No. 18-____

IN THE
Supreme Court of the United States

ARGENTINE REPUBLIC,
Petitioner,

v.

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

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Maura Barry Grinalds
Counsel of Record
Boris Bershteyn
Jonathan J. Lerner
Timothy G. Nelson
Austin R. Winniford
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000
maurabarry.grinalds@skadden.com

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 Argentine Republic is a defendant-appellant below.

Respondent YPF S.A. is a defendant-appellant below.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Argentine Republic ("Argentina") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-33a) is reported at 895 F.3d 194. The opinion of the district court (App. 34a-71a), denying in part Argentina's motion to dismiss the complaint, is unreported and is available at 2016 WL 4735367.

STATEMENT OF JURISDICTION

The Second Circuit entered its judgment on July 10, 2018. App. 1a. A timely petition for rehearing was denied on August 30, 2018. App. 72a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Foreign Sovereign Immunities Act ("FSIA") mandates that "a foreign state shall be immune from the jurisdiction of the courts of the United States," subject only to limited statutory exceptions. 28 U.S.C. § 1604. The narrow "commercial activity" exception to immunity provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a com-

> mercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

28 U.S.C. § 1605(a).

PRELIMINARY STATEMENT

This case involves an exceptionally important and unsettled question regarding the scope of foreign sovereign immunity under the FSIA, on which U.S. courts of appeals are divided. On the face of the complaint filed by Respondents Petersen Energía Inversora S.A.U. and Petersen Energía, S.A.U. (together, "Petersen" or "Plaintiffs"), the claims in this case directly follow from, and are inextricably intertwined with, Argentina's lawful 2012 expropriation of a controlling stake in its largest domestic oil and gas company, YPF S.A. ("YPF" or the "Company"), through sovereign acts of Argentina's executive and legislature. Under the doctrine of foreign sovereign immunity, codified in the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States," subject only to limited statutory exceptions. 28 U.S.C. § 1604. "[T]he 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). Accordingly, Argentina invoked its immunity from suit under the FSIA. The statute specifies when sovereign acts of expropriation do not receive immunity, but Argentina's actions unquestionably do not fit that "expropriation exception" and Petersen did not invoke it. Petersen instead chose to frame its claims as challenging the immediate and direct consequences of Argentina's lawful sovereign

acts and asserted that they fall into the FSIA's "commercial activity" exception.

In affirming the district court's denial of Argentina's motion to dismiss, the Second Circuit construed this exception to extend to Argentina's alleged failure to effectuate a takeover through a tender offer and its exercise of the voting rights attaching to the expropriated shares, purportedly breaching YPF's bylaws—even when, on the face of Petersen's complaint, these allegedly commercial "activities" were inextricably intertwined with a lawful sovereign act of expropriation. A writ of certiorari to review the Court of Appeals' holding is warranted for several independent reasons.

First, the Second Circuit's decision exacerbates a split of authority among U.S. courts of appeals. Whereas the D.C. Circuit has held that the commercial activity exception does not apply to acts stemming directly from an expropriation (even if those acts can be said to be "commercial"), *see Rong v. Liaoning Province Government*, 452 F.3d 883, 888-90 (D.C. Cir. 2006), the Ninth Circuit has held that it does so apply. *See Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 708-09 (9th Cir. 1992). The Second Circuit has now deepened this split by departing from the sound decisions of the D.C. Circuit.

Second, this Court's precedent strongly indicates that the D.C. Circuit's position on this issue is correct—and that the Second Circuit's opinion below is not. This Court has indicated that "a state engages in commercial activity . . . where it 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) (emphasis added) (citation omitted). Thus,

the FSIA denies immunity "in cases 'arising out of a foreign state's *strictly* commercial acts.'" *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) (emphasis added) (citation omitted). The Second Circuit's extension of the commercial activity exception to conduct inextricably intertwined with a sovereign act of expropriation flouts these principles.

Further, the Second Circuit's decision undermines—and encourages plaintiffs to evade—the FSIA's narrow "expropriation exception" to sovereign immunity, which allows jurisdiction over acts stemming from expropriations only where property rights are taken in violation of international law. *See* 28 U.S.C. § 1605(a)(3). Under the Second Circuit's decision, a plaintiff aggrieved by an expropriation need not show it was unlawful; it may now simply characterize the immediate consequences of an expropriation as "commercial activity" to invoke the jurisdiction of a U.S. court. Indeed, under the Second Circuit's decision, "almost any subsequent disposition of expropriated property could allow the sovereign to be haled into a federal court under [the] FSIA," thereby thwarting the FSIA's purpose. *Rong*, 452 F.3d at 890.

Finally, whether the FSIA's commercial activity exception applies to conduct inextricably intertwined with a sovereign act is an exceptionally important and recurring question that should be resolved by this Court. The principles of sovereign immunity embodied in the FSIA "recognize[ ] the 'absolute independence of every sovereign authority' and help[ ] to 'induc[e]' each nation state, as a matter of 'international comity,' to 'respect the independence and dignity of every other,' including our own." *Helmerich*, 137 S. Ct. at 1319 (third alteration in

original) (citations omitted). By extending the commercial activity exception to claims based on conduct that directly ensues from a quintessentially sovereign act, the Second Circuit's decision threatens to disrupt these sensitive interests, including the interest of the United States in reciprocal treatment before foreign courts. This Court frequently grants certiorari in cases involving the FSIA, and it has specifically noted that it has yet to address a case "where a claim consists of both commercial and sovereign elements." *Nelson*, 507 U.S. at 358 n.4. The case offers the Supreme Court a vehicle for resolving this important issue now.

STATEMENT OF THE CASE

The Parties

Defendant Argentina is a foreign state.

Plaintiffs are limited liability companies organized under the laws of the Kingdom of Spain. App. 76a ¶ 6.

Defendant YPF is a publicly-held oil and gas company organized under the laws of Argentina. App. 78a ¶ 8.

YPF's Privatization and Bylaws

YPF was a state-owned enterprise until 1993. App. 77a ¶ 7. That year, Argentina privatized the Company by offering and selling its shares to the public. App. 80a ¶ 13.

As part of the privatization process, YPF amended its bylaws to add certain "takeover" provisions. As Petersen has alleged, these provisions "require[d] persons intending to consummate a control acquisition to first make a public tender offer for all of YPF's outstanding shares." App. 82a ¶ 17. Specifi-

cally, Section 7(e) of the bylaws provided that any "person wishing to [effect] a Takeover . . . shall . . . [a]rrange a takeover bid for the acquisition of all of the shares . . . of the Corporation [*i.e.*, a tender offer]." App. 119a. The bylaws mandated a multi-step tender offer procedure lasting at least 35 days. App. 120a-127a.

The bylaws applied this tender offer requirement to certain controlling acquisitions made by Argentina. In particular, Section 28(A) of the bylaws provided:

> The provisions of [Section 7(e)] shall apply to all acquisitions made by [Argentina], . . . if, as a consequence of such acquisition, [Argentina] becomes the owner, or exercises the control of the shares of [YPF] which . . . represent, in the aggregate, at least 49% of the capital stock.

App. 159a. The bylaws further provided that any shares acquired in contravention of the tender offer requirements "shall not [have] any right to vote or collect dividends." App. 130a. According to Petersen, "Section 28 expressly prohibit[ed] Argentina from exercising control over the Company *unless and until* it . . . made a tender offer." App. 84a ¶ 20 (emphasis added).

Petersen's Acquisition of YPF Shares

Between 2008 and 2011, Petersen acquired approximately 25% of YPF's stock from Repsol YPF S.A. ("Repsol"), YPF's controlling shareholder at the time. App. 87a-88a ¶¶ 27-28. Petersen financed its acquisitions through approximately $3.6 billion in loans, primarily from Repsol. App. 37a. To ensure repayment of these loans, Petersen and Repsol agreed, as controlling shareholders, to cause YPF to (i) distribute at least 90% of its profits to shareholders as dividends paid twice per year and (ii) pay a single

"extraordinary dividend" of $850 million. App. 88a-89a ¶ 30.

Argentina's Energy Crisis and the Expropriation Law

In the judgment of Argentina's Government, Petersen's and Repsol's operation of YPF ensured that virtually none of the profits of YPF were being reinvested to develop the country's domestic energy reserves. App. 161a-170a. The Argentine Government determined that this had made Argentina unduly dependent on foreign energy sources. *Id.*; *see also* Almudena Calatrava & Michael Warren, *Argentina's YPF Gamble Is a Result of the Country's Terrible Energy Crisis*, Business Insider (Apr. 22, 2012), https://www.businessinsider.com/argentinas-ypf-gamble-is-a-result-of-the-countrys-terrible-energy-crisis-2012-4 (characterizing Argentina as having a domestic energy crisis prior to the April 2012 expropriation).

To address its domestic energy crisis, on April 16, 2012, the Argentine Government issued a decree directing the immediate and temporary seizure of Repsol's controlling stake in YPF (the "Intervention Decree"). App. 172a-175a. The Intervention Decree announced that the President would submit a bill to the Argentine legislature providing for the expropriation of a controlling stake in YPF. App. 172a. The Intervention Decree indicated that temporary government control of YPF and expropriation of a controlling stake were urgent matters of national interest requiring immediate legislative action. App. 172a-173a.

In accordance with the Intervention Decree, on May 3, 2012, the Argentine legislature enacted Law

26,741 (the "Expropriation Law"). App. 178a-186a. Citing Argentina's public interest in "[a]chieving self-sufficiency in the supply of hydrocarbons, as well as in the exploration, exploitation, industrialization, transportation and sale of hydrocarbons," the Expropriation Law declared that there was a public necessity for the Government to expropriate exactly 51% of the shares of YPF owned by Repsol. App. 178a, 181a. This percentage was significant, as it served the Expropriation Law's twin objectives of retaking government control while ensuring that YPF continued to use private capital and remained publicly traded. *See* App. 179a (describing the objective to "[i]ntegrate public and private capital . . . into strategic alliances"). The Expropriation Law directed the Argentine Government to immediately exercise all voting rights associated with the expropriated shares. App. 182a ("[T]he National Executive Office . . . shall exercise all the political rights associated with the shares subject to expropriation until the transfer of political and economic rights is completed."). The Expropriation Law was an indisputably lawful exercise of legislative authority made with respect to property located in Argentina (*i.e.*, shares of YPF).[1]

In mandating the immediate expropriation of exactly 51% of the shares of YPF owned by Repsol and directing the Argentine Government to immediately vote those shares (App. 181a-182a), the Expropriation Law conflicted with (indeed overrode) the

[1] Argentina's Constitution permits the legislature to expropriate property for a public use and provides a framework for compensation of the property owner. App. 193a-196a. Repsol's challenge to the validity of the Expropriation Law failed in Argentine courts. 2d Cir. J.A. 60-61. The expropriation process was completed when Repsol was compensated for the expropriated shares in May 2014. App. 202a.

provisions of YPF's bylaws that, but for the Expropriation Law's terms and implementation, would have (i) purportedly required Argentina to make a tender offer for all shares before acquiring a controlling stake in YPF and (ii) precluded Argentina from exercising voting rights associated with shares acquired in breach of that requirement. App. 212a-214a. In conformity with the Expropriation Law, therefore, Argentina did not make a tender offer before appropriating Repsol's shares.[2]

Pursuant to the power expressly conferred by the Expropriation Law, Argentina also exercised the voting rights of the expropriated shares and, at a June 2012 shareholder meeting, voted to cause YPF to terminate dividends under Repsol's and Petersen's agreement. App. 93a ¶ 39. Petersen alleged that, as a result of YPF's termination of dividend payments, it defaulted on its loans and went bankrupt. App. 76a-77a ¶ 6.

Petersen's Complaint

In April 2015, Petersen filed a complaint against Argentina and YPF in the district court. App. 73a-108a. Petersen alleged that, in connection with Argentina's expropriation of a controlling stake in YPF through the Expropriation Law, Argentina and YPF failed to comply with (i) "the requirement in Section 7 and 28 of [YPF's] bylaws that any acquisition of a controlling stake in YPF by Argentina be conditioned

---

[2] Argentina's expert explained that (i) the tender offer process would have "force[d] [Argentina] to acquire a larger number of shares than necessary to achieve the purposes of the expropriation as stated in the [Expropriation Law]" and (ii) under Argentine law, a private contract, such as YPF's bylaws, "cannot impede or restrict a constitutionally enacted public law," such as the Expropriation Law. App. 210a, 214a.

on a tender offer for all . . . shares" and (ii) "the provision of Section 7 of the bylaws prohibiting Argentina from voting . . . using a controlling stake acquired in violation of the tender offer requirement." App. 98a-99a, 103a ¶¶ 53, 71. Petersen asserted claims for breach of contract, among other causes of action. *Id.*

Aware that it needed to overcome Argentina's sovereign immunity under the FSIA and unable to satisfy the strict requirements of the FSIA's expropriation exception, Petersen framed its claims as merely challenging the immediate, allegedly commercial consequences of Argentina's sovereign act of expropriation—its alleged failure to make a tender offer and its exercise of shareholder voting rights in purported breach of YPF's bylaws—rather than the expropriation itself. App. 75a-76a ¶¶ 3-5. Petersen did not claim that the "expropriation exception" to sovereign immunity applied to its claims.

As a foreign sovereign presumptively immune from suit, Argentina moved to dismiss the complaint for lack of jurisdiction under the FSIA.

The Decisions Below

In September 2016, the district court denied Argentina's motion to dismiss. App. 70a-71a. The district court held that Petersen's complaint satisfied the commercial activity exception to foreign sovereign immunity under 28 U.S.C. § 1605(a)(2) because it "concern[ed] the effects of sovereign acts on commercial obligations rather than the sovereign acts themselves."[3] App. 44a. In particular, the district

[3] The district court also determined that the other aspects of Section 1605(a)(2) were satisfied because Petersen's claims were based on acts outside of the United States that caused a

court held that the complaint did not challenge the expropriation but rather challenged "Argentina's failure to issue a tender offer and YPF's failure to enforce the tender offer requirements that are contained in [YFP's] Bylaws." *Id.* At the same time, the district court indicated that these alleged obligations were "triggered" by the expropriation. App. 47a.

Argentina and YPF immediately appealed the district court's decision under the collateral order doctrine. In July 2018, the Second Circuit affirmed the denial of sovereign immunity. App. 3a. In its opinion, the Second Circuit recognized that "[e]xpropriation is a decidedly sovereign—rather than commercial—activity." App. 15a. The Court of Appeals nonetheless held that both Argentina's alleged obligation to make a tender offer under the bylaws and its alleged 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.

The Second Circuit similarly 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—*i.e.,* 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

---

direct effect in the United States. App. 44a-49a; 28 U.S.C. § 1605(a)(2). Those aspects of the statute are not presented for review in this petition.

which shares and which shares are entitled to collect dividends." *Id*.

On August 30, 2018, the Second Circuit denied Argentina's petition for panel rehearing or rehearing *en banc*. App. 72a. On Argentina's and YPF's motions, the Second Circuit stayed the issuance of its mandate pending their filing of a petition for certiorari by November 1, 2018.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Deepens a Circuit Split Regarding the FSIA's Commercial Activity Exception

The Second Circuit's decision deepens a split of authority among U.S. courts of appeals. On the one hand, the D.C. Circuit has held, correctly, that activities that directly flow from a sovereign act of expropriation are not encompassed by the commercial activities exception, even if commercial in nature. *See Rong*, 452 F.3d at 888-90. On the other hand, the Ninth Circuit has applied that exception to the commercial consequences of an expropriation. *See Siderman*, 965 F.2d at 708-09.

In *Rong*, a Chinese province expropriated the plaintiff's shares in a company and months later transferred them to a newly formed entity at a below-market price. 452 F.3d at 886-87. The province also removed plaintiff from the company's board and replaced him with party officials. *Id*. The plaintiff argued that these various acts taken by the province in connection with its ownership of the shares constituted commercial activity. *Id.* at 888-89. The D.C. Circuit disagreed. It held that, while "seem[ingly] commercial," "all of the[ ] acts [relied on by the plain-

tiff] flow[ed]" from the expropriation—"an act that can be taken only by a sovereign." *Id.* at 889. It further observed that, were the plaintiff correct, "almost any subsequent disposition of expropriated property could allow the sovereign to be haled into a federal court under [the] FSIA," which would thwart the Act's purpose. *Id.* at 890.

Conversely, in *Siderman*, the plaintiffs alleged that the Argentine government wrongfully expropriated a hotel they owned and subsequently operated it for the government's benefit, depriving them of the associated revenue stream. 965 F.2d at 709. The Ninth Circuit held that the claims fell within the FSIA's commercial activity exception. *Id.* at 708-09. The court based its holding solely on the direct commercial consequences of the expropriation—"Argentina's continuing . . . operation of the [hotel], and its receipt of profits from the [hotel's management company]," *id.*, which were "clearly activities 'of a kind in which a private party might engage.'" *Id.* at 709.

The decisions in *Rong* and *Siderman* cannot be reconciled and thus represent a clear circuit split. Nor is this inter-circuit conflict limited to two cases. *Compare, e.g.*, *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."), *with Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 725 (9th Cir. 1997) (applying the commercial activity exception to various indisputably "sovereign" acts taken by Nigeria because they were related to certain commercial acts and "the FSIA does not require that every act by the foreign state be commercial" for the exception to apply (citing *Siderman*, 965 F.2d at 709 n.10)).

Here, in holding that the commercial activity exception was capable of applying to an "activity" that itself was inextricably intertwined with (and directly followed from) a sovereign expropriation, the Second Circuit departed from the D.C. Circuit and joined the Ninth Circuit. As described further below, on the face of Petersen's complaint, the purported commercial conduct at issue—Argentina's alleged failure to make a tender offer and its exercise of shareholder voting rights in alleged breach of YPF's bylaws—flowed directly from, and was dictated by, Argentina's sovereign expropriation of a controlling stake in YPF. Consequently, the commercial activity exception would not have applied to this conduct under *Rong*. *See Rong*, 452 F.3d at 889.

The resulting lack of uniformity is uniquely problematic in this context, as the purpose of the FSIA is, in part, to ensure "a uniform body of law in this area," "[i]n view of the potential sensitivity of actions against foreign states" and the heightened risk of forum shopping. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 480, 489 (1983) (alteration in original) (quoting H.R. Rep. No. 94–1487, at 32 (1976)); *see also USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003) ("[U]niformity in decision . . . is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." (quoting H.R. Rep. No. 94–1487, at 13 (1976))); *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)*, 730 F.2d 195, 203 (5th Cir. 1984) ("[I]t is highly desirable to avoid circuit conflicts in the sensitive area of sovereign immunity."). Although the D.C. Circuit is the default venue under the FSIA's venue provisions, *see* 28 U.S.C. § 1391(f)(4), the Second Circuit's decision will en-

courage forum-shopping to the Second and Ninth Circuits to avoid the FSIA's limitations on challenges to sovereign acts, including expropriations, which will only further exacerbate the lack of uniformity in this context.

II. The Second Circuit's Decision Deviates from This Court's Precedent and Is Incorrect

The Second Circuit's decision is also inconsistent with this Court's precedent, would improperly transform virtually every sovereign expropriation into commercial conduct and negate sovereign immunity for any alleged contractual breach, and would undermine the FSIA's limited expropriation exception.

A. The Second Circuit's Decision Extends the Commercial Activity Exception Beyond "Strictly Commercial" Acts to Sovereign Acts That Invoke Sovereign Powers

This Court has recognized that the FSIA "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity," and that "the meaning of 'commercial' for purposes of the [FSIA] must be the meaning Congress understood the restrictive theory to require at the time it passed the statute." *Nelson*, 507 U.S. at 359. Under that restrictive theory, "a state engages in commercial activity . . . 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 (emphasis added) (citation omitted). More recently, this Court reaffirmed that the restrictive theory of immunity codified in the FSIA denies immunity "in cases 'arising out of a foreign state's *strictly* commercial acts,'"

and grants it "in 'suits involving the foreign sovereign's public acts.'" *Helmerich*, 137 S. Ct. at 1320 (emphasis added) (citation omitted).

The Second Circuit's extension of the commercial activity exception to conduct inextricably intertwined with a sovereign act of expropriation deviates from these established principles. Argentina's legislative expropriation of a controlling stake in YPF was accomplished through "powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360; *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . ."); *United States v. Carmack*, 329 U.S. 230, 236 (1946) ("The power of eminent domain is essential to a sovereign government."); *Rong*, 452 F.3d at 890 (recognizing that expropriation is "a quintessentially sovereign act").

On the face of Petersen's complaint, the purported commercial activity at issue—the alleged breaches of YPF's bylaws—is inextricably intertwined with, and due to, the Expropriation Law.[4] The alleged "commercial activity," according to Petersen, was Ar-

[4] Tellingly, although Petersen disclaimed any challenge to the expropriation below and made no attempt to invoke jurisdiction under the FSIA's expropriation exception, it filed a "Notice of Dispute" under a bilateral investment treaty between Argentina and Spain including allegations *in haec verba* with its complaint and asserting, *inter alia*, that the Expropriation Law operated as a wrongful expropriation of Petersen's property. 2d Cir. J.A. 461 (asserting that Argentina's "illegal actions included . . . confiscation of Repsol's controlling shareholding interest without first complying with the public tender provisions of the YPF's by-laws" and that these "measures" violated Argentina's treaty obligation "toward [Petersen] . . . not to nationalize, expropriate" or adopt "similar" measures except on certain conditions).

gentina's failure to make a tender offer and its exercise of shareholder voting rights in alleged breach of YPF's bylaws. Under Petersen's theory, as endorsed by the Second Circuit, the expropriation "triggered an obligation [under the bylaws] to make a tender offer for the remainder of YPF's outstanding shares," and the failure to do so was "commercial activity." App. 17a.

In fact, the non-occurrence of a tender offer was a direct product of, and inseparable from, the expropriation. Argentina's alleged failure to make a tender offer was specifically dictated by the Expropriation Law's interrelated provisions expressly mandating that (i) Argentina acquire *exactly* 51% of the shares of YPF owned by Repsol and (ii) YPF remain publicly traded. App. 179a, 181a, 213a-214a. Had a tender offer process occurred, it would have "force[d] [Argentina] to acquire a larger number of shares than necessary to achieve the purposes of the expropriation as stated in the law." App. 214a. Making a tender offer would have been incompatible with the Expropriation Law, because (in contrast with the terms of that Law, which held Argentina's stake at 51% of a publicly traded company), a tender offer would have required a larger takeover, exceeding the stake prescribed in the Expropriation Law and resulting in complete state ownership of YPF.

In addition, the intricate tender offer process in the bylaws (App. 120a-127a) conflicted with the Argentine Legislature's determination of an urgent public need to immediately seize and exercise control over YPF as expressed in the Intervention Decree. App. 172a-173a. The tender offer purchase price mechanism (App. 123a-126a) also clashed with that Law's compensation process.

Further, the Expropriation Law itself mandated Argentina's immediate exercise of all voting rights of the expropriated shares (App. 182a), thereby precluding application of the bylaws' prohibition against exercising voting rights associated with shares acquired in purported breach of the tender offer requirement. The alleged breaches of YPF's bylaws at issue in this case were thus the direct and inextricable "effects of [a] sovereign act[ ]." App. 44a.

Accordingly, it simply cannot be said that the alleged breaches of YPF's bylaws were accomplished through "*only* those powers that can also be exercised by private citizens," *Nelson*, 507 U.S. at 360 (emphasis added), or that Petersen's claims arise out of Argentina's "*strictly* commercial acts." *Helmerich*, 137 S. Ct. at 1320 (emphasis added); *see also Hond. Aircraft Registry, Ltd. v. Gov't of Hond.*, 129 F.3d 543, 548 (11th Cir. 1997) (indicating that commercial and sovereign elements must be "separable" before applying the commercial activity exception). Rather, these purported commercial acts were inextricably intertwined with the method through which Argentina lawfully expropriated a controlling stake in YPF using "powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360. Petersen's claims therefore fall outside of the FSIA's commercial activity exception under the principles articulated by this Court's decisions.[5]

---

[5] The Second Circuit's decision is also in tension with this Court's decision in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018), which held that, "[i]n the spirit of 'international comity,' a federal court should carefully consider a foreign state's views about the meaning of its own laws" and "accord respectful consideration" to those views. *Id.* at 1869, 1873. In its decision, the Second Circuit declared that "there is . . . no statement in [Argentina's] expert's opinion that the [Expropriation Law] compelled Argen-

B. The Second Circuit Improperly Deemed Any Alleged Breach of Contract by a Sovereign "Indisputably" Commercial Conduct

Underlying the Second Circuit's error was its endorsement of a bright-line rule that, in *all* cases, the alleged repudiation of a contract is "indisputably commercial," and the commercial activity exception invariably applies (App. 20a), notwithstanding the role that sovereign expropriation played with respect to the contract. Such a rule would substantially unsettle FSIA jurisprudence. As commentators, including the current U.S. member of the International Court of Justice, have recognized, "a per se rule against immunity for any alleged breach of contract . . . . conflicts with the legislative intent underlying the commercial activity exception and has been rejected by several courts." Joan E. Do-

---

tina to 'acquire *exactly* 51% ownership in YPF' and no greater ownership position." App. 22a (emphasis in original). Yet, Argentina's expert submissions established that the expropriation process "excluded any procedure, such as the public tender offer described in YPF's bylaws, which would have force[d] the Republic to acquire a larger number of shares than necessary to achieve the purposes of the expropriation stated in the law." App. 214a. The Second Circuit gave no consideration, let alone "respectful consideration," to Argentina's experts on the meaning of Argentina's own laws. And the district court was more explicit in its failure to consider Argentina's experts. Disregarding expert testimony that the Expropriation Law preempted any tender offer obligation because a public law cannot be restricted or limited by private contract under Argentine law, the district court declared "I actually don't really care what the experts say." 2d Cir. J.A. 538. Nonetheless, this Court need not address any factual disputes as to the meaning of the Expropriation Law or YPF's bylaws to resolve the question presented in this petition.

noghue, *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); *see, e.g.*, *Millen Indus.*, 855 F.2d at 885 ("[Claims] based on . . . breaches of promises . . . involving extending duty-free status and/or the benefit of Taiwanese law . . . would plainly be sovereign aspects of the transaction over which we lack jurisdiction."); *de Sanchez v. Banco Cent. de Nicaragua*, 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 MCI Telecomms. Corp. v. Alhadhood*, 82 F.3d 658, 663 (5th Cir. 1996) (alleged promise to pay for telephone calls made through diplomatic channels was not "commercial activity"). Such a bright-line rule also ignores the commonsense notion "that a given act be judged in context before concluding whether it is commercial activity." *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994); *see also 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]."); Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 Harv. Int'l L.J. 1, 75 (1998) ("United States courts should [not] be able to judge a non-commercial sovereign act that triggers the non-performance of a sovereign's original commercial obligation.").

Applying the commercial activity exception to alleged breaches of contract intertwined with a sovereign act of expropriation would also thwart congressional intent. In enacting the commercial activity exception, Congress "did not intend to abro-

gate the traditional immunity accorded a foreign state when it acted as a sovereign." George Kahale, III, *Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunites Act and the Act of State Doctrine*, 6 Fordham Int'l L. J. 391, 407 (1982). "To place nationalization under the umbrella of [the commercial activity exception] on the theory that it is an act in connection with a commercial activity would not [be] consistent with this legislative intent." *Id.*

In addition, "[o]ne of the main concerns of the immunity framework adopted by the FSIA is to accommodate 'the interests of foreign states in avoiding the embarrassment of defending the propriety of [sovereign] acts before a foreign court.'" *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (citation omitted). This purpose is severely undermined where, as here, a sovereign must defend against claims based on conduct that directly followed and was inseparable from a sovereign act. Given the inextricable links between the claims at issue in this case and Argentina's sovereign act of expropriation, Argentina will inevitably be forced to "defend[ ] the propriety" of that sovereign act before the district court. *Id.*; *cf. World Wide Minerals, Ltd. v. Republic of Kaz.*, 296 F.3d 1154, 1166 (D.C. Cir. 2002) (affirming dismissal of breach of contract claim under act of state doctrine because conduct resulting in breach was "accomplished pursuant to" a sovereign act of expropriation, and "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government" (quoting *Sabbatino*, 376 U.S. at 428)); *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 955–56 (5th Cir. 2011) (affirming dismissal of antitrust claims under act of state doctrine be-

cause "[t]he granting of any relief to Appellants would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories" and thereby "frustrate the longstanding foreign policy of the political branches by wading . . . brazenly into the sphere of foreign relations").

In short, the Second Circuit "paid little heed to the risks to international comity its expansive view of . . . jurisdiction posed." *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014) (referring to personal jurisdiction). Because cases involving foreign states "might have serious foreign policy implications which courts are ill-equipped to anticipate or handle," *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1155–56 (7th Cir. 2001) (citation omitted), the FSIA's exceptions to foreign sovereign immunity must be "narrowly construed." *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000). The Second Circuit painted, instead, with a broad brush—extending the "commercial activity" exception beyond its intended reach to quintessentially sovereign conduct.

C. The Second Circuit's Decision Undermines the Limited Expropriation Exception to Sovereign Immunity

In extending the commercial activity exception to conduct inextricably intertwined with an expropriation, the Second Circuit's decision effectively permits plaintiffs to circumvent the requirements of the narrow "expropriation exception" to sovereign immunity. In light of the uniquely sovereign nature of expropriations, Congress granted courts jurisdiction over claims arising from expropriations only in very specific and limited circumstances, including where property is taken in violation of international law

and has a commercial nexus to the United States. *See* 28 U.S.C. § 1605(a)(3).

Specifically, the expropriation exception permits the exercise of jurisdiction only in cases:

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). Just last term, this Court reaffirmed that the expropriation exception is narrowly drawn: it "grants jurisdiction only where there is a valid claim that 'property' has been 'taken in violation of international law.'" *Helmerich*, 137 S. Ct. at 1318; *see also De Sanchez*, 770 F.2d at 1395 ("In applying Section 1605(a)(3), our inquiry is narrowly circumscribed."); H.R. Rep. No. 94-1487, at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618 (expropriation exception is limited to "two categories of cases . . . where 'rights in property taken in violation of international are in issue'").

"In enacting Section 1605(a)(3), Congress decided that foreign states would be subject to suit in U.S. courts in only a narrow class of cases— ones in which 'international law' has been 'violat[ed]' by such an action and a commercial-activity nexus to the United States is present." Brief of United States as Amicus Curiae at 17, *Bolivarian Republic of Venezuela v.*

Helmerich & Payne Int'l Drilling Co., 37 S. Ct. 1312 (2017) (No. 15-423). "Governmental decisions involving property . . . within a sovereign's own territorial jurisdiction are generally reserved to that sovereign free of interference by the courts of another nation." *Id.* (citing *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1520-1524 (D.C. Cir. 1984)).

Notwithstanding the congressional determination to confine U.S. jurisdiction over challenges to sovereign expropriations to specified cases where the taking violated international law, *see* 28 U.S.C. § 1605(a)(3), the Second Circuit's decision would allow a plaintiff aggrieved by an expropriation—even one that violated no international norms—to bypass the express strictures of the expropriation exception and secure U.S. jurisdiction merely by challenging the immediate contractual or other seemingly commercial consequences of the expropriation. Such a result is contrary to the principle that, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

The Second Circuit's interpretation of the commercial activity exception would render the expropriation exception and its carefully-crafted limitations largely meaningless, and has been properly rejected by other courts. *See Beg v. Islamic Republic of Pak.*, 353 F.3d 1323, 1327–28 (11th Cir. 2003) (declining to apply commercial activity exception to sovereign defendant's failure to abide by agreement to compensate plaintiff in connection with the expropriation of his property in part because "the FSIA

has a separate exception for certain foreign government expropriations"); *de Sanchez*, 770 F.2d at 1398 ("We do not believe that Congress intended plaintiffs to be able to rephrase their takings claims … and thereby bring the claims even where the takings are permitted by international law."). In *Alberti v. Empresa Nicaraguense De La Carne*, for instance, the plaintiffs sued the Government of Nicaragua after it expropriated the plaintiffs' 35 percent stake in a beef company. *See* 705 F.2d 250, 252 (7th Cir. 1983). In declining to apply the commercial activity exception, the Seventh Circuit rejected the plaintiffs' attempt to "transform [a] governmental dispute into a commercial dispute" by seeking to offset the value of their expropriated stock against a debt owed for beef they had purchased from the nationalized company. *Id.* at 254. The Seventh Circuit determined that the plaintiffs' suit was based on the expropriation, "which is a quintessential Government act." *Id.* at 254. The above decisions confirm that where, as here, a plaintiff's claims arise from a sovereign expropriation, the plaintiff should not be permitted to circumvent the defendant's sovereign immunity under the FSIA merely by reframing their claims as challenging commercial conduct. *See generally OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015) (cautioning against "allow[ing] plaintiffs to evade the [FSIA's] restrictions through artful pleading").

Moreover, given that "every expropriation of property has some commercial implications," *Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 32 (E.D.N.Y. 2002), *vacated and remanded on other grounds*, 72 F. App'x 850 (2d Cir. 2003), the Second Circuit's decision will make U.S. jurisdiction available to virtually any plaintiff aggrieved by a foreign expropriation:

all they will need to do is characterize one consequence of the taking process as "commercial" in its effect. Indeed, the D.C. Circuit correctly reasoned that, if the commercial activity exception were to apply in such an indiscriminate manner, then "almost any subsequent disposition of expropriated property could allow the sovereign to be haled into a federal court under [the] FSIA." *Rong*, 452 F.3d at 890. And as one commentator noted: "American courts taking jurisdiction because of post-expropriation commercial activities must review acts of governments which Congress intended to be reviewable only within the narrow confines of [the FSIA's expropriation exception]." Philippe Lieberman, *Expropriation, Torture, and* 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).

This increased burden on foreign sovereigns and U.S. courts undermines the FSIA's structure and objectives and will translate, through reciprocity, to increased burdens on the United States in foreign litigation. *See Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955) (recognizing that sovereign immunity is derived from standards of "reciprocal self-interest"). That is precisely the result this Court sought to avoid in *Helmerich*. *See Helmerich*, 137 S. Ct. at 1322 (accepting the Department of State's warning against interpreting the FSIA's expropriation exception in a manner that "would 'affron[t]' other nations, producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States in 'expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated'").

III. The Second Circuit's Decision Raises an Exceptionally Important and Recurring Question Implicating Foreign Policy Interests that Should Be Addressed by This Court

As this Court has long recognized, "foreign sovereign immunity is a matter of grace and comity on the part of the United States," and "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983); *accord Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) ("We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area.").

"The doctrine of foreign sovereign immunity has been recognized since early in the history of our Nation" and "is premised upon the 'perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse.'" *Republic of Phil. v. Pimentel*, 553 U.S. 851, 865 (2008) (citation omitted). This doctrine "helps to 'induc[e]' each nation state, as a matter of 'international comity,' to 'respect the independence and dignity of every other,' including our own." *Helmerich*, 137 S. Ct. at 1319 (citation omitted); *accord Pimentel*, 553 U.S. at 866 ("Giving full effect to sovereign immunity promotes . . . comity interests . . . . [as] foreign sovereign immunity derives from 'standards of public morality, fair dealing, reciprocal self-interest, and respect for the "power and dignity" of the foreign sovereign.'" (citation omitted)).

Sovereign immunity is derived in part from standards of "reciprocal self-interest." *Nat'l City Bank of N.Y.*, 348 U.S. at 362. Its purposes thus include "according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts." *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1999). Courts "give effect to these Congressional purposes by considering the potential impact of [their] FSIA interpretations on foreign litigation involving the United States and its interests." *Id.*; *accord Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (noting that "some foreign states base their sovereign immunity decisions on reciprocity" and declining to adopt construction of FSIA that bore the "potential for international discord and for foreign government retaliation"); H.R. Rep. No. 94–1487, at 29–30 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6628–29 (noting goal of FSIA provision to prevent unfavorable treatment of U.S. corporations in courts abroad); *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing statute to avoid "invit[ing] retaliatory action from other nations").

Whether the commercial activity exception applies to conduct inextricably intertwined with a sovereign act poses a vitally important and oft-recurring question. As described above, the doctrine of sovereign immunity codified in the FSIA implicates exceptionally important and sensitive interests bearing on foreign relations and international comity. Thus, in recent years this Court has frequently granted certiorari to review decisions that, as here,

risked infringing upon state sovereignty.[6] The exceptionally important interests embodied in the FSIA are heightened here, where a U.S. court has asserted jurisdiction over conduct inextricably intertwined with a foreign state's quintessentially sovereign act of legislating to expropriate a stake in its largest oil company, an act it judged necessary to avert an escalating domestic energy crisis and ensure national energy independence. *Cf. Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 954–55 (5th Cir. 2011) ("The Supreme Court has held, albeit in a different factual context, that exploitation of natural resources is an inherently sovereign function." (citing *United States v. California*, 332 U.S. 19, 38–39 (1947))); *see also Mastafa v. Chevron Corp.*, 770 F.3d 170, 187 (2d Cir. 2014) ("[T]he danger of unwarranted judicial interference in the conduct of foreign policy is . . . . all the more pressing when the question is whether a cause of action under the [Alien Tort Statute] reaches conduct within the territory of another sovereign." (citation omitted)).

---

[6] *See, e.g.*, *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018); *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015); *Republic of Arg. v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014); *Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012); *Samantar v. Yousuf*, 560 U.S. 305 (2010); *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 556 U.S. 366 (2009); *Republic of Phil. v. Pimentel*, 553 U.S. 851 (2008); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Permanent Mission of India to U.N. v. City of New York*, 551 U.S. 193 (2007); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 546 U.S. 450 (2006); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

In addition, given that "every expropriation of property has some commercial implications," *Garb*, 207 F. Supp. 2d at 32, lawsuits like Petersen's challenging those alleged implications are not uncommon and are especially likely to recur if the decision below stands. Courts of appeals, for instance, have recently considered cases under the FSIA involving the expropriation of real property, *see, e.g., Beg*, 353 F.3d at 1326–28, personal property, *see, e.g., Simon v. Republic of Hungary*, 812 F.3d 127, 141–42 (D.C. Cir. 2016), stock, *see, e.g., Rong*, 452 F.3d at 888-89, bank accounts, *see, e.g., Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 474–75 (D.C. Cir. 2007), and art. *See, e.g., de Csepel v. Republic of Hungary*, 714 F.3d 591, 598–600 (D.C. Cir. 2013).

More generally, commentators have noted that "litigation against foreign states under foreign-sovereign-immunity legislation has become a significant category of contemporary international adjudication," with approximately 1,000 cases involving claims against foreign states pending in national courts at any given time and approximately 250 new cases filed each year. Gary Born, *A New Generation of International Adjudication*, 61 Duke L.J. 775, 823–24 (2012). A substantial portion of these cases involve the FSIA's commercial activity exception—the "'most significant . . . exception[ ]' to foreign sovereign immunity' . . . 'at the heart' of the FSIA's codification of the restrictive theory of foreign sovereign immunity." *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 992 (10th Cir. 2007) (citations omitted).

Further, while the Second Circuit's decision deviates from certain fundamental principles adopted by this Court (*see* Section II, *supra*), the Court has never squarely addressed whether the FSIA's

commercial activity exception applies to conduct inextricably intertwined with a sovereign act. Indeed, this Court has noted that it has not yet addressed a case "where a claim consists of both commercial and sovereign elements." *Nelson*, 507 U.S. at 358 n.4.

Courts have struggled to fill the void left by this Court's silence on this issue, often reaching conflicting decisions. Courts have observed that "the case law in this area lacks clarity," *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 706 F. App'x 269, 273 (6th Cir. 2017), and that "drawing the line between commercial and sovereign activities for FSIA purposes can sometimes be quite difficult." *Azima v. RAK Inv. Auth.*, 305 F. Supp. 3d 149, 162 (D.D.C. 2018); *see also* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 279 (5th ed. 2011) ("[T]he historic uncertainties that have surrounded the distinction between commercial and sovereign acts can be expected to persist."). One commentator in this area has highlighted the existence of conflicting authority on a question similar to the one presented here; namely, whether "a nationalization involving a breach a contract is a commercial act." Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 370 (2d ed. 2003).

This case offers an ideal vehicle for the Court to resolve these exceptionally important and unsettled questions and clarify the scope of the commercial activity exception to sovereign immunity under the FSIA. As described above, on the face of Petersen's complaint, the claims in this case are inextricably intertwined with Argentina's sovereign expropriation of a controlling stake in YPF. The Second Circuit's assertion of jurisdiction over conduct inextricably intertwined with a quintessentially sovereign act will have far-reaching implications for foreign relations

and international comity. "[A]pplying the commercial activity exception to claims based on the expropriating country's post-expropriation commercial activities seriously limits the sovereign's rights to expropriate and its respective benefits." Lieberman, *supra*, at 528; *see also* Dellapenna, *supra*, at 369 ("Once one realizes that a nationalization is 'commercial' if it involves breach of a contract, one could also conclude that the foreign state is acting like a private person whenever it nationalizes property, even without breaching a contract. After all, a private person is capable of converting property . . . . If the [FSIA] requires a court to determine the 'commerciality' of an act by its most specific aspect, then arguably a foreign state is never immune for nationalizing property."). This Court should intervene to address this vitally important issue now.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Maura Barry Grinalds
Counsel of Record
Boris Bershteyn
Jonathan J. Lerner
Timothy G. Nelson
Austin R. Winniford
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000
maurabarry.grinalds@skadden.com

Counsel for Petitioner

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,

---

[*] 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,

---

[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).)

---

[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

---

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.

---

[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-cv(L), 163304-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.

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, Argentine Republic, 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

APPENDIX D
COMPLAINT, FILED APRIL 8, 2015

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

15-cv-2739

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

Plaintiffs,

-v.-

ARGENTINE REPUBLIC, and YPF S.A.,

Defendants.

COMPLAINT

Plaintiffs Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U., (collectively, "Petersen" or "Plaintiffs"), through their court-approved receiver, and by and through their undersigned counsel, on information and belief allege as follows for their Complaint against Defendants:

NATURE OF THE ACTION

1. This is the successor action to *Repsol YPF, S.A. v. Republic of Argentina*, No. 12- CV-3877 (TPG), filed in this Court. Petersen was included within the putative class definition in the prior action, but Repsol and the other named plaintiff settled individually after briefing and oral argument but before any class was certified, and the prior action

was voluntarily dismissed. Plaintiffs now pursue their claims directly through this individual action. The claims herein relate to unlawful conduct by YPF S.A., ("YPF" or the "Company"), an Argentine public company registered with the United States Securities and Exchange Commission ("SEC") and traded on the New York Stock Exchange ("NYSE"), and by the Argentine Republic ("Argentina") with respect to the shares of YPF. Plaintiffs, like Repsol, owned American Depositary Shares ("ADSs") of YPF, which are evidenced by American Depositary Receipts ("ADRs") listed on the NYSE and provided by the Bank of New York Mellon (f/k/a Bank of New York), whose New York City office administers YPF's ADRs as depositary agent pursuant to a deposit agreement governed by New York law.

2. In 1993, Argentina, acting as the controlling shareholder of YPF, its then state-owned oil company, decided to privatize YPF through an initial public offering ("IPO") of Class D shares of YPF, compromising nearly 100% of YPF's voting stock. Argentina and YPF registered those Class D shares and related ADRs with the SEC and listed the ADRs on the NYSE (hereinafter, the "shares" or the "Class D shares" shall refer collectively to the ADRs, the ADSs, and the Class D shares). In order to induce investors like Petersen to purchase shares in that former state enterprise, Argentina and YPF promised that any subsequent acquisitions of a controlling stake in the Company, explicitly including any reacquisition of control by Argentina itself, would be conditioned on the acquirer making a tender offer for all Class D shares of YPF at a predetermined price. Those promises were made in YPF's bylaws, which constitute a binding contract

enforceable against Argentina and YPF, in YPF's U.S. IPO Prospectus dated June 28, 1993 (the "U.S. IPO Prospectus") filed with the SEC and disseminated by Argentina and YPF into the United States, and in numerous SEC filings made by YPF thereafter.

3. But Argentina and YPF intentionally and in bad faith breached those promises. When, in 2012, Argentina took steps to re-take control of YPF's operations, Argentina and YPF wholly disregarded the tender offer requirement. Argentina acquired a majority stake in YPF, usurped the function of its board and president, and took over governance of the Company — all without making the tender offer required by the bylaws and promised in the U.S. IPO Prospectus. Deputy Economy Minister Axel Kicillof, whom Argentina installed as "Vice-Intervenor" to take control of YPF, called the tender offer requirement an "unfair" "bear trap" that only "fools" would expect Argentina and YPF to honor.

4. The result of Defendants' breach of the tender offer requirement and other unlawful conduct was devastating to Petersen and other YPF stockholders. In a matter of months, YPF's share price dropped by half, causing substantial harm to Petersen. Defendants' conduct also caused Petersen additional harm by, among other things, causing Petersen to default on its loan agreements with its creditors, which then foreclosed on its YPF shares. These harms were known and foreseeable to Argentina and YPF because they were fully aware of Petersen's loan agreements, which were attached as exhibits to Petersen's SEC Form 13-D filings on YPF's shares and described in detail in YPF's SEC

Form 20-F filings. As a result of Defendants' conduct, Petersen sustained substantial financial damages and ultimately went bankrupt.

5. Plaintiffs accordingly seek compensatory damages for Argentina's and YPF's breaches of contract and other relief as set forth herein. Plaintiffs' claims do not require any ruling on the sovereign acts of Argentina or YPF. Rather, this action seeks to enforce contractual commitments that Argentina and YPF made in their commercial capacities during their sale of YPF shares to the public and regularly repeated thereafter, including in the United States and on the NYSE. Argentina's and YPF's reneging on those commitments also constitute quintessentially commercial conduct. Defendants' conduct occurred in, had a significant nexus with, and had a direct effect in, the United States and this District because, among other things, the promised tender offer was required to occur in substantial part in New York City, and because the foreclosure of Petersen's shares, which was a direct result of Defendants' unlawful actions, was effectuated in substantial part by the Bank of New York Mellon in New York City.

PARTIES

6. Plaintiffs Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U., are two limited-liability companies (sociedad anonima unipersonal) organized under the laws of the Kingdom of Spain. Through a series of transactions in 2008 and 2011, Petersen purchased NYSE-listed and SEC-registered shares of YPF stock amounting to just over 25% ownership in the Company.

Petersen financed the purchase in part through two sets of loans, one made by a group of financial institutions and another made by Repsol YPF, S.A. ("Repsol"), YPF's majority shareholder at the time. Petersen was to service the interest and principal payments due under those loans using the dividend payments associated with the acquired stock. Both sets of loans were secured by Petersen's YPF shares. As a result of Argentina's and YPF's actions, the value of Petersen's YPF shares dropped substantially, and Petersen defaulted on its loan obligations to its creditors, which foreclosed on Petersen's YPF shares. Petersen subsequently entered into insolvency proceedings in Spain and is undergoing liquidation in an effort to satisfy its outstanding creditor claims. This action is brought by Petersen's receiver pursuant to the liquidation plans approved by the Spanish bankruptcy court.

7. Defendant the Argentine Republic is a foreign state organized as a federation of twenty-three provinces and an independent federal city (Buenos Aires). Currently, Argentina is the controlling shareholder of YPF. Prior to the 1993 IPO of YPF, Argentina was the sole owner of YPF, and it participated in that offering, including the SEC-registered offering of YPF shares, as the Company's sole and selling shareholder. Subsequent to the IPO, YPF was owned, managed, and controlled by private shareholders. Argentina remained a minority, non-controlling shareholder of the Company, specifically as the holder of Class A shares, and continued to participate in its management through a designated representative on the Company's board of directors.

8. Defendant YPF is a publicly-held limited liability stock company (sociedad anonima) organized under the laws of Argentina. It is currently an instrumentality of Argentina, which owns a majority and controlling interest therein. The address of its principal executive offices is Macacha Güemes 515, C1106BKK, Buenos Aires, Argentina. Prior to 1993, it was an exclusively state-owned, monopolist oil and gas company. In the early 1990s, YPF was privatized and Argentina took it public in 1993. YPF's shares trade on the NYSE, in the form of ADRs, under the symbol "YPF." The ADRs evidence an ownership interest in YPF's ADSs, which in turn represent an ownership interest in YPF's Class D shares. YPF's Class D shares comprise almost 100% of the Company's outstanding capital stock. ADRs represent approximately 60% of YPF's outstanding Class D shares, and thus approximately 60% of YPF's capital stock.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1330 and 28 U.S.C. § 1367. This is a non-jury civil action against a foreign state, as defined in 28 U.S.C. § 1603(a), that asserts claims for relief in personam with respect to which the foreign state is not entitled to immunity under 28 U.S.C. § 1605(a), or under any applicable international agreement. In particular, immunity under 28 U.S.C. § 1605(a)(2) does not apply, because this action is based upon the defendant's commercial activity and its acts in connection therewith, which have been carried on and performed and have caused direct effects in the

United States. The Court also has supplemental jurisdiction under 28 U.S.C. § 1367(a).

10. Venue in the Southern District of New York is proper pursuant to 28 U.S.C. § 1391 because, among other things, a substantial part of the events and omissions giving rise to the claims alleged occurred in this District.

FACTUAL ALLEGATIONS

I. Argentina's Privatization of YPF and Adoption of the Tender Offer Requirements

11. From the 1920s through the 1980s, Argentina maintained a monopoly in the oil and gas industry through state agencies and YPF's predecessor entity, Yacimientos Petroliferos Fiscales. YPF was an entirely state-owned and state-run enterprise, dominated and controlled by Argentina as its sole shareholder. Argentina actively participated in and exercised control over YPF's operations. As disclosed in the U.S. IPO Prospectus, Argentina operated YPF in accordance with the national hydrocarbon policy and other governmental policies. These policies "generally reflected broader Argentine political and social objectives rather than business strategies designed to maximize [YPF's] profitability." As an instrument of Argentina, YPF functioned as its agent and representative.

12. However, in the early 1990s, Argentina made a decision to privatize YPF, representing to potential investors that the Company would be "transform[ed]" from an inefficient government

monopoly "into an efficient and competitive enterprise." Acting in a commercial capacity no different from any private controlling shareholder, Argentina sought to monetize a portion of its interest in YPF by publicly offering shares.

A. YPF's IPO

13. On June 29, 1993, acting in a commercial capacity, Argentina and YPF launched an IPO of YPF's Class D shares. YPF's Class D shares were offered on multiple stock exchanges including the NYSE. The single largest portion of the public offering was Argentina's sale of shares into the United States, which represented 65,000,000 of the total 140,000,000 Class D shares offered in the privatization. Indeed, the U.S. offering alone generated proceeds of more than $1.1 billion directly to Argentina as selling shareholder. That offering was registered through registration statements filed with the SEC in accordance with the Securities Act of 1933 and effectuated by means of the U.S. IPO Prospectus.

14. As part of YPF's IPO and in addition to its extensive contacts with the NYSE and the SEC, Argentina and YPF engaged in substantial commercial activity that occurred in, had a significant nexus with, and had a direct effect in, the United States and this District. Among other things, YPF's ADRs are issued by the Bank of New York Mellon, a New York banking corporation, from its offices in New York, NY, pursuant to a Deposit Agreement governed by New York law. The Bank of New York Mellon holds the underlying YPF Class D shares in its capacity as a depositary bank.

According to its SEC Registration Statement, YPF designated CT Corporation Systems in New York City as its agent for service of process. The IPO was underwritten in the United States by numerous investment banks located in New York with major New York City law firms as counsel. The IPO roadshow included material presence in the United States generally and New York City specifically.

15. Argentina and YPF pitched the offering to investors as part of YPF's "transformation from a politically managed, government-owned monopoly to an efficient and competitive integrated oil company." In marketing the Company to U.S. investors, Argentina and YPF distinguished in the U.S. IPO Prospectus the past management of YPF, in which government policies "dictated the management and operation of [YPF]" based on "broader Argentine political and social objectives rather than business strategies designed to maximize [YPF's] profitability." And Argentina and YPF pointedly noted that while YPF was under Argentine state control, "[its] operations were inefficient, and generally lacked continuity in planning and effective internal controls. Stringent financial criteria were not applied in making investment decisions, and [YPF]'s opportunities to reinvest internally generated funds were subject to government budgetary constraints." It is thus unsurprising that, in such circumstances, investors insisted on a compensated exit should Argentina once again obtain control of YPF, and again run YPF according to its own policies, rather than shareholder interest.

B. Adoption of the Tender Offer Requirement in YPF's Bylaws

16. In the context of this privatization and YPF's public offering, Argentina and YPF, again acting in commercial capacities no different than any private controlling shareholder and corporation, adopted certain provisions in YPF's bylaws designed to induce investors to purchase the Company's shares by committing to investors that they would receive a compensated exit in the event Argentina were to have a change of heart and choose to retake control of YPF. Those bylaw amendments took effect in May 1993 and have been in effect continuously since that date.

C. Section 7 of the Bylaws Requires a Tender Offer Upon a Control Acquisition

17. Section 7 of YPF's bylaws requires persons intending to consummate a control acquisition to first make a public tender offer for all of YPF's outstanding shares. Specifically, under Section 7, no acquisition of shares or securities of YPF that would allow the acquirer to hold or exercise control over 20% of more of YPF's Class D shares or 15% or more of the corporate capital may take place unless the acquirer launches a tender offer to acquire all the shares of all classes of YPF. The rule applies to acquisitions whether direct or indirect and "by any means or instrument." Section 7 was triggered and honored in the case of two prior acquisitions, including one by the Plaintiffs.

D. The Tender Offer Requirement Applies to Control Acquisitions by Argentina

18. Critically, Section 28 of the bylaws expressly provides that the tender offer requirement of Section 7 applies to any acquisition of control by Argentina itself. Argentina added this provision because one of the core purposes of the new tender offer provisions was to assuage investors' concern that if Argentina should later change its mind about privatizing the formerly state-owned oil company, investors could wind up holding equity in a government-dominated YPF, operated not for their benefit as shareholders, but as an instrumentality of the Argentine government. That is precisely what happened in 2012, but Argentina and YPF did not honor their tender offer obligations.

19. Indeed, Section 28 was addressed specifically to control transactions by Argentina, setting forth "Normas especiales" — "Special provisions" — that made such transactions subject to Section 7 and required Argentina to make a tender offer for all outstanding Class D shares as a condition of acquiring directly or indirectly, by any means or instrument, YPF's shares or securities if, as a result, Argentina were to own or exercise control over (i) at least 49% of YPF's capital stock; (ii) at least 8% of all Class D shares outstanding (where it also holds Class A shares representing 5% or more of the company's capital stock); or (iii) 20% or more of YPF's Class D shares.

20. Underscoring the bylaws' tender offer requirement in the case of Argentina attempting to acquire a controlling stake in YPF, Section 28 expressly prohibits Argentina from exercising control over the Company unless and until it has

made a tender offer. The bylaws also prohibit Argentina from exercising corporate governance powers using control acquired without making a tender offer to the other Class D shareholders.

E. The Bylaws Specify the Price Shareholders Must Be Offered

21. The bylaws not only require a tender offer, but also specify the procedures such a tender offer must follow and the price at which the offer must be made. That price is the highest of: (i) the highest price the acquirer paid for Class D shares in the preceding two-year period; (ii) the highest closing price, at the seller's rate, for a Class D share of stock, as quoted on the Buenos Aires Stock Exchange, for the preceding thirty-day period; (iii) the product of the highest closing price on the Buenos Aires Stock Exchange in the preceding thirty-day period and the ratio of the highest price the acquirer paid for a Class D share in the preceding two-year period against the market price of a Class D share on the day immediately prior to the first day of that two-year period; and (iv) the product of YPF's net income per Class D share during the immediately preceding four complete fiscal quarters and the higher of either the price/income ratio for those four quarters or the highest price/income ratio over the preceding two-year period.

F. The Bylaws Specify That the Tender Offer Shall Be Made in New York

22. The bylaw provisions also mandate that the required tender offer be specifically made and publicized in New York City. Under Section 7, the

offeror must publish a notice of the offer at least once a week for the duration of the offer in the business section of the major newspapers of New York City. The notice must set forth, inter alia, the identification of the bidder, the tender offer price, and a statement that the offer is open to all of YPF's shareholders.

23. Section 7 also requires that the tender offer comply with applicable regulations in the jurisdictions where the tender offer takes place and the provisions of the stock exchanges where YPF's shares are listed. The tender offer mandated by Section 7 therefore must comply with the applicable rules and regulations of the SEC and the NYSE. Those rules and regulations, incorporated by reference in the tender offer provisions, in turn require that, for the benefit of U.S. investors, a tender offer statement be filed in the United States with the SEC, notice be provided to investors and to the NYSE, and the establishment of a depository or forwarding agent in New York.

G. Argentina and YPF Reiterate the Tender Offer Commitment in the U.S. IPO Prospectus and Other SEC Filed Documents

24. In addition to amending the bylaws, Argentina and YPF expressly committed in the U.S. IPO Prospectus that there would not be any acquisition of control (including a reacquisition by Argentina) without the launch of a tender offer for all of the Class D shares it was taking public: "***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." Argentina and YPF also committed in the U.S. IPO Prospectus that "***[a]ny 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.***" The value of Argentina and YPF's promise that it would not retake control of YPF without offering all Class D shareholders a compensated exit was priced into the value of Class D shares when they were offered in 1993 and at all times thereafter.

25. Argentina and YPF have repeatedly reiterated and reaffirmed to investors, in the U.S. and elsewhere, their commitment that a tender offer would accompany any acquisition of a controlling stake in YPF. In addition to their inclusion in the U.S. IPO Prospectus, YPF has regularly included or incorporated by reference English versions of the bylaws in the Form 20-F that it files with the SEC on an annual basis. Indeed, so fundamental are the tender offer provisions that YPF has described them in each of its annual Form 20-Fs filed with the SEC since the 1993 IPO.

26. The privatization and public offering of YPF did not end Argentina's role as YPF shareholder. To the contrary, after privatization, Argentina in its commercial capacity continued to exercise important privileges and play a significant continuing role in

YPF's corporate governance. Argentina remained the holder of YPF's Class A shares, holding 3,764 such shares as of December 31, 2011. Pursuant to the bylaws, as the holder of Class A shares, Argentina votes separately with respect to the election of YPF's board of directors and, as long as it held a single Class A share, Argentina was entitled to appoint one director and one alternate director. In addition, Argentina enjoyed veto rights with respect to specific categories of corporate activities, including acquisition by a third party of shares representing more than 50% of YPF's capital stock. As the holder of YPF's Class A shares and through its representative on the Company's board of directors, Argentina made and approved each and every one of those continuing promises and continuously ratified its tender offer obligations under YPF's bylaws.

II. Petersen's Acquisition of YPF Shares in Reliance on the Tender Offer Protection

27. In February 2008, Petersen entered into several agreements with Repsol and several financial institutions to facilitate the purchase of approximately a 25% ownership stake in YPF via the acquisition of ADSs. Each ADS represented one Class D share, and Repsol's ownership of the ADSs was evidenced by ADRs issued by the Bank of New York Mellon in New York City, which serves as the depositary bank for YPF ADRs. Upon Repsol's sale of the ADSs to Petersen, Repsol delivered the ADRs to Petersen and notice was provided to the Bank of New York Mellon, which updated its records to reflect Petersen's ownership of the ADSs.

28. Petersen first purchased a 14.9% stake in YPF Class D shares in February 2008 by purchasing ADSs, evidenced by ADRs issued in New York City. Later in 2008, Petersen exercised an option to acquire an additional 0.1% of YPF, again in ADSs, which acquisition triggered Petersen's obligation under Section 7 of the bylaws to make a tender offer, an obligation with which Petersen complied. As a result of the tender offer, Petersen acquired an additional 0.46% of YPF in December 2008. Then, in May 2011, Petersen exercised a second option to purchase an additional 10% of YPF's stock, again via ADSs, putting its ownership stake at just over 25%.

29. Petersen made its decisions to invest in YPF in justifiable reliance on the representations and promises that Argentina and YPF made regarding the launching of a tender offer in the event Argentina were to decide to renationalize YPF.

30. Petersen financed the purchase of its YPF shares through separate agreements with a group of large financial institutions and with Repsol, then the controlling shareholder of YPF. Those loans were secured, among other things, by a pledge of Petersen's YPF shares in favor of the collateral agent designated by the parties, and notice to that effect was provided to Bank of New York Mellon as depositary agent. In the case of the loan by Repsol, the Bank of New York Mellon served as the collateral agent. Under § 2.04(b)(i) of Petersen's credit agreements with both the financial institutions and Repsol (the Credit Agreement, and the Seller Credit Agreement, respectively), Petersen was required every six months to prepay its debt and interest obligations in an amount equal to the

dividends generated during that six-month period. These agreements also specified certain events of default that, if triggered, entitled Petersen's creditors to foreclose on its YPF shares, which were held as collateral. To provide Petersen the necessary liquidity to satisfy those pre-payment obligations, Repsol and Petersen entered a shareholders' agreement (the "Shareholders' Agreement") in which Repsol agreed, among other things, to cause YPF to distribute dividends twice per year, amounting to 90% of YPF's profits. The parties also agreed to a single "extraordinary dividend" of $850,000,000. Argentina and YPF were aware of these agreements, which were subsequently described in the Form 20-Fs that YPF filed with the SEC, and they participated in their implementation.

III. Argentina and YPF's Campaign To Devalue YPF's Shares

31. Through the end of 2011, YPF was a commercial success as a privately held oil and gas company. Throughout that period, YPF made semi-annual dividend payments, generally in May and November, as provided under the Shareholders' Agreement. Accordingly, Petersen satisfied its debt obligations over that time period.

32. But beginning no later than January 2012 and through mid-April 2012, Argentina began to consider retaking control — and ultimately did retake control — of YPF. In advance of its actual reacquisition of control, Argentina engaged in an intentional campaign to devalue YPF's Class D shares.

33. In late January 2012, the Argentine newspaper Pagina 12, which is widely regarded to be a mouthpiece for the Kirchner administration, began reporting that Argentina was considering nationalizing YPF. In just the first month after it was leaked that the government was considering nationalizing YPF, the price of YPF's ADRs dropped over 20%. By the end of February, the Argentine legislature had reportedly prepared a plan to nationalize YPF and the plan had been presented to President Kirchner. YPF's ADR price dropped over 14% on the news. The Argentine, U.S., and Spanish press anticipated that a formal announcement of nationalization would come during the opening of the legislative session on March 1, 2012, but no such announcement was made. In mid-March, Pagina 12 reported that Argentina intended to nationalize YPF before winter began in the southern hemisphere. Chief Cabinet Minister Juan Manuel Abal Medina stated only that the government had not ruled out nationalization. Moody's subsequently downgraded YPF and other Argentine oil companies on the news. By the end of March, Pagina 12 reported that President Kirchner had decided to nationalize YPF, and was merely determining which way to proceed. From that time until April 16, when Argentina formally announced the nationalization legislation, YPF's ADRs fell another 23%.

34. As a direct and intended consequence of this government campaign, the stock market value of the Company and the price of its shares were cut nearly in half in a matter of months. Public officials acknowledged this objective and celebrated the alleged benefits to Argentina, at the expense of the Company's other shareholders. For example, on

March 14, 2012, Chubut Province Governor Martin Buzzi, speaking on Argentine television, ardently vowed that the decline in YPF's stock price would continue: "You have seen how YPF's stock price has fallen. Those shares are going to keep dropping on the Buenos Aires, Madrid and New York Stock Exchange. But that is because the shares of the people of Santa Cruz and Chubut are going up. We'll have difficult times, but the best is yet to come."

IV. Argentina and YPF's Violations of the Bylaws

35. On April 16, 2012, Argentina took steps to reacquire control of YPF. Argentina announced legislation that would expropriate 51% of the Company's Class D shares. President Kirchner signed the legislation into law on May 4, 2012, and it went into effect on May 7, 2012. Also on April 16, 2012, by Emergency Decree No. 530/12 of the National Executive Office, Argentina declared through its executive branch that it was taking complete control of YPF, effective immediately, by appointing the Minister of Planning, Julio De Vido, as "Intervenor" and vesting De Vido with all the powers of the Company's board of directors as well as those of its president. The control that Argentina claimed over YPF through its Intervenor exceeded the thresholds that would trigger a mandatory tender offer under Section 28. Indeed, through the "Intervenor," Argentina exercised total control of the Company's management and deprived Petersen and other Class D shareholders of their corporate governance rights, including the power to select the Company's directors and to establish dividend policy.

36. The same day, government officials entered YPF's headquarters in Buenos Aires, seized control of the Company's facilities, and began exercising control of the Company's operations. Argentina immediately replaced the Company's top management with government officials. The Argentine press reported that, even before President Kirchner had finished announcing the seizure and expropriation legislation, Argentina's board representative arrived at YPF's headquarters with a list of executives, including Sebastien Eskenazi, the Company's CEO (and a part owner of Petersen), who were given fifteen minutes to pack up their belongings and leave the premises. Within hours, Argentina's Intervenor, De Vido, assumed control of the seizure operation and appointed government officials to run each of the Company's key areas.

37. Due to Argentina's April 16 acquisition of control and announcement of the expropriation legislation, the NYSE suspended trading of YPF's ADRs. When the NYSE allowed trading to resume on April 18, the price of YPF's ADRs continued to fall.

38. On April 17, 2012, Deputy Economy Minister Axel Kicillof, who was appointed Vice-Intervenor in YPF by Decree No. 532, 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 abide by the bylaws. Kicillof acknowledged the contractual tender obligation but dismissed it as an "unfair" "bear trap" that only "fools" would expect Argentina

and YPF to honor.[1] Having mocked the notion that Argentina and YPF should have to honor their legal obligations, Kicillof declared that "'[l]egal certainty' and 'investment climate' are two horrible words."

39. On April 23, 2012, after the "Intervenor" canceled a regularly scheduled meeting of YPF's Board of Directors, YPF failed to make its scheduled dividend distribution to its shareholders. YPF failed to issue any dividend until November 2012. By that time, Petersen's creditors had already foreclosed on its YPF shares.

40. On May 4, 2012, the expropriation legislation was signed into law as Law 26,741 (the "Expropriation Law"), which became effective on May 7, 2012. Title III of the Expropriation Law, labeled "Of the Recovery of Control of YPF," provides for the expropriation by Argentina of 51% of the Class D shares of YPF. Pursuant to the Expropriation Law, the expropriation process was governed by Law 21,499, Argentina's 1977 law concerning expropriations. Argentina's announcement and enactment of the Expropriation Law and related statement clearly demonstrated its intent to retake control of YPF without any tender

[1] Kicillof stated: "In that unfair by-law, they said that if anyone dared to step foot, like the State itself — because, believe me, that if anyone wanted to buy shares to enter into a company, and passed 15%, he stepped into the bear trap and had to buy 100% of the company at a value equivalent to $19 billion. Because the fools are those who think that the State has to be stupid and buy everyone according to YPF's own law, respecting its by-law."

offer and to manage the Company for its own benefit, rather than that of YPF's shareholders.

V. Argentina's and YPF's Breaches of Their Contractual Duties Put Petersen into Loan Default and Liquidation

41. YPF's bylaws constitute a binding and enforceable contract among YPF and its shareholders, including Argentina and Petersen. Argentina violated YPF's 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 by Argentina be conditioned on a tender offer for all Class D shares. YPF also breached the bylaws by, among other things, failing to comply with Section 7's tender-offer requirement, by failing to distribute dividends to YPF's shareholders under the circumstances described above, and, furthermore, by failing to comply with the provision in Section 7 that prohibits Argentina from voting or otherwise exercising corporate governance powers using shares acquired in violation of the tender-offer requirement. In taking these actions, Argentina and YPF also breached the promises they made to shareholders, including Petersen, in the U.S. IPO Prospectus and other SEC filings.

42. As a direct and proximate result of these breaches, Petersen was damaged. Argentina's and YPF's illegal conduct significantly reduced the value of Petersen's YPF shares, causing Petersen direct economic harm. Moreover, Argentina's and YPF's actions caused Petersen to default on its loan obligations, the structure of which had been outlined

in previous Form 20-Fs and was known to Argentina and the Company, damaging Petersen's value. In May 2012, Petersen's institutional lenders foreclosed on Petersen's Class D shares of YPF, the value of which was by then intensely depressed by Argentina and YPF's conduct; thus, the value of those shares was insufficient to meet Petersen's debts, injuring it further. Petersen subsequently entered bankruptcy.

43. Since Argentina reacquired control of YPF and YPF suspended dividend payments leading to the Petersen default, the share price of YPF has rebounded to approximately pre-expropriation levels.

44. Argentina's and YPF's breaches of their contractual obligations occurred in, had a significant nexus with, and had a direct effect in, the United States and this District. Among other things, because Petersen held ADRs through the Bank of New York Mellon, which is located in New York City, the offer to purchase the shares was required to be made in New York. Moreover, performance of the contract was required in large part to be made in the United States, including in New York City. For example, the bylaws required notice of the tender offer to be published in New York's major newspapers. The bylaws also required the tender offer materials to be delivered to the NYSE in compliance with the NYSE's rules. And Argentina and YPF were obligated to make appropriate SEC filings detailing the tender offer. Defendants' failure to perform these contractually required acts occurred in, had a significant nexus with, and had a direct effect in, the United States and this District.

45. Moreover, when as a result of Defendants' unlawful conduct Petersen's creditors foreclosed on Petersen's YPF shares, notice was delivered by the creditors to the collateral agent, which then notified the Bank of New York Mellon as depositary agent, which in turn listed Petersen's creditors as the new holders of the YPF shares. In the case of the loan by Repsol to Petersen, the collateral agent designated by the parties was the Bank of New York Mellon in New York City. The effects of the foreclosure, which was a direct result of Defendants' actions, were thus directly felt in the United States and this District.

46. In July 2012, as a direct and proximate cause of Argentina's and YPF's breaches, Petersen filed for bankruptcy protection in Spain. Three months later, a Spanish bankruptcy court declared the Petersen entities insolvent. In December 2012, Repsol and several financial entities requested that the court-appointed Spanish bankruptcy administrator include their outstanding credits against Petersen in the bankruptcy proceedings. In November 2014, the bankruptcy court approved a plan to liquidate Petersen. The approved plan, submitted by the receiver, noted that Argentina's takeover of YPF "did not comply with the regulations in force in Argentina" and that, had Argentina observed its legal obligations, Petersen "could undoubtedly have paid to all its creditors with the price it should have received."[2]

[2] Translated from the original Spanish.

47. As a result of Petersen's bankruptcy, caused by Defendants' misconduct, Petersen's court-appointed receiver sought to raise funds necessary to pursue Petersen's claims arising out Petersen's shareholdings in YPF. 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 Investments LLC, a Delaware limited liability company and a wholly owned subsidiary of Burford Capital LLC, to provide financing for Petersen's claims.

48. On May 15, 2012, Repsol and another YPF Class D shareholder, Texas Yale Capital Corp., filed a class action complaint in this Court against Argentina for violating the bylaws when it failed to make a public tender offer after reacquiring control of YPF. That litigation settled for $5 billion in February 2014, and was voluntarily dismissed in May 2014, prior to certification of any class. *Repsol YPF, S.A. v. Republic of Argentina*, No. 12-CV-3877 (TPG), Dkt. No. 31.

49. Plaintiffs bring their claims without prejudice to other rights and remedies that might be available to them, including but not limited to their rights and remedies under: (a) Argentine law and any other applicable legal order; and (b) the Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and Argentine Republic signed on October 3, 1991 (and which entered into force on September 28, 1992).

FIRST CAUSE OF ACTION:
BREACH OF CONTRACT BY ARGENTINA

50. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 49 above.

51. YPF's bylaws provide that no acquisition of a controlling stake in YPF will be made without a public tender offer for all of YPF's outstanding Class D shares at a price set forth in the bylaws. The bylaws further provide that shares acquired in violation of the tender-offer provision shall not be permitted to exercise voting or other corporate governance rights.

