light most favorable to the Plaintiff, the complaint sets forth a plausible basis for relief on this claim. *Twombly*, 550 U.S. at 555. Argentina's motion to dismiss Plaintiffs' claim for breach of contract and anticipatory breach against it is denied.

b. Breach of Contract by YPF

Plaintiffs also allege that YPF breached the Bylaws by (1) failing to comply with or enforce the tender offer requirements of Sections 7 and 28 of the Bylaws; (2) failing to prohibit Argentina from voting or exercising corporate governance powers under Section 7(h) of the Bylaws; and (3) failing to distribute dividends to

YPF's shareholders, including Petersen. (Compl. ¶ 71.) Defendant YPF's motion to dismiss on this basis is also denied for the reasons stated below.

First, Sections 7 and 28 of the Bylaws plausibly can be read to impose liability on YPF when shares are acquired in the triggering amount absent a tender offer.[6] YPF argues that is not liable under Argentine law even if its actions constituted a breach of the Bylaws because a public law, such as the expropriation law, preempts private contractual obligations and constitutes an event of *force majeure* that excuses any alleged breach. (YPF Mem. of Law [dkt. no. 33] at 23-24.) Even if YPF's characterization of the relevant law is correct, however, it is not clear from the face of the Complaint that the obligations imposed on YPF under the Bylaws were inconsistent with the intervention and expropriation laws. Second, although YPF argues that its failure to prevent Argentina from voting did not necessarily cause Plaintiffs' alleged injury (YPF Mem. of Law [dkt. no. 33] at 24), this argument relies on facts outside of the Complaint regarding the timing and conditions of Petersen's default, which may not be considered on a motion to dismiss.

Accordingly, Defendant YPF's motion to dismiss Plaintiffs' claim for breach of contract and anticipatory breach is denied.

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[6] These provisions include: "If the terms of subsections e) and f) of this section are not complied with, it shall be forbidden to acquire shares or securities of the Corporation. . . ." (Bylaws § 7(d)); "Each takeover bid shall be conducted in accordance with the procedure herein stipulated. . . ." (*Id*. § 7(f)); "The provisions of subsections e) and f) of Section 7 . . . shall apply to all acquisitions made by the National Government, whether directly or indirectly, by any means or instrument, of shares or securities of the Corporation . . ." (*Id*. § 28 (A)).

c. Good Faith and Fair Dealing

Plaintiffs further allege that both Defendants breached the implied obligation of good faith and fair dealing. However, "New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." *Harris v. Provident Life & Acc. Ins. Co.*, 310 F.3d 73, 81 (2d Cir. 2002). Defendant YPF asserts that Argentine law compels the same result. (YPF Mem. of Law [dkt. no. 33] at 25.)

Plaintiffs argue that YPF breached its implied duty of good faith and fair dealing by, among other things, failing to enforce or attempt to enforce the tender-offer obligations in the Bylaws. (Compl. ¶ 80.) Plaintiffs' allegations are not distinct from Plaintiffs' claim for breach of contract against YPF, and, accordingly, Plaintiffs' claim for breach of the implied duty of good faith and fair dealing against YPF is dismissed as improperly duplicative.

Similarly, Plaintiffs allege that Argentina breached its implied duty of good faith and fair dealing by (1) intentionally breaching the terms of the Bylaws by declining to make a tender offer and (2) conducting a campaign against YPF shareholders beginning in January 2012 with the intent and effect to depress the value of shares and reduce the price of a later tender offer. (*Id*. ¶ 62.) Plaintiffs' claim that Argentina "intentionally" breached the bylaws is improperly duplicative of Plaintiffs' breach of contract claim and, therefore, is dismissed. However, Plaintiffs' claim that Argentina engaged in a campaign to depress share prices, including statements made by Argentine public officials prior to the alleged breach (*id*. ¶ 33), is sufficiently distinct from Plaintiffs' breach of contract

claim. Accordingly, Plaintiffs' claim with respect to Argentina is not dismissed on this ground.

d. Promissory Estoppel

Finally, Plaintiffs allege that Defendants promised that Argentina would not retake control of YPF without making a tender offer in its IPO Prospectus, SEC filings, and other documents, and that Petersen foreseeably and justifiably relied on that promise. (*Id*. ¶¶ 65-67, 83-85). Under New York law, a promissory estoppel claim should be dismissed as duplicative of a breach of contract claim where the promissory estoppel claim "is based on promises that are consistent with the undertakings contained in the contract." *Four Finger Art Factory, Inc. v. Dinicola*, No. 99 CIV. 1259 (JGK), 2000 WL 145466, at *8 (S.D.N.Y. Feb. 9, 2000). Further, although Plaintiffs assert that Argentine law "recognizes promissory estoppel," Plaintiffs' own expert acknowledges that, in Argentina, "the doctrine of estoppel is not an *autonomous* source of obligation." (*See* Pl. Opp'n to YPF [dkt. no. 49] at 21 (citing Decl. of Alberto B. Bianchi, dated Oct. 91, 2015 [dkt. no. 47] at ¶¶ 92-93 (emphasis added)).) Plaintiffs have not identified a promise made in the IPO Prospectus, SEC filings, or elsewhere that is distinct from the obligations imposed by the Bylaws. Accordingly, Plaintiffs' promissory estoppel claims are dismissed as improperly duplicative of the breach of contract claims.

III. Conclusion

For the above reasons, Defendants' motions to dismiss (Arg. Mot. to Dismiss, dated Sept. 8, 2015 [dkt. no. 23]; YPF Mot. to Dismiss, dated Sept. 8, 2015 [dkt. no. 32]) are granted in part and denied in part. Specifically, the motions to dismiss the promissory

estoppel claims against both Defendants are granted; the motion to dismiss the good faith and fair dealing claim against YPF is granted but denied as to Argentina. These motions are denied in all other respects.

SO ORDERED.

Dated: New York, New York
September 9, 2016

/s/ Loretta A. Preska
LORETTA A. PRESKA
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos: 16-3303, 16-3304

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

Plaintiffs-Appellees,

v.

ARGENTINE REPUBLIC AND YPF S.A.,

Defendants-Appellants.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of August, two thousand eighteen.

ORDER

Appellant, YPF S.A., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk