

No. _____

In the
Supreme Court of the United States

PETERSEN ENERGIA INVERSORA, S.A.U.,
PETERSEN ENERGIA S.A.U., ETON PARK
CAPITAL MANAGEMENT, L.P., ETON PARK
MASTER FUND, LTD., ETON PARK FUND, L.P.,

Petitioners,

v.

ARGENTINE REPUBLIC, YPF S.A.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the 1990s, Argentina privatized its state-owned oil company YPF, S.A. (“YPF”) to raise billions in capital from foreign investors on the NYSE and elsewhere. To ensure that privatization would succeed, Argentina amended YPF’s bylaws to promise investors that if Argentina ever decided to renationalize YPF, it would offer investors a compensated exit through a tender offer at a price set by a predetermined investor-protective formula. But when Argentina seized back control of a majority stake in YPF in 2012, it openly flouted its tender-offer obligations, causing petitioners billions of dollars of harm. Despite a prior panel’s unanimous holding that the district court had jurisdiction under the Foreign Sovereign Immunities Act (“FSIA”) to hear petitioners’ breach-of-contract claims, the divided Second Circuit panel below invalidated a decade’s worth of litigation, and the largest commercial judgment in U.S. history (a \$16.1 billion damages award against Argentina), holding that petitioners could only enforce Argentina’s promises in Argentine court.

The questions presented are:

1. Whether a foreign sovereign can circumvent federal FSIA jurisdiction by requiring that certain claims against the sovereign must be brought in the sovereign’s own courts.
2. Whether a foreign sovereign is entitled to deference when it presents a self-serving account of its own law for the first time on appeal, notwithstanding ordinary principles of waiver and forfeiture.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellees/cross-appellants below) are Petersen Energía Inversora, S.A.U., Petersen Energía, S.A.U., Eton Park Capital Management, L.P., Eton Park Master Fund, Ltd., and Eton Park Fund, L.P.

Respondents are the Argentine Republic (defendant-appellee/cross-appellee below) and YPF S.A. (defendant-conditional-cross-appellant below).

CORPORATE DISCLOSURE STATEMENT

Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U. are nongovernmental corporate entities. Petersen Energía Inversora, S.A.U. is a Spanish corporation wholly owned by Petersen Energía Inversora Holdings, S.A.U., a Spanish corporation that in turn is wholly owned by Petersen Energía Inversora, S.A., a privately held Argentine corporation. Petersen Energía, S.A.U. is a Spanish corporation wholly owned by Petersen Inversiones Spain, S.A.U., a Spanish corporation that in turn is wholly owned by Petersen Energía Inversora, S.A., a privately held Argentine corporation. No public corporation owns 10% or more of the stock of either Petersen Energía Inversora, S.A.U. or Petersen Energía, S.A.U.

Eton Park Capital Management, L.P., Eton Park Master Fund, Ltd., and Eton Park Fund, L.P. are nongovernmental entities that have no parent corporations. No public corporation owns 10% or more of the stock of either Eton Park Capital Management, L.P. or Eton Park Fund, L.P. Eton Park Master Fund, Ltd. is in liquidation; Burford Capital Limited, a public corporation, indirectly acts as its liquidator and owns more than 10% of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Petersen Energía Inversora, S.A.U., et al. v. Argentine Republic, et al.*, Nos. 23-7370 (L), 23-7463 (XAP), 23-7614 (XAP) (2nd Cir.), judgment entered on March 27, 2026.
- *Petersen Energía Inversora, S.A.U., et al. v. Argentine Republic, et al.*, No. 15-cv-2739 (S.D.N.Y), judgment entered on September 15, 2023.
- *Eton Park Capital Management, L.P., et al. v. Argentine Republic, et al.*, Nos. 23-7376 (L), 23-7471 (XAP), 23-7667 (XAP), judgment entered on March 27, 2026.
- *Eton Park Capital Management, L.P., et al. v. Argentine Republic, et al.*, No. 16-cv-8569 (S.D.N.Y.), judgment entered on September 15, 2023.

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PETITION FOR WRIT OF CERTIORARI

This case arises from Argentina’s “knowing and flagrant violation of the promises it made to [U.S.] investors.” App.39. When Argentina privatized its state-owned oil company YPF in the 1990s and listed it on the NYSE, investors were understandably skeptical given Argentina’s checkered economic past and penchant for economic nationalism. To reassure those investors, Argentina amended YPF’s bylaws to promise that if Argentina ever retook control of the company, it would offer shareholders a compensated exit through a tender offer at a price set by a predetermined investor-protective formula. That promise worked, inducing investors to purchase more than a billion dollars of shares on the NYSE in the IPO and many billions more in secondary market transactions thereafter.

In 2012, Argentina returned to its old ways and seized control of a majority stake in YPF—and made a calculated (literally) decision to refuse to provide investors the compensated exit it had promised. Argentina deemed the cost of giving investors their due under the bylaws’ formula (\$11 to \$14.5 billion) too steep, and openly repudiated its tender-offer obligations, which had induced billions of investment, as a “bear trap.” That unequivocal breach of Argentina’s clear promises predictably caused petitioners billions of dollars of harm, driving them into liquidation.

A prior panel of the Second Circuit held that sovereign immunity did not allow Argentina to evade the consequences of its clear breach. That panel held that the district court had jurisdiction under the FSIA

because Argentina's breach was commercial, not sovereign, in nature, and had direct effects in the United States. Argentina asked this Court to review that decision; this Court called for the views of the Solicitor General, who recommended denying certiorari, and this Court denied review.

Over the following decade, the parties and the district court dedicated enormous resources to ascertaining Argentine law and providing investors with their promised compensated exit. After hundreds of pages of briefing, reports, and rebuttal reports from experts on Argentine law, and a multi-day trial on damages, the district court entered a \$16.1 billion judgment against Argentina. The size of that undoubtedly substantial judgment could have surprised no one, as it was in line with Argentina's real-time calculations and a simple matter of applying the YPF bylaws' investor-protective formula and adding the interest caused by a decade-plus of Argentina's recalcitrance and delay.

The divided Second Circuit panel below nevertheless reversed the district court's judgment, effectively granting Argentina the sovereign immunity from suit in the United States that Congress waived under the FSIA. According to the panel majority, Argentine law required petitioners to pursue their claims in Argentine court, depriving petitioners of the U.S. forum that the FSIA provides and allowing Argentina's own forum-allocation rules to control.

That decision is egregiously wrong and turns the FSIA on its head. Congress enacted the FSIA to establish a comprehensive framework for determining

when foreign sovereigns may be sued and held liable *in U.S. courts*. Under that framework, a foreign sovereign that engages in commercial conduct with direct effects in the United States is not immune from suit in the United States, and is liable “in the same manner and to the same extent as a private individual under like circumstances,” regardless of any special rules that might benefit the sovereign back home. 28 U.S.C. §1606. The decision below ignores that statutory command and deepens entrenched disagreement among the lower courts over whether FSIA jurisdiction can be undermined by non-FSIA considerations—a question on which this Court has twice granted certiorari yet twice left unresolved.

The decision below is equally remarkable for its disregard of the district court’s exhaustive analysis in favor of deference to the late-breaking and self-serving interpretation of Argentine law that Argentina advanced for the first time on appeal. This Court has made clear that when a foreign sovereign appears in U.S. litigation and offers a novel and self-serving account of its own law, courts should not treat that account as conclusive. Those concerns are at their zenith when the sovereign’s interpretation conveniently excuses it from substantial monetary liability. The panel majority nevertheless ignored this Court’s warning, crediting Argentina’s account of its law on appeal (which differed radically from Argentina’s initial account subject to expert rebuttal in the district court), and dismissing the district court’s painstaking consideration of the issues. That mistaken approach contravenes this Court’s guidance and implicates a conflict over the application of waiver

and forfeiture principles to foreign-law arguments raised for the first time on appeal.

The consequences of allowing the decision below to stand are difficult to overstate. The decision below strips petitioners of a remedy for Argentina's clear breach, disregards Congress' considered judgments in the FSIA, and undermines future foreign-sovereign offerings in U.S. markets. Foreign sovereigns routinely access U.S. capital markets by making commitments designed to reassure investors. If the panel's decision stands, those commitments will mean nothing, to the long-term detriment of both investors and other sovereigns. Moreover, the task of holding foreign sovereigns to account is no small undertaking. If over a decade of litigation efforts can be discarded despite a decision rejecting the sovereign's FSIA defenses, no rational actor will dedicate the resources necessary to hold foreign sovereigns to account for the kind of massive bait-and-switch pulled by Argentina here. In short, the decision below gives foreign sovereigns a roadmap for evading the FSIA and supplanting Congress' role in defining the contours of foreign sovereign immunity, enables foreign sovereigns to redefine their own law on appeal, and undermines the credibility of investor protections offered in U.S. markets. This Court should grant certiorari and reverse.

OPINIONS BELOW

The Second Circuit's opinion, 172 F.4th 120, is reproduced at App.1-48. The district court's decisions are unreported but reproduced at App.52-179.

JURISDICTION

The Second Circuit issued its opinion on March 27, 2026, and denied rehearing en banc on June 2, 2026. Justice Sotomayor extended the time to file a petition for certiorari to September 30, 2026. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced at App.180-81.

STATEMENT OF THE CASE

A. Factual Background

1. YPF was founded in 1922 as a “politically managed, government-owned” oil company. C.A.App.507-08; *see* App.90. In the 1990s, however, a new regime in Argentina came to power on a platform of free-market principles and embarked upon an ambitious privatization program, with YPF’s privatization as its cornerstone. *See Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 199 n.1 (2d Cir. 2018). Considering Argentina’s “checkered economic past” and “persistent economic ills,” however, foreign investors were “very skeptical” Argentina’s newfound commitment to privatization would last. C.A.App.845.

To overcome that skepticism, Argentina and YPF undertook a series of extraordinary steps to convince foreign investors—especially NYSE investors—that YPF would be an attractive and safe investment. *Petersen*, 895 F.3d at 199. Most relevant here, Argentina amended YPF’s bylaws “to incorporate protections for investors from (1) hostile takeovers and (2) attempts by Argentina to renationalize the

company.” *Id.* Under §7 of the amended bylaws, shareholders wishing to acquire control of 15% or more of YPF were obligated to make a tender offer to all shareholders at a price determined by a specified formula. App.4. Section 28 extended similar requirements to the Argentine government, ensuring “minority shareholders would be offered a compensated exit if and when the Argentine government ever renationalized YPF.” App.5. “The Bylaws and the tender offer requirements therein were explicitly referenced in YPF’s IPO Prospectus filed with the SEC.” App.6.

2. Argentina ultimately “raised billions of dollars from private investors” in an IPO, with “the largest portion ... over \$1.1 billion,” coming from “[t]he sale of NYSE-listed ADRs” in the United States. App.6. The protections afforded by the bylaws were “critical” to the IPO’s success, as Argentina “likely could not have achieved the valuation it did at the time of its IPO, or even completed the IPO, without providing prospective investors with protections” like those in the amended bylaws. C.A.App.842, 859.

Following the IPO, petitioners Petersen and Eton Park became significant shareholders in YPF by purchasing billions of dollars’ worth of NYSE-listed ADRs, ultimately becoming the second- and third-largest investors in YPF. App.7. When Petersen crossed the 15% threshold set forth in §7 of the YPF bylaws, it fully complied with that section’s tender-offer requirements.

3. After YPF’s discovery of a major new oil field, Argentina began a campaign to retake control of YPF by depressing YPF’s share price and ultimately

seizing a majority stake in the company. *See* App.144-45. The bylaws, however, presented a major obstacle.

On February 21, 2012, Argentine Secretary of Energy Daniel Cameron sent a memorandum to Roberto Baratta, the government's appointed YPF board member, recognizing that the bylaws were "carefully intended at the outset to defend its future minority shareholders." C.A.App.1380-81. Cameron estimated that if Argentina complied with the bylaws' tender-offer requirements, Argentina would owe "between 11 billion and 14.5 billion dollars." C.A.App.1380-81. In Cameron's view, "this is not the path that will allow us greater possibilities." C.A.App.1381. Instead, he stressed, "[t]he only way to go is expropriation," C.A.App.1381, even though the failure to make a tender offer would "probably involve lawsuits." C.A.App.1382.

On April 16, 2012, Argentina "seized control of YPF's facilities, replaced top management with government officials, and escorted YPF's then-CEO off the premises." *Petersen*, 895 F.3d at 202. But Argentine officials were "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." *Id.* On April 17, 2012, Axel Kicillof—speaking as both Argentina's Secretary of Economic Policy and Development Planning and as YPF's new Vice-Intervenor—told the Argentine Congress that Argentina and YPF would not honor the bylaws, describing as "fools ... those who think that the State has to be stupid and buy everything according to the law of YPF itself, respecting its bylaws," and dismissing the tender-offer

requirement as a “bear trap.” C.A.App.3693; *see* App.9. Consistent with Kicillof’s declaration, Argentina never made the required tender offer, nor did it comply with the other requirements of §7 and §28. YPF likewise never enforced those requirements, and violated the provisions of §7 and §28 concerning the counting of votes and payment of dividends.

B. Proceedings Below

1. Within days, YPF’s former-majority owner, Spanish oil company Repsol S.A. (“Repsol”), filed in New York a putative class action on behalf of all private shareholders against Argentina for breaching the bylaws. *Repsol v. Republic of Argentina*, No. 12-cv-3877 (S.D.N.Y. filed May 15, 2012). Petitioners were members of that putative class, but Repsol individually settled with Argentina and voluntarily dismissed that suit in May 2014, before the class was certified.

Petersen filed suit against Argentina and YPF in the Southern District of New York in April 2015, alleging breach of contract, promissory estoppel, and breach of the implied duty of good faith. App.11. Argentina and YPF moved to dismiss on a host of grounds, including foreign sovereign immunity, the act-of-state doctrine, forum non conveniens, and failure to state a claim. App.11. The district court (Preska, J.) denied the motion. App.140-79.

The Second Circuit affirmed on interlocutory appeal. A unanimous panel explained Argentina was not entitled to foreign sovereign immunity under the FSIA because the claims against it were “‘based on’ Argentina’s breach of a commercial obligation”: namely, its “obligation under section 28(A) of YPF’s

bylaws to make a tender offer for the remainder of YPF's outstanding shares," which Argentina triggered when it expropriated a majority stake in YPF from Repsol. *Petersen*, 895 F.3d at 207 (Chin, J., joined by Calabresi and Winter, JJ.). As to YPF, the Second Circuit concluded its "obligation to enforce the tender offer provision triggered by Argentina's expropriation" was likewise "commercial in nature." *Id.* at 210. Argentina and YPF filed petitions for certiorari, and this Court called for the views of the Solicitor General; the Solicitor General recommended against further review, noting the federal government's "interest in ensuring that foreign states that enter U.S. markets as commercial actors do not enjoy immunity from lawsuits regarding violations of their commercial obligations." U.S.Br.18, *YPF S.A. v. Petersen Energia Inversora S.A.U.*, No. 18-575 (U.S. May 21, 2019) ("*Petersen* U.S.Br."). This Court denied certiorari. 139 S.Ct. 2741 (2019).

Meanwhile, Eton Park, a New York-based investment fund, filed suit against Argentina and YPF in November 2016. C.A.App.421-46. The district court designated Petersen's and Eton Park's actions as related, and they have since proceeded in tandem.

2. After extensive discovery spanning three years, the parties cross-moved for summary judgment. App.12. The district court granted summary judgment for petitioners against Argentina on liability but granted summary judgment for YPF. As the court explained, respondents "d[id] not dispute that Sections 7 and 28 of YPF's Bylaws, on their face, required that [Argentina] make a tender offer upon acquisition of more than 49% of YPF's capital stock,"

and that Argentina “failed to make the tender offer called for by the Bylaws.” App.98. The court thus concluded that petitioners had satisfied all the elements of their breach-of-contract claim against Argentina. App.114-15.

The district court rejected Argentina’s attempts to escape liability for that straightforward contractual breach. Based on the extensive expert reports and testimony, the court rejected Argentina’s categorical argument that petitioners’ claims failed because Argentine law does not allow one shareholder to sue another for breaching corporate bylaws. App.116-17. The court likewise rejected Argentina’s argument that its General Expropriation Law barred petitioners’ claims in the U.S. courts, explaining that holding Argentina to its contractual commitments did not “impede [the] expropriation.” App.126-30. However, the court granted summary judgment for YPF. App.105-08.

The district court held a three-day trial on damages, where it heard testimony from multiple expert witnesses on Argentine law. After months of deliberation—and consistent with Argentina’s own projection of how much it would cost to abide by the bylaws in the first instance, *see supra* p.7—the district court awarded petitioners \$16.1 billion in damages, including prejudgment interest for the eleven years since Argentina’s breach. App.14.

3. A divided panel of the Second Circuit reversed in substantial part and zeroed out the district court’s multi-billion-dollar damages award.

The panel unanimously declined to adopt Argentina’s *forum non conveniens* and international-

comity abstention arguments, recognizing that this case has “now been litigated in a U.S. court for ten years” through trial and final judgment, resulting in a “high bar for reversal” on those issues. App.18-19. At that point, however, the panel split. Despite Argentina’s “knowing and flagrant violation of the promises it made to [U.S.] investors,” the panel majority (Chin, J., joined by Robinson, J.) held petitioners had no contractual remedy in the U.S. courts for that deliberate breach, and should have pursued a corporate-law remedy in the Argentine courts instead. App.29-34, 38-39. The panel majority also held petitioners’ claims were precluded by Argentina’s General Expropriation Law because they would impede Argentina’s sovereign act of expropriation, App.29, 34-38—despite the Second Circuit’s prior unanimous holding that Argentina’s breach was “indisputably” commercial and not sovereign in nature. *Petersen*, 895 F.3d at 207-10. Again, according to the panel majority, that foreign-law restriction meant petitioners were precluded from pursuing their claims in federal court, and their only option was to try “to enforce the Bylaws’ protections in Argentine court.” App.39.

Judge Cabranes dissented. In his view, the panel majority’s approach would “minimize if not forget” the “factual realities” of this case, including “Argentina’s own acknowledgment, calculation, and repudiation of its liabilities” and “Argentine law as expounded by experts of all parties.” App.44-46. Given the district court’s “close familiarity” with those “facts” and the “law of the case” after “ten years of painstaking consideration,” Judge Cabranes would have afforded “special consideration and respect to a District Court

that has closely evaluated every aspect of the facts and ... the governing law” and would have affirmed. App.45-47.

REASONS FOR GRANTING THE PETITION

The split decision below is egregiously wrong, wholly unprecedented, and extremely consequential. Congress enacted the FSIA to replace an executive-driven and unpredictable immunity regime with a comprehensive statutory framework that clearly dictates when foreign sovereigns may be held liable in U.S. courts. This Court has accordingly made abundantly clear that “any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA’s] text. Or it must fall.” *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141-42 (2014). Yet the Second Circuit’s panel majority allowed Argentina to accomplish indirectly what the FSIA forecloses directly: escape a U.S. judgment by invoking its own law relegating claims to a specialized forum in Argentina. That result cannot be squared with the FSIA, this Court’s precedents, or the prior Second Circuit decision in this very case. Allowing the decision below to stand would exacerbate the existing disagreement among lower courts about whether they may cede authority to foreign tribunals when they otherwise have jurisdiction under the FSIA, and would defy the FSIA’s plain instruction that foreign states subject to suit under the FSIA shall be held liable “in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. §1606. Applying special foreign rules that benefit the foreign sovereign alone in its own courts defies that statutory command.

The panel majority’s extraordinary result not only contravenes statutory text and controlling precedent, it wholly disregards the district court’s painstaking analysis of Argentine law, deferring instead to Argentina’s self-serving and novel construction of its own law on appeal. That misguided deference independently warrants this Court’s review. This Court has previously made clear that when a foreign sovereign offers an account of its own law in litigation—especially one that conveniently excuses it from billions in liability—courts must proceed with caution and not treat the foreign sovereign’s own interpretation as dispositive. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 585 U.S. 33, 43-44 (2018). That direction is particularly critical when the sovereign tries to change horses on appeal, after its initial interpretation failed in the crucible of adversarial testing and expert rebuttal. The Second Circuit’s failure to heed that direction implicates a recurring conflict among the circuits over whether ordinary waiver and forfeiture principles constrain appellate courts when foreign-law arguments are raised for the first time on appeal, further underscoring the need for certiorari.

Those issues would warrant this Court’s attention in any case—but this is not just any case. Argentina raised billions from investors on the NYSE by making explicit, investor-protective promises in YPF’s bylaws and in its SEC filings, then made a calculated decision to breach those promises once the cost of compliance became evident. After more than a decade of litigation, an experienced district judge held Argentina to its word and entered a \$16.1 billion judgment reflecting the very same tender-offer

formula Argentina had used to induce investment and to calculate the costs of compliance. But despite acknowledging Argentina’s “knowing and flagrant violation” of its promises, the Second Circuit panel majority erased the district court’s judgment and over a decade of litigation in the U.S. courts, and instead relegated investors to the courts of the very sovereign that had repudiated its obligations. App.39. That divided decision undermines Congress’ role in defining foreign sovereign immunity, threatens the integrity of U.S. capital markets, invites foreign sovereigns to promise robust protections to attract investment and later invoke domestic sovereign-law doctrines to escape those same protections, and leaves investors with only illusory remedies. This Court should not allow that extraordinary decision to stand without further review.

I. This Court Should Decide Whether A Foreign Sovereign Can Use Its Own Law To Circumvent FSIA Jurisdiction.

A. The Decision Below Cannot Be Reconciled With the FSIA or This Court’s Precedent Interpreting It.

Under settled law dating back to Chief Justice Marshall, “foreign sovereigns have no right to immunity in our courts,” and instead enjoy immunity only as “a matter of grace and comity.” *Republic of Austria v. Altmann*, 541 U.S. 677, 688-89 (2004) (citing *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.)). As a result, federal courts historically deferred to the political branches in deciding “whether and when to exercise judicial power over foreign states.” *NML*, 573 U.S. at 140. In 1976,

however, Congress “replac[ed] the old executive-driven, factor-intensive, loosely common-law-based immunity regime” with the FSIA, a “comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.” *Id.* (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983)). As a result, today, “any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA’s] text. Or it must fall.” *NML*, 573 U.S. at 141-42. And if a foreign sovereign is not entitled to immunity under the FSIA, that foreign sovereign “shall be liable” in federal court “in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. §1606.

Those principles make clear that petitioners properly brought this case in federal court—as the Second Circuit previously held, in a decision that remains law of the case. As that decision recognized, Argentina’s tender-offer obligation and its subsequent breach of that obligation were “indisputably commercial in nature,” and so Argentina was not entitled to invoke foreign sovereign immunity. *Petersen*, 895 F.3d at 207. The district court accordingly had jurisdiction to decide petitioners’ claims against Argentina “in the same manner and to the same extent” as claims against any private individual. 28 U.S.C. §1606. Special rules that benefit the sovereign alone back in its home courts should play no role.

The Second Circuit panel majority below nevertheless reached the opposite conclusion, holding that notwithstanding Argentina’s lack of FSIA

immunity, petitioners could proceed against Argentina only in Argentina's own courts (if at all). App.39; *see* App.33-34, 37-39. The panel declined to disturb the district court's *forum non conveniens* and international-comity abstention rulings, recognizing the "high bar for reversal" those rulings faced in light of the district court's entry of final judgment after a decade-plus of U.S. litigation. App.17-20. But the panel majority nevertheless concluded that "substantive Argentine law" produced the same result, holding that Argentine public and private law required petitioners to bring suit in Argentina. App.20; *see* App.33-34, 37-39. That analysis cannot be squared with the FSIA or this Court's precedent.

1. *Public law.* According to the panel majority, Argentina's "public law governing expropriation"—the General Expropriation Law—"establishes a comprehensive procedure for resolving claims arising from expropriation" and "channels" any such claims to the Argentine administrative courts, foreclosing any other suits by third parties that "impede the expropriation or its effects." App.34-35, 37. While the panel majority recognized that petitioners' claims "did not literally bar the expropriation" or prevent Argentina from "successfully depriv[ing] Repsol of control over 51% of its shares," it nevertheless concluded that petitioners' claims "functionally" impeded the expropriation because they "saddled the Republic with ten years of litigation and a damages award representing 45% of its annual national budget." App.36.¹ Under that misguided analysis, the

¹ The panel majority plucked that 45% number from Argentina's appellate briefing, *see* App.36, with no record

very thing Congress authorized in the FSIA—litigation in the U.S. courts to hold a foreign sovereign accountable to the same extent as a private individual—“impede[d]” the expropriation under Argentine law and thus precluded litigation in the U.S. courts, relegating petitioners to “the compensation-setting mechanism set forth elsewhere” in Argentina’s General Expropriation Law. App.37-38.

None of that can be reconciled with the FSIA or this Court’s precedent. As this Court has made clear, “after the enactment of the FSIA,” it is the FSIA itself that “indisputably governs the determination of whether a foreign state is entitled to sovereign immunity” in U.S. courts—not the common law, and certainly not the foreign state’s own law. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010); *see, e.g., Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 272-73 (2023) (describing the FSIA’s “comprehensive scheme” governing foreign sovereign immunity). The panel majority nevertheless allowed Argentina to rely on its own procedural rules limiting certain claims to certain Argentine courts to prevent petitioners from bringing their claims in federal court in the United States—squarely contravening the FSIA’s comprehensive and controlling scheme. *See* App.35-38.

That approach upends the FSIA, eviscerating Congress’ carefully considered determination of when

support; the actual percentage is far less. *See, e.g.,* Miguel Goyeneche, *Argentina Approves 2023 National Budget*, Argentina Reports (Nov. 18, 2022), perma.cc/7KPT-83LM (suggesting 9%).

foreign sovereigns should be subject to suit in the United States and instead leaving it to each foreign sovereign to decide for itself whether to face suit on any given claim in the U.S. courts. *But see Exxon Mobil Corp. v. Corporación Cimex, S. A. (Cuba)*, 609 U.S. 108, 117, 130 (2026) (recognizing it is up to Congress to decide whether to “abrogate the foreign sovereign immunity of [foreign] agencies and instrumentalities,” and courts may not “thwart Congress’s design”). Under the FSIA, once a district court establishes jurisdiction over a foreign state, it “shall” render judgment against that foreign state “in the same manner and to the same extent as a private individual under like circumstances”—regardless of any foreign law that would otherwise channel the claims against that foreign sovereign to a foreign court. 28 U.S.C. §1606; *see Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 114 (2022) (non-immune foreign sovereign “is subject to the same rules of liability as a private party”). The panel majority’s contrary holding, allowing Argentina’s General Expropriation Law to supersede the FSIA and force petitioners to bring their claims in Argentina rather than the United States, cannot be sustained.

2. *Private law.* The panel majority’s private-law rationale is equally at odds with the FSIA. As a matter of Argentine private law, the panel majority concluded that the Argentine Commercial Code required petitioners to pursue their claims not by filing breach-of-contract claims in federal court (as the FSIA contemplates), but instead by filing suit “in the Argentine courts” under Argentine corporate law. App.33; *see* App.24 (suggesting that suit in Argentine

court might allow petitioners to impose “joint and several liability” on Argentina for breaching the bylaws). The panel majority accordingly again allowed its view of Argentine law to supersede the FSIA, holding petitioners could not bring their claims in the United States because Argentine law required them to seek relief in Argentina’s own courts instead.

While the panel majority framed its decision as addressing the merits of petitioners’ claims under Argentine law, its ultimate conclusion—that petitioners should have “attempted to enforce [the bylaws] through Argentine corporate law mechanisms” by suing in Argentine court, App.33—makes clear that its analysis allows foreign law to override the FSIA in determining which claims against a foreign sovereign can be brought in federal court. That analysis cannot be reconciled with this Court’s clear instruction that a federal court’s authority over a foreign sovereign in the United States turns on the limits that Congress set in the FSIA, not whatever limits a foreign sovereign may choose to set under foreign law.

The panel majority compounded its disregard of the FSIA by refusing to treat the case as “a run-of-the-mill civil contract dispute between two private parties” and allowing its “interpretation of the Bylaws [to be] informed by the context of the governmental expropriation.” App.28 n.12, 34. Again, that approach contravenes the plain text of §1606 and this Court’s straightforward teaching that a non-immune sovereign “is subject to the same rules of liability as a private party” under the FSIA. *Cassirer*, 596 U.S. at 114. Far from being “independent,” App.29, the panel

majority's public- and private-law errors reinforce each other and lead to the same destination: forcing plaintiffs to bring claims against Argentina in the Argentine courts rather than the federal forum that the FSIA provides.

B. The Decision Below Exacerbates Ongoing Disagreement in the Courts of Appeals.

The panel majority's erroneous analysis not only conflicts with the statutory text and this Court's precedent, but exacerbates ongoing confusion and disagreement among lower courts. This Court has twice granted certiorari to clarify whether a federal court with jurisdiction under the FSIA may be called on to relinquish that jurisdiction in favor of a foreign court, but has twice left that issue unresolved. This case presents a critical variant of that question—whether a foreign sovereign may *force* a federal court to relinquish its FSIA jurisdiction in favor of the foreign sovereign's own courts through the foreign sovereign's own laws—and so offers the Court an opportunity to provide much needed clarity.

In *Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021), and *Republic of Hungary v. Simon*, 592 U.S. 207 (2021) (per curiam), this Court granted certiorari to decide, *inter alia*, whether a federal court may relinquish its FSIA jurisdiction over a case against a foreign sovereign based on the discretionary federal common-law doctrines of comity and exhaustion, leaving that case to be tried instead in a foreign court. Despite twice granting certiorari on that question, this Court ultimately decided *Philipp* on alternative grounds, *see* 592 U.S. at 187, and

remanded *Simon* for proceedings consistent with *Philipp*. The lower courts accordingly remain at odds over whether a plaintiff may be forced to proceed in a foreign court even when FSIA jurisdiction is available.

The Seventh Circuit takes the atextual view, requiring plaintiffs to seek relief in foreign courts before invoking FSIA jurisdiction in a U.S. court unless any potential foreign remedies are “futile or imaginary.” *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 852, 857-59 (7th Cir. 2015). According to the Seventh Circuit, despite the FSIA’s plain text, “principles of international comity” require U.S. courts to give foreign sovereigns “an opportunity to redress [alleged violations] by [their] own means, within the framework of [their] own legal system, before the same alleged [violation] may be aired in [U.S.] courts” under the FSIA. *Id.* at 852, 855. Along similar lines, the Ninth and Eleventh Circuits have held that U.S. courts have discretion to decline the exercise of their jurisdiction in favor of a foreign forum on a case-by-case basis pursuant to principles of international comity. *See Mujica v. AirScan, Inc.*, 771 F.3d 580 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004).

The D.C. Circuit, by contrast, has taken the opposite (and correct) approach, expressly rejecting the Seventh Circuit’s approach on numerous occasions. *See Simon v. Republic of Hungary*, 911 F.3d 1172, 1180-82 (D.C. Cir. 2018); *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 416 (D.C. Cir. 2018); *see also Philipp v. Federal Republic of Germany*, 925 F.3d 1349, 1350, 1355-56 (D.C. Cir. 2019) (Katsas, J., dissenting from denial of rehearing en banc)

(explaining that *Simon* and *Philipp* “create a clear split with the Seventh Circuit” and “are in tension with decisions from the Ninth and Eleventh Circuits”); U.S.Br.15-22, *Philipp*, No. 19-351 (U.S. May 26, 2020) (“*Philipp* U.S.Br.”) (recognizing the split and recommending review).

In both *Simon* and *Philipp*, the D.C. Circuit held (in accordance with the plain text of the FSIA) that a U.S. court that has jurisdiction over a claim against a foreign sovereign under the FSIA must adjudicate that claim without requiring the plaintiff to first exhaust any potential remedies that foreign law may make available in foreign courts. As the D.C. Circuit has explained, allowing foreign sovereigns to rely on their own law or international comity principles to evade jurisdiction under the FSIA would “amount to a judicial grant of immunity from jurisdiction in United States courts” that Congress omitted from the FSIA. *See Simon*, 911 F.3d at 1180.² The First Circuit has taken the same approach, agreeing with the D.C. Circuit. *See Merlini v. Canada*, 926 F.3d 21, 38 (1st Cir. 2019).

The Second Circuit’s decision below exacerbates that ongoing confusion and disagreement, and underscores the importance of firmly endorsing the D.C. Circuit’s and the First Circuit’s approach. By reversing the judgment for petitioners on the theory that petitioners should have brought suit in the

² While this Court vacated the D.C. Circuit’s decisions in *Simon* and *Philipp* on other grounds, *see supra* pp.20-21, the D.C. Circuit has since “reaffirm[ed] [the relevant] holdings and rationales in *Simon* and *Philipp*,” *De Csepel v. Republic of Hungary*, 27 F.4th 736, 753 (D.C. Cir. 2022).

Argentine courts, the panel majority has effectively endorsed the Seventh Circuit’s view that FSIA jurisdiction is subject to unwritten judicial exceptions. Under the panel majority’s reasoning—as in the Seventh, Ninth, and Eleventh Circuits—it is up to foreign courts, not the federal district courts assigned the task by Congress and the FSIA, to provide redress when foreign sovereigns breach their contractual obligations or otherwise engage in commercial acts that cause injury in the United States.³

Indeed, the panel majority’s decision below goes further than the Seventh, Ninth, and Eleventh Circuits’ approaches, allowing a foreign sovereign to evade FSIA jurisdiction altogether based solely on the foreign sovereign’s rules requiring plaintiffs to bring certain claims against the sovereign to its own courts, without regard to discretionary or comity considerations. *Cf. Philipp* U.S.Br.15 (framing adjudicatory comity as whether a U.S. court may abstain “in deference to adjudication in a foreign forum”). The Second Circuit not only joins these other circuits in undermining *Congress*’ control over federal court authority, but hands that power entirely to *the foreign sovereign itself*. That extreme position—which hands foreign sovereigns a playbook to evade U.S. litigation—highlights the costs of leaving the conflict unresolved and the need for this Court’s intervention.

³ Notably, this Court has already settled the analogous domestic question long ago: A right created by state law can be enforced by federal courts, notwithstanding state law confining its enforcement to particular courts. *Ry. Co. v. Whitton’s Adm’r*, 80 U.S. (13 Wall.) 270, 286 (1871); see *Marshall v. Marshall*, 547 U.S. 293, 313-14 (2006).

II. This Court Should Decide Whether Foreign Sovereigns Are Entitled To Deference When They Raise Self-Serving Interpretations Of Foreign Law For The First Time On Appeal.

The panel majority's decision not only gives foreign nations the power to define the contours of their own immunity from suit in United States courts, but permitted Argentina to claim that immunity based on new interpretations of Argentine law that Argentina had never presented to the district court—and that are squarely contradicted by the foreign law materials that were presented in the district court and subjected to adversarial testing and expert rebuttal there. That aspect of the panel majority's decision likewise conflicts with this Court's precedent and decisions from other circuits, and independently warrants this Court's review.

The panel's ready acceptance of Argentina's new and self-serving account of its own law further undermines Congress' decision in the FSIA to make an independent federal forum available when foreign sovereigns engage in commercial activity in the United States, by inviting foreign sovereigns to reinterpret their laws on appeal to avoid liability. Beyond that, the panel's approach conflates the distinct responsibilities of trial and appellate courts, allowing foreign sovereigns to raise novel foreign-law arguments that were never presented to the district court or subjected to expert scrutiny, competing testimony, or other "fact-like procedures that a district court is better situated to implement." App.47 (Cabranes, J., dissenting). This Court should grant review and make clear that foreign-law arguments are

not exempt from the basic rules of waiver and forfeiture that structure the respective roles of trial and appellate courts.

A. The Panel Majority's Decision to Credit Argentina's Novel and Self-Serving Arguments on Appeal Cannot Be Reconciled With This Court's Precedent.

1. As this Court has made clear, where (as here) federal courts are “provided with the views of the relevant foreign government” in a case involving foreign law, those views do not control. *Animal Sci.*, 585 U.S. at 42-43. A federal court presented with a foreign sovereign’s interpretation of its own law “is neither bound to adopt the foreign government’s characterization nor required to ignore other relevant materials.” *Id.* at 43. And “[w]hen a foreign government makes conflicting statements ... or offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government’s submission.” *Id.*

That caution is particularly warranted when a foreign government’s interpretation of its law on appeal not only conveniently saves the sovereign billions of dollars, but also conflicts with its presentation in the district court and with the district court’s rulings. As this Court has long recognized, appellate courts must “give due consideration to the first-instance decisionmaker’s ‘feel’ for the overall case,” and “be constantly alert to the trial judge’s first-hand knowledge of witnesses, testimony, and issues.” *Weisgram v. Marley Co.*, 528 U.S. 440, 443 (2000). That due consideration applies with full force to questions of foreign law, which are reviewed de novo

under Rule 44.1 but which “frequently call for fact-like procedures that a district court is better situated to implement.” App.47 (Cabranes, J., dissenting).

2. This case exemplifies both points. As Judge Cabranes emphasized in dissent, “[f]or more than ten years, a distinguished judge of the Southern District has presided with meticulous care” over this litigation, investing “ten years of painstaking consideration of the law and facts on the ground.” App.44-45. And “[b]ased on its close familiarity with the facts and law of the case, the District Court rejected Argentina’s arguments,” holding that petitioners have valid claims based on Argentina’s flagrant breach of its contractual promises. App.46. The decade-long history of this litigation—and the hundreds of pages of briefing and expert reports that the district court considered, along with its unique ability to observe live testimony from multiple experts at the multi-day damages trial—warranted “special consideration and respect to a District Court that has closely evaluated every aspect of the facts and, importantly, the governing law of Argentina.” App.47.

The panel majority nevertheless offered none of the special consideration and respect for the district court’s decision required by this Court’s precedent, and none of the appropriate skepticism for Argentina’s novel and self-serving arguments. Instead, despite acknowledging that the district court “has presided over these difficult and lengthy cases for over a decade” and “engaged deeply with complex questions of Argentine law,” the panel majority dismissed the district court’s analysis in a footnote, *see* App.39 n.14, deferring instead to arguments that Argentina raised

for the first time on appeal and that were clearly contradicted by the record. That departure from settled principles warrants this Court's review.

3. Before the district court, Argentina took the categorical position that corporate bylaws are multilateral promises and so necessarily cannot give rise to any breach-of-contract claim. *See, e.g., D.Ct.Dkt.373* at 26. That categorical position, however, was undermined both by Argentine caselaw and by Argentina's own expert, who conceded both in his reply report and at his deposition that corporate bylaws can include bilateral contractual promises that will support a breach-of-contract claim. App.116-17; C.A.App.1735-36, 3957.⁴ Argentina accordingly pivoted on appeal, abandoning its categorical view and asserting instead that while *some* corporate bylaw provisions may reflect bilateral promises, the bylaws here do not fit that bill and so could not give rise to any breach-of-contract claim. *See App.32-34.*

That new and untested position was likewise plainly incorrect. As the district court had already explained, the corporate bylaws here plainly included bilateral promises because they were necessary to

⁴ The panel majority incorrectly asserted that petitioners failed to cite "any Argentine cases" recognizing a "contract suit between shareholders arising out of a violation of corporate bylaws." App.33. In fact, petitioners and their experts cited multiple Argentine cases to that effect. *See, e.g., Zullo v. Kehoe*, CN Com., Room A, July 22, 2008 (TR LA LEY AR/JUR/8909/2008) ("Actions that arise from the bylaws ... may be exercised by the company against the shareholders or by the shareholders among themselves or against the company."); *Gutiérrez v. Neumáticos Gutiérrez SA*, CN Com, Room A, October 16, 2012 (TR LA LEY AR/JUR/62470/2012); *see also C.A.Dkt.227* at 33.

induce investment. Argentina thus “promised security holders that *it* would provide *them* with a compensated exit if it reacquired control over the requisite number of shares,” and so the contractual promise here was made “to specific and identifiable persons, the remaining shareholders, and was owed by a specific and identifiable person [Argentina].” App.117. Indeed, the bilateral nature of the obligation explains why Petersen itself complied with the relevant provision by extending a tender offer to other shareholders when it crossed the bylaws’ ownership thresholds. And it explains why Argentina itself calculated its own liability in real time by reference to the bylaws. Tellingly, Argentina did not dispute below that “[t]his bilateral obligation could as easily have been created via a shareholder agreement or a simple contract”—in which case its breach would plainly give rise to a breach-of-contract claim. App.117. As the district court recognized, the fact that the obligation was instead contained in the bylaws “does not change its nature.” App.117.

The panel majority nevertheless adopted Argentina’s new argument on appeal. Despite recognizing the contractual nature of Argentina’s promises, the panel majority uncritically accepted Argentina’s assertion that those contractual promises were multilateral rather than bilateral, and so could not form the basis of a breach-of-contract suit. App.29-32; *cf.* App.23-24 (discussing unilateral versus bilateral obligations, both of which are enforceable under Argentine law, before observing that bylaws breaches give rise to joint and several liability for responsible shareholders).

In reaching that conclusion, the panel did precisely what this Court warned against in *Animal Science*: it “rivet[ed] its attention on [Argentina’s] submission” on appeal, while failing to “address other evidence” and the district court’s analysis. 585 U.S. at 44. Whatever “discretion” the Second Circuit claims to have under its own precedent “to decide [a] question of Argentine law in the first instance,” see *Bugliotti v. Republic of Argentina*, 952 F.3d 410, 413 (2d Cir. 2020) (per curiam), it did not have discretion to ignore the district court’s reasoning, the “expert evidence in point,” and Argentina’s lack of “consistency with [its] past positions,” *Animal Sci.*, 585 U.S. at 43, 45; see *Weisgram*, 528 U.S. at 443. That disregard of the district court’s decision and this Court’s clear instructions warrants further review.

4. The panel majority’s reasoning with respect to Argentine public law suffers from the same flaws. Before the district court, Argentina argued that petitioners’ breach-of-contract claims were “preempted” by Argentine law for two reasons: because they were purportedly based on a “private-law encumbrance on expropriated property” (an argument that the tender-offer requirement in the bylaws somehow “encumb[ered]” the YPF shares Argentina had expropriated to take control), C.A.App.1841-43, and because they would purportedly “impede” the expropriation by effectively requiring the Republic “to acquire more than a 51% interest in YPF,” C.A.App.1843-44. But after losing on both arguments below, Argentina switched horses, claiming for the first time on appeal that petitioners’ claims would (retroactively) impede the expropriation by imposing a \$16 billion judgment on Argentina. And the panel

majority uncritically adopted that argument, again without serious consideration of the record or any of the caution that this Court has made clear courts should apply in evaluating a foreign sovereign's novel and self-serving interpretation of its own law. *See Animal Sci.*, 585 U.S. at 43.

Once again, the panel majority's disregard of the record and its deference to Argentina's unsupported and forfeited arguments on appeal cannot stand. As the record makes clear, Argentina never remotely suggested at the time of the expropriation that Argentine public law superseded its tender-offer obligations; instead, it simply repudiated those obligations, acknowledged that its repudiation would be the subject of litigation, and declared that it would not be "stupid" enough to comply with its prior promises. *See supra* pp.7-8. As the district court recognized, nothing in Argentine public law relieved Argentina of its contractual tender-offer obligations just because Argentina chose to trigger those obligations by expropriating a controlling stake in YPF rather than buying that controlling stake on the open market. App.126-30. And the panel majority's contrary conclusion that petitioners' claims retroactively "impede" Argentina's expropriation by subjecting it to litigation and a sizable judgment, App.35-36, cannot be squared with the district court record, which makes clear that the General Expropriation Law looks to the legal effect of a claim at the time of the expropriation and not the subsequent cost of litigation or a final judgment, *see* App.126-30. The facts the panel majority relied upon to find an impediment—10 years of litigation and a final judgment—did not exist when the district court

record was assembled, let alone when Argentina undertook the expropriation. By casually accepting Argentina's arguments without meaningful scrutiny, even when those arguments were never raised in the district court and conflict with the record, the panel majority's opinion departs from this Court's caselaw and warrants further review.

B. The Decision Below Conflicts With Decisions From Other Circuits.

The panel majority's approach to Argentina's arguments not only contravenes binding precedent, but illustrates a broader disagreement in the federal courts of appeals on how to apply principles of waiver and forfeiture in reviewing questions of foreign law. While the federal courts of appeals all agree that they "generally will not consider arguments raised for the first time on appeal," *e.g.*, *In re Am. W. Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000), they do not all apply that principle in the same way to questions of foreign law, and specifically diverge on the issue of whether a litigant may prevail on appeal on foreign-law arguments and materials that it never presented to the district court.

That disagreement implicates the basic allocation of responsibility between district courts and courts of appeals. Rule 44.1 treats foreign law as a question of law, and so permits *de novo* appellate review—but it does not make the federal appellate courts into courts of first instance. Instead, traditional preservation rules ensure that legal arguments will first be presented to the district court—a principle that has particular force in the foreign-law context, given that determining the content of foreign law often requires

considering competing expert submissions, live testimony, translations, and other “fact-like procedures that a district court is better situated to implement.” App.47 (Cabranes, J., dissenting). Allowing a losing litigant to advance materially new theories of foreign law for the first time on appeal reallocates to the appellate courts work that should be done at the trial level, while depriving both the district court and the opposing party of the opportunity to properly test those newly-introduced theories.

On one side of the split, the Fifth and Ninth Circuits preserve the traditional allocation of judicial responsibility by applying ordinary preservation principles to foreign-law arguments. The Fifth Circuit, for example, has rejected foreign-law arguments that were not sufficiently presented to the district court, explaining that “[w]hile it is true that an appellate court is free to review questions of foreign law on appeal,” a foreign defendant must still satisfy its “burden of proof of the foreign law” in the district court, and “should not be entitled to a second chance to meet his burden of proof on appeal.” *Banque Libanaise Pour Le Com. v. Khreich*, 915 F.2d 1000, 1006-07 (5th Cir. 1990). The Ninth Circuit has likewise held that the “appropriate reading of [precedent] and of Rule 44.1 ... is that a party relying on foreign law has an obligation to raise the specific legal issues and to provide the district court with the information needed to determine the meaning of the foreign law” in the first instance, rather than raising new theories of foreign law “for the first time on appeal.” *G & G Prods. LLC v. Rusic*, 902 F.3d 940, 949 (9th Cir. 2018).

The Second, Third, and Seventh Circuits, by contrast, have endorsed free-ranging appellate examination of foreign-law issues without regard to whether the relevant arguments or materials were presented to the district court. As the decision below illustrates, for instance, the Second Circuit takes the view that courts of appeals “undoubtedly have discretion to decide [a] question of [foreign] law in the first instance” regardless of whether that question was presented to the district court, and are not “limited to the record created in the district court” in doing so. *Bugliotti*, 952 F.3d at 413; see App.29-38 (relying on multiple foreign-law arguments never presented to the district court). The Third Circuit has likewise held that a court of appeals “may consider information not available to or considered by the district court” in deciding questions of foreign law, *Mobile Marine Sales, Ltd. v. M/V Prodomos*, 776 F.2d 85, 89 (3d Cir. 1985), and the Seventh Circuit has taken a similar approach, *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 628-31 (7th Cir. 2010).

This Court should not allow that confusion to continue. Contrary to what the panel majority below apparently believed and several other circuits have concluded, basic principles of waiver and forfeiture apply in the foreign-law context just as they do in other contexts. Indeed, the case for waiver and forfeiture is at its strongest in foreign law matters because “fact-like procedures” and adversarial testing in the district court may reduce the risk of error on unfamiliar foreign law questions—as evidenced by the concessions of respondents’ foreign law experts in the district court when confronted with contrary expert evidence via rebuttal reports and cross-examination.

See supra pp.10, 27. This Court should take this opportunity to settle that question by granting certiorari and correcting the panel majority's contrary analysis.

III. The Questions Presented Are Exceptionally Important.

The exceptional importance of this case—which involves the largest commercial judgment in U.S. history—cannot be overstated. By allowing Argentina to make explicit investor-protecting promises to raise massive amounts of capital in U.S. markets, only to repudiate those promises without consequence, the panel majority's decision will have severe ramifications for foreign investment in the United States. And the effects of that decision will be all the more problematic in light of the Second Circuit's preeminent role in protecting the integrity of the U.S. capital markets, not to mention New York's position as a leading international hub for foreign investment. If the decision below is permitted to stand, investors will be harmed directly in the short run, and everyone will suffer in the long run from the inability to hold foreign sovereigns in need of capital to their word.

As even the panel majority recognized, Argentina deliberately "t[ie]d its own hands" by adopting the tender-offer provisions in the YPF bylaws, and repeatedly "tout[ed] these protections in its IPO prospectus and SEC filings" to "assure private investors—many of whom were based in the United States—that they would be protected" if Argentina chose to renationalize YPF. App.38. Argentina simply "would not have been able to raise \$1.1 billion from YPF's NYSE-listed [shares] without these investor

protections,” nor would subsequent investors have paid billions more for those shares. App.38. But when Argentina later returned to its tradition of economic nationalism and seized back control of YPF, it flagrantly broke its contractual promises and refused to make the tender offer that the bylaws required. App.38. After running the numbers, Argentina made a calculated decision to breach its promises, deriding as “fools” anyone who thought that it would be “stupid” enough to comply. C.A.App.3693; *see supra* pp.7-8.

Despite recognizing Argentina’s “knowing and flagrant violation of the promises it made to foreign investors,” the panel majority relegated the investors that Argentina brazenly betrayed to seeking “to enforce the Bylaws’ protections in Argentine court.” App.39. That is no remedy at all. Forcing investors on U.S. markets who have claims against a foreign sovereign to sue in that sovereign’s own courts will only convince those investors that foreign offerings on U.S. markets cannot be trusted. This case is a perfect example: If Argentina had made clear at the outset that the only remedy for a breach was a lawsuit in Buenos Aires, it would have come back from the NYSE empty-handed. By allowing Argentina to make clear promises to attract investors and then “refus[e] to honor those protections two decades after making them,” the Second Circuit’s decision “cast[s] doubt on the security of foreign investment” on the U.S. markets, App.38, and undermines the United States’ significant “interest in ensuring that foreign states that enter U.S. markets as commercial actors do not enjoy immunity from lawsuits regarding violations of their commercial obligations,” *Petersen* U.S.Br.18.

In straining to excuse Argentina from the consequences of its breach, the panel majority's decision undermines the basic promise of the FSIA's commercial-activity exception: that U.S. courts will hold foreign sovereigns to their commercial obligations as they would any private individual. *See* 28 U.S.C. §§1605(a)(2), 1606. The decision below signals to foreign sovereigns that they can rely on their own law to evade FSIA jurisdiction, allowing them to decide for themselves what claims they are willing to face in federal court (regardless of Congress' contrary choices). And by allowing a two-judge panel majority to reach that unlikely result over the clear and meticulous contrary rulings of a district court with years of experience supervising this litigation, based on arguments that Argentina never raised in the district court at all, the decision below profoundly undermines the important role of district courts in resolving questions of foreign law in the first instance.

While the circumstances have varied, numerous decisions have held Argentina to account in U.S. courts for its repeated failure to keep the promises it has made to U.S. investors. *See, e.g., NML Cap., Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (rejecting Argentina's claim to FSIA immunity for its commercial activities based on its "sovereign objectives"). The Second Circuit has now taken a different course, using sovereign-specific principles of Argentine law to invalidate a massive judgment while ignoring the views of a seasoned district court judge formed after adversarial testing over a decade of litigation, all while recognizing Argentina's "knowing and flagrant breach of the promises it made to foreign

investors.” App.39. This Court should not permit that dangerous and indefensible ruling to stand without further review.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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September 30, 2026

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Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Nos. 23-7370(L), 23-7463, 23-7614
and 23-7376(L), 23-7471, 23-7667

PETERSEN ENERGIA INVERSORA S.A.U.,
PETERSEN ENERGIA S.A.U.,

*Plaintiffs-Appellees-
Cross-Appellants,*

v.

ARGENTINE REPUBLIC,

*Defendant-Appellant-
Cross-Appellee.*

YPF S.A.,

*Defendant-Conditional
Cross-Appellant.*

ETON PARK CAPITAL MANAGEMENT, L.P., ETON PARK
MASTER FUND, LTD., ETON PARK FUND, L.P.,

*Plaintiffs-Appellees-
Cross-Appellants,*

v.

ARGENTINE REPUBLIC,

*Defendant-Appellant-
Cross-Appellee.*

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YPF S.A.,

*Defendant-Conditional
Cross-Appellant.*

Argued: Oct. 29, 2025
Decided: Mar. 27, 2026

Before: Cabranes, Chin, and Robinson,
Circuit Judges.

OPINION

CHIN, *Circuit Judge*:

Defendant-Appellant Argentine Republic (the “Republic”) appeals from several orders and the final judgment of the United States District Court for the Southern District of New York (Preska, *J.*) in two cases resulting in the Republic being ordered to pay a combined damages award of \$16.1 billion, an award that equals approximately 45% of the Republic’s entire national fiscal budget for 2024. Plaintiffs-Appellees Petersen Energía Inversora S.A.U. and Petersen Energía S.A.U., two Spanish entities owned by an Argentine family (together, “Petersen”), and Eton Park Capital Management, L.P., Eton Park Master Fund, Ltd., and Eton Park Fund, L.P., entities of a New York hedge fund (together, “Eton Park,” and together, with Petersen, “Plaintiffs”), were minority shareholders of Defendant-Conditional Cross-Appellant YPF S.A. (“YPF”), an Argentine oil and gas company that had been owned by private shareholders

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from 1993 until 2012, at which point the Republic nationalized YPF by expropriating a majority of YPF's common shares. The Republic did so without conducting a tender offer to minority shareholders, as required by YPF's corporate bylaws. Plaintiffs thereafter brought, *inter alia*, breach of contract and promissory estoppel claims under Argentine civil law against the Republic and YPF in the Southern District of New York, seeking damages for the Republic's non-compliance with the tender offer requirement as set forth in YPF's bylaws, and for YPF's failure to enforce those requirements. After eight years of litigation, Plaintiffs prevailed on their claims against the Republic, and the district court granted summary judgment to YPF.

We hold that Plaintiffs' breach of contract damages claims against the Republic are not cognizable under Argentina's civil codes and public law governing expropriation, and accordingly REVERSE the district court's entry of judgment for Plaintiffs on those claims. We AFFIRM the district court's dismissal of the promissory estoppel claims against the Republic and YPF and its entry of judgment for YPF on Plaintiffs' breach of contract claims. Finally, we REMAND for further proceedings consistent with this opinion.¹

BACKGROUND

These appeals are taken from two of many cases brought in the wake of the Republic's controversial

¹ Because we affirm the district court's dismissal of Plaintiffs' claims against YPF, we need not consider YPF's conditional cross-appeal challenging the district court's damage calculations.

decision in 2012 to renationalize YPF, the country's largest oil and gas company, following a decade marked by economic decline and the rise of political nationalism. We summarize the factual and procedural history of these two suits as is relevant to the primary issue before us now: the merits of Plaintiffs' contract-based damages claims against the Republic.

I. Factual Background

A. The Republic Privatizes YPF

YPF was founded as a state-run oil company in 1922 and is incorporated under Argentine law. It was wholly owned and operated by the Argentine government until 1993. As part of the country's free-market reform and deregulation movement in the early 1990s, the Argentine government decided to privatize YPF by selling the company to private investors through an initial public offering ("IPO"). In preparation for the IPO, the Republic and YPF amended certain key provisions of YPF's corporate bylaws (the "Bylaws").

Central to this case are provisions of the Bylaws that protect YPF's minority shareholders from takeover acquisitions. Under § 7(d) of the Bylaws, an acquiring shareholder must make a public tender offer to all holders of YPF's outstanding shares—that is, to all other YPF shareholders—if the transaction would result in the acquirer owning more than 15% of YPF's common stock, known as its "Class D" shares. The acquirer is required to ensure the tender adheres to procedures set out in §§ 7(e)-(f), including by complying with New York Stock Exchange ("NYSE") and Securities and Exchange Commission ("SEC")

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rules and regulations, publishing notice in New York City, and tendering the shares at an above-market price determined by the highest result of several pricing formulas outlined in the Bylaws.

These tender offer requirements are expressly extended to control acquisitions by the Argentine government. Section 28(A) of the Bylaws states that the procedures of §§ 7(e)-(f) apply to “all acquisitions made by the National Government, whether indirectly or directly, by any means or instrument, of shares or securities of [YPF]” that result in “the National Government becom[ing] the owner, or exercis[ing] the control of,” a cumulative 49% of YPF’s shares. Joint App’x at 674 § 28(A). In essence, § 28(A) provides that minority shareholders would be offered a compensated exit if and when the Argentine government ever renationalized YPF. The Bylaws also provide that any Class D shares acquired in breach of the tender offer requirements, including those acquired by the Republic in a § 28(A) transaction, “shall not grant” voting, dividend, quorum, and other rights. *Id.* at 657 § 7(h).

The Bylaws (as amended) took effect in May 1993, after the Argentine executive branch ratified them via executive order and instructed the Argentine Ministry of Economy and Public Works and Services to, in its capacity as a YPF shareholder, submit the Bylaws and “cause the same to be approved.” Dist. Ct. Dkt. 363, Ex. 73 at 1-2.² The Bylaws and the tender offer requirements therein were explicitly referenced in

² District court materials cited are from the docket in *Petersen Engergía Inversora S.A.U. v. Argentine Republic*, No. 1:15-cv-02739 (S.D.N.Y.).

YPF's IPO Prospectus filed with the SEC, which assured investors that if the Republic were to retake majority control of YPF, it "first would be required to make a cash tender offer to all holders of Class D shares on specified terms and conditions" outlined in the Bylaws. Joint App'x at 502.

YPF's IPO raised billions of dollars from private investors. On June 29, 1993, YPF's Class D shares were listed on the Buenos Aires Stock Exchange, and corresponding American Depositary Receipts ("ADRs") were listed on the New York Stock Exchange ("NYSE").³ The sale of NYSE-listed ADRs, the largest portion of YPF's IPO, generated over \$1.1 billion in revenue for the Republic. All in, the Republic sold 80% of its interest in YPF, including 59% of its Class D shares. Post-IPO, the Republic remained a minority, non-controlling shareholder of YPF.

B. Plaintiffs Purchase YPF Stock

By 2008—fifteen years after the IPO—nearly all of YPF's capital stock was owned by Repsol S.A. ("Repsol"), a Spanish oil company. It was from Repsol that Petersen began purchasing YPF ADRs. By 2011, Petersen had bought ADRs representing just over 25% of YPF's Class D shares. Its stock acquisitions were

³ ADRs are dollar-denominated certificates, issued by a U.S. bank, that represent ownership shares of a foreign security. To create an ADR, a U.S. depositary bank buys shares of a foreign security and holds them in a foreign custodian bank. Issued ADRs can be listed and traded on U.S. stock exchanges. In YPF's IPO, Bank of New York Mellon purchased Class D shares deposited in the Republic and issued ADRs, each of which represented an interest in a Class D share, that were then listed on the NYSE.

financed by highly leveraged loans from Repsol and a syndicate of financial institutions that were secured against Petersen's YPF shares. Petersen intended to service its loan interest with the dividend payments associated with the collateralized shares. To facilitate this, it entered into a shareholder's agreement with Repsol in which Repsol agreed to cause YPF to distribute 90% of its profits as dividends twice a year, and to pay a one-time "special dividend" of \$850 million after the purchase. *Id.* at 3294-95.

Eton Park began purchasing YPF ADRs in November 2010. By March 2012, Eton Park owned ADRs representing about 3% of YPF's Class D shares. At the time of the Republic's expropriation in 2012, Petersen and YPF were the second- and third-largest holders of YPF's common stock.

C. The Republic Expropriates YPF Stock

By the early 2010s, the Republic's domestic oil and gas production had steadily declined following a decade marked by currency crises, price controls, and nationalist economic policies. The Argentine government began to criticize Repsol's management of YPF, accusing Repsol of paying out YPF's profits in shareholder dividends instead of investing them to develop new energy reserves or increase its oil production during a period in which the Republic had become a net energy importer, rather than exporter.

In early 2012, the Argentine press began reporting rumors that the Republic was considering renationalizing YPF. The company's stock price fell sharply in response to the rumors of renationalization. The reports proved true—on April 16, 2012, then-Argentine President Cristina Fernández de Kirchner

announced that the government would take a 51% controlling stake in YPF. It would do so through a process known as expropriation, in which the Argentine government is permitted under its domestic law to, under certain circumstances, take private property for public use or benefit—analogous to the concept of eminent domain in U.S. law. To effectuate the expropriation, Kirchner submitted a bill to the Argentine legislature authorizing the expropriation of 51% of YPF's Class D shares from Repsol. The government simultaneously issued an executive order, Decree No. 530/2012 (the "Intervention Decree"), declaring that the Republic was temporarily seizing YPF, taking immediate and complete control of the company, and appointing an "Intervenor" vested with the powers of YPF's Board of Directors and President to "ensure full compliance" with the proposed legislation. Sp. App'x at 249.

The proposed expropriation legislation (the "YPF Expropriation Law"), was passed by the Legislature on May 3, 2012, and took effect on May 7, 2012. *See* Law No. 26,741, May 3, 2012, [CXX] B.O. 32391. In accordance with the Argentine Constitution and its General Expropriation Law, the YPF Expropriation Law pronounced a national public need for the expropriation and declared 51% of YPF's shares (held by Repsol) to be "a public interest and subject to expropriation." Sp. App'x at 241. The YPF Expropriation Law also gave the Argentine executive branch the right to "exercise all the political rights associated with the shares subject to expropriation until the transfer of political economic rights is completed." *Id.* at 241-42.

The Republic never conducted a tender offer as required by § 7 and § 28(A) of the Bylaws. Indeed, Argentine officials voiced their express refusal to do so. The day after the executive branch issued its Intervention Decree, the Republic's Deputy Economy Minister Axel Kicillof—who had been appointed the temporary Vice-Intervenor of YPF—announced in a speech before the Argentine Senate that the government did not intend to issue a tender offer because the requirements were a “bear trap” and it would be “stupid” for the Republic to “buy everything according to the law of YPF itself, respecting its bylaws.” Joint App'x at 3693.

Some of YPF's minority shareholders quickly challenged the Republic's failure to comply with the Bylaws' tender offer requirement. At YPF's first post-expropriation shareholders' meeting on June 4, 2012—which Plaintiffs did not attend—several shareholders asserted that the Argentine government violated the Bylaws and thus could not vote its shares or have them counted towards the meeting quorum. The Republic voted the expropriated shares anyway. After that June 4 meeting, some YPF shareholders sued in an Argentine court alleging that the Republic had violated the Bylaws, and sought to compel the Republic to conduct a tender. Repsol also sued in Argentina and Spain, and brought a putative class action in the Southern District of New York on behalf of all private shareholders challenging various aspects of the expropriation. These suits, including the one in the Southern District, were dismissed after Repsol agreed to a global settlement of all past and future minority shareholder claims in connection with the expropriation for \$5 billion. The global settlement was

reviewed and approved by the Republic's National Court of Appraisals, which determined that the \$5 billion compensation was "fair and reasonable" in light of the value of the expropriated shares. Joint App'x at 3309-10. The Republic paid the settlement and Repsol transferred title to the expropriated shares to the Republic on May 8, 2014.

Unable to service its loan interest without YPF's dividend payments, Petersen defaulted on its obligations, and its lenders foreclosed on its YPF ADRs in May 2012. Petersen entered insolvency proceedings in Spain two months later. As part of its bankruptcy liquidation plan, Petersen sold its claims in this case to Prospect Investments LLC, a wholly owned subsidiary of Burford Capital LLC ("Burford"), for €15 million. Under this litigation financing agreement, Burford would receive 70% of the total judgment Petersen obtains in this lawsuit; Petersen would receive the remaining 30%. Burford acquired Eton Park's claims in this case in 2016, and would receive 75% of Eton Park's recovery.

II. Procedural History

A. Filing of Suit, Motions to Dismiss, and Interlocutory Appeal

Petersen filed suit in the Southern District of New York against the Republic and YPF ("Defendants") on April 8, 2015. It brought breach of contract, anticipatory breach, and promissory estoppel claims, alleging that the Republic had violated the Bylaws by failing to conduct a tender offer, and that YPF had breached its obligations under the Bylaws by failing to enforce the tender requirement and associated penalties against the Republic. Petersen also brought

good faith and fair dealing claims, alleging that Defendants had engaged in a campaign to depress YPF's share price leading up to expropriation to the detriment of minority shareholders.

The district court denied Defendants' motions to dismiss the breach of contract claims, rejecting their arguments based on, *inter alia*, the Foreign Sovereign Immunities Act (the "FSIA"), act of state doctrine, and *forum non conveniens*. See *Petersen Energía Inversora, S.A.U. v. Argentine Republic*, No. 15 Civ. 02739, 2016 WL 4735367, at *5, *7, *13 (S.D.N.Y. Sept. 9, 2016) (*Petersen I*). The court dismissed the promissory estoppel claims against both Defendants, finding them duplicative of the breach of contract claims. *Id.* at *16. It also dismissed the good faith and fair dealing claim against YPF. *Id.* at *15.

On interlocutory appeal, this Court affirmed the FSIA ruling and declined to reach the act of state question, holding that "under the bylaws, Argentina's expropriation triggered an obligation to make a tender offer for the remainder of YPF's outstanding shares." *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 206 (2d Cir. 2018) (*Petersen II*), *cert. denied*, 139 S. Ct. 2741 (2019); *see also id.* at 212. While Petersen's appeal was pending, Eton Park filed a substantively similar suit against the Republic and YPF in November 2016. The district court designated the two actions as related, and they have since proceeded in tandem.

Upon remand to the district court, Defendants filed a renewed motion to dismiss based on *forum non conveniens*. The district court considered the *forum non conveniens* arguments anew under the three-part

analysis set forth in *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (en banc). See *Petersen Energía Inversora S.A.U. v. Argentine Republic*, No. 15 Civ. 02739, 2020 WL 3034824, at *6-14 (S.D.N.Y. June 5, 2020) (*Petersen III*). It again declined to dismiss after reasoning that the addition of New York-based Eton Park strengthened the deference owed to Plaintiffs’ choice of forum, public interests weighed heavily in favor of litigation in New York, and the need to make and apply conclusions of Argentine law did not warrant dismissal. It also rejected, in a footnote, Defendants’ invocation of abstention based on international comity, finding that they had not shown “exceptional circumstances” justifying dismissal, and that dismissal at that stage would be “woefully inefficient” given the time and money already expended in what was then five years of litigation. *Id.* at *14 n.15.

B. Summary Judgment, Trial, and Judgment

After three more years of discovery, the parties cross-moved for summary judgment. The district court granted summary judgment for Plaintiffs on their breach of contract claims against the Republic on liability, but not damages. See *Petersen Energía Inversora, S.A.U. v. Argentine Republic*, No. 15 Civ. 02739, 2023 WL 2746022, at *2, 4-5 (S.D.N.Y. Mar. 31, 2023) (*Petersen IV*). The court construed Plaintiffs’ claims as seeking damages for a straightforward breach of contract based on § 28(A) of the Bylaws, and it reasoned that the elements of such claims under Argentine civil law are analogous to those in U.S. common law. It then found liability after noting that

“key facts are not in serious dispute”—the Bylaws required the Republic to conduct a tender offer if and when it made a control acquisition, the Republic made such an acquisition via the 51% expropriation, and it did not make the required tender. *Id.* at *5; *see also id.* at *14. The district court then rejected the Republic’s slate of defenses based on Argentine contract, corporate, and public expropriation law.

The district court also granted summary judgment to YPF on the breach of contract claims against it, finding that the Bylaws did not create an affirmative obligation on the part of YPF to enforce the tender requirements or enforce sanctions against the Republic for its noncompliance.⁴

The cases proceeded to a bench trial on damages in July 2023. The sole factual issue was whether, for purposes of calculating the required tender offer price (and resulting damages), the Republic “acquired control” of the expropriated shares and thus breached its Bylaw obligations when it issued its Intervention Decree on April 16, 2012, or when the YPF Expropriation Law went into effect on May 7, 2012. The court found that the Republic exercised indirect control over the expropriated Repsol shares beginning April 16, 2012, when it “deprived Repsol of control over its shares” through the Intervention Decree. *Petersen Energía Inversora, S.A.U. v. Argentine Republic*, No. 15 Civ. 02739, 2023 WL 5827596, at *1 (S.D.N.Y.

⁴ The district court also granted summary judgment for the Republic on the good faith and fair dealing claim, finding that Argentine law does not recognize a good-faith cause of action independent of a traditional breach of contract claim. Plaintiffs do not contest this ruling on appeal.

Sept. 8, 2023). It then selected an 8% simple interest rate for prejudgment interest.

On September 15, 2023, the district court entered final judgment of \$7.5 billion in damages plus \$6.9 billion in prejudgment interest to Petersen, and \$898 million in damages plus \$817 million in prejudgment interest to Eton Park.⁵ Together, the judgment exceeds \$16.1 billion, with post-judgment interest accruing.⁶

DISCUSSION

Faced with an unprecedented multi-billion dollar damages award, Defendants now raise a host of

⁵ The district court also dismissed all other claims against Argentina, including the anticipatory breach, good faith and fair dealing, and promissory estoppel claims, and dismissed all claims against YPF.

⁶ Because we conclude that the district court's grant of summary judgment for Plaintiffs on their breach of contract claim against the Republic was erroneous, the district court's post-judgment order requiring the Republic to transfer its YPF shares to Plaintiffs in satisfaction of the judgment is vacated. Our decision thus may render moot some or all of the pending appeals of the district court's orders related to turnover and post-judgment discovery, some of which have already been stayed pending resolution of these appeals on the merits. *See, e.g., Petersen Energía Inversora, S.A.U., et al. v. Argentine Republic*, No. 25-2362-cv (2d Cir. 2026), *stay granted*, Dkt. No. 88 (2d Cir. Mar. 18, 2026); *Eton Park Cap. Mgmt. et al. v. Argentine Republic*, No. 25-2363-cv (2d Cir. 2026), *stay granted*, Dkt. No. 75 (2d Cir. Mar. 18, 2026); *Petersen Energía Inversora, S.A.U., et al. v. Argentine Republic*, No. 25-1687 (2d Cir. 2026); *Eton Park Cap. Mgmt. et al. v. Argentine Republic*, No. 25-1689-cv (2d Cir. 2026); *Petersen Energía Inversora, S.A.U., et al. v. YPF S.A.*, No. 25-2629-cv (2d Cir. 2026); *Eton Park Cap. Mgmt. et al. v. YPF S.A.*, No. 25-2630-cv (2d Cir. 2026).

challenges to the district court's rulings on the motions to dismiss and cross-motions for summary judgment, and its entry of final judgment. We first discuss the Republic's threshold challenges based on Plaintiffs' standing, *forum non conveniens*, and international comity. We then turn to the merits, beginning with an overview of relevant Argentine civil and public laws that govern Plaintiffs' substantive contract-based claims. After determining that Plaintiffs' breach of contract claims against the Republic fail as a matter of Argentine law, we conclude with a discussion of their promissory estoppel claims against the Republic and remaining claims against YPF.

I. Threshold Issues

The Republic advances several arguments for reversal that we address prior to the merits. We first discuss the Republic's challenge to Plaintiffs' standing based on the timing of when the Republic's obligation to tender was triggered, and conclude that Plaintiffs do have standing to bring suit. We next consider the Republic's threshold arguments that these two cases should never have been adjudicated in a United States court based on *forum non conveniens* and international comity-based abstention, and conclude that we need not decide whether the district court abused its discretion in its application of either doctrine given the procedural posture of these cases and our decision to reverse on the fully briefed and litigated merits.

A. Standing

As a preliminary matter, we agree with the district court that Plaintiffs have standing to bring

their breach of contract claims against the Republic. Section 28 of YPF's Bylaws extends the tender offer requirement to "all acquisitions made by the National Government, whether directly or indirectly" that result in the government "becom[ing] the owner, or exerci[sing] the control of" an aggregate 49% of YPF's common stock. Joint App'x at 674 § 28(A). The Republic argues that the "acquisition[]" triggering the obligation to tender did not occur until the Republic formally received title to the expropriated Repsol shares in May 2014, at which point Plaintiffs no longer held YPF shares and thus no longer had standing to pursue these claims because they lacked a concrete stake in the outcome of the litigation.

We disagree. The Republic at least "indirectly" owned or controlled the shares it expropriated from Repsol upon passage of the YPF Expropriation Law two years earlier in May 2012. The YPF Expropriation Law authorized the seizure of 51% of YPF's shares held by Repsol, pushing the Republic's ownership of YPF over the 49% threshold required to trigger the tender obligation in § 28(A) that forms the basis of Plaintiffs' claims. Although the YPF Expropriation Law did not formally deliver title of the shares to the Republic, it explicitly granted the Republic the authority to "exercise all the political rights associated with the shares subject to expropriation until the transfer of political and economic rights is completed"—that is, until the time period to settle expropriation-related compensation set out under Argentina's General Expropriation Law elapsed, at which point the shares would be formally transferred. YPF Expropriation Law art. 9 (Sp. App'x at 241). Indeed, the YPF Expropriation Law stipulated that

the Republic's authority to "exercise . . . rights associated with the shares" was for the specific purpose of "ensur[ing] compliance with [the law's] objectives"—that is, the objective of renationalizing YPF by controlling the majority of its common stock. *Id.* And the Republic clearly did "exercise the control of" those shares, by cancelling dividend payments and shareholder meetings, voting the shares at the June 4, 2012 shareholder meeting, and, at the very least, depriving Repsol of the ability to exercise rights associated with the shares it had formerly controlled.

Accordingly, the Republic exercised control of 51% of YPF's common stock when the YPF Expropriation Law was enacted in May 2012, thus triggering its obligation to conduct a tender under § 28(A) of the Bylaws. It is undisputed that Plaintiffs held YPF shares when the YPF Expropriation Law went into effect. Plaintiffs therefore have standing to bring their contract-based claims based on the Republic's noncompliance with § 28(A).

B. Forum Non Conveniens *and International Comity*

The Republic next asserts that the district court should have dismissed these cases at the outset under the doctrine of *forum non conveniens* and the principle of abstention based on international comity.

Although Plaintiffs' substantive legal claims are governed by Argentine law, *see infra* Part II.B, the Republic's threshold arguments based on *forum non conveniens* and international comity are governed by U.S. federal law. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) (adopting doctrine of *forum non conveniens* as a matter of federal law); *Royal & Sun*

All. Ins. Co. of Canada v. Century Int’l Arms, Inc., 466 F.3d 88, 92-94 (2d Cir. 2006) (discussing abstention based on international comity as a matter of federal law).

The principle of *forum non conveniens* provides an exception to the established rule that federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The district court assessed whether to exercise this exception twice in this case—first in response to Defendants’ initial motion to dismiss, and again in response to Defendants’ renewed motion to dismiss following our decision in the FSIA interlocutory appeal. In conducting the second analysis, the district court reasoned, under the three-part test set forth in *Iragorri*, 274 F.3d at 71-75, that the addition of New York-based Eton Park increased the deference warranted to Plaintiffs’ choice of forum, private interests in favor of litigating in the Republic were neutral, and the public interests “weigh[ed] heavily in favor of litigation in New York.” *Petersen III*, 2020 WL 3034824, at *14.

We acknowledge that there are serious forum-related issues presented by these cases—the propriety of the Republic’s decision to “take” the property of a Spanish company under Argentine law has now been litigated in a U.S. court for ten years. Nonetheless, our Court has explained that *forum non conveniens* is a non-jurisdictional doctrine, the application of which “lies wholly within the broad discretion of the district court.” *Iragorri*, 274 F.3d at 72 (citing *Scottish Air Int’l, Inc. v. British Caledonian Group, PLC*, 81 F.3d

1224, 1232 (2d Cir. 1996)). Accordingly, we review *forum non conveniens* rulings for abuse of discretion, see *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat’l Petroleum Corp.*, 40 F.4th 56, 70 (2d Cir. 2022), and parties challenging such rulings after a full trial on the merits must display “substantial prejudice” warranting reversal. *Indasu Int’l, C.A. v. Citibank, N.A.*, 861 F.2d 375, 380 (2d Cir. 1988); see also *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1168 (5th Cir. 1987) (reasoning that “the trial’s occurrence and completion bolsters the district court’s original decision to deny the motion to dismiss” based on *forum non conveniens*), *vacated on other grounds*, *Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989).⁷

Given the latitude afforded to district courts on *forum non conveniens* determinations, the reality that we are reviewing this decision *after* a trial has been conducted and final judgment has been entered, and our ruling on the merits, we need not decide whether the district court abused its discretion here in a manner that satisfies the high bar for reversal in this procedural posture.

The district court also rejected the Republic’s argument—presented as a component of the *forum non conveniens* argument below and as a standalone argument on appeal—that Plaintiffs’ suits were precluded by abstention principles based on

⁷ Moreover, it is exceedingly rare for our Court to reverse a district court’s decision to *deny* a motion to dismiss based on *forum non conveniens* at any stage of litigation. See *Figueiredo Ferraz E Engenharia de Projecto Ltda. v. Republic of Peru*, 665 F.3d 384, 400 (2d Cir. 2011) (Lynch, J., dissenting).

international comity. We typically review an international comity ruling for abuse of discretion, but have noted that because such rulings implicate a district court's "decision to abstain from exercising jurisdiction," our inquiry is "more rigorous" and has "little practical distinction" from *de novo* review. *Royal & Sun*, 466 F.3d at 92 (citation modified).

On the Republic's telling, it has a strong sovereign interest in adjudicating these cases, as expressed by its existing statutory framework for resolving expropriation-related claims, requiring the district court to "surrender" its jurisdiction even in the absence of a parallel proceeding in Argentine court. *Cf. id.* at 93-94 (setting forth a series of non-exhaustive factors that may constitute "exceptional circumstances" as required to justify abstention where there are pending parallel proceedings in a foreign court). Again, however, the merits of Plaintiffs' claims have been fully decided by a district court and extensively briefed on appeal. Accordingly, we also decline to decide whether international comity concerns warranted abstention here.

Because we ultimately conclude that Plaintiffs' claims fail as a matter of Argentine law, we need not—and indeed do not—rest our conclusions on the Republic's threshold arguments about the propriety of conducting this litigation in a U.S. court. Assuming without deciding that proceeding in Plaintiffs' choice of forum was permissible, we nevertheless reverse the district court's decision on the merits of Plaintiffs' primary breach of contract claims as a matter of substantive Argentine law.

II. The Merits

A. Standard of Review

The district court’s interpretation and application of foreign law is reviewed *de novo*. *Animal Sci. Prods., Inc. v Hebei Welcome Pharm. Co.*, 585 U.S. 33, 42 (2018). While we give “respectful consideration” to the Republic’s interpretation of its own law, we are “not bound to accord conclusive effect” to its statements, and instead “may consider any relevant material or source” in making our determination *de novo*. *Id.* at 36 (citing Fed. R. Civ. P. 44.1).

We review the district court’s decision to grant summary judgment on the breach of contract claim *de novo*, “construing the evidence in the light most favorable to the party against whom summary judgment was granted and drawing all reasonable inferences in that party’s favor.” *Unkechaug Indian Nation v. Seggos*, 126 F.4th 822, 828 (2d Cir. 2025) (citation modified). “Summary judgment is required if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.*

Finally, we review the district court’s dismissal of Plaintiffs’ promissory estoppel claims under Rule 12(b)(6) *de novo* as well. *See Ezrasons, Inc. v. Travelers Indem. Co.*, 89 F.4th 388, 394 (2d Cir. 2023).

B. Argentine Legal Framework

The parties agree that Plaintiffs’ substantive legal claims—that is, their breach of contract and promissory estoppel claims—are governed by Argentine law. YPF is incorporated under the laws of the Republic, and the Bylaws contain a choice of law

clause providing that they, and any claims arising from them, are “governed by Argentine law.” Joint App’x at 519. We apply New York choice of law rules, *see Thea v. Kleinhandler*, 807 F.3d 492, 497 (2d Cir. 2015), under which questions related to the “internal affairs” of a corporation—including those involving the relationship between a company and its shareholders—are generally “decided in accordance with the law of the place of incorporation.” *Scottish Air*, 81 F.3d at 1234; *see also Eccles v. Shamrock Cap. Advisors*, 245 N.E.3d 1110, 1122-23 (N.Y. 2024).

Accordingly, we begin with an overview of the Argentine legal codes implicated by Plaintiffs’ claims. First, we summarize the relevant Argentine civil and commercial codes and, second, we summarize the Argentine General Expropriation Law.

1. Argentine Civil and Commercial Codes⁸

The primary Argentine legal codes at issue are the Argentine Civil Code and Commercial Code, which outline the relevant doctrines of Argentine contract and corporate law, respectively.⁹ Under the Civil

⁸ Unless otherwise noted, we rely throughout this opinion on the English translations of Argentine legal materials that the Republic provided in the Special Appendix and Joint Appendix. Plaintiffs have not provided any additional translations on appeal. The parties disagree over the translation of one provision of the Argentine Civil Code—Article 653—that we do not address here. The record before us does not indicate any dispute over the proffered translations of the legal materials discussed in this decision.

⁹ The Republic’s Civil and Commercial codes were merged into a single code in August 2015. *See* Código Civil y Comercial de la Nación, Law No. 26,994, Oct. 7, 2014, [CXXII] B.O. 32985

Code, contracts are categorized as “unilateral” or “bilateral.” Código Civil [Cód. Civ.] [Civil Code] art. 1138 (Sp. App’x at 208). These definitions mirror those in U.S. common law: Unilateral contracts are “those in which only one of the parties undertakes an obligation with respect to the other,” while bilateral contracts are “those in which both parties to the contract assume *reciprocal obligations*.” *Id.* (emphasis added). The two types of contractual obligations have different corresponding remedial mechanisms. If a party has not performed its promise “in contracts with reciprocal obligations”—that is, in a bilateral contract—the non-breaching party “may demand that the non-performing party fulfill their obligation”—that is, demand specific performance. Cód. Civ. art. 1204 (Sp. App’x at 205); *accord* Código de Comercio [Cód. Com.] [Commercial Code] art. 216 (Sp. App’x at 210).¹⁰ Then,

Suplemento. The translations provided by the parties in the Special Appendix and Joint Appendix appear to reference the pre-2015 codes, which governed at the time Petersen filed its Complaint in April 2015.

¹⁰ Contrary to Plaintiffs’ contention, the breach of contract claims as framed by Plaintiffs are governed by Article 1204 of the Civil Code and Article 216 of the Commercial Code. Plaintiffs argue repeatedly in their briefs that the Bylaws constituted a bilateral contract between the Republic and YPF’s minority shareholders. If the Bylaws are a bilateral contract, then they are governed by Articles 1204 and 216, which expressly apply to “contracts with reciprocal obligations.” Cód. Civ. art. 1204 (Sp. App’x at 205); *accord* Cód. Com. art. 216 (Sp. App’x at 210). Moreover, the breach of contract cases cited by the Republic are all governed by Article 216 of the Commercial Code, which is worded identically to Article 1204 of the Civil Code in the translations provided by the parties. *See* Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] [National Court of Commercial Appeals of the Federal Capital],

if a waiting period has elapsed “without the obligation being fulfilled,” the contract is terminated and the non-breaching party “shall have the right to seek compensation for damages.” Cód. Civ. art. 1204 (Sp. App’x at 205); *accord* Cód. Com. art. 216 (Sp. App’x at 210).

The Commercial Code also contains the General Companies Law (“GCL”), which sets forth Argentine corporate governance law. *See* Law No. 19,550, Apr. 25, 1972, [LXXX] B.O. 22409, as amended. The GCL provides, among other things, a process by which a company’s shareholders may challenge actions that violate the corporation’s bylaws. Shareholders representing at least 5% of the capital stock can convene a special shareholder’s meeting to challenge a decision made in violation of the bylaws. At that meeting, shareholders can challenge any resolution adopted in contravention of the bylaws as void, and then bring legal action against the company within three months of the meeting. If the adopted resolutions are ultimately deemed void, the shareholders who voted in favor of it face joint and several liability.

Chamber A, 2010/06/10, "Lipnik, Alberto Teodoro v. Constructora San José the Republic S.A.," L.L. Online, AR/JUR/32215/2010 (Arg.) (Sp. App’x at 369-70), CNCom., Chamber A, 1999/08/31, "Lezcano, Juan C. v. Arismendi S.C.S.," La Ley [L.L.] (2000-D-12) (Arg.) (Sp. App’x at 344-45). Although we need not decide whether Plaintiffs were required to seek specific performance before suing the Republic for damages, we conclude, for purposes of determining whether these claims are cognizable under Argentine law, that Articles 1204 and 216 apply to the contract-based claims that Plaintiffs have advanced.

2. Argentine General Expropriation Law

Despite Plaintiffs' effort to cast this as an ordinary breach of contract dispute between two corporate shareholders, it is evident that this case is not so simple. Plaintiffs' claims—even if styled as typical contractual claims—arise from the Republic's renationalization of YPF through an act of expropriation. They therefore necessarily implicate the Republic's public law regime in addition to its private law civil codes.

Article 17 of the Argentine Constitution provides that the government may expropriate property if such an expropriation has been “authorized by law” and the owners of the property have been “previously compensated.” Art. 17, Constitución Nacional [Const. Nac.] (Arg.) (Sp. App'x at 195). The procedures, conditions, and remedies for expropriation are governed by the General Expropriation Law (“GEL”). *See* Law No. 21,499, Jan. 17, 1977, [LXXXV] B.O. 23581. Article 4 of the GEL provides:

Property of any kind that is suitable or necessary for the satisfaction of the “public utility,” irrespective of its legal nature, may be the subject of expropriation, including assets in the public or private domain, whether they qualify as things or otherwise.

GEL art. 4 (Sp. App'x at 229).

Although the government may make such a “public utility” determination to effectuate an expropriation, it must also pay the owner of the expropriated property compensation that “include[s] only the objective value of the asset and the damages

that are a direct and immediate consequence of the expropriation.” GEL art. 10 (Sp. App’x at 230).

The amount of this compensation is determined pursuant to a process laid out in the GEL. If the expropriator and property owner cannot agree on the amount of compensation, the expropriator can bring judicial action within two years of the authorizing law going into effect to fix the value of the property taken. While this two-year clock for judicial action is running, Article 28 of the GEL provides that:

No action by third parties may impede the expropriation or its effects. The rights of the claimant shall be considered transferred from the thing to its price or to the compensation, leaving the thing free of any encumbrance.

GEL art. 28 (Sp. App’x at 233).

With these Argentine legal codes in mind, we now turn to the merits of Plaintiffs’ contract-based claims against the Republic.

C. Plaintiffs’ Claims Against the Republic

The crux of this ten-year-old litigation is Plaintiffs’ breach of contract claims against the Republic for damages arising from the Republic’s failure to conduct a tender offer upon expropriation. Plaintiffs also argue, in essence, that if the Court rules for the Republic on their breach of contract claims, then it should revive the promissory estoppel claims that were dismissed at the Rule 12(b)(6) stage. We address each set of claims in turn.

1. Breach of Contract

We turn to the merits of Plaintiffs' breach of contract claims against the Republic with two overarching observations in mind.

First, under Argentine law, as under United States law, corporate bylaws are not generally understood to create bilateral obligations among shareholders of a company that are enforceable under contract law, even if they set forth a contractual relationship among those shareholders. As one of the Republic's experts explained, bylaws are a "plurilateral organizational contract" and thus "do not create specific bilateral obligations between shareholders." Joint App'x at 1561-62. Although bylaws are often colloquially referred to, including in U.S. law, as "contracts" among shareholders, that analogy holds to the extent that, for example, the meaning of their text is discerned through traditional tools of contract interpretation. *See, e.g., Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) (reasoning that bylaws are "contracts among the shareholders of a corporation" in that "the general rules of contract interpretation are held to apply"); *see also* Joint App'x at 3438-40 (YPF's Expert Report explaining the limits of the "contract" metaphor under Argentine law from a comparative lens).

The primary function of corporate bylaws, however, is to provide a set of rules governing a corporation's internal operations, rather than to stipulate a set of legal obligations owed by the contractual parties to one another. *See* Joint App'x at 1561 (Republic's Expert Report explaining that bylaws

are “rules that govern how a company functions”), 3437 (YPF’s Expert Report explaining that bylaws provide the “governance rules of corporations”); *see also Hollinger Intern., Inc. v. Black*, 844 A.2d 1022, 1078-79 (Del. Ch. 2004) (“Traditionally, the bylaws have been the corporate instrument used to set forth the rules by which the corporate board conducts its business.”). It follows, then, that the comparison of bylaws to contracts for purposes of textual interpretation does not automatically import the host of contract-based *remedies* to the bylaws context.¹¹

Second, as noted above, this is not a run-of-the-mill civil contract dispute between two private parties. Instead, Plaintiffs’ claims against the Republic arise from, and are being litigated in the shadow of, a governmental expropriation.¹² These damages suits—

¹¹ Although not dispositive, amici also note that at least two U.S. courts have rejected, as a matter of state law, shareholder-versus-shareholder breach of contract claims based on corporate bylaws akin to Plaintiffs’ claims. *See* Brief of Amicus Curiae Law Professors in Support of Defendant-Appellant-Cross-Appellee at 8-11, *Petersen Energía Inversora S.A.U. v. Argentine Republic, YPF S.A.* (2d Cir. 2025) (No. 23-7370-cv) (discussing *Quantum Tech. Partners II, L.P. v. Altman Browning & Co.*, No. 08-CV-376-BR, 2009 WL 4826474 (D. Or. Dec. 8, 2009), *aff’d*, 436 F. App’x 792 (9th Cir. 2011) (applying Delaware law), and *In re Pearl*, No. 16-20305, 2017 WL 932951 (Bankr. E.D. Ky. Mar. 8, 2017) (applying Kentucky law)).

¹² Contrary to Plaintiffs’ contention, our decision in the FSIA interlocutory appeal does not preclude our recognition that these cases were brought following an act of expropriation. In our prior decision, we held that Petersen’s claims were “based on” the Republic’s breach of a commercial obligation that had a direct effect on the United States, such that the claims fell within the FSIA’s commercial activity exception. *See Petersen II*, 895 F.3d at 207, 211. This was true even if the Republic’s “obligation to

even if styled as ones brought to remediate contract-based injuries—thus necessarily implicate the GEL, which, by its plain language and purpose, serves as the primary legal framework governing expropriation under Argentine law.

Taking these observations into consideration, we now reverse the decision of the district court for two independent reasons. First, under Argentine civil law, the Bylaws did not create bilateral promises giving rise to a contractual obligation on the part of the Republic to YPF's other shareholders, including to Plaintiffs. Second, even assuming the Bylaws did create a bilateral contract, Plaintiffs' breach of contract claims for damages are precluded by the Republic's public law governing expropriation.

a. Argentine Contract Law

The principles of contract interpretation under Argentine law mirror those of U.S. common law. Argentine law instructs courts to look to the objective plain meaning of contractual language, as it is understood “according to general usage.” Cód. Com. art. 217 (Sp. App’x at 210). If the contractual language is clear and unambiguous, it “cannot be modified by interpretations based on the spirit of the clauses, presumed intention of the parties or the purposes

conduct a tender offer . . . was *triggered* by its sovereign act of expropriation.” *Id.* at 207 (emphasis added). But our holding that an act was not “sovereign” for purposes of determining whether a U.S. court had subject matter jurisdiction under the FSIA does not mean, by necessity or by implication, that the act does not implicate foreign public law that governs actions performed by a sovereign, including acts of expropriation by a sovereign government.

pursued.” Cámara Nacional de Apelaciones en lo Comercial de la Capital Federal [CNCom.] [National Court of Commercial Appeals of the Federal Capital], Chamber B, 1997/12/30, “Motta v. Abraxas Construcciones,” La Ley [L.L.] (1998-F-283) (Arg.) (Joint App’x at 2945).

The elements of a breach of contract claim under Argentine law are “(1) the existence of a valid and binding contract; (2) a breach of that contract; (3) damages to the plaintiff; (4) that the damages were attributable to the breaching party; and (5) the breaching party acted negligently or willfully or was subject to strict liability.” *Petersen IV*, 2023 WL 2746022, at *6. For a breach claim to be valid, therefore, there must be a “valid and binding contract” between the parties; here, there would have to be a valid contract between Plaintiffs and the Republic in the latter’s capacity as a shareholder of YPF. Accordingly, the question is whether § 7 and § 28(A) of YPF’s Bylaws create the type of “valid and binding contract” between two corporate shareholders that gives rise to a valid breach of damages claim under Argentine law.

The definition of a bilateral contract under Argentine law is parallel to that under U.S. common law. *See* Cód Civ. art. 1138 (Sp. App’x at 208) (defining bilateral contracts as “those in which both parties to the contract assume reciprocal obligations”); *cf.* 1 Williston on Contracts § 1:18 (4th ed. 2025) (“A bilateral contract exists when both parties exchange mutual or reciprocal promises.”). The defining feature of a bilateral contract under Argentine (and U.S.) law is the existence of “reciprocal obligations,” such as

promises between contractual parties to provide goods or services in exchange for payment. *See, e.g.*, “Lipnik,” L.L. Online, AR/JUR/32215/2010 (Sp. App’x at 346) (contractor suing for unpaid fees after a construction company failed to pay its work progress certificate); “Lezcano,” L.L. (2000-D-12) (Sp. App’x at 344) (plaintiff suing for damages and losses incurred due to a defendant’s unilateral breach of an oral distribution agreement). Bilateral contracts under Argentine law thus resemble what we commonly understand in U.S. common law as contracts resulting from agreements “containing mutual promises imposing some legal duty or liability on each promisor.” 1 Williston on Contracts § 1:18.

As noted above, corporate bylaws, on the other hand, do not typically contain “mutual promises” that a corporation’s shareholders owe to one another, and are instead more aptly understood as creating a set of multilateral rules between the corporation and its shareholders that dictate the internal governance of the corporate entity. One of the Republic’s commercial appellate courts has explained that, under Argentine law, “the rights and the obligations of the [shareholders] revolve around their relations with the legal subject called the company,” rather than “in relation to each one of the other [shareholders] individually” CNCom., Chamber A, 1999/10/22, “Gatti, Ernesto Ignacio and other v. Bulad, Alfredo Ragueb s/ summary,” *El Derecho* [E.D.] (2000-188-694) (Arg.) (Sp. App’x at 335). Consistent with *Gatti*’s articulation of the nature of corporate bylaws under Argentine law, we have previously described YPF’s Bylaws as a “contract governing the relationship among YPF, [the Republic] (in its capacity as a

shareholder), and other YPF shareholders.” *Petersen II*, 895 F.3d at 199. Neither *Gatti*’s explanation of the general operation of corporate bylaws under Argentine law nor our formulation of YPF’s Bylaws specifically in *Petersen II* suggest that they would create bilateral obligations between shareholders that are enforceable through a contract-based damages suit.

Plaintiffs acknowledge that corporate bylaws generally do not give rise to bilateral obligations, but argue that they *could* do so if they contained specific duties owed by certain shareholders to others. Section 28(A) of the Bylaws, Plaintiffs contend, does just that by specifically articulating an obligation owed by one shareholder (the Argentine government) to others (the minority shareholders) upon the occurrence of a contractually specified condition (a renationalizing transaction). *See also Petersen IV*, 2023 WL 2746022, at *12 (reasoning that “the Republic promised security holders that *it* would provide *them* with a compensated exit if it reacquired control over the requisite number of shares”).

Even assuming corporate bylaws *could* contain embedded bilateral obligations under Argentine law, there are no such obligations created by § 28(A). To be sure, § 28(A) singles out the Republic among all other current or potential YPF shareholders, stating that that the tender offer requirements “shall apply to all acquisitions made by the National government” that result in the Republic cumulatively holding 49% or more of YPF’s shares. Joint App’x at 674 § 28(A). But the only reason the “National government” is mentioned by name in § 28(A) is because the section

contains a higher triggering share percentage than what applies to ordinary acquirers under § 7(d). In other words, the purpose of specifically naming the Republic in § 28(A) is to establish a higher threshold for the size of the control block the Republic can acquire before it must conduct a tender, rather than to create a specific bilateral obligation that it owes to the minority shareholders. This is underscored by the fact that § 28(A) never names the minority shareholders as beneficiaries of or counterparties to the tender offer requirement. Indeed, if we were to view § 28(A)—or even the Bylaws as a whole—as establishing a set of “reciprocal obligations,” it is difficult to identify what the minority shareholders would owe as a “mutual promise” to the Republic in exchange for the Republic’s obligation to tender.

Moreover, Plaintiffs and their experts have not cited to any Argentine cases, below or on appeal, that recognize a breach of contract suit between shareholders arising out of a violation of corporate bylaws. And indeed, Plaintiffs’ chosen cause of action and remedy were not pursued by the many other similarly situated YPF minority shareholders, who, rather than bringing contract-based damages claims following the expropriation, instead attempted to enforce § 28(A) through Argentine corporate law mechanisms. YPF’s other minority shareholders objected to the Republic’s attempt to participate in the June 4, 2012 shareholders’ meeting, then filed suit in the Argentine courts to nullify shareholder resolutions passed at that meeting as adopted in violation of the Bylaws—all in accordance with the GCL’s procedure for challenging actions that violate a company’s bylaws.

Perhaps it is true that, as Plaintiffs argue, the Republic made “uniquely clear promises” in these Bylaws and committed a “uniquely egregious breach” by flagrantly refusing to conduct a tender offer to YPF’s many private investors who had bought assuming they would be protected from renationalization. Plaintiffs’ Br. at 51. But in interpreting the unambiguous language of § 28(A) in accordance with its “general usage,” and in the absence of Argentine authority guiding us otherwise, we decline to find a reciprocal obligation in § 28(A) that is enforceable in a contract-based damages suit brought by one corporate shareholder against another.

b. The General Expropriation Law

Our interpretation of the Bylaws is based on the “general usage” of the language of § 28(A). But it is also informed by the context of the governmental expropriation from which these claims arise. Accordingly, even if bylaws could create reciprocal obligations, and even if we assumed § 28(A) does so, Plaintiffs’ claims would nonetheless be precluded by the GEL—the Republic’s public law governing expropriation.

We are unpersuaded by Plaintiffs’ argument that this case does not implicate the GEL, which establishes a comprehensive procedure for resolving claims arising from expropriation. Although we need and do not decide whether the GEL displaces the private contract law of the Civil Code, the subject and substance of the GEL certainly suggest that these claims implicate Argentine public law. *See* Cód Civ. art. 2611 (Sp. App’x at 206) (providing that “[r]estrictions imposed on private ownership solely in

the public interest are governed by Administrative Law”). Moreover, when YPF’s other minority shareholders sought a judicial order from an Argentine court to compel the Republic to conduct a tender offer shortly after the expropriation, the Republic’s highest federal court stated that it was “clear that the aspects of administrative law”—that is, the GEL—“are of primary relevance to the resolution of this case.” Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 2014/08/20, “De San Martín, José et al. v. EN – PEN,” S.C. Comp. 731. L. XLIX (Arg.) (Sp. App’x at 255).¹³ Plaintiffs’ claims—though seeking damages for breach of contract, rather than an order to compel the execution of the tender offer—stem from the same expropriation and failure to tender by the Republic, thus also implicating the GEL.

Moreover, the GEL clearly contemplates the possibility of parties bringing judicial action against the expropriator in the aftermath of an expropriation. In anticipation of this reality, the GEL explicitly forecloses actions “by third parties [that] impede the expropriation or its effects” while the expropriator and property owner determine the amount of compensation owed to the owner. GEL art. 28 (Sp. App’x at 233). The GEL’s preclusion of third-party lawsuits was likely intended to mitigate the fallout

¹³ *De San Martín* is not wholly dispositive of the question presented here because it was a jurisdictional rather than merits determination, and because the *De San Martín* plaintiffs sought to enforce the Bylaws by compelling the Republic to conduct the required tender offer. Here, by contrast, Plaintiffs seek damages resulting from the Republic’s failure to tender, rather than seeking to compel specific performance.

from the exact kinds of claims brought by Plaintiffs here, which have clearly “impede[d]” the Republic’s expropriation of Repsol’s shares by subjecting the Republic to protracted litigation regarding the propriety of its actions, imposing costs on the Republic beyond those assessed in connection with the expropriation itself, and ultimately rendering the Republic’s control of the shares uncertain. *See Petersen Energía Inversora, S.A.U. v. Argentine Republic*, No. 15 Civ. 02739, 2025 WL 1796392, at *1 (S.D.N.Y. June 30, 2025) (granting transfer of the Republic’s YPF shares in satisfaction of the judgment).

It is true that, as Plaintiffs argue, the tender offer requirement did not literally bar the expropriation, because the Republic did successfully deprive Repsol of control over 51% of its shares and eventually take title to them. But it is difficult to conclude that the evident consequences of Plaintiffs’ lawsuits, which have saddled the Republic with ten years of litigation and a damages award representing 45% of its annual national budget, fall outside the plain meaning of “impede.” These cases—which functionally seek to extract payment for the Republic’s seizure of Repsol’s shares to the tune of \$16.1 billion—have undoubtedly “interfere[d] with” the act of expropriation, even if they did not actually prevent its completion.

The Republic also points to several other Argentine cases in which Argentine courts have held that GEL article 28 renders impermissible private contractual conditions that interfere with a properly declared expropriation, even if they do not literally prevent its occurrence. In one case, the Argentine

National Supreme Court of Justice held that the plaintiff could not enforce a contractual provision requiring the city to give five years' notice before an expropriation, because doing so "would entail conditioning the State in the exercise of its irrevocable discretion to establish the moment at which the public interest [in expropriation] exists." CSJN, 1975/04/14, "Sociedad de Electricidad de Rosario," Fallos (1975-291-290) (Arg.) (Sp. App'x at 312). There, the court explained that "the expropriation itself is not a negotiable issue [between the parties], since its public nature does not reconcile with the free will representing contractual negotiations." *Id.* Accordingly, the decision to expropriate overrode any existing contractual conditions to the extent they would affect or "impede" the expropriation, even if the parties may negotiate "the determination of a fair compensation for the expropriation" pursuant to the process laid out in the GEL. *Id.* In another case, the Supreme Court invalidated a contract obligation requiring the government to build two crossings over the land it expropriated under GEL article 28's identically worded statutory predecessor, reasoning that the expropriator was instead required to compensate the owner for such encumbrances out of the value of the expropriated property. *See* CSJN, 1911/11/21, "Ferrocarril Central Argentino v. L. de Fosse," Fallos (1912-115-59) (Arg.) (Sp. App'x at 283).

As these cases illustrate, GEL article 28 precludes private suits brought in the wake of expropriation based on existing contractual obligations to the extent fulfillment of those obligations would "impede," or interfere with, the expropriation. It instead channels those disputes into the compensation-setting

mechanism set forth elsewhere in the GEL. Perhaps Plaintiffs could have sought compensation by bringing a claim against the Republic under the GEL's procedures, or more likely against Repsol's \$5 billion global settlement with the Republic, given it was Repsol's YPF shares that were "taken" through the expropriation. We do not opine on whether Plaintiffs should have done so. We merely conclude that these claims for contract-based damages—even if they were cognizable under Argentine contract and corporate law—likely "impede the expropriation or its effects," and are thus barred under the text and purpose of the GEL. GEL art. 28 (Sp. App'x at 233).

* * *

At the end of the day, none of the parties involved in these two cases dispute that the Republic violated YPF's Bylaws. The Republic did so after tying its own hands with a tender offer requirement and repeatedly "tout[ing] these protections" in its IPO prospectus and SEC filings in the 1990s. *Petersen II*, 895 F.3d at 200. Its reason for doing so was plainly to assure private investors—many of whom were based in the United States—that they would be protected in the event the Republic decided to renationalize the country's largest oil and gas company if the economic and political winds ever shifted, just as they did in the early 2010s. It may well be that the Republic would not have been able to raise \$1.1 billion from YPF's NYSE-listed ADRs without these investor protections. And its refusal to honor those protections two decades after making them cast doubt on the security of foreign investment in the country more broadly.

Despite these factual realities, however, we are faced now with the narrow legal question of whether the cause of action that Plaintiffs brought and the remedy they seek in the face of the Republic's actions are permitted under Argentine law. Notwithstanding the Republic's knowing and flagrant violation of the promises it made to foreign investors, the answer to that question is no.¹⁴ But to the extent that the Republic committed a wrong against the shareholders it promised to protect, Argentine law did not leave YPF's minority shareholders without any remedy—Plaintiffs could have sought, and indeed other shareholders did seek, to enforce the Bylaws' protections in Argentine court through causes of action recognized under Argentine law.

2. Promissory Estoppel

The district court did not err in dismissing Petersen's promissory estoppel claim against the Republic under Rule 12(b)(6).¹⁵ This claim also fails as

¹⁴ As the dissent notes, the district court has presided over these difficult and lengthy cases for over a decade. See Dissent at 3-4. And we agree with the dissent's observation that, in the process of adjudication, the district court has engaged deeply with complex questions of Argentine law that are now the subject of our review. *See id.* Nonetheless, given our ability to "find and apply foreign law" in the first instance, *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998), our conclusion stands, especially as we are doing so on substantially the same factual record as was before the district court. *Cf. Bugliotti v. Republic of Argentina*, 952 F.3d 410, 414 (2d Cir. 2020) ("[C]onsiderations of judicial economy will occasionally lead us to remand rather than review a foreign legal question with which the district court did not, or did not fully, engage.").

¹⁵ Eton Park brought its suit after the district court had dismissed Petersen's promissory estoppel claims against

a matter of Argentine law. Promissory estoppel is not “an autonomous source of an obligation” separate from a breach of contract claim, and is otherwise precluded by the existence of a contractual relationship between the parties. Sp. App’x at 46 (quoting Joint App’x at 250, 338). Petersen argues that if we conclude that the Bylaws did not create a contractually binding obligation on the part of the Republic, then promissory estoppel should provide an “alternative basis” for liability. Plaintiffs’ Br. at 90. This argument, however, conflates our holding that the Bylaws do not create a bilateral obligation enforceable through a contract-based damages suit with a finding that the Bylaws do not constitute *any* sort of written contractual relationship between the parties, which, if true, may have permitted an estoppel claim. It also elides the fact that Plaintiffs still have not identified any “obligation” on the part of the Republic separate from the Bylaws provisions on which they premise their failed breach of contract claim, thus failing to plausibly plead an independent claim for promissory estoppel under Argentine law.¹⁶

D. Plaintiffs’ Claims Against YPF

We conclude by briefly discussing Plaintiffs’ breach of contract and promissory estoppel claims

Argentina and YPF, and did not assert separate estoppel claims against either Defendant.

¹⁶ The Second Circuit case to which Plaintiffs cite that allows estoppel claims as an alternative to breach claims is irrelevant, because Plaintiffs’ claims are not governed by New York law. *See* Plaintiffs’ Br. at 90 (citing *Goldberg v. Pace Univ.*, 88 F.4th 204, 214-15 (2d Cir. 2023)).

against YPF that were dismissed by the district court at earlier stages of this litigation.

The district court did not err in granting summary judgment for YPF on Plaintiffs' breach of contract claims. Looking to the language of §§ 7(d)-(f), 7(h), and 28 as understood "according to general usage," we do not find any affirmative obligation on the part of YPF to enforce the tender offer requirements or enforce sanctions against the Republic for failing to conduct a tender. Cód. Com. art. 217 (Sp. App'x at 210).¹⁷ Section 7(d) states that if the terms of §§ 7(e)-(f) are not complied with, "it shall be forbidden to acquire shares . . . if, as a result of such acquisition, the purchaser becomes [a controlling shareholder]." Joint App'x at 651 § 7(d). This only places limitations on the purchasing shareholder, and does not create an obligation on the part of YPF. Section 7(e) states that "the bidder" wishing to conduct a control acquisition must "(i) [o]btain the prior consent of [certain] class A shareholders" and "(ii) [a]rrange a takeover bid for all of the shares" *Id.* at 652 § 7(e). Again, this imposes obligations on the bidder, not on YPF. Section 7(f) sets out the required procedure for the tender offer, in which the only requirement of YPF is that "the Corporation shall send by mail to each shareholder . . . a copy of the notice delivered to the Corporation," *id.* at 653 § 7(f)(iii), which YPF correctly characterizes as

¹⁷ For the same reasons as noted above with regard to the claims against the Republic, this conclusion is not inconsistent with *Petersen II*, which only described the operation of the Bylaws as relevant to determining whether Defendant's actions fell within the FSIA's commercial activity exception, *see Petersen II*, 895 F.3d at 210, not whether those actions would create contractual liability for YPF under Argentine law.

a “narrow administrative task.” YPF Br. at 29. Section 7(h) states that shares acquired in breach of the Bylaws “shall not grant any right to vote or collect dividends or other distributions.” Joint App’x at 657 § 7(h). By its plain language and in context, this provision strips the rights of acquired shares, and does not create an enforcement prerogative on the part of YPF. And finally, § 28, which extends the tender offer requirements to the Republic, again imposes no obligations on YPF. *Id.* at 674 § 28(A).

We are not persuaded by Plaintiffs’ arguments to the contrary. For example, the fact that YPF or its Board could not enforce the Bylaws does not mean that no one can. If anything, the remedial scheme set out by the GCL suggests that this ability lies in the hands of YPF’s minority shareholders—some of whom *did* seek to compel a tender offer by challenging the Republic’s exercise of the expropriated shares at a shareholder’s meeting, then bringing action in Argentine court. And the fact that YPF assured investors of the tender offer requirement in its IPO Prospectus is inapposite to the question of whether YPF had an obligation to enforce that requirement.

Even if the Bylaws did create a contractual obligation on the part of YPF, Plaintiffs’ breach of contract claims against YPF have the same fundamental defect as their claims against the Republic—these claims are not cognizable under Argentine law. Just as Argentine law likely does not authorize damages suits between shareholders for a breach of corporate bylaws, it also likely does not recognize suits brought by a shareholder against a *corporation*. That makes good sense, because allowing

individual shareholders to sue a corporation for damages would “allow shareholders to transform themselves into standard creditors of the corporation” and deplete corporate assets at the expense of other shareholders. Joint App’x at 3451.

Finally, Petersen’s promissory estoppel claims against YPF, which were dismissed at the motion to dismiss stage, fail for the same reasons as discussed above with the regard to the estoppel claims brought against the Republic. *See supra* Part II.C.2.

CONCLUSION

For the foregoing reasons, we REVERSE the district court’s entry of judgment for Plaintiffs on their breach of contract claims against the Republic, AFFIRM the district court’s dismissal of the promissory estoppel claims against the Republic and YPF, AFFIRM the district court’s grant of judgment for YPF, and REMAND for further proceedings consistent with this opinion.

José A. Cabranes, *Circuit Judge*:

I respectfully dissent.

The majority decision rests on an analysis of the corporate and expropriation law of the Republic of Argentina. Its opinion is a careful and respectful description of that complex body of law.

At this stage of the long-lived litigation the parties agree that the applicable substantive law is that of Argentina.

Under Fed. R. Civ. P. 44.1, “[a] court’s determination [of foreign law] must be treated as a ruling on a question of law.” It is thus not surprising that, as Judge Diane Wood, then of the Seventh Circuit, reminded us, “[r]easoning through foreign law is ‘notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country’s law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not.’”¹

As the majority opinion succinctly and accurately reports, “[t]he crux of this ten-year litigation is Plaintiffs’ breach of contract claims against the Republic for damages arising from the Republic’s failure to conduct a tender offer upon expropriation.”²

For more than ten years, a distinguished judge of the Southern District has presided with meticulous care over the “factual realities” that included complex arrangements designed to assure “private investors—

¹ *Menghistab v. Garland*, 37 F. 4th 1240, 1246 (7th Cir. 2022).

² Op. at 35 (emphasis added).

many of whom were based in the United States—that they would be protected in the event the Republic decided to renationalize the country’s largest oil and gas company if the economic and political winds ever shifted, just as they did in the early 2010s.”³

The majority concludes that despite these “factual realities,” we are required to limit our review of ten years of painstaking consideration of the law and facts on the ground by a demanding district judge to “the narrow legal question of whether the cause of action and remedy that Plaintiffs seek in the face of the Republic’s actions is permitted under Argentine law.”⁴

Lest we forget the “factual realities” that the majority opinion would have us minimize if not forget, I recall for the record some of the “factual realities” that make it impossible for me to join an otherwise outstanding majority opinion.

Over the course of more than ten years, the District Court heard about:

1. Argentina’s forcible expulsion of YPF’s board members from their premises;⁵
2. “A well-founded fear of prosecution of [plaintiffs]’ counsel if the instant action were brought in Argentina”;⁶

³ *Id.* at 50.

⁴ *Id.* at 50-51.

⁵ Tr. Of Trial at 296-97 (Aug. 15, 2023), *Petersen Energia Inversora S.A.U. v. Argentine Republic*, No. 15 Civ. 2739, Dkt. No. 489.

⁶ *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, 2016 WL 4735367, at *12 (S.D.N.Y. Sept. 9, 2016), *aff’d in part, appeal dismissed in part sub nom. Petersen Energia Inversora*

3. Argentine law as expounded by experts of all parties;⁷
4. Argentina's own acknowledgement, calculation, and repudiation of its liabilities.⁸

Based on its close familiarity with the facts and law of the case, the District Court rejected Argentina's arguments as to breach of contract. Specifically, it held that the Republic had bilateral obligations towards the plaintiffs, enforceable under the Argentina Civil Code, remediable by damages, and not precluded by the General Corporations Law.⁹ The District Court also found that Argentina's General Expropriation Law does not bar plaintiffs' claims. In reaching its conclusions, the District Court relied on, and cited, various expert reports.¹⁰

Although there is no doubt that "we undoubtedly have discretion to decide [a] question of Argentine law in the first instance and would not be limited to the record created in the district court were we to do so,"¹¹ "we have recognized that determinations of another

S.A.U. v. Argentine Republic & YPF S.A., 895 F.3d 194 (2d Cir. 2018).

⁷ See generally *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, 2023 WL 2746022 (S.D.N.Y. Mar. 31, 2023), *on reconsideration in part*, 2023 WL 3625784 (S.D.N.Y. May 24, 2023).

⁸ *Petersen Energia Inversora, S.A.U. et al v. Argentine Republic et al.*, No. 15-cv-02739-LAP, Dkt. No. 371-06.

⁹ *Id.* at *12-13.

¹⁰ See, e.g., *id.* at *12-13, *15.

¹¹ *Bugliotti v. Republic of Argentina*, 952 F.3d 410, 413 (2d Cir. 2020).

sovereign's law 'frequently call for fact-like procedures that a district court is better situated to implement.'¹² This is especially true when it comes to a civil-law jurisdiction like Argentina, whose legal system is "much different."¹³

We owe special consideration and respect to a District Court that has closely evaluated every aspect of the facts and, importantly, the governing law of Argentina.

On this basis, I would affirm the judgment of the District Court.

¹² *Petroleos de Venezuela S.A. v. MUFG Union Bank*, 106 F.4th 263, 269 (2d Cir. 2024).

¹³ *See Curley v. AMR Corp.*, 153 F.3d 5, 14 (2d Cir. 1998).

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Appendix B

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Nos. 23-7370(L), 23-7463, 23-7614

PETERSEN ENERGIA INVERSORA S.A.U.,
PETERSEN ENERGIA S.A.U.,

*Plaintiffs-Appellees-
Cross-Appellants,*

v.

ARGENTINE REPUBLIC,

*Defendant-Appellant-
Cross-Appellee.*

YPF S.A.,

*Defendant-Conditional
Cross-Appellant.*

Filed: June 2, 2026

ORDER

Appellee-Cross-Appellants, Petersen Energia Invesora, S.A.U., Petersen Energia S.A.U., filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

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IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

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Appendix C

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Nos. 23-7376(L), 23-7471, 23-7667

ETON PARK CAPITAL MANAGEMENT, L.P., ETON PARK
MASTER FUND, LTD., ETON PARK FUND, L.P.,

*Plaintiffs-Appellees-
Cross-Appellants,*

v.

ARGENTINE REPUBLIC,

*Defendant-Appellant-
Cross-Appellee.*

YPF S.A.,

*Defendant-Conditional
Cross-Appellant.*

Filed: June 2, 2026

ORDER

Appellee-Cross-Appellants, Eton Park Capital Management, L.P., Eton Park Master Fund, Ltd., and Eton Park Fund, L.P., filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

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IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

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Appendix D

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

Nos. 15-cv-2739, 16-cv-8569

PETERSEN ENERGIA INVERSORA S.A.U.,
PETERSEN ENERGIA S.A.U.,

Plaintiffs,

v.

ARGENTINE REPUBLIC, YPF S.A.,

Defendants.

ETON PARK CAPITAL MANAGEMENT, L.P., ETON PARK
MASTER FUND, LTD., ETON PARK FUND, L.P.,

Plaintiffs,

v.

ARGENTINE REPUBLIC, YPF S.A.,

Defendants.

Filed: Sept. 15, 2023

FINAL JUDGMENT

LORETTA A. PRESKA, Senior United States District
Judge:

Before the Court are the parties' competing
proposed judgments and submissions related thereto.

(Dkt. nos. 495, 496, and 497.) The Republic, not satisfied with the extraordinary latitude afforded to it at trial to insert new factual and legal issues, attempts a final ambush by arguing that the Court's finding that interest should run from May 3, 2012, the date on which the Republic repudiated its obligations, requires that damages be calculated from that date as well. (Dkt. no. 496 at 1-2.) However, the Court used the May 3, 2012 date for one purpose only: to set the date from which "prejudgment interest should run." (Dkt. no. 493 at 15.) The Court held that, despite the Republic's April 16 breach of the Bylaws, its interest obligations did not begin to run until the Argentine Congress' passage of the YPF Expropriation Law on May 3, 2012, which obviated the need for Plaintiffs to provide Argentina with a formal notice of default. (*Id.* at 17 (as of that date "no formal request for compliance was necessary").) This was the only issue before the Court because the Republic did not argue that damages should run from anything other than the Bylaws' trigger date and, indeed, has never advanced such an argument. For example, Professor Manóvil, testified that the Court could "establish[] . . . the date from which eventually the tender offer should have been conducted," "[b]ut the right to get interest is only from the request to pay damages." (Tr. 295:8-12; *see also* Tr. 294:20-25 ("One thing is that the Court may decide that the tender offer was due on" a certain date "[s]omething else is since when the interest will run if somebody claims damage . . . because of not complying with the obligation").) The Republic repeated the point in its posttrial brief. (Dkt. no. 482 at 15 ("interest should accrue only from the service of Plaintiffs' Complaints").) Professor Harris also "calculated

damages by taking the “tender offer price on the notice date,” “multiplying the number of shares owned by the parties on the trigger date,” and “then deducting the value of the shares as of the trigger date.” (Tr. 367:16-24.)

As such, the Court did not hold that damages, as opposed to interest, should run from May 3, 2012, because the Republic chose to forgo such an argument. The Court’s holding regarding May 3, 2012, relates only to interest and is not an invitation to relitigate the proper calculation of damages.

Therefore, it is hereby, ORDERED, ADJUDGED AND DECREED that Plaintiffs Petersen Energía Inversora, S.A.U. and Petersen Energía, S.A.U. (together, “Petersen”) and Eton Park Capital Management, L.P., Eton Park Master Fund, Ltd., and Eton Park Fund, L.P. (together, “Eton Park,” and together with Petersen, “Plaintiffs”) shall recover on their claim for breach of contract from defendant the Argentine Republic (the “Republic”) as follows:

1. Petersen shall recover from the Republic \$14,385,449,737 which figure is comprised of (i) \$7,533,269,948 in damages; plus (ii) \$6,852,179,789 (representing 8% simple prejudgment interest from May 3, 2012 through the date of the entry of judgment, September 15, 2023). Petersen shall also recover post-judgment interest under 28 U.S.C. § 1961, calculated from the date of the entry of this judgment at a rate of 5.42% per annum, computed daily to the date of payment and compounded annually.

2. Eton Park shall recover from the Republic \$1,714,338,556 which figure is comprised of (i) \$897,752,615 in damages; plus (ii) \$816,585,941

(representing 8% simple prejudgment interest from May 3, 2012 through the date of the entry of judgment, September 15, 2023). Eton Park shall also recover post-judgment under 28 U.S.C. § 1961, calculated from the date of the entry of this judgment at a rate of 5.42% per annum, computed daily to the date of payment and compounded annually.

It is further ORDERED, ADJUDGED AND DECREED that all of Plaintiffs' other claims against defendant the Argentine Republic, including claims for anticipatory breach, breach of the duty of good faith and fair dealing and promissory estoppel, are dismissed and that all of Plaintiffs' claims against defendant YPF S.A. are dismissed.

The Clerk of Court is directed to enter this judgment and to mark these actions closed.

SO ORDERED.

Dated: New York, New York
September 15, 2023

[handwritten: signature]
LORETTA A. PRESKA
Senior United States
District Judge

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Appendix E

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

Nos. 15-cv-2739, 16-cv-8569

PETERSEN ENERGIA INVERSORA S.A.U.,
PETERSEN ENERGIA S.A.U.,

Plaintiffs,

v.

ARGENTINE REPUBLIC, YPF S.A.,

Defendants.

ETON PARK CAPITAL MANAGEMENT, L.P., ETON PARK
MASTER FUND, LTD., ETON PARK FUND, L.P.,

Plaintiffs,

v.

ARGENTINE REPUBLIC, YPF S.A.,

Defendants.

Filed: Sept. 8, 2023

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

LORETTA A. PRESKA, Senior United States
District Judge:

A bench trial was held in this matter on July 26, 27, and 28, 2023. The factual background of this dispute has been set forth in the Court’s prior opinion on summary judgment in *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, 2023 U.S. Dist. LEXIS 57097, at *4 (S.D.N.Y. Mar. 30, 2023) and will not be repeated here except to the extent necessary to resolve the remaining disputes.¹ The Court identified one issue for resolution at trial: the date on which the Republic² triggered its tender offer obligations by exercising control over Repsol’s shares of YPF. The Court also reserved judgment regarding the amount of prejudgment interest it would, in its discretion, award to Plaintiffs. The parties submitted evidence and argument on these issues. The Republic also availed itself of the opportunity to submit evidence and argument, for the first time, regarding the proper

¹ Unless otherwise noted, in making these findings of fact and formulating its conclusions of law, the Court relied on the following sources: Transcript of Trial held July 26-28, 2023 (“Tr.”) [dkt. nos. 487, 489, 491]; Plaintiffs’ Trial Exhibits (“PX”); Defendant’s Trial Exhibits (“DX”); Plaintiffs’ Legal Authorities (“PLA”), [dkt. nos. 470, 478, 481]; and Defendant’s Legal Authorities (“DLA”) [dkt. no. 469]. The Court also considered: Plaintiffs’ Post-Trial Brief (“Pls.’ Post-Trial Brief”), dated August 4, 2023 [dkt. no. 467]; Defendants’ Post-Trial Brief (“Def.’s Post-Trial Brief”), dated August 4, 2023 [dkt. no. 482]; and the subsequent (unauthorized) letters submitted by the parties in further support of their Post-Trial Briefs, dated August 7 (the Republic), 9 (Plaintiffs), and 10 (the Republic), 2023 [dkt. nos. 484, 485, and 486]. As with its March 30, 2023 opinion, all docket references are to the Petersen docket (15-cv-2739) unless otherwise noted.

² Unless otherwise noted, the Court incorporates the abbreviations from its opinion dated March 30, 2023.

application of Formula D and the date on which prejudgment interest should begin to run.

I. Findings of Fact and Conclusions of Law

A. The Republic Exercised Indirect Control Over Repsol's shares on April 16, 2012

The Court finds that the Republic exercised indirect control over Repsol's shares on April 16, 2012. The Republic took control of YPF on this date via the Intervention Decree. (PX-11 (Argentine Decree No. 530/201).)³ Through the intervention, the Republic deprived Repsol of control over its shares and thereby exercised indirect control over those shares. Before April 16, 2012, Repsol, via its ownership and control of a majority of YPF D shares, could use its shares to govern the company and take other actions as a shareholder. (Tr. 273:21-274:9 (Professor Manóvil testifying that, prior to intervention, shareholders appointed the majority of YPF board, that the CEO of Repsol was chairman of YPF's board, and conceding that "Repsol had the power to select its own CEO and chairman of the board, as chairman of YPF's board, because it was the majority shareholder"); *see also* Tr. 278:3-22.) It could use those shares to appoint or remove the persons exercising the powers of the Board, vote at shareholder meetings to approve dividends and direct corporate policy, and otherwise exercise all the considerable powers of a majority shareholder. (Tr. 79:17-82:18; Tr. 278:3-22.) Through the Intervention Decree, the Republic, as a practical matter, eliminated Repsol's ability to do any of these things. After the intervention, Repsol could no longer

³ (Dkt. no. 481-10.)

appoint or remove those with the powers of the Board, (see Tr. 79:17-82:18; Tr. 285:17-24), as those powers were vested in the government-appointed intervenor, and the Repsol-elected Board was “displaced” and rendered “devoid of any powers, functions, or duties,” (Tr. 276:2-5 (Professor Manóvil conceding that “the purpose of the decree” was to “displace[]” the board and render it “unable to operate as the board”); Tr. 276:24-277:17; Tr. 77:9-13; PX-29⁴ (Excerpts from YPF’s SEC Form 20-F, filed May 16, 2012) at 131; see also Tr. 283:19-24 (Professor Manóvil testifying that Repsol “could not have voted to remove the intervenor, of course not”)). Perhaps most critically, Repsol could not vote its shares at any shareholder meeting (and so could not approve a proposed capital distribution), (see Tr. 279:15-19 (Professor Manóvil conceding that “[i]n practice,” Repsol “did not have the opportunity” “to vote [its] shares at a shareholders meeting” following the intervention); PX-6⁵ (Minutes of the March 21, 2012 meeting of the YPF S.A. Board of Directors) at 11), because the intervenor controlled whether any such meeting was held and suspended the scheduled meeting to ensure that Repsol would have no ability to vote its shares and no distribution would be made, (PX-24 (YPF’s SEC Form 6-K, filed April 23, 2012);⁶ Tr. 278:23-25 (Professor Manóvil conceding that the April 25, 2012 shareholder meeting was suspended by the intervenor)). “This was by design. (See PX-11 at 2

⁴ (Dkt. no. 481-15.)

⁵ (Dkt. no. 481-9.)

⁶ (Dkt. no. 481-12.)

(targeting “majority shareholder” because its “interests” were at odds with the Republic’s).⁷

Indeed, the Republic’s argument that it was simply maintaining the status quo proves the point. (Def.’s Post-Trial Brief at 2 (citing Tr. 259:6-9 (Professor Manóvil testifying that the purpose of the intervention was to “ensure the continuity of the company” and to “preserve[] its assets” by giving the Intervenor the management of YPF)).) It begs the question: the status quo for whose benefit and to what end? It is, perhaps, more telling than anything else that the stated purpose of the Intervention Decree was to “preserv[e]” YPF’s “assets” (PX-11 at 8) pending expropriation and that the intervention power was then immediately used to prevent Repsol from using its shares to exercise control over those same assets. The timeline demonstrates this. YPF’s board (appointed by Repsol) voted to propose capital distributions at the next shareholder meeting (where Repsol would command a majority). (PX-6 at 11.) The Republic’s representative opposed those capital distributions. (*Id.*) The Republic intervened, appropriated the rights of the Board to itself, and used

⁷ The Court acknowledges Professor Manóvil’s point that the ability to block certain actions in narrow circumstances does not necessarily constitute control (Def.’s Post-Trial Brief at 5 (citing Tr. 286:8-16)), but the Republic’s cumulative acts of control through the Intervention Decree deprived Repsol of the ability to use its shares in any way the Republic opposed. The Court accepts that the Republic did not remove every stick from Repsol’s bundle of property rights. But it removed enough to exercise exactly the amount of control necessary to accomplish its purposes by preventing Repsol from taking any of the actions the Republic opposed.

those rights to cancel the shareholder meeting at which those distributions were scheduled to be approved. (PX-24.) The assets of YPF were certainly “preserved,” but not for the shareholders’ (or Repsol’s) benefit. Repsol, as the majority shareholder, possessed significant authority over how those “assets” were to be used, and, through the intervention, the Republic took specific actions to prevent Repsol from exercising that authority to ensure the Republic would have access to those assets once the expropriation became official. This constituted indirect control over Repsol’s shares.

Though not necessary to determine that the Republic exercised indirect control, it is also telling that Argentine officials recognized that April 16, 2012 was, for all practical purposes, the date on which Repsol could no longer use its shares to control the company. Secretary of Economic Policy and Development Planning and Vice-Intervenor Axel Kicillof stated on April 17 that the Republic had “modif[ied] the control that until now belonged to the Repsol group.” (PX-15⁸ (Excerpts of the Transcript of Speech by the Secretary of Economic Policy and Development Planning, Axel Kicillof, on April 17, 2012 to the Argentine Senate) at 22.) Similarly, in its February 17, 2014 decision, the Republic’s federal appraisal agency (the “TTN”) appraised the property that was seized—namely, “fifty-one percent (51%) of YPF Sociedad Anónima equity . . . held by Repsol.” (PX-35⁹ (TTN Resolution No. 9/2013) at 1.) And it

⁸ (Dkt. no. 481-11.)

⁹ (Dkt. nos. 481-16 and 481-17.)

appraised that property as of the date on which Repsol was dispossessed, which the TTN concluded was April 16, 2012. (*Id.*; see Tr. 87:11-88:14.) Daniel Martin, the TTN panel's head, told the Argentine Chamber of Deputies that the TTN's "appraisal was carried out as of the dispossession date, in accordance with Article 20 of the Expropriation Law, which was April 16, 2012." (PX-39¹⁰ (Transcript of Speeches by Dr. Carlos Zannini and Daniel Martin to the Argentine Chamber of Deputies on April 8, 2014) at 5; PLA-7 (Argentine Law No. 21,499, the General Expropriation Law) at 3 (requiring that the compensation take into account the value of the property *at the time of dispossession*).) Carlos Zannini, then Secretary of Legal and Technical Affairs of the Presidency, agreed that "the taking of possession . . . was in April 2012." (PX-39 at 1.) The Court is unpersuaded by the Republic's attempts to conflate that February 17, 2014 TTN decision with a separate TTN decision issued on February 25, 2014 in connection with the Repsol settlement, (see PX-36¹¹ (Excerpts of the Argentine Republic and Repsol's Agreement for the Amicable Settlement and Compromise of Expropriation, dated February 27, 2014) at 81-82), and to assert the TTN was focused not on the expropriation of Repsol's 51% of YPF but on other related litigation claims (see Tr. 304:5-305:7; Tr. 312:21-313:1 (Uslenghi)). That interpretation ignores the February 17 decision, which pre-dated the settlement, and contradicts the February 25 decision, which makes explicit that it provided an "appraisal of the shares," (PX-36 at 81; Tr. 306:14-19 (Judge

¹⁰ (Dkt. no. 481-21.)

¹¹ (Dkt. nos. 481-18 and 481-19.)

Uslenghi confirming appraisal was of the Repsol shares)), as of “the date of the dispossession” by the Decree, (PX-36 at 82). These more contemporaneous statements of the Republic and its representatives are further evidence that April 16, 2012 was the date of dispossession.

The market also recognized that an event having material economic significance had occurred on April 16, 2012. After the Intervention Decree on April 16, YPF shares plummeted by over 40%. (PX-47;¹² Tr. 188:22-189:11 (Fischel).) However, when the YPF Expropriation Law took effect on May 7, 2012, YPF shares dipped a mere 3%. (PX-47.) This difference in response to each event shows that investors in the market—like everyone else, including Mr. Kicillof, the TTN, Mr. Martin, and Mr. Zinna—“understood that, as a matter of economic substance, the actions that mattered occurred on April 16th, not on May 7th.” (Tr. 189:7-11 (Fischel).) YPF’s share price thus reflected the reality that the Republic was exercising control of Repsol’s shares in every meaningful way by April 16, 2012.

B. Prejudgment Interest of 8% Simple Interest is Appropriate and Equitable

The question of the rate of prejudgment interest “is entirely a matter for the Court’s discretion,” though the Court may take into account “‘factors’ including the ‘nature of the obligation,’ ‘situation,’ ‘who the parties are,’ ‘what has been the dispute’—in other words what would be ‘equitable.’” (Def.’s Post-Trial Brief at 13 (quoting Tr. 268:8-22).) After considering

¹² (Dkt. no. 481-22.)

these factors, the Court determines that 8% simple interest is appropriate and equitable. The best evidence of the fair rate that the Court, in its complete discretion, should award is the rate that the Republic agreed to in similar circumstances. The Republic paid Repsol for its expropriated YPF shares with \$5 billion in government bonds, including debt carrying compound interest exceeding 8%. (*See* PX-36 at 84.)

This rate is well within the range imposed by Argentine Courts. Though the Republic has identified courts that award a lower rate of prejudgment interest, (Tr. 269:7-270:15; DLA-8; DLA-9; DLA-10; DLA-11; DLA-12; DLA-13; DLA-20; DLA-21; DLA-22; *see also* Tr. 270:16-22), five of the six panels of the Argentine National Court of Appeals for Commercial Matters regularly award prejudgment interest in the 6% to 8% range or above (*see, e.g.*, PLA-9; PLA-10; PLA-15; PLA-21; PLA-81; *see also* Rhodes Decl. Ex. C, dated August 4, 2023 [dkt. no. 481-3] (collecting cases)). Indeed, Professor Manóvil conceded on cross-examination that, apart from decisions by one outlier panel, he was not aware of any “[modern] interest rates” in other cases from the National Court of Appeals for Commercial Matters below that range. (Tr. 293:9-14.)

The Court also rejects the Republic’s complaint that the cases cited by Plaintiffs lack context or that the Court requires testimony or “evidence” to help it review Argentine legal decisions and determine what rate of interest was awarded in those cases. (Def.’s Post-Trial Brief at 12-13.) The ability to read and count is all that is required to determine the simple question of the rate of interest that commercial courts

in Argentina have imposed and under what circumstances.¹³ And the Republic's criticism that Plaintiffs have not provided a basis for "the Court to infer than an Argentine court would apply a similar rate on the facts of this case," (Def.'s Post-Trial Brief at 13), applies equally to the Republic's evidence and testimony. The Republic did not cite cases or provide testimony regarding cases with similar factual circumstances or explain how an Argentine court would evaluate these circumstances. Its arguments are based not on identifying analogous cases but simply identifying courts that have applied lower rates. (Def.'s Post-Trial Brief at 13-15; Tr. 269:7-271:20.) The Republic's expert finds these cases to be better reasoned but does not rely on facts unique to those cases that make them more applicable to the circumstances at issue here. (Tr. 269:13-25.) With all due respect to Professor Manóvil, his idea of what is more persuasive does not represent the views of the Republic on its own laws, (*see* Def.'s Post-Trial Brief at 13), as evidenced by his concession that there "is no unanimity" regarding the prejudgment interest rates Argentine courts apply (Tr. 269:7-12). And the Court does not agree with Professor Manóvil that the inability of Argentine banks to offer loans in foreign currency is a persuasive reason to apply a lower rate. (Tr. 269:13-25.) If anything, their inability to provide loans in foreign currency suggests the rate should be higher, not lower.

¹³ "[T]he court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1.

In any event, the Republic does not seriously dispute that numerous commercial courts in Argentina award interest in the 6-8% range or that the Court may, in its complete discretion, impose interest in that range. Instead, the Republic holds up equitable arguments with oil-stained hands. Equity is no refuge for the Republic. The Republic forced Plaintiffs to give it a massive loan after forcibly expelling the members of the YPF board on April 16, 2012, leading to the Repsol representatives of YPF fleeing the country. (Tr. 297:2-8.) Mr. Kicillof brazenly declared that it would be “stupid” to comply with “the law of YPF itself” or “respect[] its bylaws.” (PX-15 at 25.) The Republic subsequently enacted the legislation that, purportedly, allowed it to acquire control of YPF without being “stupid” and complying with the bylaws (PX-15 at 25). (PX-26¹⁴ (YPF Expropriation Law).)¹⁵ It would offend, not serve, equity to allow the Republic knowingly to violate the bylaws, force Plaintiffs to be its involuntary creditors for a massive amount over the course of a decade, and then pay a reduced rate by crying poverty when the bill comes due.¹⁶ If the

¹⁴ PX-26 was not filed on the docket post-trial, but was previously filed at docket number 363-72.

¹⁵ The Court imputes Mr. Kicillof’s statements only to the Republic’s executive branch, as he was Secretary of Economic Policy and Development Planning and Vice-Intervenor. But it takes notice that, through his statements, the Argentine Legislature was aware that this was the purpose when it passed the YPF Expropriation Law.

¹⁶ The Court does not impose the 8% interest rate based on the “forced loan” theory, (*see* Tr. 174:13-175:22), but does consider the rate at which the Republic could have borrowed to be relevant to the Republic’s equitable arguments.

Republic could not extract a return exceeding 8% *simple* interest on that massive loan, it has been a poor steward, and it does not offend equity for it to bear the consequences. If it did achieve that return or more it is not inequitable for it to turn those proceeds over to Plaintiffs. It is the size and long duration of the loan the Republic foisted upon Plaintiffs in knowing violation of its obligations that results in the large amount of interest that accumulated—not some exorbitant or usurious interest rate—and it provides no equitable reason to impose a reduced interest rate. The Republic vigorously took with both hands and stood steadfast in its inequitable refusal to satisfy its obligations to Plaintiffs. It does not offend equity for it to give back now in equal measure.¹⁷

The Court accepts that some commercial courts in Argentina have imposed a lower rate, but the Republic has cited no authority requiring that those rates be

¹⁷ The Court also rejects the Republic's effort to inject Burford Capital into these proceedings. This remains a case brought by plaintiffs against a defendant for its wrongful conduct towards them, and the relevant question is what the Republic owes Plaintiffs to compensate them for the loss of the use of their money, not what Plaintiffs have done or will do with what they are owed. The Republic owes no more or less because of Burford Capital's involvement. Furthermore, the Republic pulled the considerable levers available to it as a sovereign to attempt to take what it should have paid for and has since spared no expense in its defense. If Plaintiffs were required to trade a substantial part of their potential recovery to secure the financing necessary to bring their claims, in Petersen's case because it was driven to bankruptcy, and litigate their claims to conclusion against a powerful sovereign defendant that has behaved in this manner, this is all the more reason to award Plaintiffs the full measure of their damages.

imposed, and the Court finds the cases cited by the Republic to be less persuasive than the ones cited by Plaintiffs. The appropriate rate of interest is, as the Republic concedes, entirely up to the discretion of the court considering the question. The Republic identified some courts that exercised that discretion to grant a lower rate. Plaintiffs identified some courts that exercised that discretion to impose a higher rate, findings that the Court finds better reasoned. The Court therefore exercises its discretion to impose a rate of 8% simple interest in order to compensate Plaintiffs for the loss of the use of their money.

C. Prejudgment Interest Should Run from May 3, 2012

The Court also rejects the Republic's argument that prejudgment interest should run from the date Plaintiffs served their complaints. The Court is persuaded by the Republic's argument that, under Argentine law, an obligor must be in default before interest can run, (Tr. 267:6-268:5; DLA-29 (Argentine Civil Code, arts. 509, 622); PLA 34 (*Perez Monica Lourdes c. Enriquez Miguel Angel s/Ordinario*, Cámara Nacional de Apelaciones en lo Comercial, Sala F, 22 October 2015) at 13 (setting date on which interest began to run based on date of default pursuant to articles 509 and 622 of the Argentine Civil Code)), but rejects the Republic's assertion that a "formal request" is necessary to put the obligor in default (Tr. 267:6-268:5 (Professor Manóvil testifying only that "*normally* the creditor has the obligation to make a formal request to the debtor" to trigger default) (emphasis added)). Under Argentine law, a formal request is not necessary where the obligor has

repudiated the contract by clearly “manifest[ing] its will not to perform.” (PLA-11 (*Argencip S.A v. Fondo Compensador Para Jubilados Y Pensionados Telefonicos*, Cámara Nacional de Apelaciones en lo Comercial, Sala A, 30 June 2010) at 4).) Such intent not to perform can be “tacit” and need not be express. (*Id.* at 4-5.) Where it is possible to “undoubtedly infer[]” from “the acts” of the obligor that it “inten[ds] not to perform,” a formal request for performance is not required to place the obligor in default. (*Id.*)

The Court “undoubtedly infer[s]” that the Republic’s acts “manifest[ed] its will not to perform.” (*Id.*) The Court acknowledges that the Republic’s system of government requires both executive and legislative action in order to enact legislation and that Mr. Kicillof’s statements made prior to the Argentine Legislature’s passage of the YPF Expropriation Law were not the final word and cannot be directly imputed to the legislature. However, Mr. Kicillof’s statements can be attributed to the Republic’s executive branch, as he was Secretary of Economic Policy and Development Planning and the government appointed Vice-Intervenor. Thus, by April 17, 2012, the Argentine executive branch, one of the necessary branches, clearly expressed its intention not to comply with the tender offer obligation by sending its representative to advocate for legislation that would purportedly avoid the obligation. (PX-15 at 25.) And, on May 3, 2012, the Argentine Legislature, the second necessary branch, passed the YPF Expropriation Law while fully aware that the law was intended to escape the obligation to pay the tender offer. (PX-26; PX-15 at 25.) Thus, on May 3, 2012, “it can be undoubtedly inferred” that the Republic did not intend to perform

as manifested by its acts. (PLA-11 at 4-5.) As such, on May 3, 2012, the Republic was in default, and no formal request for compliance was necessary.¹⁸

Alternatively, even if a formal request is required, Repsol filed a class action on May 16, 2012, suing the Republic for failing to comply with the tender offer requirements on behalf of class members that included Plaintiffs. (PX-28¹⁹ (Class Action Complaint in *Repsol YPF, S.A. v. Republic of Argentina*, No. 12-cv-3877 (S.D.N.Y. May 15, 2012)) ¶¶ 44, 51-56.) If the Plaintiffs' current litigation is sufficient to serve as a formal request, (Tr. 268:2-5), prior litigation filed on behalf of Plaintiffs and others similarly situated is also necessarily sufficient to serve as a formal request by all of the Republic's creditors. Professor Manóvil stated that a demand is necessary because the "allegedly breaching party does not assume the risk that it has breached." (Expert Report of Rafael M. Manóvil ("Manóvil Expert Report"), dated September

¹⁸ The Court rejects Professor Manóvil's assertion, supported only by citation to a civil code article not in effect at the relevant time, that the repudiation must be some formalistic communication directly from the debtor to the creditor. (DX-28 (Manóvil Rebuttal Report) at ¶ 126 (previously filed at dkt. no. 368-2).) Aside from relying on a provision that was not in effect and did not govern, as a practical matter the acts of a state are public and communicated to the world, of which Plaintiffs are part. That the communication was directed to others as well does not mean that it was not also directed to Plaintiffs. It is illogical to say that a communication was not directed at a person because it was directed at other people as well. In any event, the Argentine law as it stood at the relevant time permitted the repudiation to be "tacit," (PLA-11 at 4-5), meaning that a formal, direct communication cannot be necessary.

¹⁹ (Dkt. nos. 481-13 and 481-14.)

24, 2021 [dkt. no. 368-1] at ¶ 124.) Repsol's class action addressed this concern by putting the Republic on notice that its creditors believed that it was in breach.²⁰ Thus, the Court finds, in the alternative, that even if the Republic did not repudiate the tender offer obligation, the purportedly necessary formal request was made by May 16, 2012.

D. Formula D Must Be Calculated Using the Highest Price/Income Ratio During the Relevant Period

In another argument raised for the very first time at trial, the Republic asserts that Professor Fischel's use of contemporaneously reported earnings to calculate the price/income ratio "is not the 'regular' method of computation that would be used by the 'financial community' for calculating a tender offer price *as of February 13, 2012*." (Def.'s Post-Trial Brief at 10 (emphasis added) (quoting Tr. 342:20-343:14).) Professor Fischel calculated price/income ratios for each day in the look-back period by using the prior four quarters of earnings available as of each day in the look-back period, as opposed to those available as of the tender offer notice date. (Tr. 239:7-21.) In other words, his calculation for the price/income ratio on February 22, 2010 (the highest price/income ratio

²⁰ Professor Manóvil also makes the unsupported assertion that "each claimant must make its own demand" and that a creditor "may not rely on a demand made by another similarly situated person." (Manóvil Expert Report ¶ 124.) Aside from citing no authority for this proposition, a class action is not simply a "demand made by another similarly situated person," (*id.*), it is a demand by a plaintiff *on behalf of* all others similarly situated. Fed. R. Civ. P. 23(a).

during the look-back period at 27.1) relied on the earnings information that was available to investors deciding whether to invest in YPF as of February 22, 2010. (Tr. 158:4-159:20.) This resulted in the use of Q-4 2008 earnings, which were available on that date, instead of the higher Q-4 2009 earnings, which were not reported until February 25, 2010 (Tr. 205:2-22; Tr. 388:15-19) and could not have been relied on by an investor on February 22, 2010 (Tr. 158:4-159:20). The Republic argues that the financial community would, on February 13, 2012 (the notice date), use the most recent four quarters of earnings available to calculate price/income ratios, as Bloomberg does by default once those numbers are available. (Def.'s Post-Trial Brief at 10 (citing Tr. 238:25-239:6; Tr. 370:1-5; Tr. 365:10-366:14; Tr. 234:16-236:5; DX-201).) This would result in the use of the higher Q-4 2009 earnings to calculate the price/income ratio, which would reduce the ratio as calculated for February 22, 2010 from 27.1 to 18.05. (Tr. 238:16-20.) The use of the lower 18.05 ratio would result in a lower tender offer price and an approximate \$3.4 billion reduction in Plaintiffs' damages. (Pls.' Post-Trial Brief at 15; Def.'s Post-Trial Brief at 9.)

The Republic misreads Formula D. Formula D requires that the tender-offer price be calculated using "the highest price/income ratio for [YPF] *during* the two-year period immediately preceding the notice date," applying "the regular method used by the financial community for computing and reporting purposes." (PX-3²¹ (YPF Bylaws § 7(f)(v)(D) at 7-8) (emphasis added).) It does not say that the "regular method used by the financial community" shall be the

²¹ (Dkt. no. 481-8.)

method that would be used on the date of the tender offer, it says that the ratio to be used is the “highest” one produced by the “regular method” used by “the financial community for computing and reporting purposes” “during” the relevant time period. (*Id.*) The Republic’s interpretation, in other words, attempts to insert a timing requirement for the computing and reporting that does not appear in the text and which would nullify the requirements that do appear in the text, that the price/income ratio be the “highest” one and that it be one “comput[ed] and report[ed]” “during” the look-back period. The Republic’s interpretation is thus contrary to the plain language of Formula D.

The price/income ratio that Professor Fischel used was the ratio reported on each day “during” the look-back period by Bloomberg, the Wall Street Journal, FactSet, and the Argentine stock exchange itself. (See Tr. 151:18-21; Tr. 418:18-419:16; Tr. 420:9-12; Tr. 421:9-11; Tr. 425:1-12.) All of these entities are members of the financial community. (Tr. 416:25-417:4; Tr. 420:6-8; Tr. 421:4-6.) Further, as Professor Harris testified, many “financial reports that come out every day” use the daily price/income ratio “every day” as their “regular method . . . for computing reporting earnings.” (Tr. 416:25-417:4.) Thus, the Court finds that Professor Fischel’s calculations rely on the price/income ratio derived from the “regular method” used by the “financial community” to “report[] and comput[e]” the relevant ratio “during” the two year look-back period and are the proper inputs pursuant to the text of Formula D.

In any event, even if the Court adopted the Republic's interpretation, The Wall Street Journal, FactSet, and the Argentine stock exchange still compute and report the price/income ratio relied on by Professor Fischel to this day by default, and this ratio remains available on Bloomberg (though it is not the ratio Bloomberg calculates or reports by default). (*See* Tr. 419:12-16; Tr. 420:20-24; Tr. 421:16-19; Tr. 427:17-23.) Accepting that Bloomberg recalculates the price/income ratio that it reports by default, (DX-201), and that Professor Harris testified that this is the way it is done in finance and by financial professionals, (Tr. 370:1-5; Tr. 365:10-366:14),²² the fact remains that three entities that are admittedly members of the financial community, (Tr. 416:25-417:4; Tr. 420:6-8; Tr. 421:4-6), all compute and report the ratio in the same way as Professor Fischel and continue to do so. Thus, in determining which method is the "regular method" used by the financial community, the Court

²² Since the proceeding was a bench trial, the Court permitted the parties significant latitude in their examinations but is cognizant that the Republic did not previously raise this issue—even in its pretrial memorandum—and that the basis for the introduction of Professor Harris's testimony on this point was a single line on a chart, a sentence in a footnote, and the underlying data. (DX-34 (Harris Expert Report) at p. 37, Fig. 12 & App'x C8 & C9 (previously filed at dkt. no. 398-24).) In other words, the Court recognizes that Plaintiffs had little (if any) basis to challenge or prepare to meet this "opinion" by Professor Harris prior to its being sprung on them at trial. As such, the Court takes the testimony for what it is worth considering its, at best, implicit disclosure in Professor Harris's report and extremely minor prominence, as well as the Republic's decision to remain silent regarding its intention to explore this issue until the last possible moment.

is left to weigh a largely untested expert opinion and the methodology used by one member of the financial community against the methodology that is indisputably used by three members of the financial community. On this record, the Court finds based on the weight of the evidence that the “regular method” used by the majority of the financial community for computing and reporting the relevant ratio, even as of February 13, 2012, was the methodology used by Professor Fischel in his calculations.

In the alternative, even if the Court found that Professor Harris’ methodology was *also* a “regular method used by the financial community for computing and reporting purposes” Formula D requires the use of the highest price/income ratio. (PX-3 at 7-8.) Thus, as between two methods regularly used by the financial community, Formula D by its terms breaks the tie and prescribes the use of the one that produces the “highest” ratio. As such, even if both Professor Fischel’s method and Professor Harris’ method are a “regular method,” Formula D requires the application of Professor Fischel’s method because it produces the higher ratio.

II. Conclusion

For the foregoing reasons, the Courts finds that the Republic exercised indirect control over the requisite number of Repsol’s shares on April 16, 2012, thereby triggering its tender offer obligations. The Court also finds that prejudgment interest of 8% simple interest is appropriate and that it should run from May 3, 2012. Finally, the Court finds that Professor Fischel’s calculation of the tender offer price is correct and relies on the price/income ratio required

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by Formula D. The parties are directed to submit a proposed judgment consistent with these findings of fact and law.

SO ORDERED.

September 8, 2023

Dated: New York, New York

[handwritten: signature]
LORETTA A. PRESKA
Senior United States
District Judge

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Appendix F

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

Nos. 15-cv-2739, 16-cv-8569

PETERSEN ENERGIA INVERSORA S.A.U.,
PETERSEN ENERGIA S.A.U.,
Plaintiffs,

v.

ARGENTINE REPUBLIC, YPF S.A.,
Defendants.

ETON PARK CAPITAL MANAGEMENT, L.P., ETON PARK
MASTER FUND, LTD., ETON PARK FUND, L.P.,
Plaintiffs,

v.

ARGENTINE REPUBLIC, YPF S.A.,
Defendants.

Filed: May 24, 2023

MEMORANDUM & ORDER

LORETTA A. PRESKA, Senior United States District
Judge:

Plaintiffs Petersen Energía Inversora, S.A.U. and
Petersen Energía, S.A.U. (together, “Petersen”) and

Eton Park Capital Management, L.P., Eton Park Master Fund, Ltd., and Eton Park Fund, L.P. (together, “Eton Park,” and together with Petersen, “Plaintiffs”), who previously owned stakes in Argentine energy company YPF S.A. (“YPF”), commenced actions against the Argentine Republic (the “Republic”) and YPF (collectively, “Defendants”). On March 30, 2023, the Court issued an Opinion & Order (the “March 30 Opinion”) granting YPF’s motion for summary judgment, granting the Republic’s motion for summary judgment as to Plaintiffs’ claim for breach of the duty of good faith and fair dealing and otherwise denying it, and granting Plaintiffs’ motion for summary judgment against the Republic as to liability but denying it as to damages. (Dkt. no. 437.) The Republic moved for reconsideration of the March 30 Opinion on April 14, 2023. (Dkt. nos. 439-40.) Plaintiffs opposed on April 28, 2023. (Dkt. no. 443.) The Republic filed its reply in further support on May 5, 2023. (Dkt. no. 445.) Finally, the parties each made additional submissions via letter. (Dkt. nos. 447, 449.) For the reasons set forth below, the Republic’s motion is GRANTED in part and DENIED in part.

I. Legal Standard

Reconsideration is an “extraordinary remedy.” *In re Beacon Assocs. Litig.*, 818 F. Supp. 2d 697, 701 (S.D.N.Y. 2011) (quoting *In re Health Mgmt. Sys. Inc. Sec. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000)). Such motions “are properly granted only if there is a showing of: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) a need to correct a clear error or prevent manifest injustice.” *Drapkin v. Mafco Consol. Grp., Inc.*, 818 F. Supp. 2d

678, 696 (S.D.N.Y. 2011). “A motion for reconsideration may not be used to advance new facts, issues or arguments not previously presented to the Court, nor may it be used as a vehicle for relitigating issues already decided by the Court.” *Bennett v. Watson Wyatt & Co.*, 156 F. Supp. 2d 270, 271 (S.D.N.Y. 2001). The standard “is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked.” *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012).

Manifest injustice “is defined as an error committed by the trial court that is direct, obvious, and observable.” *Corpac v. Does*, 10 F. Supp. 3d 349, 354 (E.D.N.Y. 2013); *Westcon Grp., Inc. v. CCC Techs., Inc.*, 2023 WL 2058709, at *2 (S.D.N.Y. Feb. 16, 2023). The strict standard “provides relief only in the proverbial ‘rare case,’” *Corsair Special Situations Fund, L.P. v. Nat’l Res.*, 595 F. App’x 40, 44 (2d Cir. 2014) (cleaned up), and requires the proponent to “meet [a] high burden” *Sigmon v. Goldman Sachs Mortg. Co.*, No. 1:12-cv-03367 (ALC), 2019 U.S. Dist. LEXIS 32348, at *11 (S.D.N.Y. Feb. 28, 2019). “Courts ordinarily have not defined precisely what constitutes clearly erroneous or manifest injustice for reconsideration purposes. At least one court has held though that reconsideration is not warranted unless the prior decision is ‘dead wrong.’” *Ogi Oceangate Transp. Co. v. RP Logistics Pvt. Ltd.*, 2007 U.S. Dist. LEXIS 74180, at *3 n.1 (S.D.N.Y. Oct. 4, 2007) (quoting *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

II. Discussion

The Republic first asserts that it was manifestly unjust for the Court to decide issues of Argentine law without live testimony from the legal experts “[g]iven the disputes between the parties’ experts on fundamental questions of Argentine law.” (Dkt. no. 439 at 3-4, 6.)¹ In all of the voluminous briefing submitted by the Republic, the Court did not hear a whisper regarding the necessity of live testimony until the Republic received an adverse ruling. Indeed, as the Republic told the Court in its brief affirmatively seeking summary judgment, “[a] disagreement of the experts as to an issue of foreign law does not foreclose the granting of a motion for summary judgment.” (Dkt. no. 373 at 15 (quoting *Korea Life Ins. Co. v. Morgan Guar. Tr. Co. of New York*, 269 F. Supp. 2d 424, 439 (S.D.N.Y. 2003)).) It is only now that the Court has resolved the experts’ disagreements against the Republic that doing so on the papers has purportedly become “manifest injustice.”

A motion for reconsideration is not an opportunity “to advance new facts, issues or arguments not previously presented to the Court,” *Bennett v. Watson Wyatt & Co.*, 156 F. Supp. 2d 270, 271 (S.D.N.Y. 2001), and “cannot be used as a vehicle to make new

¹ The Republic also implies that the Court’s determination that “the Republic was incorrect as a matter of law on each and every one” of the “numerous complex questions of Argentine law” the Republic raised suggests error. (*Id.* at 2-3.) The Court does not claim to be infallible, but perhaps the Court made “numerous” rulings against the Republic because the Republic made meritless arguments in an effort to eliminate its liability for breaching the Bylaws—and made a lot of them.

arguments that contradict or are inconsistent with a party's earlier submission" *Wilder v. News Corp.*, 2016 U.S. Dist. LEXIS 128862, at *15 (S.D.N.Y. Sept. 20, 2016). The time for the Republic to argue that the Court could not decide these questions of foreign law without a hearing was during summary judgment briefing, and certainly before taking the exact opposite position when asking for summary judgment on its own behalf. There is no manifest injustice in the Court's failing to hold a hearing that no one—including the Republic—asked for.

In any event, even if the Court considered this argument it would fail. Reconsideration based on manifest injustice is only appropriate where the alleged error is "direct, obvious, and observable." *Corpac v. Does*, 10 F. Supp. 3d 349, 354 (E.D.N.Y. 2013). The Republic does not cite a single case holding that a live hearing of expert testimony on foreign law is mandatory. Nor has the Court uncovered any case so holding. This makes sense. The determination of foreign law is a question of law, Fed. R. Civ. P. 44.1, and "it is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998) (declining to defer to the district court's "ruling on the content of foreign law" despite the district court's opportunity to "assess the witness's demeanor). Though "[t]he court *may* consider any relevant material or source, including testimony," Fed. R. Civ. P. 44.1 (emphasis added), the language of Federal Rule of Civil Procedure 44.1 is plainly permissive, and there is no authority to suggest that a hearing is mandatory. The authority that does exist is to the contrary and holds

that no live testimony is required. *Weiss v. La Suisse, Societe d'Assurances sur la Vie*, 313 F. Supp. 2d 241, 244 (S.D.N.Y. 2004) (“Unless the law requires me to hear live testimony on these matters—and I do not believe it does—plaintiffs cannot complain that they have not had a Rule 44.1 hearing.”); 9 Moore’s Federal Practice - Civil § 44.1.04 (2023) (“[T]he court is not required to hear live testimony concerning foreign law.”). And with the substantial materials submitted to the Court, including translated versions of the controlling statutes and cases and comprehensive expert opinions that were extensively tested through depositions and rebuttal reports, (dkt. no. 443 at 4-5 nn.2, 3 (listing materials submitted to the Court)), the Republic “did have a hearing—just not one involving live witnesses” *Weiss*, 313 F. Supp. 2d at 244.

The Republic suggests that hearing live testimony is the “fair and prudent course.” (Dkt. no. 445 at 1.) Setting aside the belated nature of its embrace of this position, the Republic’s view of what is “fair and prudent” is not the standard for reconsideration. The question is whether the Court’s made an error that was “direct, obvious, and observable.” *Corpac v. Does*, 10 F. Supp. 3d 349, 354 (E.D.N.Y. 2013). The Republic has provided no basis for the Court to so find beyond the Republic’s belief that the Court was incorrect in its interpretation of Argentine law. If the Republic believes that the Court has gotten Argentine law wrong, its recourse is to raise it with the Court of Appeals at the appropriate time.