52. YPF's bylaws constitute an enforceable contract among the Company and its shareholders. Defendant Argentina is and was at the relevant times specified in this Complaint a YPF shareholder and therefore a party to that contract. Plaintiffs were shareholders and either parties to or third-party beneficiaries of that contract at the relevant times specified in this Complaint. Sections 7 and 28 are intended to benefit all record or beneficial holders of Class D shares and the benefit of those provisions to Plaintiffs is immediate, not merely incidental, as they exist precisely to protect the value of shareholders' investment in the event Argentina seeks to retake control of YPF.

53. 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 by Argentina be conditioned on a tender offer for all

Class D shares.

54. Plaintiffs were damaged by Argentina's breach in an amount to be determined according to proof.

SECOND CAUSE OF ACTION: ANTICIPATORY BREACH BY ARGENTINA

55. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 54 above.

56. YPF's bylaws provide that no acquisition of a controlling stake in YPF will be made without a public tender offer for all of YPF's outstanding Class D shares at a price set forth in the bylaws. The bylaws further provide that shares acquired in violation of the tender-offer provision shall not be permitted to exercise voting or other corporate governance rights.

57. YPF's bylaws constitute an enforceable contract among the Company and its shareholders. Defendant Argentina is and was at the relevant times specified in this Complaint a YPF shareholder and therefore a party to that contract. Plaintiffs were shareholders and either parties to or third-party beneficiaries of that contract at the relevant times specified in this Complaint. Sections 7 and 28 are intended to benefit all record or beneficial holders of Class D shares and the benefit of those provisions to Plaintiffs is immediate, not merely incidental, as they exist precisely to protect the value of shareholders' investment in the event

Argentina seeks to retake control of YPF.

58. Argentina repudiated its contractual obligations under the bylaws, by, among other things, declaring that it would not honor the requirement in Sections 7 and 28 of the bylaws that any acquisition of a controlling stake in YPF by Argentina be conditioned on a tender offer for all Class D shares.

59. Plaintiffs were damaged by Argentina's breach in an amount to be determined according to proof.

THIRD CAUSE OF ACTION: BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING BY ARGENTINA

60. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 59 above.

61. YPF's bylaws constitute an enforceable contract. A duty of good faith and fair dealing is implied in the bylaws and binds the parties thereto. This duty implies obligations consistent with the other terms of the contract, including the obligation that Argentina would not take actions to cause Plaintiffs' rights under the contract to be devalued.

62. Argentina breached this implied duty of good faith and fair dealing by, among other things, conducting a wide-ranging campaign against YPF's shareholders beginning in January 2012 that caused the price of YPF's shares to drop precipitously. Argentina engaged in this conduct with the intent and effect to depress the value of YPF's shares and to reduce the price at which it could be obligated to

make a tender offer under the terms of the bylaws. It further breached its implied duty of good faith by intentionally declining to make a tender offer in express and knowing contravention of the terms of the contract.

63. Argentina's actions had the effect of depriving Plaintiffs of the full benefit of their bargain, including their right under the tender-offer price provisions of the bylaws to be offered fair consideration for their shares, free from manipulation, in the event that Argentina retook control of YPF, and their right to dividend payments. Plaintiffs have been damaged by Argentina's breach of the implied duty of good faith and fair dealing in an amount to be determined according to proof.

FOURTH CAUSE OF ACTION: PROMISSORY ESTOPPEL AGAINST ARGENTINA

64. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 63 above.

65. In connection with the 1993 public offering of YPF and continuously at all times thereafter, Argentina promised to U.S. and other investors that it would not retake control of YPF without making a tender offer for all Class D shares as provided in the bylaws. Those promises were communicated to investors by means including the bylaws and the U.S. IPO Prospectus. Argentina repeated these promises on a regular basis to the U.S. market, including every time the Company's bylaws were publicly filed with the SEC in connection with YPF's periodic

reporting requirements under U.S. securities law.

66. Argentina made these promises with the intention to induce reliance and specifically with the intention to induce investors to purchase shares in YPF, and the value of Argentina's promises was priced into the value of Class D shares at all times. It was therefore reasonable and foreseeable that investors would rely on Argentina's promise in purchasing their Class D shares of YPF.

67. Petersen justifiably relied on Argentina's promises to their detriment. As a direct and proximate — indeed foreseeable and known — result of that detrimental reliance, Petersen suffered monetary damages in an amount to be determined according to proof

FIFTH CAUSE OF ACTION: BREACH OF CONTRACT BY YPF

68. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 67 above.

69. YPF's bylaws provide that no acquisition of a controlling stake in YPF will be made without a public tender offer for all of YPF's outstanding Class D shares at a price set forth in the bylaws. The bylaws further provide that shares acquired in violation of the tender-offer provision shall not be permitted to exercise voting or other corporate governance rights.

70. YPF's bylaws constitute an enforceable contract among the Company and its shareholders.

YPF is thus bound by the contract. Plaintiffs were shareholders and either parties to or third-party beneficiaries of that contract at the relevant times specified in this Complaint. Sections 7 and 28 are intended to benefit all record or beneficial holders of Class D shares and the benefit of those provisions to Plaintiffs is immediate, not merely incidental, as they exist precisely to protect the value of shareholders' investment in the event Argentina seeks to retake control of YPF.

71. YPF breached the bylaws, by, among other things, failing to comply with or enforce the requirement in Sections 7 and 28 of the bylaws that any acquisition of a controlling stake in YPF by Argentina be conditioned on a tender offer for all Class D shares; failing to comply with the provision of Section 7 of the bylaws prohibiting Argentina from voting or otherwise exercising corporate governance powers using a controlling stake acquired in violation of the tender offer requirement; and failing to distribute dividends to YPF's shareholders, including Petersen, under the circumstances described above.

72. Plaintiffs were damaged by Argentina's breach in an amount to be determined according to proof.

SIXTH CAUSE OF ACTION: ANTICIPATORY BREACH BY YPF

73. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 72 above.

74. YPF's bylaws provide that no acquisition of a controlling stake in YPF will be made without a public tender offer for all of YPF's outstanding Class D shares at a price set forth in the bylaws. The bylaws further provide that shares acquired in violation of the tender-offer provision shall not be permitted to exercise voting or other corporate governance rights.

75. YPF's bylaws constitute an enforceable contract among the Company and its shareholders. YPF is thus bound by the contract. Plaintiffs were shareholders and either parties to or third-party beneficiaries of that contract at the relevant times specified in this Complaint. Sections 7 and 28 are intended to benefit all record or beneficial holders of Class D shares and the benefit of those provisions to Plaintiffs is immediate, not merely incidental, as they exist precisely to protect the value of shareholders' investment in the event Argentina seeks to retake control of YPF.

76. YPF repudiated its contractual obligations under the bylaws, by, among other things, declaring that the Company would not honor the requirement in Sections 7 and 28 of the bylaws that any acquisition of a controlling stake in YPF by Argentina be conditioned on a tender offer for all Class D shares and would not comply with the provision of Section 7 of the bylaws prohibiting Argentina from voting or otherwise exercising corporate governance powers using a controlling stake acquired in violation of the tender offer requirement.

77. Plaintiffs were damaged by Argentina's breach in an amount to be determined according to proof.

SEVENTH CAUSE OF ACTION: BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING BY YPF

78. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 77 above.

79. YPF's bylaws constitute an enforceable contract. A duty of good faith and fair dealing is implied in the bylaws and binds the parties thereto. This duty implies obligations consistent with the other terms of the contract, including the obligation that YPF would not take actions to cause Plaintiffs' rights under the contract to be devalued.

80. YPF breached this implied duty of good faith and fair dealing by, among other things, repudiating, and failing to enforce or to attempt to enforce, the tender-offer obligations in the bylaws against Argentina when Argentina reacquired control of YPF. Argentina's months-long campaign to devalue and acquire control of YPF put the Company on firm notice of what was to come. YPF's failure to attempt to secure performance of the contract, despite that advanced warning, is a breach of the implied duty of good faith and fair dealing.

81. YPF's actions had the effect of depriving Plaintiffs of the full benefit of their bargain, including their right under the tender-offer-price provisions of the bylaws to be offered fair

consideration for their shares, free from manipulation, in the event that Argentina retook control of YPF, and their right to dividend payments. Plaintiffs have been damaged by YPF's breach of the implied duty of good faith and fair dealing in an amount to be determined according to proof.

EIGHTH CAUSE OF ACTION:
PROMISSORY ESTOPPEL AGAINST YPF

82. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 81 above.

83. In connection with its 1993 IPO and continuously at all times thereafter, YPF promised to U.S. and other investors that no acquisition of a controlling stake in the company would take place without a tender offer being made for all Class D shares as provided in the bylaws. Those promises were communicated to investors by means including the bylaws and the U.S. IPO Prospectus. YPF repeated these promises on a regular basis to the U.S. market, including every time the Company's bylaws were publicly filed with the SEC in connection with YPF's periodic reporting requirements under U.S. securities law.

84. YPF made these promises with the intention to induce reliance and specifically with the intention to induce investors to purchase shares in YPF, and the value of YPF's promises was priced into the value of Class D shares at all times. It was therefore reasonable and foreseeable that investors would rely on Argentina's promise in purchasing

their Class D shares of YPF.

85. Petersen justifiably relied on YPF's promises to their detrimentd. As a direct and proximate — indeed foreseeable and known — result of that detrimental reliance, Petersen suffered monetary damages in an amount to be determined according to proof.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter an order and judgment awarding:

A. Compensatory damages according to proof;

B. Such other and further relief as the Court may deem just and proper.

Dated: April 8, 2015

KELLOGG, HUBER, HANSEN, TODD EVANS & FIGEL P.L.L.C.
/s/
Mark C. Hansen
Derek T. Ho
1615 M Street N.W., Suite 400
Washington, D.C. 20036
Phone: (202) 326-7900
Fax: (202) 326-7999
Email:mhansen@khhte.com
dho@khhte corn

KING & SPALDING LLP

Israel Dahan
1185 Avenue of the Americas
New York, NY 10036
Phone: (212) 556-2114
Fax: (212) 556-2222
Email: idahan@kslaw.com

-and-

Reginald R. Smith
1100 Louisiana
Houston, TX 77002
Phone: (713) 751-3200
Fax: (713) 751-3290
Email: rsmith@kslaw.com

Attorneys for Plaintiffs Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U.

APPENDIX E

BY-LAWS OF Y.P.F. SOCIEDAD ANÓNIMA

ARTICLE I

NAME, OFFICES AND DURATION

Section 1 – Name

The Corporation name is YPF SOCIEDAD ANÓNIMA. In the performance of the activities incidental to its corporate purpose and in all legal acts carried out thereby, it shall indistinctly use either its full name or the short form YPF S.A.

Section 2 – Office

The legal domicile of the Corporation shall be located at the City of Buenos Aires, Argentine Republic, notwithstanding which, it may establish regional administrations, delegations, branches, agencies or any other kind of representation within the country or abroad.

Section 3 – Duration

The term of duration of the Corporation shall be of one hundred (100) years as from the registration of these By-laws with the Public Registry of Commerce (*Registro Público de Comercio*).

ARTICLE II

PURPOSE

Section 4 – Purpose

The Corporation's purpose shall be to perform, on its own, through third parties or in association with third parties, the survey, exploration and exploitation of liquid and/or gaseous hydrocarbon fields and other minerals, as well as the industrialization, transportation and commercialization of these products and their direct or indirect by-products, including petrochemical products, chemical products, whether derived from hydrocarbons or not, and non-fossil fuels, biofuels and their components, as well as the generation of electrical energy through the use of hydrocarbons, to which effect it may manufacture, use, purchase, sell, exchange, import or export them. It shall also be the Corporation's purpose the rendering, on its own, through a controlled company or in association with third parties, of telecommunications services in all forms and modalities authorized by the legislation in force after applying for the relevant licenses as required by the regulatory framework, as well as the production, industrialization, processing, commercialization, conditioning, transportation and stockpiling of grains and products derived from grains, as well as any other activity complementary to its industrial and commercial business or any activity which may be necessary to attain its object. To better achieve these purposes, it may set up, become associated with or have an interest in any public or private entity domiciled in the country or abroad, within the limits set forth in these By-laws.

Section 5 – Actions for the achievement of the corporate purpose

(a) To accomplish its purpose, the Corporation may carry out any kind of legal act or transaction, including those of a financial nature but excluding intermediation, which are incidental to its corporate purpose, or related thereto, since for the purpose of fulfilling its purpose, the Corporation has full legal capacity to acquire rights, undertake obligations, and exercise any act not prohibited by the laws or these By-laws.

(b) In particular, the Corporation may:

(i) Purchase or otherwise acquire real estate, personal property, livestock, facilities and any other class of rights, titles, shares or securities, sell, exchange, assign or dispose of them under any instrument, give them as security and encumber them, including pledges, mortgages or any other real-property interests and constitute ease of ways thereon, become associated with individuals or legal persons, enter into joint ventures and business collaboration agreements.

(ii) Enter into any kind of agreement and undertake obligations, even loans or other liabilities, with official or private banks, whether national or foreign, international credit institutions and/or organizations of any other nature,

accept and grant consignments, commissions and/or agency agreements and grant commercial credits related to its business activities.

(iii) Issue, in the country or abroad, debentures, corporate bonds, and other debt securities in any currency with or without a security interest, whether special or floating, convertible or not.

ARTICLE III

CAPITAL. SHARES OF STOCK

Section 6 – Principal

(a) Amount of capital stock: The capital stock is fixed in the amount of THREE THOUSAND NINE HUNDRED THIRTY-THREE MILLION ONE HUNDRED AND TWENTY-SEVEN THOUSAND NINE HUNDRED AND THIRTY ($ 3,933,127,930) fully subscribed and paid in, represented by THREE HUNDRED NINTY-THREE MILLION THREE HUNDRED AND TWELVE THOUSAND SEVEN HUNDRED NINETY-THREE (393,312,793) book-entry shares of common stock, of TEN PESOS ($10.00) nominal value each, entitled to one vote per share.

(b) Classes of shares of common stock: The capital stock is divided into four classes of shares of common stock as per the following detail:

(i) Class A shares of stock, only the National Government shall be the holder of class A shares of stock;

(ii) Class B shares of stock, originally destined to be acquired by holders of Consolidation Bonds of Gas and Oil Royalties or creditors of the Nation on account of gas and oil royalties. Class B shares of stock acquired by a holder of such Bonds other than a Province or the National Government shall become Class D shares of stock;

(iii) Class C shares of stock, originally destined by the National Government to the Corporation's employees under the Shared Ownership Program set forth in Act 23,696. Class C shares of stock not purchased by the Corporation's employees under the Shared Ownership Program shall become class A shares of stock; and

(iv) Class D shares of stock, thus converted due to the transfer of class A, B or C shares of stock to any person in accordance with the following rules:

- Class A shares of stock transferred by the National Government to any person shall become class D shares of stock, except for transfers to the Provinces, if previously authorized bylaw, in which case they shall not change their class.

- Class B shares of stock that the Provinces transfer to any person other than a Province shall become class D shares of stock.

- Class C shares of stock that are transferred to third parties beyond the Shared Ownership Program shall become class D shares of stock.

- Class D shares of stock shall not change to other classes by virtue of the subscription or acquisition thereof by the National Government, the Provinces, other public legal entity or by the personnel participating in the Shared Ownership Program.

(c) Class A special rights: The affirmative vote of class A shares of stock, whatever the percentage of capital stock that such class of shares represents, shall be required so that the Corporation validly resolves to:

(i) Determine the merger with another or other companies;

(ii) Accept that the Corporation, through the acquisition of its shares by third parties, shall become subject to a takeover, whether consented or hostile, representing the holding of more than fifty percent (50 %) of the capital stock of the Corporation;

(iii) Transfer to third parties all of the exploitation rights granted within the framework of Act 17,319, its supplementary and regulatory rules, and Act 24,145, for it to determine the full suspension of the exploration and exploitation activities of the Corporation;

(iv) Determine the voluntary dissolution of the Corporation;

(v) Transfer the corporate or fiscal domicile of the Corporation outside the Argentine Republic.

Besides, the prior enactment of a national law will be required to resolve favorably on paragraphs (iii) and (iv) above.

(d) Preferred shares of stock: The Corporation may issue preferred shares with or without voting right, which shall be divided into classes A, B, C, and D. The same rules on ownership and conversion set forth in subsection b) above for the same class of shares of common stock shall be applied to each class of preferred stock. When preferred shares of stock exercise their voting right (whether temporarily or permanently), they shall do so as members, to such effect, of the class they belong to.

(e) Capital Increases: The capital may be increased up to five times its original amount by resolution passed at the regular

shareholders' meeting, in accordance with the provisions of section 188 of Act 19,550, such limit being ruled out if the Corporation is authorized to make a public offering of its shares of stock. The regular shareholders' meeting shall establish the nature of the shares to be issued on account of the capital increase, pursuant to the conditions set forth in these By-laws, it being able to delegate to the Board of Directors the power to set the time of issuance, as well as the determination of the payment terms and conditions of the shares, being also empowered to carry out any other delegation authorized by law. The issuance of shares of preferred or common stock shall be carried out per classes, respecting the proportion existing among the different classes as of the date of issuance, without prejudice to the modifications that may subsequently be derived from the exercise of the preemptive and accretion rights, as provided for in section 8 hereof.

Section 7 – Transfer of stock

(a) Book-entry stocks: Shares shall not be represented by certificates. Instead, they shall be book-entry shares and shall be recorded in accounts kept under their holder's names in the Corporation, commercial banks, investment banks or securities clearing houses as authorized by the Board of Directors. Shares of stock shall be indivisible. Should there be co-ownership, the representation to exercise the rights or the fulfillment of obligations shall be unified.

(b) Transfer of class A or C shares: Any transfer of class A shares carried out in breach of the provisions of the last paragraph of section 8 of Act 24,145, or of class C shares carried out in breach of the rules of the Shared Ownership Program or the relevant General Transfer Agreement notified by effective means to the Corporation, shall be null and void and shall not be acknowledged by the Corporation.

(c) Information duty: Any person who shall, directly or indirectly, acquire by any means or instrument, class D shares, or which upon transfer shall be converted into class D, or securities of the Corporation of any type that may be convertible into class D shares (including, within the meaning of the term "securities", but without limitation, debentures, corporate bonds, and stock coupons), which shall grant control over more than three per cent (3%) of the class D shares, shall notify the Corporation within five (5) days as from the acquisition that caused such excess, and report such circumstance to the Corporation, notwithstanding the compliance of the additional measures imposed by the applicable regulations on capital markets for this kind of event. The information referred to above shall also include the transaction date, the price, the number of shares purchased and the intent of the purchaser to acquire a larger stake or to take over control of the corporate will. If the purchaser is made up of a group of individuals, it shall be bound to identify the members composing the group. The information herein provided for shall be

furnished in relation to acquisitions carried out after the one informed first, when the limit on the amounts of class D shares indicated in the latest information shall be exceeded again in accordance with the provisions hereunder.

(d) Takeover: 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, whether directly or indirectly, by any means or instrument (including within the meaning of the term "securities", without limitation, debentures, corporate bonds and stock coupons) convertible into shares if, as a result of such acquisition, the purchaser becomes the holder of, or exercises the control of, class D shares of stock of the Corporation which, in addition to its prior holdings of such class (if any), represent, in the aggregate, FIFTEEN PERCENT (15%) or more of the capital stock, or TWENTY PERCENT (20%) or more of the outstanding class D shares of stock, if the shares representing such TWENTY PERCENT (20%) constitute, at the same time, less than FIFTEEN PERCENT (15%) of the capital stock.

Notwithstanding the foregoing: (i) acquisitions by the person already holding, or the person already exercising control of, shares representing more than FIFTY PERCENT (50%) of the capital stock shall be excluded from the provisions of subsections e) and f) of this section; and (ii) any subsequent acquisitions by any person already holding, or

any person already exercising the control of, shares representing FIFTEEN PERCENT (15%) or more of the capital stock, or TWENTY PERCENT (20%) or more of outstanding Class D shares, if the shares representing such TWENTY PERCENT (20%) constitute, at the same time, less than FIFTEEN PERCENT (15%) of the capital stock, provided the shares the purchaser already holds or becomes a holder of (including the shares it held prior to the acquisition and those it acquired by virtue thereof) do not exceed FIFTY PERCENT (50%) of the capital stock, shall be excluded from the provisions of subsection e) paragraph (ii) and subsection f) of this section.

Acquisitions referred to in this subsection d) are called "Takeovers".

(e) Requirements: The person wishing to a Takeover (hereinafter called "the Bidder") shall:

(i) Obtain the prior consent of the special shareholders' meeting of class A shareholders; and

(ii) Arrange a takeover bid for the acquisition of all the shares of all classes of the Corporation and all securities convertible into shares.

Any decision passed at special shareholders' meeting of Class A shares regarding the matters provided for in this subsection e) shall

be final and shall not entitle any of the parties to claim any kind of compensation.

(f) Takeover Bid: Each takeover bid shall be conducted in accordance with the procedure herein stipulated and, to the extent that applicable regulations in the jurisdictions where the takeover bid takes place and the provisions of the stock exchanges where the Corporation's shares and securities are listed impose additional or stricter requirements than the ones provided hereunder, such additional or stricter requirements shall be complied with in the stock exchanges or markets where they are applicable.

(i) The Bidder shall notify the Corporation in writing about the takeover bid at least fifteen business days in advance to the starting date thereof. The Corporation shall be notified about all terms and conditions of any agreement or memorandum of understanding that the Bidder might have entered into or might intend to enter into with a holder of shares of the Corporation whereby, if such agreement or memorandum of understanding were executed, the Bidder would be in the situation described in the first paragraph of subsection d) of this Section (hereinafter called "Prior Agreement"). Such notice shall include the following minimum information:

(A) The Bidder's identification, nationality, domicile, and telephone number;

(B) If the Bidder is made up by a group of persons, the identification and domicile of each Bidder of the group and of the managing officer of each person or entity making up the group;

(C) The consideration offered for the shares of stock and/or securities. If the takeover bid is subject to the condition that a certain number of shares be acquired, such minimum number shall be indicated;

(D) The scheduled expiration date of the takeover bid period, whether it can be extended, and if so, the procedure therefor;

(E) A statement by the Bidder indicating the exact dates before and after which the shareholders and security holders, who subjected them for sale subject to the takeover bid regime, shall be entitled to withdraw them, how the shares and securities thus subjected to sale shall be accepted, and in accordance to which the withdrawal of the

shares and securities from sale under the takeover bid regime shall be carried out;

(F) A statement indicating that the takeover bid shall be open to all shareholders and holders of securities convertible into shares of stock;

(G) Any additional information, including the Bidder's accounting statements, as the Corporation may reasonably request or which may be necessary so as to avoid the above-mentioned notice from leading to wrong conclusions or when the information submitted is incomplete or insufficient.

(ii) The Board of Directors shall call special meeting of class A shares of stock, by any effective means, to be held ten business days following the receipt by the Corporation of the notice indicated under paragraph (i), for the purpose of considering the approval of the takeover bid, and it shall submit to such meeting its recommendation in that regard. If the meeting is not held despite the call, or if it is held but the takeover bid is rejected, the latter shall not be carried out, nor shall the Prior Agreement, if any, be executed.

(iii) The Corporation shall send by mail to each shareholder or holder of securities convertible into stock, at the Bidder's cost and expense, and with reasonable due diligence, a copy of the notice delivered to the Corporation in accordance with the provisions of paragraph (i). The Bidder shall make an advance payment to Corporation of the funds required for such purpose.

(iv) The Bidder shall send by mail or otherwise deliver, with reasonable due diligence, to each shareholder or holder of securities convertible into stock who shall so request, a copy of the notice delivered to the Corporation and shall publish a notice containing substantially the information stated in paragraph (i), at least once a week, starting on the date such notice is served on the Corporation pursuant to paragraph (i) and ending upon the expiration date of the takeover bid. Subject to the applicable legal provisions, this information shall be published in the business section of the major newspapers of the Argentine Republic, in the City of New York, U.S.A. and any other city where the shares shall be listed.

(v) The consideration for each share of stock or security convertible into stock payable to each shareholder or security holder shall be the same, in cash, and

shall not be lower than the highest of the following prices of each class D share of stock or security convertible into a class D share:

(A) the highest price per share or security paid by the Bidder, or on behalf thereof, in relation to any acquisition of class D shares of stock or securities convertible into class D shares of stock within the two-year period immediately preceding the notice of Takeover, adjusted as a consequence of any division of shares, stock dividend, subdivision or reclassification affecting or related to class D shares of stock; or

(B) The highest closing price, at the seller's rate, during the thirty-day period immediately preceding such notice, of a class D share of stock as quoted by the Buenos Aires Stock Exchange, in each case as adjusted as a consequence of any division of shares, stock dividend, subdivision or reclassification affecting or related to class D shares of stock; or

(C) A price per share equal to the market price per class D share of stock determined as stated in

paragraph (B) herein multiplied by the ratio between: (a) the highest price per share paid by the Bidder, or on his behalf, for any class D share of stock, in any share acquisition of this class within the two-year term immediately preceding the notice date indicated in paragraph (i), and (b) the market price for class D share of stock on the day immediately preceding the first day of the two-year period in which the Bidder acquired any type of interest or right in a class D share of stock. In each case the price shall be adjusted taking into account the subsequent division of shares, stock dividend, subdivision or reclassification affecting or related to class D; or

(D) The Corporation's net income per class D share during the last four complete fiscal quarters immediately preceding the notice date indicated in paragraph (i), multiplied by the higher of the following ratios: the price/income ratio for that period for class D shares of stock (if any) or the highest price/income ratio for the Corporation during the two-year period immediately preceding the notice date indicated in paragraph (i). Such multiples

shall be determined by applying the regular method used by the financial community for computing and reporting purposes.

(vi) The shareholders or security holders that have subjected them to the takeover bid may withdraw them from the bid before the date established for the expiration of such bid.

(vii) The takeover bid shall be open for a minimum term of TWENTY (20) days and a maximum term of THIRTY (30) days as from the date the bid was authorized by Comisión Nacional de Valores de Argentina (Argentine Securities Exchange Commission).

(viii) The Bidder shall acquire all shares and/or securities convertible into stock that before the expiration date of the takeover bid are set on sale in accordance with the regime ruling takeover bids. If the number of such shares or securities is lower than the minimum number to which the Bidder conditioned the takeover bid, the Bidder may withdraw it.

(ix) If the Bidder has not set a minimum number as a condition to the takeover bid as stated in paragraph (i) (C) of this subsection, once this procedure has finished, the Bidder may execute the

Prior Agreement, if any, whatever the number of shares of stock and/or securities purchased thereby under the regime regulating takeover bids. If he has set that minimum number, the Bidder shall execute the Prior Agreement only if the minimum number required under the regime ruling takeover bids has been exceeded. The prior agreement shall be executed within thirty days as from the closing of the takeover bid, otherwise, it shall be necessary to repeat the procedure provided for in this section to execute it.

If there existed no Prior Agreement, the Bidder, in the afore-mentioned cases and opportunities where such Prior Agreement could be executed, may purchase freely the number of shares of stock and/or securities that he reported to the Corporation through the communication set forth in paragraph (i) of this subsection, provided the Bidder has not purchased such number of shares of stock and/or securities under the takeover bid regime.

(g) Related transactions: Any merger, consolidation or any other combination leading to substantially the same effects (hereinafter called "the Related Transaction") comprising the Corporation or any other person (hereinafter "the Interested Shareholder") that has previously carried out a Takeover, or having for the Interested

Shareholder the effects, regarding the holding of class D shares of stock, of a Takeover, shall only be performed if the consideration to be received by each shareholder from the Corporation in such Related Transaction is equal for all shareholders and not lower than:

(i) The highest price per share of stock paid by or on account of such Interested Shareholder in relation to the acquisition of:

(A) Shares of the class to be transferred by the shareholders in such Related Transaction (hereinafter called "the Class"), within the two-year period immediately preceding the first public announcement of the Related Transaction (hereinafter called "the Announcement Date"), or

(B) Shares of the Class purchased by said Interested Shareholder in any Takeover.

In both cases as adjusted by virtue of any stock division, share dividend, subdivision or reclassification affecting or related to the class.

(ii) The highest closing price, at the seller's rate, during the thirty-day period immediately preceding the announcement date or the date of

purchase of the shares of the Class by the Interested Shareholder in any Takeover, of a share of the Class as quoted at the Buenos Aires Stock Exchange, adjusted by any division of shares, stock dividend, subdivision or reclassification affecting or related to the Class.

(iii) A price per share equal to the market price of a share of the Class determined as established in subsection (ii) of this section multiplied by the ratio between: (a) the highest price per share paid by the Interested Shareholder or on his behalf, for any share of the Class, in any acquisition of shares of the Class within the two-year period immediately preceding the Announcement Date, and (b) the market price per share of the Class on the day immediately preceding the first day of the two-year period in which the Interested Shareholder acquired any type of interest or right in a share of the Class. In each case the price shall be adjusted taking into account the subsequent division of shares, stock dividend, subdivision or reclassification affecting or related to the Class.

(iv) The net income of the Corporation per each share of the Class during the last four complete fiscal quarters immediately preceding the Announcement Date, multiplied by the

higher of the following ratios: the price / income ratio for that period for the shares of stock of the Class (if any) or the highest price / income for the Corporation in the two-year period immediately preceding the Announcement Date. Such multiples shall be determined using the regular method used by the financial community for their computation and reporting.

(h) Breach of Requirements: Shares of stock and securities acquired in breach of the provisions of subsections 7 c) through 7 g), both included, of this section, shall not grant any right to vote or collect dividends or other distributions that the Corporation may carry out, nor shall they be computed to determine the presence of the quorum at any of the shareholders' meetings of the Corporation, until such shares of stock are sold, in the case the purchaser has obtained the direct control of YPF, or until the purchaser loses the control of the YPF's parent company, if the takeover has been indirect.

(i) Construction: For the purposes of section 7, the term "indirectly" shall include the purchaser's parent companies, the companies controlled by it or that would end up under the control thereof as a consequence of the Takeover, Takeover Bid, Prior Agreement, or Related Transaction, as the case may be, that would grant at the same time the control of the Corporation, the companies submitted to

the common control of the purchaser and other persons acting jointly with the purchaser; likewise, the holdings a person has through trusts, American Depositary Receipts ("ADR") or other similar mechanisms shall be included.

The Corporation is not adhered to the Optional Statutory Regime for the Mandatory Acquisition of Shares in a Takeover Bid (*Régimen Estatutario Optativo de Oferta Pública de Adquisición Obligatoria*) under the regulations of section 24 of Decree 677/01.

Section 8 – Preemptive right

(a) General rules: The holders of each class of common or preferred stock shall be entitled to a preemptive right in the subscription of the shares of stock of the same class to be issued, pro rata their holdings. This right shall be exercised under the conditions and terms established in the applicable Law and regulations. The conditions of issuance, subscription and payment of class C shares of stock may be more advantageous for their purchasers than the ones provided for the rest of the shares; however, under no circumstances shall they be more onerous. Any preemptive right holder, whatever the class of stock originating it, may assign it to any third party, in which case the share of stock entitled to such preemptive right shall become or consist of a class D share of stock.

(b) Accretion Right: The accretion right shall be exercised within the same period fixed for the preemptive right, and with respect to all classes of shares that have not been initially subscribed. To such purposes:

(i) Class A shares that have not been subscribed in exercise of the preemptive right of by the National Government shall be converted into class D shares and shall be offered to the shareholders of such Class that have expressed their intention to exercise their accretion right with respect to non-subscribed class A shares;

(ii) Class B shares that have not been subscribed by the Provinces in exercise of their original preemptive rights, for failure to exercise such right or due to the assignment thereof, shall be allocated to the Provinces having subscribed class B shares and having expressed their intention to exercise their accretion right, and the balance shall be converted into class D shares to be offered to class D shareholders who have expressed their intention to exercise their accretion right with respect to non-subscribed class B shares;

(iii) Class C shares that have been subscribed by the persons comprised in the Shared Ownership Program in exercise of their original preemptive rights, due to failure to do so or to

assignment thereof, shall be assigned to those persons comprised in such regime that have subscribed class C shares and have stated their intention to exercise their accretion right, and the balance shall be converted into class D shares to be offered to shareholders of that class who have stated their intention to exercise their accretion right with respect to non-subscribed class C shares;

(iv) Class D shares not subscribed in exercise of the preemptive rights incidental to that class of shares shall be assigned to the subscribers of that class who have stated their intention to exercise their accretion right;

(v) The remaining class D shares shall be assigned to shareholders of other classes who have stated their intention to exercise their accretion right.

(c) Limits: The preemptive and accretion rights set forth in the preceding paragraphs shall only exist provided they are required by the corporate legislation in force at the time or that they are necessary to comply with the applicable provisions of Acts 23,696 and 24,145.

Section 9 – Public and private offering. Revoked

ARTICLE IV

CORPORATE BONDS, PROFIT SHARING STOCK ("BONOS DE PARTICIPACIÓN") AND OTHER SECURITIES

Section 10 – Securities the Corporation may Issue

(a) Corporate bonds: The Corporation may issue corporate bonds, whether convertible or not. When it is required by law that the issuance of corporate bonds be decided by the shareholders' meeting, said meeting may delegate all or some of the issuance conditions to the Board of Directors.

(b) Other securities: The Corporation may issue preferential right securities ("*bonos de preferencia*") and other securities authorized by the applicable law. The preferential right securities shall grant their holders the preemptive subscription right in the event of capital increases decided in the future and up to the amount that such securities shall allow. In the subscription of such securities and other convertible securities, the shareholders shall have the preemptive right under the terms and in the cases established in section 8 of these By-laws.

(c) Conversion into class D: Any convertible security issued by the Corporation shall grant the conversion right only into class D shares of stock. Its issuance shall be authorized at a special meeting of class D shareholders.

ARTICLE V

ADMINISTRATION AND MANAGEMENT

Section 11 – Board of Directors

(a) Number: The administration and management of the Corporation shall be in the hands of a Board of Directors composed of at least eleven (11) and not more than twenty-one (21) regular Directors, as may be decided at the Shareholders' Meeting, who shall be appointed to serve for a term of 1 to 3 fiscal years, as may be decided at the Shareholders Meeting in each case, and may be reelected indefinitely, notwithstanding the provisions of subsection e) of this section.

(b) Alternate directors: Each class of shares shall appoint an equal or lower number of alternate directors than the number of regular directors it is authorized to appoint. Alternate directors shall fill the vacancies within their respective class in the order of their appointment upon the occurrence of such vacancy, whether by absence, resignation, license, incapacity, disability or death, prior acceptance by the Board of the grounds for substitution, should it be temporary.

(c) Appointment: Directors shall be appointed by the majority vote within each of the classes of ordinary shares of stock, as indicated below:

(i) class A shall appoint a regular and an alternate director provided there exists at least one class A share;

(ii) The appointment of the other regular and alternate directors (which shall in no case be lower than six regular directors and an equal or lower number of alternate directors) shall correspond to class D. Classes B and C shall cast their votes together with class D shares at the special meeting of shareholders of such class called for the appointment of Directors;

(iii) at Class D special meetings of shareholders called for the appointment of directors, directors may be elected by cumulative voting in compliance with provisions of section 263 of Act 19,550, even when such meeting is attended by holders of shares A, B or C as afore-mentioned.

(d) Absence of a class: If no shares of a given class entitled to vote in the election of directors of a class of shares are present at a meeting held on second call for the appointment of directors, then the directors of such class shall be elected by the shareholders of the remaining classes voting jointly as if they belonged to a single class, except when the absence of shareholders shall occur at meetings of Class A, B or C shareholders, in which case the statutory auditor elected by class A shares or jointly by classes A, B and C, as appropriate

pursuant to the provisions of section 21, subsection b), shall appoint the regular and alternate directors of those classes that are absent.

(e) Staggered Appointment: Directors shall be appointed for the term decided at the meeting as provided for in section 11, subsection a), except when directors are appointed to complete the term of office of the directors being replaced.

(f) Candidate nomination: Each meeting at which directors for class D shares are to be elected, any class D shareholder or group of shareholders holding more than three per cent (3%) of the capital represented by class D shares, may request that all shareholders of such class be sent a list of the candidates to be proposed by such shareholder or group of shareholders at the meeting of such class for the election thereof. In the case of depositary banks having shares registered in their name, these provisions shall apply with respect to the beneficiaries. Likewise, the board of directors may propose candidates for the office of directors to be elected at the shareholders' meetings of the respective classes, whose names shall be notified to all shareholders together with the lists proposed by the shareholders first above-mentioned. The preceding provisions shall not prevent any shareholder present at the meeting from proposing candidates not included in the nominations notified by the Board. No proposal for the election of directors for any of

the classes may be made, prior to the meeting or during the course thereof, unless the written acceptance of the offices by the nominated candidates is presented to the Corporation.

(g) Manner of election: Notwithstanding the provisions related to cumulative voting set forth in paragraph (vi), subsection c) of this Section, class D Directors shall be elected by voting a whole list provided no shareholder shall object thereto; otherwise, it shall be carried out individually. The list or person, as the case may be, shall be considered elected when it has obtained the absolute majority vote of class D shares of stock present at the meeting. Should no list obtain a majority vote, a new voting shall take place in which the two lists or persons receiving the higher number of votes shall participate, and the list or person obtaining the higher number of votes shall be deemed elected.

(h) Removal: Subject to the requirements of applicable quorums, each class, by a majority vote of the shares of the class present at the meeting, may remove the directors elected thereby, provided the removal has been included in the agenda.

Section 12 – Performance Bond

Each Regular Director shall furnish a bond for the amount of at least ten thousand Pesos ($ 10,000) or its equivalent, which may consist of securities, sovereign bonds or amounts of money in domestic or

foreign currencies deposited with financial institutions or securities clearing houses, to the order of the Corporation, or sureties or bank guaranties, or surety bonds or third party insurance to the name of the Corporation, which cost shall be borne by each Director; no bond shall be furnished by depositing funds in the corporate safe deposit box. When the bond is furnished by depositing securities, sovereign bonds or sums of money in domestic or foreign currencies, the conditions under which such deposits are made shall ensure their unavailability during the course of any liability claims against him. Alternate Directors shall only furnish the mentioned bond in the event of taking office in replacement of a regular Director to complete the relevant term or terms of office.

Section 13 – Vacancies

Statutory auditors may appoint directors in the event vacancies, who shall hold office until the election of new Directors at the shareholders meeting. The statutory auditor appointed by Class A shares shall appoint one Director for Class A shareholder, following consultation with Class A shareholder, and the statutory auditors appointed by Class D shares shall appoint Directors for such class.

Section 14 – Remuneration

(a) Non-executive members: The duties of non-executive Board members shall be compensated pursuant to the resolution passed annually at the regular meeting in global terms and shall be distributed in equal parts among them, whereas among alternate

directors, such distribution shall be made pro rata the term during which they replaced such regular members. The meeting shall authorize the amounts that may be paid on account of such fees during the current fiscal year, subject to the approval at the meeting at which such fiscal year shall be considered.

(b) Executive members: The Corporation directors performing executive, technical and administrative functions or special assignments shall receive a remuneration for such duties or assignments which shall be in line with those prevailing in the market, and which shall be fixed by the Board, with abstention of the above-mentioned. Such remunerations, together with those of the whole Board, shall be subject to the approval of the shareholders' meeting, pursuant to the system provided for by section 261 of Act. 19,550.

(c) General rule: Directors' remunerations set forth in the foregoing subsections a) and b) shall comply with the limits provided for by section 261 of Act 19,550, except for the case provided for in the last paragraph of such section.

Section 15 – Meetings

The Board shall meet at least once a quarter, and may be called by the Chairman of the Board of Directors, or his replacement, whenever he shall deem it convenient. Likewise, the Chairman of the Board, or his replacement, shall call a meeting of the

Board at any of the director's request. In this case, the meeting shall be called by Chairman of the Board, and the meeting shall be held within a term of five days as from the request receipt; otherwise, the meeting may be called by any of the directors. The Meetings of the Board of Directors shall be called by written notice and shall include the agenda. However, items not included in the agenda may be considered in the event of urgent matters occurring after the call.

Section 16 – Quorum and majorities

At the meetings, the Board may transact business with the members present thereat, or communicated with one another by other means of simultaneous transmission of sound, images or words. The Board shall be presided over by the Chairman of the Board of Directors, or his replacement, and the signing of the minutes may be delegated by those who attend the meeting from another place to the members present at the meeting. The absolute majority of the board members shall constitute a quorum for the transaction of business, considering the attendance of participating and present members as well as those communicated with one another from another place. The attendance and participation of the members present and of the members attending the meeting from another place shall be entered in the minutes. If at a regularly called meeting, after one hour of the time fixed in the meeting notice the quorum shall not be present, the Chairman of the Board, or his replacement, may invite the alternate directors of the classes corresponding to those absent at the meeting to join the meeting until the minimum quorum shall be present or may call the

meeting to another date. Notwithstanding the above, in the event the absences shall not affect the quorum, the board may invite the alternate directors of the corresponding classes to join the meeting. The Board shall adopt resolutions by the majority vote of the members present at the meeting and of those participating thereat from another place. The Statutory Committee shall register in the Board Minutes the adoption of resolutions according to the appropriate procedure. The Chairman of the Board, or his replacement, shall, in all cases, be entitled to vote and double vote should the ballots result in a tie. Absent directors may authorize another director to vote on their behalf, provided the quorum shall be present, in which case no alternate directors shall join the meeting in replacement of the directors granting such authorization. Minutes shall be prepared and signed within FIVE (5) business days from the date on which the meeting was held by the present members of the Board and by the representative of the Statutory Committee.

Section 17 – Powers of the Board of Directors

The Board of Directors shall have wide powers to organize, conduct and manage the affairs of the Corporation, including those powers which require the granting of special powers of attorney as provided for in Section 1881 of the Civil Code and Section 9 of Decree Law 5965/63. It may specifically operate with all kind of banks, financial companies or public and private credit institutions; grant or revoke special, general, judicial, administrative or other kind of powers of attorney, with or without power of substitution; bring in, prosecute, answer or waive claims or criminal actions, and carry out any

other proceedings or legal acts by which the Corporation shall acquire rights or assume obligations, with no further restriction than those arising from the applicable laws, these By-laws or the decisions adopted at the meetings, being empowered to:

(i) Grant general and special powers of attorney – including those having the purpose set forth in section 1881 of the Civil Code – as well as those authorizing to lodge criminal actions, and to revoke them. For the purposes of filing and answering interrogatories, acknowledge documents in court proceedings, make statements answering charges at the preliminary investigation proceedings or declare at administrative proceedings, the Board shall be allowed to grant powers so that the Corporation be represented by a duly appointed director, manager, or attorney-in-fact.

(ii) Purchase, sell, assign, grant, exchange and give and accept in gratuitous bailment all kinds of real and personal property, business and industrial facilities, vessels, shipping equipment and aircraft, rights, including trade-marks and letters patent and industrial and intellectual property rights; enter into easement agreements, either as grantor or grantee, mortgages, ship mortgages, pledges or any other security interest and, in general, carry out any and all acts and enter into all the contracts deemed convenient with respect to the Corporate purpose, whether within the

country or abroad, including leases for the maximum term established by law.

(iii) Become associated with individuals or legal persons, in compliance with the legislation in force and these By-laws and enter into joint ventures or business collaboration agreements.

(iv) Take all the necessary steps before national or foreign authorities for the fulfillment of the Corporation's purpose.

(v) Approve staff appointments, appoint general or special managers, fix the compensation levels and working conditions thereof, and any other action related to staff policy, decide promotions, transfers and removals, and apply the penalties that might be applicable.

(vi) Issue, within the country or abroad, in national or foreign currency, debentures, corporate bonds or bonds guaranteed by a security interest, or by a special or floating guarantee or unsecured, whether convertible or not, pursuant to the legal applicable provisions and with the prior consent of the pertinent shareholders meeting when legally required.

(vii) Make court or out-of-court settlements in all kind of matters, submit to arbitration proceedings, file and answer all kinds of legal and administrative complaints and assume the capacity as accuser in the competent criminal or correctional jurisdiction, grant all kinds of bonds and extend jurisdictions within

the country or abroad, waive the right to appeal and any applicable statutes of limitation, file or answer interrogatories in court, make novations, grant debt reductions or grace periods and, in general, perform all acts for which the law requires a special power of attorney.

(viii) Carry out all kinds of transactions with banks and financial institutions, including Banco de la Nación Argentina, Banco de la Provincia de Buenos Aires, and other official banking and financial institutions, whether private, semiprivate existing within the country or abroad. Perform transactions and take out loans and other liabilities with official or private banks, including those mentioned in the preceding phrase, international credit institutions or agencies or of any other nature, individuals or legal persons domiciled in the country or abroad.

(ix) Create, maintain, close, restructure or transfer the offices and divisions of the Corporation and create new regional administrations, agencies or branches within the country or abroad; set up and accept representations.

(x) Approve and submit the Annual Report, Inventory, General Balance Sheet and Statement of Income of the Corporation at the shareholders' meeting for the consideration thereof, proposing, on an annual basis, the allocation of the Fiscal Year profits.

(xi) Approve the contracting system of the Corporation, which shall ensure the participation of bidders as well as the transparency and publicity of the bidding process.

(xii) Decide, if he shall deem it convenient and necessary, the creation of an executive committee and other committees of the Board, determine the functions and performance restrictions thereof within the powers granted by these By-laws and issue the internal rules of procedure thereof.

(xiii) Approve, if applicable, the appointment of the General Manager and Assistant General Manager, as provided for in section 18 (c).

(xiv) Resolve all doubts or issues derived from the application of these By-laws, for which purpose the Board of Directors shall be vested with ample powers, all of which shall be reported in due time at the shareholders' meeting.

(xv) Issue its own internal rules of procedure.

(xvi) Request and maintain the quotation, on the domestic and foreign stock and security markets, of its shares of stock and other securities when deemed necessary.

(xvii) Approve the annual budget, expenditure and investment estimates, the necessary borrowing levels and the annual action plan of the Corporation.

(xviii) Exercise the other powers granted by these By-laws.

The above list of powers is merely illustrative and not restrictive, and therefore, the Board is vested with all the powers to manage and dispose of the assets of the Corporation and to perform all the acts for the best fulfillment of the corporate purpose, save as otherwise provided for in these By-laws. Such powers may be exercised by attorneys-in-fact specifically appointed to such end, for the purposes and to the extent determined in each particular case.

Section 18 – Chairman and Vice Chairman of the Board of Directors – General Manager – Assistant General Manager

(a) Appointment: The Board shall appoint a Chairman from among the members elected by Class D shares, and it may appoint, as applicable, Vice Chairmen of the Board. In the event of a tie, it shall be decided by the votes cast by the Directors elected by Class D. The Chairman and Vice Chairmen of the Board shall hold office for two (2) fiscal years, provided such term shall not exceed their respective terms of office, and may be indefinitely reelected under such conditions should they be elected or reelected as Directors by Class D. The Chairman of the Board shall also serve as General Manager. He shall be the Corporations' chief executive officer and shall be responsible for the executive management functions. Should the Chairman of the Board state upon his election, or subsequently thereto, that he does not wish

to serve as General Manager, he shall propose the person (who may be a Director or not, but in the first case he shall have been elected by Class D shareholders) who shall hold such office, subject to the Board's consent. The Chairman of the Board may resume at any time the position as General Manager. The Chairman or the General Manager may propose two persons to the Board (who may be Directors or not, but in the first case they shall have been elected by Class D) who, subject to the Board's approval, shall serve as Assistant General Managers. The Assistant General Managers shall report directly to the General Manager and shall assist him in the management of the corporate affairs as well as in other executive functions assigned or delegated thereto by the General Manager, whom he shall replace in case of absence or other interim impediment. One Assistant General Manager shall serve as General Operations Director and the other as Assistant Director to the Executive Vice Chairman, if any.

(b) Vice Chairmen of the Board: The Executive Vice Chairman of the Board shall replace the Chairman of the Board in case of resignation, death, incapacity, disability, removal or temporary or definite absence of the latter. In all these cases, save in the case of temporary absence, the Board shall appoint a new Chairman of the Board within sixty days as from the date in which the vacancy occurred and in compliance with the provisions of subsection a) of this section. Should there be

more than one Vice Chairman, the Chairman's vacancy shall be filled by the Vice Chairman who has been discharging the functions of the Executive Vice President, and in second place by the eldest Vice Chairman.

(c) When one of the Vice Chairmen is appointed as General Manager or as Assistant General Manager, he shall be called "Executive Vice Chairman". When the Chairman of the Board serves as General Manager, if the Vice Chairman of the Board does not serve as Executive Vice Chairman, the latter shall only replace the former in the position as Chairman of the Board.

(d) In case of a tie vote in the approval of the General Manager's or the Assistant General Managers' designation, it shall be decided by the votes cast by the Directors elected by Class D.

(e) For the purposes of his activities abroad and with respect to the international capital markets, the General Manager shall be appointed as "Chief Executive Officer" and the General Operations Director shall be designated as "Chief Operating Officer". The General Manager and the Assistant General Managers shall be authorized to sign all contracts, commercial papers, public deeds and other public and private documents binding and/or granting rights to the Corporation within the scope of the powers granted by the Board, without detriment to the legal representation corresponding to the

Chairman of the Board and the Executive Vice Chairman of the Board, as the case may be, and notwithstanding the other powers and delegations of executing authority as the Board shall decide.

Section 19 – Powers of the Chairman of the Board

The Chairman of the Board, or the Executive Vice Chairman of the Board, in absence of the former, shall have the following rights and duties, in addition to those established in section 18 of these Bylaws:

(i) To exercise the legal representation of the Corporation in compliance with the provisions of section 268 of Act 19,550 and to comply with and verify the compliance of the laws, decrees, these By-laws and the resolutions adopted by the shareholders' meeting, the Board and the Executive Committee.

(ii) To call and preside over all meetings of the Board of Directors, being entitled to vote in all cases and to cast two votes in case of a tie.

(iii) To serve, if appropriate, as General Manager.

(iv) To execute public and private documents in the name and on behalf of the Corporation, without detriment to the delegation of executing authority or powers granted by the Board thereto and to the powers which, as the case may be, are vested in the General Manager and Assistant General Manager.

(v) To perform or order the performance of Board resolutions, without detriment to the powers vested, as the case may be, on the General Manager and Assistant General Manager, and notwithstanding the fact that the Board may decide to undertake on its own behalf the performance of a resolution or functions or powers of a particular nature.

(vi) To preside over the shareholders' meetings of the Corporation.

ARTICLE VI
SUPERVISION

Section 20 – Statutory Audit Committee

(a) Number of members: The supervision of the Corporation shall be in the hands of a statutory audit committee composed of three (3) to five (five) regular statutory auditors and three (3) to five (5) alternate statutory auditors, as shall be decided by the shareholders meeting.

(b) Appointment: Class A shares shall appoint one regular and one alternate statutory auditors, provided at last one share of such class shall exist; the remaining regular and alternate statutory auditors shall be appointed by Class D shares. Statutory auditors shall serve for one (1) fiscal year and shall have the powers established in Act No. 19,550 and in the legal regulations in force. Meetings of the Statutory Audit Committee may be called by any of the statutory auditors.

The presence of all its members shall be necessary at such meetings and resolutions shall be adopted by a majority vote. The dissident statutory auditor shall have the rights, powers and duties established in Act No. 19,550.

(c) Compensation: Statutory auditors' compensation shall be fixed at shareholders' regular meeting within the limits provided for by the legislation in force.

ARTICLE VII
REGULAR MEETINGS OF SHAREHOLDERS

Section 21 – Notice

Shareholders' regular or special meetings, as the case may be, shall be called for the purpose of considering the matters established in sections 234 and 235 of Act 19,550. Notices of meetings shall be given pursuant to the legal provisions in force.

Section 22 – Publicity

(a) Public notice: Notice of shareholders' meetings, whether regular or special, shall be published in the Official Gazette ("Boletín Oficial"), in one of the major newspapers in the Argentine Republic and in the reports of the stock and securities exchange markets of the country where the shares of the company shall be listed. Such notice shall be published during the term with the anticipation provided for by legal provisions in force. The Board shall order the publications to be made abroad in

order to comply with the rules and practices in force in the jurisdictions corresponding to the stock and exchange markets where the said shares shall be listed.

(b) Other media: The Board may hire the services of companies specialized in the communication with shareholders, and may resort to other media in order to inform them about their points of view regarding the items of the agenda to be submitted for consideration at the shareholders' meetings being called. The cost of such services and publicity shall be borne by the Corporation.

Section 23 – Proxies

Shareholders may be represented at any meeting by a written proxy granted by private instrument with the shareholder's signature certified either in court, by a notary public or a bank. The Chairman of the Board of Directors, shall preside over the shareholders' meetings, or in his absence, they shall be presided over by the person appointed at the meeting.

Section 24 – Decision-making

(a) Quorum and majorities: The applicable quorum and majorities are those provided for in sections 243 and 244 of Act 19,550 according to the nature of the meeting, notice and matters to be considered, except for:

(i) quorum at special meeting at second call, which shall be deemed validly held

whatever the number of shares entitled to vote present thereat;

(ii) decisions regarding the matters listed in subsection (c) of Section 6, which shall require the affirmative vote of class A shares of stock cast at a Special Meeting;

(iii) decisions related to the issues listed in subsection (b) below, which shall require, both at meetings on first and second call, a majority equivalent to 75% (seventy-five percent) of the shares entitled to vote;

(iv) decisions regarding the issues listed in subsection (c) below, which shall require both at first and second call a majority equivalent to 66% (sixty-six percent) of the shares entitled to vote;

(v) decisions modifying the rights of a class of shares, which shall require the consent of such class given at special meeting;

(vi) decisions related to the amendment of any provision of these By-laws requiring a special majority, which shall require to such end a special majority; and

(vii) other cases in which these By-laws require the voting per class or the consent of each of the classes.

(b) The decisions requiring the special majority provided for in paragraph (iii) of the preceding subsection, notwithstanding the consent given by at the Special Meeting of the class which rights are being modified, are the following: (i) the transfer of the corporate office to a foreign country; (ii) a substantial change of the corporate purpose whereby the activity defined in section 4 of these By-laws shall cease to be the main or principal activity of the corporation, (iii) the approval to cancel the listing of shares in the Buenos Aires and New York Stock Exchanges (iv) the Corporation splitting-up into various companies, if as a result thereof at least 25% of the assets of the Corporation are transferred to the resulting companies, even when such percentage shall be reached by successive splitting-ups operated in a one-year term.

(c) The decisions that shall require the special majority provided for in paragraph (iv) of the preceding subsection, notwithstanding the consent given at the Special Meeting of Shareholders by the class of shares the rights of which are being affected, are the following: (i) the amendment of these By-laws when it shall imply (A) modifying the percentages set forth in paragraphs 7 (c) or 7 (d) or (B) or eliminating the requirements set forth in paragraphs 7(e)(ii) 7 (f) (i) (F) and 7 (f) (v) of section 7 in the sense that the public offering shall reach 100% of the shares of stock and convertible securities, shall be payable in cash and shall not be lower than the price resulting form the mechanisms provided therein; (ii) the

granting of guarantees in favor of the shareholders of the Corporation, except when the guarantee and the guaranteed obligation shall have been assumed in furtherance of the corporate purpose; (iii) the complete suspension of all refining, commercialization and distribution activities; and (iv) the amendment of the provisions related to the number, nomination, election and structure of the Board of Directors.

(d) Special shareholders' meetings: Special meetings of classes of shares shall follow the quorum rules provided for regular shareholders' meetings applied to the total number of outstanding shares of such class. Should the general quorum of all classes of shares be present, any number of shares of the classes A, B and C shall constitute quorum at first and subsequent calls for special meetings of the said classes. Should the holder of all class A shares be the National Government, the special meeting of such class may be replaced by a notice signed by the public officer authorized to vote such shares.

ARTICLE VIII

BALANCE SHEETS AND ACCOUNTS

Section 25 – Fiscal year of the Corporation

(a) Date: the fiscal year of the Corporation shall commence on January 1 of each year and shall close on December 31 of like year. The Inventory, General Balance Sheet and

Statement of Income shall be drawn up as of that date according to the pertinent legal regulations and technical accounting standards.

(b) Modification: The fiscal year closing date may be modified by decision passed at the shareholders' meeting, which shall be registered with the Public Registry of Commerce and notified to the supervisory authorities.

(c) Allocation of profits: The liquid and realized profits shall be allocated as follows:

(i) Five percent (5%) up to the twenty percent of the capital stock, to the Legal Reserve Fund;

(ii) To fees pay able to the Board of Directors and statutory auditors, as the case may be;

(iii) To payment of fixed dividends on preferred shares of stock, if any with such preference, and otherwise the unpaid cumulative dividends;

(iv) The balance, in whole or in part, to dividends in cash to holders of shares of common stock or to contingency Reserve Funds or carried forward to the next fiscal year or to the purpose that the shareholder's meeting shall determine.

(d) Dividend payment: Dividends shall be paid pro rata the respective holdings, within ninety (90) days as from the approval thereof and the collection right shall revert to the Company upon the expiration of a three (3) year term as from the date they were made available to the shareholders. The shareholders' meeting, or the Board of Directors, as the case may be, may authorize the payment of dividends on a quarterly basis, provided the applicable provisions are not be infringed.

ARTICLE IX

LIQUIDATION

Section 26 – Applicable rules

Upon the dissolution, liquidation or winding up of the affairs of the Corporation for any cause whatsoever, the pertinent procedures shall be carried out in accordance with the provisions of Chapter I, Article XIII of Act Number 19,550.

ARTICLE X

OTHER PROVISIONS

Section 27

All references made in these By-laws to the "date of these By-laws" shall mean the date on which the By-laws amendment passed by Decree Number 1106/93 is registered with the Public Registry of Commerce.

Section 28 – Provisions applicable to acquisitions by the National Government

(A) 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, 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.

(B) The purchase offer provided for in the cases contemplated in the preceding points (1) and (2) in A) above shall be limited to the aggregate amount of class D shares of stock.

(C) The penalties provided for in subsection (h) of Section 7 shall be limited, in the case of the National Government, to the loss of the right to vote, provided the acquisition in breach of the provisions of Section 7 and this section has occurred gratuitously or due to a question of fact or a question of law in which the National Government has acted with the intention and purpose of acquiring shares exceeding the established limits, except if, as a consequence of such acquisition, the National Government becomes the owner of, or exercises the control over at least 49% of the capital stock, or over at least 50% of class D shares of stock. In all other cases, the penalties provided for in subsection h) of Section 7 shall be applied with no kind of limitation whatsoever.

(D) For the purposes provided for in this section and in subsections e) and f) of section 7, the term "companies" contemplated in paragraph (i) of section 7, in its relevant parts, comprises any kind of entity or organization having a relationship with the National Government of the nature described in the mentioned subsection. The term "securities" as used in this section shall have the scope provided for in subsection d) of section 7. The term "Takeover" used in section 7 is applied to the acquisitions provided for in paragraph (A) of this section 28.

Section 29 – Revoked

APPENDIX F

DECREE 530/2012

Seizure is ordered

Bs. As., 4/16/2012

VIEWED and WHEREAS:

Section 3rd of Act No. 17,319 stipulates that the NATIONAL EXECUTIVE BRANCH shall set the national policy with respect to activities related to the exploitation, industrialization, transportation, and sale of hydrocarbons, whose principal objective is to meet hydrocarbon needs of the country with the results from its deposits, maintaining reserves that ensure that objective.

In turn, Section 6th of such act establishes that permit holders and concessionaires shall have title to such hydrocarbons as they extract and, consequently, they may transport them, sell them, industrialize them, and sell their derivatives, complying with such regulations as are issued by the NATIONAL EXECUTIVE BRANCH on reasonable technical and economic bases that take into account the needs of domestic market and seek to foster exploration and exploitation of hydrocarbons.

One of the premises of the road to inclusive economic development, in a country such as ours that has hydrocarbon resources, is self-sufficiency as regards fuel.

Otherwise, the production and price of this strategic input that influences the cost and consumption structure of the entire economy would be determined by the dual action of local companies and international changes in the hydrocarbons market, the latter being principally dominated by the behavior of an international oligopoly such as the Organization of Petroleum Exporting Countries (OPEC).

A country that has the possibility of being self-sufficient in oil should ensure it because otherwise its economy is subject to the ups and downs of the international price which, furthermore, depends on geopolitical and speculative factors.

International experience does nothing but confirm that the objective of ensuring self-sufficiency in fuel determines, to a good degree, the type of economic and growth model that countries can implement.

Although YPF S.A. is the biggest company in the petroleum sector in our country, its actions over recent years show that the interests of the majority shareholder have been different from those of Argentine Republic, inasmuch as it has led to a reduction in investments, a fall in production, and a reduction in the reserve horizon that compromises energy sovereignty of the country, and it is evident that the actions of the company were guided by a short-term logic aimed at international expansion bordering on speculation which translated into the progressive evisceration of the principal company in our country, which had a negative effect on production and the level of reserves.

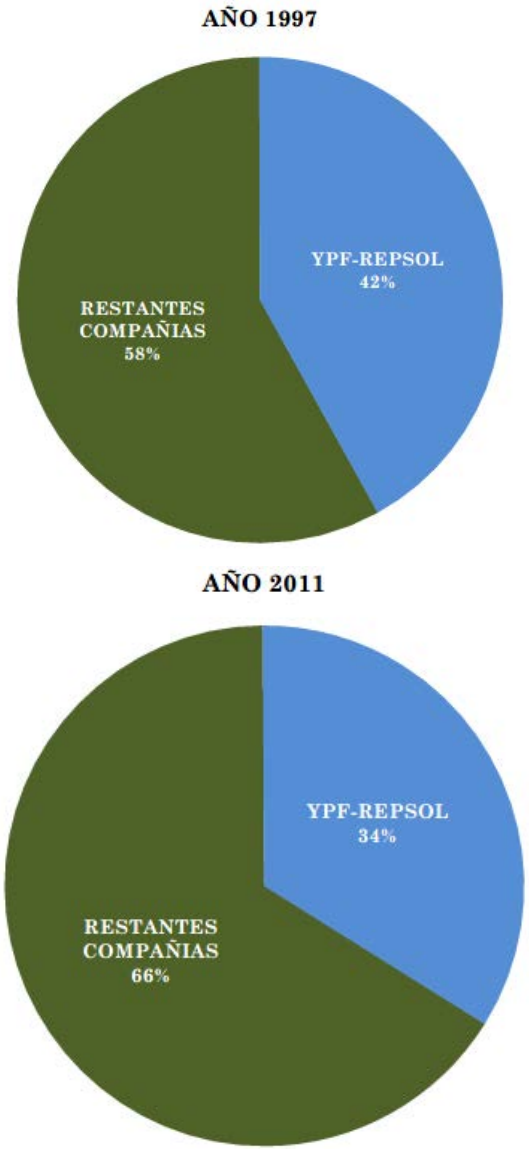
There is no way to deny that over recent years, in order to increase hydrocarbon production and exploration, National State designed different instruments to "incentivize" the sector. The Petróleo Plus, Refino Plus, and Gas Plus programs were created in order to increase exploration, the level of reserves and the production of oil and natural gas.

However, although YPF S.A. was a beneficiary of these programs, the company's supply of hydrocarbons has not only failed to increase, but also it continues to show a downward trend.

In parallel, there has been a deepening strategy to virtually eviscerate the company, which process has led to a sizable increase in sending profit and dividends abroad.

The predatory policy undertaken by the principal shareholder since 1999 led to a systematic loss of relevance for YPF S.A. in the local hydrocarbons market. While numerous private companies, both foreign and domestic, expanded their investments, and thereby their production, there was a progressive reduction in the relevance of YPF S.A. in the production of hydrocarbons. Thus in 1997, YPF represented 42% of oil production and 35% of gas production in our country, which share fell in 2011 to 34% and 23%, respectively.

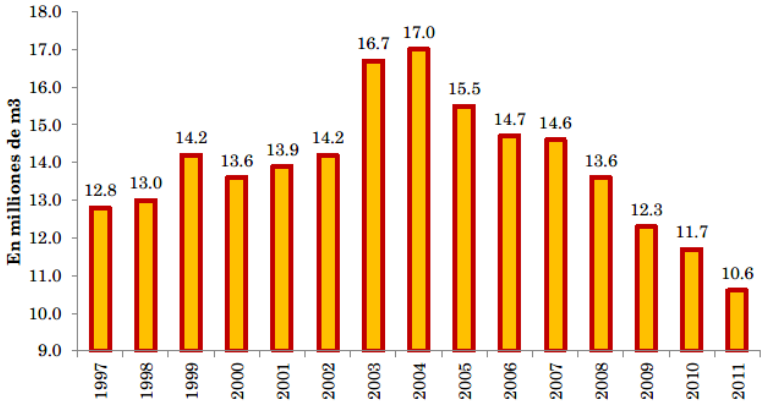
The following chart shows the share in local oil production, 1997 and 2001 (in %).



This same strategy occurred in gas production. Once all of the deposits discovered in the prior phases had been exhausted, the lack of investments led to a

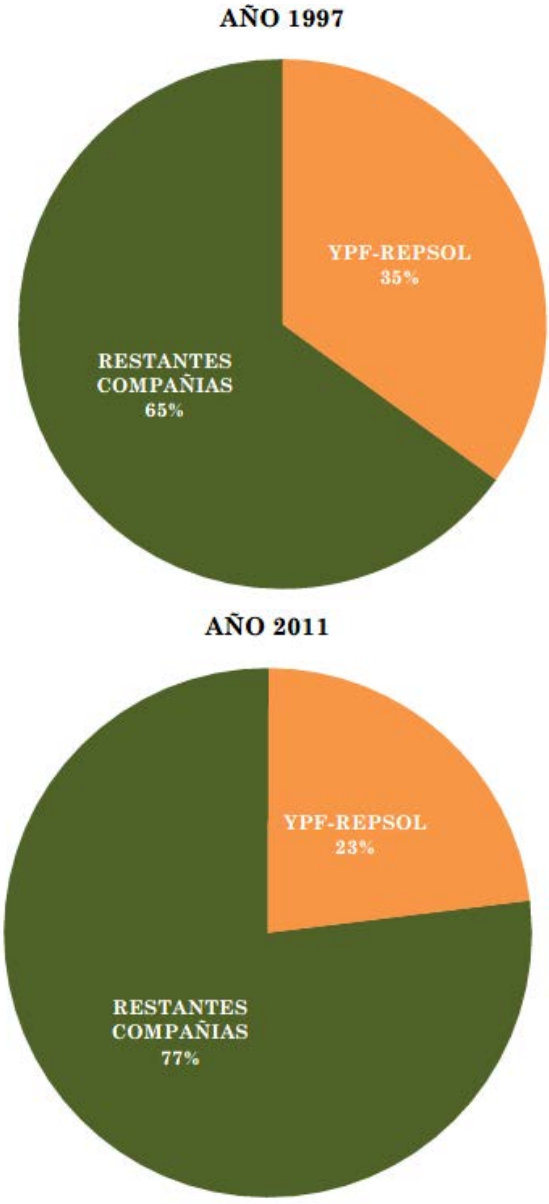
contraction in gas production by Repsol-YPF. Thus, whereas between 1997 and 2004 the company's gas production increased by 33%, between 2004 and 2011 it fell by 38%.

Change in gas production by Repsol-YPF (in millions of m3):



As also occurred with the production of oil, the gas investment policy led to a fall in production and market share by the company: Repsol-YPF reduced its market share between 1997 and 2011 by more than 11 percentage points.

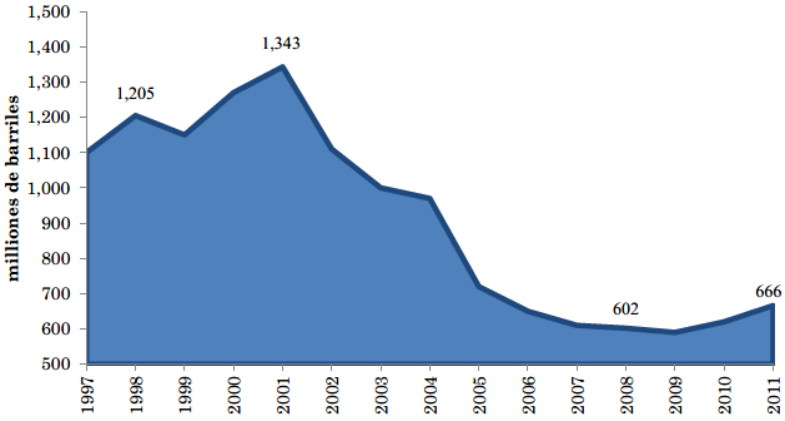
Share in production, 1997 and 2011 (in %).



The systematic lack of investment by the company led to a significant fall in oil reserves in the Repsol-

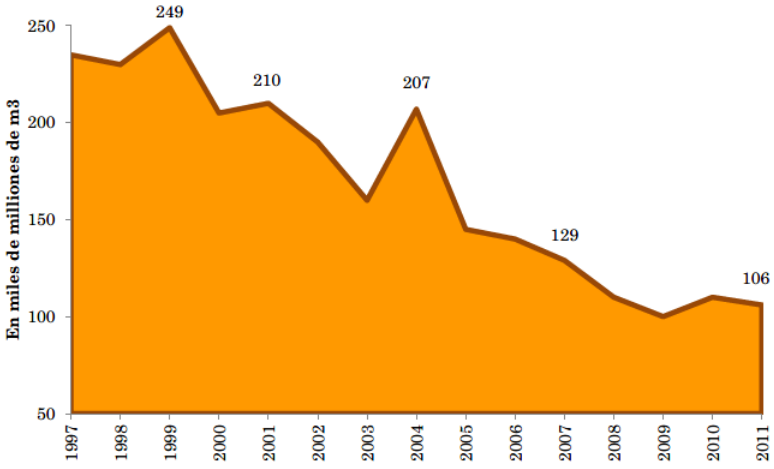
YPF concession areas. Thus, Repsol-YPF's oil reserves fell by 50% between 2001 and 2011.

Change in the level of Repsol-YPF's oil reserves (in millions of barrels):



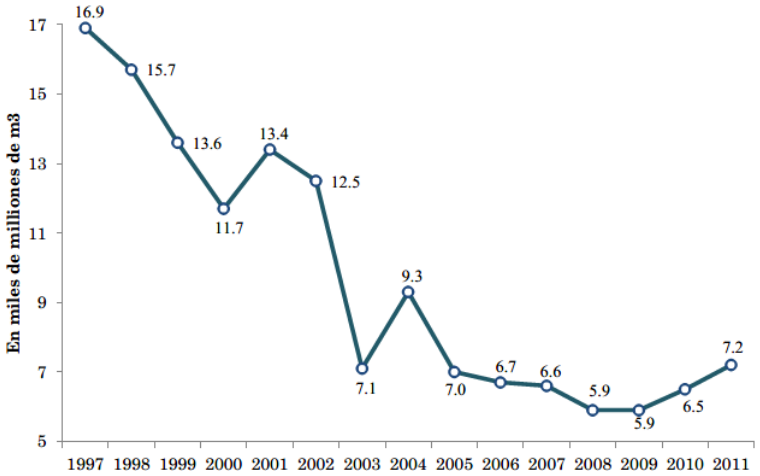
In the case of gas reserves, the reduction in the reserve horizon has forced the importation of this fuel, with the consequent need to finance those purchases with foreign currency. Indeed, since 1999, Repsol-YPF's gas reserves fell by more than 55%.

Change in the level of Repsol-YPF's gas reserves (in billions of m3):



This reduction was so drastic that it led to a fall in the gas reserve horizon from almost 17 years in 1997 to just 7 years in 2011.

Change in the level of YPF-Repsol's gas reserves (in years of consumption):



However, the contraction of the oil and gas production levels and, consequently, the fall in the reserve horizon was far from negatively affecting the company. Indeed, the reduction in production was not a result of the slow depletion of the wells explored by Repsol-YPF, but rather between 1997 and 2001 Repsol-YPF's share fell as a result of a policy of market segmentation by the company, which reduced the production of oil and gas so as to be able to increase the prices and keep the most profitable portion of the market.

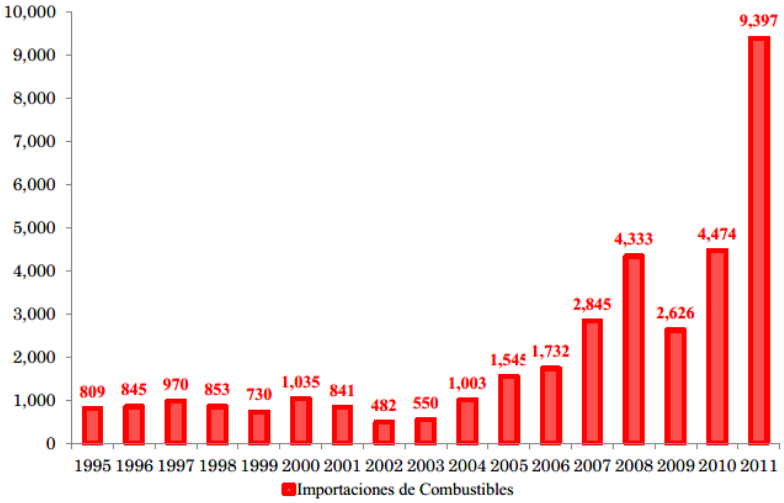
As shall be seen below, Repsol-YPF's behavior caused Argentina to have a significant deterioration in terms of its self-sufficiency capacity in fuels. The result of this change caused an increasing need for fuel imports which implied greater external

vulnerability and undermined the bases of the social inclusion growth process which from 2003 to date has allowed, among other things, the unemployment rate to fall from the 24.7% reached in 2002 to a level as low as 6.7% of the economically active population. For all these workers to continue to enjoy the fruits of growth and, above all, to continue to advance along this road, it is central that the State has the ability and power to effectively control the activity in the sector.

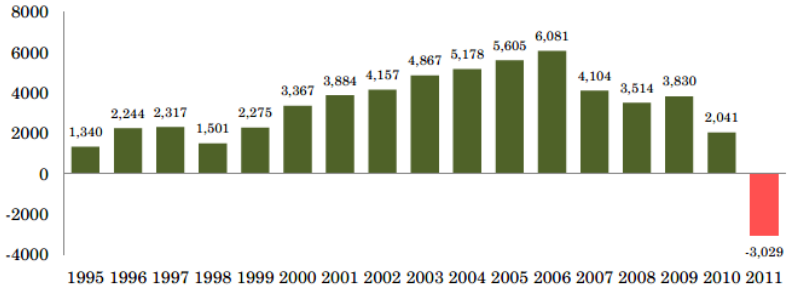
Repsol-YPF's predatory strategy has had serious consequences for domestic economy, given that as a result, starting in the middle of 2010, the imported amounts of fuel exceeded the exported amounts.

Likewise, an analysis of oil and gas production data clearly shows the differential responsibility that belongs to YPF. Between 1998 and 2011 Argentina's total production of oil fell by 15.9 million m3 per year, out of which 8.6 million m3 were YPF's responsibility. In this same sense, the total production of gas fell between 2004 and 2011 by 6.6 million m3 per year, out of which 6.4 million belonged to YPF. That is to say, YPF was responsible for 54% of the fall in oil production and 97% of the fall in gas production. Indeed, if YPF had been able to maintain 1998 levels of oil production and 2004 levels of gas production, the fall in the former of these hydrocarbons would have been reduced by one-half, whereas, in the case of gas, the production would not have recorded any reduction whatsoever.

Change in fuel imports (in millions of dollars):



In conclusion, the predatory policy implemented by Repsol-YPF led Argentina to experience a deficit trade balance for fuels, which reached US$ 3.029 billion in 2011, for the first time in 17 years.



As a result, it is absolutely necessary to ensure the supply of fuel, in order to guarantee that the country's needs are met, and specific measures must exist to that end.

Thus, it is necessary to take into account the forfeitures ordered by different Provincial Governments, with respect to concessions granted to YPF S.A.

In this line of thought, on March 14 of this year, the Province of Chubut, through Decree No. 324/12, ordered the forfeiture of YPF's operating contracts in the "EL TREBOL – ESCALANTE" and "CAÑADON PERDIDO – CAMPAMENTO CENTRAL – BELLA VISTA ESTE" areas, after determining that the company has failed to comply with the investments that it was responsible for, promised in the sector.

Likewise, on the 19th of that month, the Province of Neuquén was the one that reversed the concessions in the "Chihuido de la Salina" and "Portezuelo Minas" areas, also concessioned to YPF S.A., after proving the breach by the company of the obligations corresponding to those concessions.

The Province of Salta did the same thing on the 26th of that month, also claiming breaches by the concessionaire, in relation to the Tartagal Oeste deposit, whereas on the next day the province of Río Negro withdrew YPF's concession to exploit the LOS CALDENES area and on the 4th of such month, it did the same thing with the Ñirihuau area concession.

On April 11, the Province of Santa Cruz was the one that ordered forfeiture due to breach of the concession of the LOS PERALES – LAS MESETAS area operated by YPF S.A., a deposit of vital importance for the company. It also cancelled the concessions for the CAÑADON VASCO and PICO

TRUNCADO – EL CORDON areas, located in the San Jorge Gulf Basin, which are added to the reversals announced by that province in the middle of March through Decree No. 393/12 regarding the LOS MONOS Y CERRO PIEDRA – CERRO GUADAL NORTE areas, also operated by YPF S.A. Those areas represent 11% of the total oil production in the country.

Different measures were also adopted with respect to hydrocarbons by the Department of Domestic Trade within the Supply Act (Resolution No. 13 dated February 1, 2011, Resolution No. 295 dated August 17, 2010, Resolution No. 25 dated October 11, 2006).

In this instance, in view of the seriousness of the situation set forth and to resolve that problem, National Government has ordered to send a Bill to the Honorable Congress of the Nation, which contributes to the declaration of national public interest and to a priority objective for ARGENTINE REPUBLIC to achieve self-sufficiency in hydrocarbons, as well as the exploitation, industrialization, transportation, and commercialization of hydrocarbons, in order to ensure economic development with social equity, job creation, an increase in the competitiveness of the different economic sectors and equitable and sustainable growth of provinces and regions; as well as the declaration of public utility and subject to expropriation of FIFTY-ONE PERCENT (51%) of the equity of YPF Sociedad Anónima represented by the same percentage of Class D shares of that company belonging to Repsol YPF S.A., its direct or indirect controllers or controlled entities.

Likewise, to ensure full and absolute compliance with measures brought about through the aforementioned Bill that is being sent today, the issuance of an act of such nature is vital to take the necessary measures that urgency requires, as it is impossible to follow the ordinary processes stipulated by NATIONAL CONSTITUTION to enact laws, thus ordering the temporary seizure of YPF S.A. for a period of THIRTY (30) days in order to ensure the continuity of the company, the preservation of its assets and its equity, the supply of fuel and to ensure that the country's needs are met. Act No. 26,122 regulates the process and the scope of the involvement of the HONORABLE CONGRESS OF THE NATION with respect to the Necessary and Urgent Decrees issued by the NATIONAL EXECUTIVE BRANCH, by virtue of the provisions of Section 99, subsection 3 of NATIONAL CONSTITUTION.

The aforementioned act stipulates that the Permanent Bicameral Committee has jurisdiction to decide on the validity or invalidity of necessary and urgent decrees, as well as to send an opinion to the plenary of each Chamber for the express prosecution thereof, within a period of TEN (10) business days.

Section 20 of Act No. 26,122 also stipulates that if the Permanent Bicameral Committee does not send the corresponding order, the Chambers shall undertake the express and immediate prosecution of the decree, pursuant to the provisions of Sections 99, subsection 3 and 82 of NATIONAL CONSTITUTION.

For its part, Section 22 of such act provides that the Chambers will decide through different resolutions

and that the rejection or approval of the decrees shall be expressed as established in Section 82 of the Constitution.

The pertinent legal department has been involved as appropriate.

This measure is issued in use of the powers conferred by Section 99, subsection 3 of NATIONAL CONSTITUTION and Sections 2nd, 19, and 20 of Act No. 26,122.

Therefore,

THE PRESIDENT OF THE ARGENTINE NATION IN A GENERAL RESOLUTION OF MINISTERS

ORDERS:

Section 1st – Order the temporary seizure of YPF S.A. for a period of THIRTY (30) days in order to ensure the continuity of the company, the preservation of its assets and equity, the supply of fuel and to ensure that the country's needs are met.

(Infoleg Note: Sect. 1st of Decree No. 732/2012 Official Register 5/16/2012 extends, from its expiration date, the seizure of YPF Sociedad Anónima and Repsol YPF SAS S.A., which was ordered by this Decree and 557 dated April 18, 2012, for a period of THIRTY (30) days)

(Infoleg Note: Sect. 1st of Decree No. 557/2012 Official Register 4/19/2012 expands the scope of this Decree to Repsol YPF Gas S.A. Effective period: from that day)

Section 2nd – Appoint the Minister of Federal Planning, Public Investment and Services, Architect Mr. Julio Miguel DE VIDO (ID No. 8.186.471) to the position of Receiver of YPF S.A.

(Infoleg Note: Sect. 2nd of Decree No. 732/2012 Official Register 5/16/2012 extends for a period of THIRTY (30) days, the appointment of the Minister of Federal Planning, Public Investment and Services, Architect Mr .Julio Miguel DE VIDO (ID. No. 8.186.471) as Receiver of YPF Sociedad Anónima and Repsol YPF GAS S.A.)

Sect. 3rd – In exercise of such position, the appointed Receiver shall have such powers conferred by YPF S.A. Bylaws to the Board of Directors and/or the President of the company.

Sect. 4th – This measure shall come into effect from the day it is issued.

Sect. 5th – Inform the HONORABLE CONGRESS OF THE NATION by virtue of the provisions of Section 99, subsection 3 of NATIONAL CONSTITUTION.

Sect. 6th – Notify, publish, give to the National Department of Civil Register and file. FERNANDEZ DE KIRCHNER.– Juan M. Abal Medina. – Aníbal F. Randazzo. – Nilda C. Garré. – Hernán G. Lorenzino. – Débora A. Giorgi. – Julio M. De Vido. – Julio C. Alak. – Carlos A. Tomada. – Alicia M. Kirchner. – Alberto E. Sileoni. – José L. S. Barañao. – Juan L. Manzur. – Héctor M. Timerman. – Carlos E. Meyer.

Honorable House of Deputies of the Nation

CONGRESS OF THE NATION

Unnumbered Resolution

Decree 530/2012 is declared valid.

Bs. As., 5/23/2012

Madam President of the Nation:

I have the honor to write to the Honorable President to notify that today this Honorable House has approved the following resolution.

THE HOUSE OF DEPUTIES OF THE NATION
RESOLVES:

Section 1st – Decree 530 dated April 16, 2012 is declared valid.

Sect. 2nd – Notify the Executive.

God save the President.
Julián A. Domínguez. – Gervasio Bozzano.

Honorable Senate of the Nation

CONGRESS OF THE NATION

Unnumbered Resolution

Decree No. 530/12 is declared valid.

Bs. As., 5/30/2012

Madam, President of the Nation:

I have the honor to write to the Honorable President to notify that today this Honorable Senate has approved the following resolution:

"THE SENATE OF THE ARGENTINE NATION RESOLVES:

Section 1st – Decree 530 dated April 16, 2012 is declared valid.

Section 2nd – Notify the National Executive Branch."

Sincerely yours,
AMADO BOUDOU. – Juan H. Estrada.

APPENDIX G

LAW 26,741

THE SENATE AND HOUSE OF DELEGATES OF THE ARGENTINE NATION, CONVENED IN LEGISLATURE, ETC. ISSUES BY LAW:

TITLE I

SOLE CHAPTER

ARGENTINA'S HYDROCARBON SOVEREIGNTY

Article 1. Achieving self-sufficiency in the supply of hydrocarbons as well as in the exploration, exploitation, industrialization, transportation and sale of hydrocarbons, is hereby declared a national public interest and a priority for the Republic of Argentina, with the goal of guaranteeing socially equitable economic development, the creation of jobs, the increase of the competitiveness of various economic sectors and the equitable and sustainable growth of the provinces and regions.

Article 2. The National Executive Office, as the authority in charge of setting policy on this subject, shall introduce the measures necessary to accomplish the purpose of the present law with the participation of the provinces and public and private capital, national and international.

Article 3. The principles of the hydrocarbon policy of the Republic of Argentina are hereby established as the following:

a. Promote the use of hydrocarbons and their derivatives to promote development and as a mechanism to increase the competitiveness of the various economic sectors and that of the provinces and regions;

b. Convert hydrocarbon resources to proved reserves and their exploitation and the restoration of reserves;

c. Integrate public and private capital, national and international, into strategic alliances dedicated to the exploration and exploitation of conventional and nonconventional hydrocarbons;

d. Maximize the investments and the resources employed for the achievement of self-sufficiency in hydrocarbons in the short, medium and long term;

e. Incorporate new technologies and categories of management that contribute to the improvement of hydrocarbon exploration and exploitation activities and the advancement of technological development in the Republic of Argentina in this regard;

f. Promote the industrialization and sale of hydrocarbons with a high added-value;

g. Protect the interests of consumers with respect to the price, quality and availability of hydrocarbon derivatives;

h. Collect outstanding balances relating to exportable hydrocarbons in order to improve

the trade balance, ensuring a rational exploitation of the resources and the sustainability of its exploitation for use by future generations.

TITLE II

SOLE CHAPTER

FEDERAL COUNCIL OF HYDROCARBONS

Article 4. A Federal Council of Hydrocarbons is hereby created which shall include the participation of the following:

a. The Ministry of Economy and Public Finances, the Ministry of Federal Planning, Public Investment and Services, the Ministry of Labor, Employment and Social Security and the Ministry of Industry, through their respective representatives.

b. The provinces and the Autonomous City of Buenos Aires, through the representatives that each may appoint.

Article 5. The duties of the Federal Council of Hydrocarbons shall be the following:

a. Promote the coordinated action of the National and Provincial Governments, with the purpose of ensuring the fulfillment of the objectives of the present law.

b. Adopt decisions regarding all questions related to the accomplishment of the objectives of this law and the establishment of

the hydrocarbons policy of the Republic of Argentina that the National Executive Office may submit for consideration.

Article 6. The Council shall convene a meeting with the absolute majority of its members an shall be presided and represented by the representative of the National Government that the National Executive Office designates to such end. It shall establish its own internal regulations.

TITLE III

RECUPERATION OF CONTROL OF YPF

CHAPTER I

EXPROPRIATION

Article 7. For purposes of ensuring the fulfillment of the objectives of this law, fifty-one percent (51%) of the equity of YPF Sociedad Anónima, represented by an identical stake of Class D shares held by Repsol YPF S.A., its controlled or controlling entities, directly or indirectly, is hereby declared a public interest and subject to expropriation. In addition, fifty-one percent (51%) of the equity of Repsol YPF GAS S.A, represented by sixty percent (60%) of the Class A shares of such company, held by Repsol Butano S.A., its controlled or controlling entities, is hereby declared a public interest and subject to expropriation.

Article 8. The YPF Sociedad Anónima and Repsol YPF Gas S.A. shares subject to expropriation in accordance with the preceding article shall be distributed in the following manner: fifty-one

percent (51%) shall belong to the National Government and the remaining forty-nine percent (49%) shall be distributed among the provinces that compose the National Organization of Hydrocarbon Producing States.

Regulations shall take into consideration the conditions relating to the transfer, ensuring that the distribution of the shares among the provinces that accept their transfer is conducted in an equitable manner, considering each of their levels of hydrocarbon production and proved reserves.

Article 9. To ensure compliance with the objectives of this law, the National Executive Office, by itself or through an appointed public entity, shall exercise all the political rights associated with the shares subject to expropriation until the transfer of political and economic rights is completed, in accordance with the preceding article.

The transfer of the political and economic rights of the shares subject to expropriation conducted by the National Government in favor of the provincial governments members of the National Organization of Hydrocarbon Producing States, shall provide for the exercise of shareholder rights in a unified manner for the minimum term of fifty (50) years by means of a shareholders' agreement.

The appointment of YPF S.A. Directors corresponding to the expropriated shares shall be completed proportionately considering the holdings of the National Government, Provincial Governments and one Director shall represent the employees of the company.

Article 10. For purposes of implementing this law and the registration of the ownership rights connected to the shares subject to expropriation, it is hereby recorded that the expropriation of such shares is conducted for the public interest and that any future transfer of the shares is prohibited without the permission of the National Congress by a two-thirds vote of its members.

Article 11. The expropriation processes shall be governed by the provisions of Law No. 21,499 and the expropriator shall be the National Executive Office.

Article 12. The price of the property subject to expropriation shall be determined in accordance with the provisions of Law No. 21,499, Article 10 and the corresponding provisions. The appraisal shall be conducted by the National Court of Appraisal.

CHAPTER II

OPERATIONAL CONTINUITY

Article 13. To ensure the continuity of the activities associated with the exploration, production, processing and refining of hydrocarbons by YPF Sociedad Anónima and Repsol YPF Gas S.A., as well as their transport, distribution and sale, and the increasing investment flows, and adequately supplying the fuel required for the function of the national economy pursuant to the provisions of this law, the National Executive Office, through the persons or organizations it appoints, shall exercise all of the rights conferred upon the shares subject to

expropriation in accordance with articles 57 and 59 of such act.

The National Securities Commission, on the day of enactment of this law, shall convene a shareholders meeting in order to discuss, among other matters deemed necessary and relevant for the purposes of the foregoing, the dismissal of all the directors and alternate members, trustees and their alternates, and appoint replacements for the applicable term.

Article 14. The National Executive Office and Intervenor designated by YPF Sociedad Anónima and Repsol YPF Gas S.A. are empowered to adopt all actions and precautions as necessary, until control of YPF Sociedad Anónima and Repsol YPF Gas S.A. is assumed, in order to ensure the operation of the company, the preservation of its assets, and the supply of hydrocarbons.

CHAPTER III

THE LEGAL CONTINUITY AND MANAGEMENT OF YPF S.A.

Article 15. In the execution of its activities, YPF Sociedad Anónima and Repsol YPF Gas S.A. shall continue to operate as publicly traded corporations pursuant to Chapter II, Section V of Law Nº 19,550 and its corresponding regulations, and shall not be subject to any legislation or regulation applicable to the management or control of Companies or entities owned by the National Government or provincial governments.

Article 16. The administration of shareholder rights corresponding to the shares subject to expropriation by the National Government and its provinces shall be executed pursuant to the following principles:

b. The strategic contribution of YPF Sociedad Anónima in compliance with the objectives set forth herein;

c. The administration of YPF Sociedad Anónima pursuant to the industry's best practices and corporate governance, safeguarding shareholder interest and generating value on their behalf;

d. The professional management of YPF S.A.

Article 17. For purposes of complying with the present law, with respect to sources of finance, YPF Sociedad Anónima shall resort to internal and external, strategic alliances, joint ventures, transitory business unions, and all cooperation partnerships whether public, private or mixed companies, domestic and foreign.

Article 18. This law is a public order law and shall enter into force upon its publication in the Official Gazette.

Article 19. It shall be communicated to the National Executive Office.

GIVEN IN THE SESSIONS ROOM OF THE ARGENTINE CONGRESS, IN BUENOS AIRES, THE THIRD DAY OF MAY OF THE YEAR TWO THOUSAND AND TWELVE.

-REGISTERED UNDER NO. 26,741-

AMADO BOUDOU. – JULIAN A. DOMINGUEZ. – Juan H. Estrada. – Gervasio Bozzano

APPENDIX H

DECLARATION OF ISMAEL MATA, FILED SEPTEMBER 8, 2015

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

15-Civ.-2739 (TPG)

PETERSEN ENERGÍA INVERSORA, S.A.U. *and* PETERSEN ENERGÍA, S.A.U.,

Plaintiffs,

-v.-

ARGENTINE REPUBLIC *and* YPF S.A.,

Defendants.

September 8, 2015, Filed

DECLARATION OF ISMAEL MATA

Pursuant to 28 U.S.C. § 1746, I, Ismael MATA declare as follows:

1. I prepared this declaration at the request of counsel for the Republic of Argentina, one of the defendants in this case.

2. My professional experience, teaching activity, academic work and performance as expert in international arbitrations are included in my *curriculum vitae*, a copy of which is attached hereto (in English – Annex A).

3. My Opinion is based on the provisions of the National Constitution, Hydrocarbons Law No. 17,319, Argentine Companies Law No. 19,550, Expropriation Law No. 21,499, Emergency Decree No. 530/2012 and laws No. 26,741 and No. 26,932, as well as other supplementary rules thereto, specified as cited in the text of the Opinion.

I. DIFFERENCE BETWEEN PUBLIC AND PRIVATE LAW.

4. The Argentine legal system makes a distinction between public and private law and the rules of public law protect directly and immediately the public or general interests of society.

5. Public law rules govern relationships between the Government and individuals or residents, which may involve governmental power or be of a contractual nature, but always related to a public subject (i.e., public domain, public service, regulated activity).

6. On the other hand, private law standards govern and protect directly and immediately particular legal interests, although in some cases the general interest justifies public regulation, such as family relations or the public announcement of real property rights.

7. The Argentine legal system relies on the National Constitution (hereinafter, CN), and its Article 31 defines the rules of such system hierarchically, as follows: *"This Constitution, the laws of the Nation enacted by Congress in pursuance*

thereof, and treaties with foreign powers, are the supreme law of the Nation..."

8. The protection of property rights is defined in the first Chapter of the CN called "Declarations, rights and guarantees", whose Article 17 states that *"Property may not be violated, and no inhabitant of the Nation can be deprived of it except by virtue of a judgment based on law."* Next, it refers to the public law instrument that empowers the National Government to dispose of private property, and states: *"Expropriation for reason of public use must be authorized by law and previously compensated."*

9. Regarding relationships with individuals, the Government is under a duty to preserve public interest and, therefore, legislation grants the Government attributes of power that, in certain cases, allow the adoption of unilateral decisions against individuals, even in administrative contracts agreed with them.

10. In this type of public contracts, the "*pacta sunt servanda*" principle is related to the public interest purpose and enables the contracting Administration, within the limits set forth by law, to adopt certain decisions that may modify the scope of services ("potestas variandi"), in order to preserve public interest related to the relationship. Such attributes are included in public contract systems, and have always been considered legitimate by the highest Argentine court, the Argentine Supreme Court of Justice (hereinafter, CSJN).

11. One of the most prominent commentators on Public Law in Argentina wrote that the difference between a legal case of public and private law is one where: *"Public interest may not be alienated as a private object or property; the relationships so established do not have the stability of those derived from private interests"*[3].

12. Finally, it should be noted that the priority of public law as opposed to a private contract means that the expropriation of YPF shares for reasons of public interest, as a result of a sovereign act of the Government, prevails over the clauses of a private company contract such as YPF bylaws, in particular, regarding the procedure related to an offer to acquire shares in the market.

---

[3] The author adds: "Revocable administrative subjective rights, also called conditional rights, are called administrative subjective rights because the public nature of property comprising ownership is added to the legal structure, as a legal situation in particular. This kind of legal property is subjected to the collective interest because of its public essence. The content of that ownership satisfies collective needs, and may not be taken for the benefit of a subject in particular. This legal situation may not be described as a vested right, because public interest may never be disposed of or transferred for the benefit of private property (...) Collective interest is a part and content of public order and may never be transferred to the private domain of an individual. (FIORINI, Bartolomé A., "Qué es el contencioso"(What is litigation) Abeledo-Perrot Publishing House, Buenos Aires, 1997, pages 58 and 59).

II. REGULATORY POWER OF THE EXECUTIVE POWER TOWARDS THE YPF BYLAWS.

13. Argentine law makes a distinction among four kinds of regulations derived from competences granted to the Executive Power by the CN: 1) executive or executory [4] ; 2) autonomous or independent[5]; 3) delegated[6]; and 4) of necessity and urgency[7].

---

[4] These are set forth in Article 99, Subsection 2, CN, as follows: "It issues the instructions and rules necessary for the enforcement of the laws of the nation, without altering their spirit with regulatory exceptions".

[5] They are enacted by such Power through direct application of the CN, in its capacity as owner and in the exercise of its capacity as "politically responsible for the general administration of the country" (Article 99, Subsection 1, CN).

[6] They are delegated by the Congress to the Executive Power in exceptional cases and pursuant to a restrictive regulation of the CN, as follows: "*The legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress*" (Article 76, CN).

[7] For this type of regulation, the Constitution states: "*The Executive Power shall in no event issue provisions of legislative nature, in which case they shall be absolutely and irreparably null and void. Only when due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed, and when rules are not referred to criminal issues, taxation, electoral matters, or the system of political parties, it shall issue decrees on grounds of necessity and urgency, which shall be decided by a general*

(cont'd)

14. Regarding the issues analyzed in the case in which I have been asked to issue an opinion, I think that, in particular, the legal profile of executive regulations and regulations on grounds of necessity and urgency are of interest, as Decree No. 1,106/1993, which approved the YPF Bylaws, is included in the former category, while Decree No. 530/2012, which ordered the provisional intervention of YPF, is included in the latter category (necessity and urgency).

15. Firstly, I will analyze the first regulation and its relationship with the approved Bylaws, and regarding Decree No. 530/2012, I will comment on it later as part of the process of expropriation of YPF shares.

16. Decree No. 1,106/1993, derived from Law No. 24,145 and enacted in 1992, ordered the transfer of hydrocarbon fields of the National Government to the provinces, as well as the YPF capital stock privatization. Such decree was "executive", as inferred from the content and its wording, as the last recital states as follows: "it is hereby enacted in the exercise of rights derived from Subsection 2, Article 86, CN (currently, Article 99, after the 1994 Constitutional Reform) and Law No. 24,145".

(cont'd from previous page)
agreement of ministers who shall countersign them together with the Chief of the Ministerial Cabinet" (Section 99, Subsection 2, second and third paragraph, CN). It also establishes the subsequent control procedure to be followed by Congress.

17. Pursuant to the Argentine legal system, Decree N 1,106/1993 is a statutory act of law, subjected to public law. The YPF Bylaws, approved by Article 1 of such decree, is a company agreement governed by private law, as evidenced by its design pursuant to the Argentine Companies Law No. 19,550 and the references to such Law. (For instance, Articles 6 (e), 10 (a), 11 (e)(vi), 14 (c), 19 (i), 20 (b), 21, 24 (a), 26), as well as reference to the Argentine Civil Code in matters related to the Board of Directors' authority (Article 17). Moreover, Articles 2 and 3 of such decree provided for the carrying out of the acts of formal registration, which are acts attributable to private corporations.

18. Finally, regarding the separation between the public law system, to which Decree No. 1106/1993 is subordinated, and the private law system, applicable to the YPF Bylaws, I would like to emphasize the fact that while Article 1 of Decree 1,106/1993 approves the above mentioned bylaws, it also states that, in order to be fully effective, the approval of a Special Meeting of YPF is required, where the Government shall attend "in the exercise of shareholders' rights" of such corporation.

19. Therefore, the regulatory provision explains that subsequent amendments of the YPF bylaws did not require approval of the Congress or the Executive Power.

III. EXPROPRIATION SYSTEM

20. In the Argentine system, expropriation is clearly within the scope of public law, pursuant to

Article 17 of the CN and its specific regulation through Law No. 21,499.

21. Expropriation is a legal means used to resolve the conflict between two interests: the public and private, and is employed in case of incompatibility between the right of the individual and the interest of a group, community or society, represented by the Government. The basis of expropriation involves enabling the Government to carry out its essential functions; therefore, the expropriation action is justified as a legal means to resolve the antagonistic situation between the public and private interest.

22. The main effect of expropriation is the transfer of property, requiring compliance with the requirements set forth by law. In that sense, the CN states that expropriation for reason of public use must be qualified by law and previously compensated[8].

23. Legal characteristics of this institution are as follows: a) it is of "current", not "potential" nature, as there cannot be expropriation for the future, because in that case, the cause of public use would be absent at the time of seizure; b) expropriation is a public law legal action and therefore, it is "unilateral", as the will of the expropriated person is not included in the act; c) when the National Government adopts the decision to expropriate, it

[8] Article 17, National Constitution.

exercises a public power, not a right. In that regard, the CSJN stated "that the expropriation is the exercise of an inalienable power of the National Government"[9].

24. The "public use" concept is not univocal, as it may change according to place, time and legal system involved; however, the declaration qualifying it of public use has a substantial legal relevance, as it commences the expropriation process, and proves the reason justifying expropriation. Such declaration is exclusive to the legislator pursuant to the CN[10].

25. Any property with pecuniary or economic value, included in the constitutional concept of "property", is considered subject to expropriation. In that regard, the CSJN has stated that *"When the term property is used within the meanings of articles 14 and 17 of the Constitution or in other provisions thereof, it includes, as this Court has said, all appreciable interests a man can have outside himself, his life and his freedom. The constitutional concept of property relates to every right with a value recognized as such by law, whether derived from private law, or administrative acts (subjective, private or public rights), that enables the owner to file an action against anyone trying to deprive the owner from its use, even the National Government"*[11].

---

[9] Decisions 238:335.

[10] Article 17, CN.

[11] Decisions 145:307.

26. According to the Law of Expropriations No. 21,499, compensation of an expropriated owner shall include the objective value of the property, and damages derived from a direct and immediate consequence of the expropriation[12].

27. The expropriation action is aimed at obtaining all convenient or necessary property, regardless of the legal nature, in order to satisfy "public use"[13], a wide concept including *"anything satisfying a general need, or the convenience of the greatest number"*[14].

28. The determination of public use that serves as basis for expropriation is an attribute included in the powers reserved to the legislative power (National Congress and provincial legislatures), pursuant to Article 17 of the CN, cited before. Moreover, the legal determination must be express, accurate and true, so that the reason for the expropriation is clearly derived from the law.

29. Regarding the adequate forum to hear expropriation cases, pursuant to the Argentine CN, Expropriation Law No. 21,499 and Hydrocarbons Law No. 17,319 (hereinafter, LH), the Argentine

---

[12] Law No. 21,499, Article 10.

[13] Law No. 21.499, Article 4°.

[14] BIELSA, Rafael, "Derecho Administrativo" (Administrative Law) 6th Edition, Buenos Aires, 1965, La Ley Publishing House, Volume 4, pages 454/455, note 42.

courts are the courts of competent jurisdiction to hear the case[15].

IV. YPF AND REGULATION OF ITS ACTIVITIES BY THE NATIONAL GOVERNMENT

30. In a case related to expropriation of shares of a corporation, the CSJN set forth the following case law principles:

a) the expropriation for reason of legally declared public use generates a public law relationship, subjected to its principles;

b) upon expropriation for public use, the Government performs a legal power recognized by the CN and regulated by specific provisions;

---

[15] Article 116, CN: "*The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, (...) matters in which the Nation shall be a party; (...) against a foreign state or citizen*". Expropriation Law No. 21.499, Article 21: "*Regarding real property, even in cases of acquisition by accession, the federal Judge where the property to be expropriated is located will be competent to hear the administrative-litigation case. Regarding property other than real property, the Judge of the location where it is found or the defendant's address, at the plaintiff's election, will be competent to hear the case*". LH, Article 5: "*Notwithstanding the requirement to comply with applicable regulations, holders of permits and concessions shall be domiciled at the Republic of Argentina*".

c) in every valid expropriation, the main purpose of the Government involves satisfying higher public interests, whose consolidation demands sacrifice of the private domain;

d) it is for the legislator to decide when a public use justifies the expropriation and also to decide whether such public use is still valid in order to commence or continue the expropriation process. Except in case of manifest arbitrariness, both these are not subject to judicial review[16].

31. It should be added that, because expropriation is included in the CN, no law may declare property free from expropriation. Therefore, if the Congress is not empowered to do it, individuals are even less empowered when they are parties to a corporate agreement.

32. In that regard, the autonomy of the will is clearly limited by Civil Code specific regulations[17], i.e., Articles 1167 and 953, which state that the purpose of contracts "*must be commercial objects, or objects which for a special reasons cannot be the purpose of a legal action, or facts that are not impossible, illegal or prohibited by law, under penalty of being "void, as if they had no object*".

---

[16] Decisions 291:507, year 1975.

[17] Effective at the time the company was incorporated.

33. The YPF bylaws are governed by the law of corporations of Argentina, which falls within the scope of private law issues.

34. Therefore, YPF is a private legal person; however, that legal status does not exempt it from the application of the public system of expropriation if it was related to a "public use reason", determined by a law enacted by the National Congress, as in the case of Law No. 26,741.

35. To sum up, clauses related to the Public Offer of Shares included in 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. Such bylaws clauses are only applicable to shareholders who, acting as private law subjects, acquire shares in the market. But they do not apply – nor may legally apply – to the process of expropriation or temporary occupation, as the latter are inalienable powers of the National Government, as provided in the CN.

36. It should be mentioned that in the case of YPF, whose corporate purpose is substantially related to exploration and exploitation of hydrocarbon fields, those activities are performed on public domain property, belonging irrevocably and perpetually to the national or provincial Government, pursuant to Article 124, *in fine*, CN and Articles 1 and 2 of the LH.

37. The national policy adopted by the LH regarding regulated activities mainly aims to satisfy

the needs of hydrocarbons of the country with the product of its fields and to keep reserves in order to meet that goal (Article 3, LH).

38. The LH enables the Executive Power to grant exploration permits and exploitation concessions in the areas it deems necessary, and such permits and concessions are considered administrative contracts, in particular, the restrictive interpretation of a co-contractor in the case of a privilege, the necessary presence of attributes of power on the part of the Administration ("exorbitant clauses") and a specific system of risk distribution among the parties.

39. Therefore, YPF's activity is governed by a strong regulation that conditions its performance on rules of public law and the control of a regulatory authority.

V. YPF INTERVENTION. TEMPORARY OCCUPATION AND EXPROPRIATION OF YPF SHARES.

40. Before the expropriation of the YPF shares, the National Executive Power, based on the provisions of the above mentioned Article 99, Subsection 3 of the CN, enacted the Emergency Decree No. 530/2012, dated 04/16/2012, whereby it ordered the provisional intervention of YPF "in order to ensure the continuity of the company, the preservation of assets and equity, the supply of fuel and to guarantee coverage of requirements of the country", pursuant to its Article 1. Such decree was ratified by the Argentine House of Representatives

on 05/23/2012, and by the Argentine Senate on 05/30/2012.

41. In its lengthy "Recitals", the decree analyzes the situation of the company and the reasons justifying the intervention measure in view of the critical situation of the company management and its negative impact on the energy sector.

42. Among its recitals it announces that "given the gravity of the situation presented", a bill is sent to Congress promoting a public interest declaration and, as its main purpose, the self-sufficiency of hydrocarbons, as well as the public use determination and subjecting to expropriation of 51% of the equity of YPF, represented by an equal percentage of Class D shares belonging to Repsol YPF SA.

43. The bill, announced in Decree No. 530/2012, was enacted by the National Congress as Law No. 26,741 which, besides setting forth objectives and principles related to hydrocarbon policies, declared "*of public interest and subject to expropriation, the fifty-one percent (51%) of the equity of YPF Sociedad Anónima represented by the same percentage of Class D shares of said company, belonging to Repsol YPF S.A., its controlling or controlled companies, directly or indirectly. Moreover, it declared of public use and subject to expropriation fifty-one percent (51%) of the equity of Repsol YPF GAS S.A. represented by sixty percent (60%) of the Class A shares of said company, belonging to Repsol Butano S.A., its controlling or controlled companies. (Article 7).*

44. In order to guarantee the objectives, the law stated that the Executive Power was to exercise the *"political rights over all shares subjected to expropriation until the assignment of the pertinent public and economic rights was completed"* (Article 9, first paragraph).

45. On the other hand, in order to guarantee the continuation of YPF's activities, the law authorized the Executive Power, from its effective date, to act upon rights of shares to be subjected to expropriation within the terms of Articles 57 and 59 of Expropriation Law No. 21,499, which refer to temporary occupation.

46. The process of expropriation concluded with the signature of the "Agreement for the Amicable Settlement and Compromise of Expropriation" between the Republic of Argentina and Repsol, ratified by National Congress in 2014 through Law No. 26,932.

47. Pursuant to the legal framework of Article 17, CN, and Law No. 21,499, the expropriation of the YPF shares through Law No. 26,741 allows us to formulate the following considerations:

a) Law No. 26,741 was enacted by National Congress (Article 17, CN);

b) its wording identifies and defines the public use (Article 17, CN, Articles 1 to 7, Law No. 26,741 and 4, Law No. 21,499);

c) the YPF shares being expropriated comprise a specific object, with an economic value and entail the constitutional concept of "property" (Article 17, CN, Article 7 Law No. 26,741 and 5, Law No. 21,499);

d) the scope and content of the expropriated object were set by the legislator in the exercise of its power to choose the best means to ensure the public interest (article 17, CN, and articles 1 and 4, Law No. 21,499);

e) in the exercise of its sovereign power, the Government, through Congress, decided the amount of YPF capital stock to be subjected to expropriation based on the public interest involved, without the possibility of questioning the percentage of shares decided upon; and

f) the compensation was agreed upon in the above mentioned "Agreement" signed between expropriator and expropriated party (Article 17, CN and Articles 10 and 13, Law No. 21,499), approved by Law No. 26,932, which declared that the objective of Articles 7, 11 and 12 of Law No. 26,741 and 12 of Law No. 21,499 was complied with. With this "Agreement" between the interested parties, the expropriation process that had been commenced by Decree No. 530/2012 was completed, and the transfer of the expropriated shares in favor of the Government was performed.

48. It should be noted that after the Government exercised its public powers of intervention of the company, and the temporary occupation and expropriation of shares, YPF continued operating as a commercial company subjected to private law, even with the possibility of organizing meetings to adopt decisions within the competence of such entity.

VI. THE TEMPORARY OCCUPATION

49. As mentioned above, in order to ensure continuation of YPF's activities (Article 13), the law for the expropriation of shares also provided for the Executive Power to exercise the rights of those shares, pursuant to Articles 57 and 59 of Law No. 21,499.

50. Such articles included in the Expropriation Law refer to the legal concept of temporary occupation and the first section refers to two types of occupation, called by doctrine "normal" and "abnormal". The text of the above mentioned Article 57 states that "*whenever for public use reasons it is necessary to temporarily use a specific property or thing, whether personal or real property, or a specific universe thereof, temporary occupation may be ordered*".

51. Unlike expropriation, both types of temporary occupation do not imply loss of property, they only involve an occupation of the property for a limited time.

52. "Abnormal" temporary occupation over private property was addressed by the CSJN, which held that it occurs whenever it derives from an abnormal, urgent, imperative or sudden necessity, without any compensation, except for compensation for damages derived from the cases set forth by Article 59 of Law No. 21,499[18].

53. Pursuant to Law No. 26,741, the general requirements for occupation were met, as follows: a) the reason for the public use; b) the determination of the property; and c) its temporary use until expropriation of the shares became effective.

54. Moreover, while both concepts share the same legal cause "public use", the "abnormal" temporary occupation provided in Article 59 of the Expropriation Law answers to "*a requirement that must be satisfied urgently, promptly, without any delay or hold*"[19].

55. In our case, despite the fact that occupation may be ordered by the administrative authority, it was ordered by the legislator in relation to the expropriation of the shares, reinforcing the legality in the urgent case.

---

[18] Decisions 312-2285.

[19] MARIENHOFF, op. cit., page. 445.

VII. CONCLUSIONS

56. The Argentine legal system is contained in the CN and its article 31 defines the rules of such system in hierarchal terms, as follows: "*This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation...*"

57. Article 17 of the CN establishes that "*Expropriation for reason of public use must be authorized by law and previously compensated*".

58. The priority of public law over a private contract, such as the YPF bylaws, means that the expropriation of YPF shares for reasons of public use, as a result of a sovereign act of the Government, prevails over clauses in such a private corporate agreement, in particular, regarding the procedure related to the offer to acquire shares.

59. Expropriation is a legal means used to solve the conflict between two interests: the public and private, and it is employed in case of incompatibility between the right of the individual and the interest of a group, community or society, represented by the Government. The basis for expropriation involves enabling the Government to carry out its essential functions; therefore, the expropriation action is justified as a legal means to resolve the antagonistic situation between the public and private interest.

60. Regarding the adequate forum to hear expropriation cases, pursuant to the Argentine CN,

Expropriation Law No. 21,499 and the LH, the Argentine courts are the courts of competent jurisdiction to hear the case.

61. Because expropriation is provided for in the CN, no law may declare property free from expropriation. Therefore, if the Congress is not empowered to do it, individuals are even less empowered when they are parties to a corporate agreement.

62. Clauses related to the Public Offer of Shares included in 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. Such bylaws clauses are only applicable to shareholders who, acting as private law subjects, acquire shares *in the market*. But they do not apply – nor may legally apply – to the process of expropriation or temporary occupation, as the latter are inalienable powers of the National Government, as provided in the CN.

63. Finally, in my opinion, I do 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.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Buenos Aires, Argentina on September 4, 2015.

/s/
ISMAEL MATA

APPENDIX I

REPLY DECLARATION OF ISMAEL MATA, FILED NOVEMBER 9, 2015

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

15-Civ.-2739 (TPG)

PETERSEN ENERGÍA INVERSORA, S.A.U. *and* PETERSEN ENERGÍA, S.A.U.,

Plaintiffs,

-v.-

ARGENTINE REPUBLIC *and* YPF S.A.,

Defendants.

REPLY DECLARATION OF ISMAEL MATA

Pursuant to 28 U.S.C. § 1746, the undersigned, Ismael Mata, declares the following:

1. I previously submitted a declaration in this case, on September 8, 2015, in support of the motion to dismiss filed by the Republic of Argentina. Concerning my qualifications, I respectfully refer the Court to my *curriculum vitae*, which was annexed thereto.

2. I submit this reply declaration in response to the declarations of Dr. Alberto B. Bianchi ("Bianchi") and Dr. Alfredo L. Rovira ("Rovira") submitted by plaintiffs on October 19, 2015.

3. Bianchi and I agree on certain points. For example, Bianchi states that expropriation is expressly provided for in Section 17 of the Argentine Constitution, which states that "*Expropriation for public-interest reasons must be authorized by law and previously compensated*" (Bianchi ¶ 16 [emphasis in original]). I stated the same thing in my initial declaration (at ¶¶ 8, 20-22).

4. The main point of disagreement between Bianchi and Rovira (on one hand) and me concerns the interplay between (a) the Republic's sovereign acts by which it intervened in YPF's management and eventually expropriated 51% of YPF's shares then held by Repsol, and (b) the takeover and tender offer provisions contained in YPF's bylaws. Bianchi and Rovira regard these two matters as independent of and compatible with each other. In fact and in law, they are not.

5. In my initial declaration (at ¶¶ 4-12), I explained that Argentine law establishes a hierarchical order, under which public law holds priority over private law and rights. This means that a private contract, such as the YPF bylaws, cannot impede or restrict a constitutionally enacted public law, such as an intervention and expropriation. Bianchi and Rovira do not dispute this principle; however, they misapply the principle in analyzing the meaning and effect of the bylaws' takeover and tender offer requirements.

6. The clause in article 28 of the bylaws, which states that the tender offer provisions "shall apply to the acquisitions directly or indirectly made

by the National Government, by any means or instrument, of shares. . . ," can only apply to instances in which the Republic acquires (or assumes control over) shares by any means available to a private person, for example, purchases on the open market or from other shareholders, either directly or through its agencies or other controlled entities. Under the hierarchical principle, that bylaws provision, which is a contractual provision that is part of the private law, legally cannot apply, and is not triggered, when the acquisition of shares (or of their control) occurs by operation of a public law, as occurred in this case.

7. Bianchi's analysis of the bylaws' tender offer provision, while flawed, confirms that the obligation to make a tender offer does not apply in this case. Dr. Bianchi asserts that a "takeover" as defined in the bylaws occurred both (a) when the executive branch, under Decree 530/2012 (issued on April 16, 2012), "assumed complete control of YPF's management" (Bianchi ¶ 38); and (b) when Congress enacted Law No. 26,741 (effective May 7, 2012), under which the Republic temporarily took control of 51% of YPF's shares to be expropriated (Bianchi ¶ 37).

8. In my initial declaration (at ¶¶ 40-48), I described these events as sovereign acts, undertaken pursuant to the Constitution and law, and thus a proper exercise of the Republic's public powers. Bianchi and Rovira do not dispute this.

9. Bianchi goes on to say, however, that under the bylaws, "no 'takeover' may take place

unless the party acquiring the shares or securities has previously carried out a 'tender offer' (TO) covering the shares of all classes of the Company's stock . . ." (Bianchi ¶ 28 [emphasis added]). He repeats this later on: "*Prior* to takeover, the acquirer is required to carry out a TO" (Bianchi ¶ 31(ii) [emphasis added]).

10. Rovira similarly opines that "Argentina was obligated to make a tender offer under Articles 7 and 28 *before* exercising the control necessary to change YPF's dividend policy" (Rovira ¶ 42 [emphasis added]).

11. Thus, under Bianchi's and Rovira's analysis, the bylaws supposedly barred the Republic from either intervening in YPF's management (in April) or temporarily taking control of 51% of YPF's shares (in May), as in neither case did the Republic "previously" carry out a tender offer. In other words, Bianchi and Rovira opine that the bylaws prevented the Republic from carrying out the sovereign acts that, they nevertheless concede, the Republic had the legal right and power to carry out.

12. As is evident, therefore, the bylaws' takeover and tender offer provisions are incompatible with the Republic's sovereign acts of intervention and expropriation. Given such incompatibility, under Argentine law, the public law prevails over the private rights established by the bylaws. The bylaws may not override or prevent laws related to public order.

13. This conclusion is buttressed by the fact that article 18 of Law No. 26,741 – the YPF expropriation law – states as follows: "*This law is a public order law*." The term "public order" has a particular meaning under Argentine law. It refers to those laws and dispositions that are of fundamental interest to the public and the Nation. When a law or other disposition is described as being one of public order, it means that it prevails over any private rights or interests that are incompatible with it.[20]

14. Article 18 of Law No. 26,741 thus confirms that the private rights in the YPF bylaws concerning takeovers and tender offers, which are incompatible with Law No. 26,741, legally could not be triggered or applied before or after the intervention and expropriation that was carried out under that law.

15. There is another reason why the bylaws' tender offer provisions are incompatible with the intervention and expropriation, and thus cannot be given effect. Law No. 26,741 declared to be "of public interest" and "subject to expropriation" 51% of YPF's shares then held by Repsol.

16. The Republic cannot be bound by a private contractual agreement to acquire a higher number of shares than necessary in order to satisfy the public use as set forth in Law No. 26,741. The National Congress decided to declare for public use 51% of

---

[20] Jorge J. Llambías, *Tratado de Derecho Civil, Parte General*, Vol. I, ¶¶ 184, 196-97, 200, at pp. 158, 164-65 (16th ed. 1995).

YPF shares, and no more than that percentage. The declaration to subject certain stock to expropriation in the public interest only refers to the shares specified in the law and does not authorize any kind of payment, nor does it grant any rights, to shareholders whose shareholding is not included in this law.

17. If the Argentine Congress had decided that the public interest required the expropriation of a larger proportion of YPF equity represented by a greater number of shares than the number specified in Section 7 of Law No. 26,741, the Congress would have expressed that decision in the law. The intervention and expropriation process therefore excluded any procedure, such as the public tender offer described in YPF's bylaws, which would force the Republic to acquire a larger number of shares than necessary to achieve the purposes of the expropriation as stated in the law.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge. Executed in Buenos Aires, Argentina on November 9, 2015.

/s/
Ismael Mata