The Republic also asserts that Judge Villanueva’s *opinión jurídica* supports reconsideration. (Dkt. no. 445 at 8-9.) The Court appreciates Judge

Villanueva’s courteous words and credits her intent to provide a “disinterested and objective” opinion “in accordance with [her] most sincere convictions” and her lack of “intention of encroaching upon the jurisdiction” of the Court.” (Dkt. no. 445-3 at 3.) Nonetheless, Judge Villanueva’s opinion was requested by the Republic itself “in support of the defense of the Argentine Republic” (dkt. no. 445-1 at 1), is a belated expert opinion that is not properly part of the record, and is being used by the Republic to attack and undermine the Court’s ruling, regardless of Judge Villanueva’s intent.² The time to introduce an opinion of this nature was at summary judgment. Nothing prevented the Republic from attempting to submit an *opinión jurídica* addressing the same legal issues at that time, as it knew the legal positions that Plaintiffs were taking and, indeed, addressed those positions in its own expert reports. A motion for reconsideration may not be used to “adduce new evidence in response to the court’s rulings.” *Lima LS PLC v. Nassau Reinsurance Grp. Holdings, L.P.*, 160 F. Supp. 3d 574, 578 (S.D.N.Y. 2015). In seeking and submitting an opinion literally reviewing the Court’s order, this is precisely what the Republic has done.³

² The Court also notes with disapproval that Judge Villanueva’s opinion was introduced for the first time in the Republic’s reply in further support of its motion for reconsideration.

³ Nor is Judge Villanueva’s opinion “the best available substitute” for “certifying question of foreign law to foreign courts.” (Dkt. no. 445 at 9.) The Court expresses no view on the merits of whether there should be such a certification system, though it notes that the Rules Committee has not deemed it necessary. Regardless, unlike certification, where the court to

Indeed, Judge Villanueva’s opinion is not newly discovered evidence at all. It is newly created expert testimony “in response to the court’s rulings,” is improper, and does not provide a basis for reconsideration. *Id.*

Nor does the Court find that reconsideration of its determination regarding the prejudgment interest rate is appropriate. The Republic bases its argument on what a court in Argentina would “typically” do. (Dkt. nos. 440 at 18; 445 at 10.) But what a court in Argentina would “typically” do is irrelevant to whether this Court abused its discretion, much less whether the Court made an “obvious” error.

However, the Court will allow the Republic to submit evidence showing that it did not acquire control of YPF’s share or “temporarily occupy” those shares until May 7, 2012. The Court reserves judgment regarding whether the Republic’s reading of its answer is plausible but will allow the Republic to submit evidence on this point since the precise date of control requires a trial in any event. However, the Court will not allow the Republic to introduce evidence that it acquired control of YPF’s share after May 7, 2012. The YPF Expropriation Law plainly provides for Republic control of the shares by its effective date, as the Court already found.

which the question is certified receives briefing from the parties and answers the question in the first instance, the Republic’s purported “substitute” entails what looks to this Court an awful lot like appellate review of the Court’s decision by an Argentine judge at the solicitation of only one of the parties and a second bite at the apple for the Republic.

III. Conclusion

The Republic's motion for reconsideration (dkt. no. 439) is thus GRANTED in part and DENIED in part. The Republic's letter motion for oral argument (dkt. no. 446) is also DENIED as moot.

The Clerk of the Court shall close the open motions at dkt. nos. 439 and 446 in Civil Case Number 15-cv-2739. The Clerk of the Court shall close the open motions at dkt. nos. 368 and 375 in Civil Case Number 16-cv-8569. Counsel shall confer and inform the Court by letter no later than May 31 whether their positions regarding how to proceed, set forth at docket numbers 438 and 441, have changed in light of this decision.

SO ORDERED.

Dated: New York, New York
May 24, 2023

[handwritten: signature]
LORETTA A. PRESKA
Senior United States
District Judge

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Appendix G

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

Nos. 15-cv-2739, 16-cv-8569

PETERSEN ENERGIA INVERSORA S.A.U.,
PETERSEN ENERGIA S.A.U.,

Plaintiffs,

v.

ARGENTINE REPUBLIC, YPF S.A.,

Defendants.

ETON PARK CAPITAL MANAGEMENT, L.P., ETON PARK
MASTER FUND, LTD., ETON PARK FUND, L.P.,

Plaintiffs,

v.

ARGENTINE REPUBLIC, YPF S.A.,

Defendants.

Filed: Mar. 31, 2023

OPINION & ORDER

LORETTA A. PRESKA, Senior United States District
Judge:

Plaintiffs Petersen Energía Inversora, S.A.U. and
Petersen Energía, S.A.U. (together, “Petersen”) and

Eton Park Capital Management, L.P., Eton Park Master Fund, Ltd., and Eton Park Fund, L.P. (together, “Eton Park,” and together with Petersen, “Plaintiffs”), who previously owned stakes in Argentine energy company YPF S.A. (“YPF”), commenced actions against the Argentine Republic (the “Republic”) and YPF (collectively, “Defendants”).

Petersen filed its Complaint in April 2015,¹ alleging breach of contract, anticipatory contract breach, breach of the implied duty of good faith and fair dealing, and promissory estoppel claims against both the Republic and YPF. On September 9, 2016, the Court denied Defendants’ motions to dismiss based on the Foreign Sovereign Immunities Act of 1976 (“FSIA”), the act-of-state doctrine, *forum non conveniens*, and failure to state a claim, except to grant Defendants’ motions to dismiss Petersen’s promissory estoppel claims against the Republic and YPF and its good faith and fair dealing claim against YPF. *See generally Petersen Energía Inversora, S.A.U. v. Argentine Republic (Petersen I)*, 2016 WL 4735367, at *16 (S.D.N.Y. Sept. 9, 2016).

After Defendants pursued an interlocutory appeal of the Court’s FSIA and act-of-state holdings, the Court of Appeals affirmed the Court’s FSIA holding and declined to reach the Court’s act-of-state holding. *Petersen Energía Inversora S.A.U. v. Argentine Republic (Petersen II)*, 895 F.3d 194, 198-99 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 2741 (2019). The Court of Appeals “agree[d] with” this Court that, “under the

¹ Complaint (“Petersen Complaint”), dated Apr. 8, 2015 [dkt. no. 1].

bylaws, Argentina’s expropriation triggered an obligation to make a tender offer for the remainder of YPF’s outstanding shares” and that this obligation was “a separate commercial obligation.” *Id.* at 206-09. Defendants thereafter petitioned for certiorari, which was denied.

As this was ongoing, Eton Park filed its own lawsuit against Defendants on November 3, 2016.² The Eton Park Complaint alleged breach of contract, anticipatory contract breach, and breach of the implied duty of good faith and fair dealing claims against both the Republic and YPF. The Court subsequently found the two cases to be related. Upon remand, Defendants moved for dismissal against both Plaintiffs’ complaints, this time based solely on *forum non conveniens*, which the Court denied. *Petersen Energía Inversora S.A.U. v. Argentine Republic (Petersen III)*, No. 15 Civ. 2739 (LAP), 2020 WL 3034824, at *13 (S.D.N.Y. June 5, 2020).

Plaintiffs now move for summary judgment on their breach of contract claims or, in the alternative, their anticipatory breach claims, against Defendants and oppose the motions for summary judgment filed by the Republic and YPF.³ The Republic and YPF each

² Complaint (“Eton Park Complaint”), *Eton Park Capital Management, L.P. v. Argentine Republic*, No. 16-cv-8569 (S.D.N.Y. filed Nov. 3, 2016), ECF No. 1. Unless otherwise noted, all future docket references will be to the Petersen docket (15-cv-2739).

³ (See Notice of Plaintiffs’ Motion for Summary Judgment, dated Apr. 14, 2022 [dkt. no. 359]; Plaintiffs’ Memorandum of Law in Support of Motion for Summary Judgment (“Pls.’ Mot.”), dated Apr. 14, 2022 [dkt. no. 371]; Declaration of George W. Hicks, Jr. (“Hicks Decls.”), dated Apr. 14, 2022 and May 26, 2022

affirmatively move for summary judgment on all of Plaintiffs' claims and oppose Plaintiffs' motion for summary judgment.⁴

For the reasons stated below, YPF's motion for summary judgment is granted, the Republic's motion for summary judgment is granted as to Plaintiffs' claim for breach of the duty of good faith and fair dealing and is otherwise denied. Plaintiffs' motion for summary judgment against the Republic is granted as to liability but denied as to damages.

[dkt. nos. 374, 391]; Plaintiffs' Combined Opposition to Defendants' Motions for Summary Judgment ("Pls.' Opp'n"), dated May 26, 2022 [dkt. no. 392]; Plaintiffs Combined Reply in Support of Their Motion for Summary Judgment ("Pls.' Reply"), dated June 23, 2022 [dkt. no. 405].)

⁴ (See Defendant the Argentine Republic's Notice of Motion for Summary Judgment, dated Apr. 14, 2022 [dkt. no. 360]; The Republic's Memorandum of Law in Support of Its Motion for Summary Judgment ("Republic's Mot."), dated Apr. 14, 2022 [dkt. no. 373]; Declaration of Robert J. Giuffra, Jr. ("Giuffra Decl."), dated April 14, 2022 [dkt. no. 363]; Notice of Motion by Defendant YPF S.A. for Summary Judgment on All Remaining Claims, dated Apr. 14, 2022 [dkt. no. 367]; Memorandum of Law in Support of Defendant YPF S.A.'s Motion for Summary Judgment ("YPF's Mot."), dated Apr. 14, 2022 [dkt. no. 369]; Declaration of Mark P. Goodman ("Goodman Decl."), dated April 14, 2022 [dkt. no. 377]; Defendants' Joint Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment ("Defs.' Joint Opp'n"), dated May 26, 2022 [dkt. no. 402]; YPF's Supplemental Opposition to Plaintiffs' Motion for Summary Judgment ("YPF's Supp. Opp'n"), dated May 26, 2022 [dkt. no. 399]; The Republic's Reply Memorandum of Law in Support of Its Motion for Summary Judgment ("Republic's Reply"), dated June 23, 2022 [dkt. no. 410]; YPF's Reply in Support of Its Motion for Summary Judgment ("YPF's Reply"), dated June 23, 2022 [dkt. no. 412].)

I. Background

A. Facts

The Court assumes familiarity with this dispute, the facts of which have been set out at length in the prior opinions of this Court and the Court of Appeals. Unless otherwise noted, the facts recounted herein are undisputed.

Originally founded in 1922 as a state-run company, YPF is currently a corporation (*sociedad anónima*) incorporated under the laws of Argentina. (Plaintiffs' Counter to YPF's Rule 56.1 SUF ("Pls.' Counter to YPF's 56.1") [dkt. no. 394] ¶ 1; Defendants' Counter to Plaintiffs' Rule 56.1 SUF ("Defendants' Counter 56.1") [dkt. no. 401] ¶ 3.) Prior to 1993, YPF was wholly-owned and operated by the Republic. (Pls.' Counter to YPF's 56.1 ¶ 4; Defendants' Counter 56.1 ¶ 2.) YPF was privatized in 1993. Prior to privatization, the Argentine executive branch issued Decree No. 1106/93 ("Executive Order 1106/93"), which stated that, in order to enact Argentine Law No. 24,145, the law which approved the privatization of YPF, "new Bylaws of YPF . . . shall be approved . . . to replace [YPF's prior] Bylaws." (Giuffra Decl., Ex. 73 (Executive Order 1106/93) at 1.) To do so, the Republic approved the text of the amended Bylaws via Executive Order 1106/93 and "instruct[ed]" the Argentine Ministry of the Economy of Public Works and Services, "in its capacity as shareholder of YPF," to "submit for consideration . . . the replacement" bylaws and "cause the same to be approved." (*Id.* at 2.) Among other things, the Republic and YPF amended Sections 7 and 28 of YPF's bylaws. (*Id.*)

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The language of Section 7(d) pertinent to the instant dispute provides:

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 [YPF], whether directly or indirectly, by any means or instrument . . . if, as a result of such acquisition, the purchaser becomes the holder of, or exercises the control of, class D shares of stock of [YPF] 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.

(Giuffra Decl., Ex. 1 (“Bylaws”) § 7(d).) Sections 7(e) and 7(f) in turn require parties who wish to acquire control of such shares to comply with certain obligations, including making a tender offer subject to certain formulae before taking control. (Bylaws § 7(e).) Shares acquired “in breach of” Sections 7(e) and 7(f), including the tender offer requirement, “shall not grant any right to vote or collect dividends or other distributions that [YPF] may carry out, nor shall they be computed to determine the presence of the quorum at any of the shareholders’ meetings of [YPF].” (Bylaws § 7(h).)

Section 28 of the amended Bylaws extends the requirements and sanctions of Section 7 to the

Argentine Government, while setting certain Government-specific thresholds that trigger the tender offer requirement. Titled “Provisions applicable to acquisitions by the National Government,” Section 28 provides in relevant part:

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 [YPF], 1) 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; 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

(Bylaws § 28(A).) Section 28(C) provides that the sanctions in Section 7(h) “shall be applied” to Argentina “with no kind of limitation whatsoever,” unless “the acquisition in breach of the provisions of Section 7 and [Section 28] has occurred gratuitously,” *i.e.*, without intent to exceed the applicable acquisition thresholds, in which case the sanction is limited to “the loss of the right to vote.” (Bylaws § 28(C).)

From 2008 to 2011, Petersen purchased American Depositary Receipts (“ADRs”) representing approximately 25% of YPF’s ADRs. (Defendants’ Counter 56.1 ¶ 62.) Between November 2010 and

March 2012, Eton Park owned American Depositary Shares (“ADSs”) in an amount representing approximately 11.95 million Class D shares of YPF. (*Id.* ¶ 71.)

On April 16, 2012, the Argentine executive branch submitted a bill to the National Congress that, if enacted, would begin the process of expropriating 51% of YPF’s Class D shares from Spanish oil company Repsol S.A. (“Repsol”), a large YPF shareholder. (Plaintiffs’ Counter to the Republic’s Rule 56.1 SUF (“Pls.’ Counter to Republic’s 56.1”) [dkt. no. 393] ¶¶ 20-21, 59.) At the same time, the Argentine executive branch issued emergency decree 530/2012 (the “Intervention Decree”), which provided for the immediate appointment of a temporary “intervenor” who was granted the “powers conferred by the YPF S.A. Bylaws to the Board of Directors and/or the President of the company.” (Pls.’ Counter to Republic’s 56.1 ¶¶ 60-62.) Argentina simultaneously issued Decree 532/2012, which appointed Axel Kicillof, then-Secretary of Economic Policy and Development Planning, as the “Vice- Intervenor” of YPF. (Defendants’ Counter 56.1 ¶ 99.) On May 3, the National Congress enacted the proposed bill, which went into effect on May 7, 2012 as Argentine Law No. 26,741 (the “YPF Expropriation Law”). (Pls.’ Counter to Republic’s 56.1 ¶ 66; Giuffra Decl., Ex. 72 (YPF Expropriation Law).) The YPF Expropriation Law provided that the Republic would “exercise all the political rights associated with the shares subject to expropriation until the transfer of political and economic rights is completed.” (YPF Expropriation Law Art. 9.) The Republic finally completed the expropriation of Repsol’s shares on May 8, 2014 and

took title to the expropriated shares on that date. (Pls.’ Counter to Republic’s 56.1 ¶ 98.)

The Republic did not commence a tender offer for outstanding shares of YPF capital stock in 2012. (Defendants’ Counter 56.1 ¶ 109.) Nor has it commenced a tender offer since then.

B. Procedural History

In April 2015, Petersen sued the Republic and YPF in this Court. As relevant here, Petersen brought a breach-of-contract claim alleging that the Republic had violated the YPF Bylaws through its “acquisition of a controlling stake in YPF” without making a tender offer to other shareholders. (Petersen Complaint ¶¶ 51-54.) Petersen also brought a good-faith-and-fair-dealing claim based on the Republic’s supposed “wide-ranging campaign against YPF’s shareholders . . . to depress the value of YPF’s shares.” (*Id.* ¶¶ 60-63.) As to YPF, Petersen alleged that YPF breached its alleged obligations under the Bylaws by “(1) failing to enforce the bylaws’ tender offer provisions vis-à-vis Argentina[;] . . . (2) failing to enforce the penalties that section 7(h) imposes on shareholders who have breached their tender offer obligations[;]” *Petersen II*, 895 F.3d at 210; and (3) “failing to distribute dividends to YPF’s shareholders, including Petersen.” *Petersen I*, 2016 WL 4735367, at *15.

Defendants moved to dismiss the Petersen Complaint, contending that the claims were barred by the FSIA or the act-of-state doctrine and otherwise failed to state a claim. The Court dismissed Petersen’s promissory estoppel claims against Argentina and YPF and its good-faith-and-fair-dealing claim against

YPF. *Id.* at *16. However, the Court held that Petersen's breach-of-contract claims fell within the FSIA's "commercial activity" exception to sovereign immunity, 28 U.S.C. § 1605(a)(2), holding that the Republic's expropriation "triggered" the Republic's separate "commercial contractual obligations" to commence a tender offer consistent with the Bylaws. *Id.* at *6. For similar reasons, the Court rejected the Republic's act-of-state defense. *Id.* at *7-8. Thereafter, Eton Park filed a substantively similar suit against the Republic and YPF, and the Court treated the cases as related.

Defendants pursued an interlocutory appeal of the Court's FSIA and act-of-state holdings to the Court of Appeals, which affirmed the FSIA holding and dismissed the act-of-state appeal. *See Petersen II*, 895 F.3d at 198-99. The Court of Appeals "agree[d] with" this Court that, "under the bylaws, Argentina's expropriation triggered an obligation to make a tender offer for the remainder of YPF's outstanding shares." *Id.* at 206. Section 28(A) of the Bylaws, the Court of Appeals explained, "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." *Id.* (alteration in original). Thus, "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." *Id.* at 207. As such, "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." *Id.* at 209. Defendants sought and were denied certiorari. *See* 139 S. Ct. 2741 (2019).

On their return to this Court, Defendants once again moved to dismiss, this time based solely on *forum non conveniens*. In denying that motion, the Court noted, among other things, that "all agree that Argentine law applies to this action." *Petersen III*, 2020 WL 3034824, at *13. In addressing Defendants' argument that Argentine courts have "exclusive jurisdiction" over "corporate' claims," the Court found that Section 5(11) of the Argentine National Code of Civil and Commercial Procedure, which applies to all "claims 'based on corporate relationships,'" was so broadly worded that Plaintiffs' claims were "corporate claims" for purposes of Section 5(11), even though Plaintiffs' claims were "contractual in nature." *Id.* at *12. The Court nonetheless retained jurisdiction, finding that Section 5(11) did "not speak to international jurisdiction and does not purport to address the ability of foreign courts to address" claims that fell within the procedural ambit of Section 5(11). *Id.*

II. Legal Standards

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Material facts are those which 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party.'" *Coppola v. Bear Stearns & Co.*, 499

F.3d 144, 148 (2d Cir. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The interpretation and application of foreign law is a legal question appropriate for resolution by the Court on summary judgment. Fed. R. Civ. P. 44.1; *Republic of Turkey v. Christie's Inc.*, 425 F. Supp. 3d 204, 214 (S.D.N.Y. 2019); *see also Rutgerswerke AG & Frendo S.p.A. v. Abex Corp.*, No. 93 CIV. 2914 JFK, 2002 WL 1203836, at *16 (S.D.N.Y. June 4, 2020). The testimony of experts is “the basic mode of proving foreign law,” *Jonas v. Est. of Leven*, 116 F. Supp. 3d 314, 330 (S.D.N.Y. 2015) (internal quotations and citations omitted), but the Court may consider “any relevant material or source.” Fed. R. Civ. P. 44.1; *see also Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., Ltd.*, 138 S. Ct. 1865, 1873 (2018). “Disagreement among legal experts on content, applicability, or interpretation of foreign law . . . does not create genuine issues of material fact.” *Rutgerswerke AG*, 2002 WL 1203836, at *16. Disputes about the meaning of foreign law “raise questions of law, rather than questions of fact.” *Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 737 (S.D.N.Y. 1986); *see also* Fed. R. Civ. P. 44.1.

While the Court must “accord respectful consideration to a foreign government’s submission,” “the appropriate weight in each case will depend upon the circumstances” and where, as here, the foreign government “offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government’s submission.” *Animal Sci. Prods.*, 138 S. Ct. at 1869, 1873.

III. Discussion

The parties' motions for summary judgment are somewhat unique insofar as certain key facts are not in serious dispute. Rather, the parties argue primarily about the import of those facts, the interpretation of the Bylaws and Argentine law, and whether the operation of Argentine law bars Plaintiffs' claims.

For example, the Republic and YPF do not dispute that Sections 7 and 28 of YPF's Bylaws, on their face, required that the Republic make a tender offer upon acquisition of more than 49% of YPF's capital stock. There is also no question, or dispute, that the Republic failed to make the tender offer called for by the Bylaws at the time it acquired control of more than 51% of YPF's capital stock or any time thereafter. As a consequence, there is no dispute that Plaintiffs never received a tender offer calculated pursuant to the Bylaws. This harmed Plaintiffs because they never received the compensated exit that Sections 7 and 28 promised. These facts, according to Plaintiffs, require summary judgment in their favor.

The Republic disagrees but not because it disagrees that these events occurred as set forth above. Rather, it argues that Plaintiffs' claims fail because (i) Plaintiffs are not currently security holders and were not security holders when the Republic acquired Repsol's shares and therefore lack standing, (ii) the asserted claims are not cognizable under Argentine law because Argentine law does not recognize a breach of contract claim between shareholders and does not permit the damages claim Plaintiffs assert, (iii) the asserted claims impermissibly challenge the Republic's sovereign

activity, and (iv) the asserted claims are barred by Argentine public law. YPF adopts the Republic's arguments to the extent they apply to YPF and further argues that (i) YPF did not owe Plaintiffs any obligations pursuant to Sections 7 and 28 of the Bylaws, (ii) Plaintiffs cannot demonstrate that YPF's conduct caused their damages, (iii) the Section 7(h) claim was superseded and excused pursuant to Argentine law, (iv) Plaintiffs' claims are barred because they have not satisfied the Argentine corporate law prerequisites to suit for damages, and (v) Plaintiffs lack standing to assert their claims.

With the exception of its argument that Plaintiffs were not security holders at the necessary time, the Republic does not engage with the merits or substantive elements of Plaintiffs' breach of contract claim and instead argues that Plaintiffs lack the legal ability to assert their breach of contract claim for the legal reasons set forth above and addressed in greater detail below. Even the Republic's standing arguments turn not on a factual dispute but on the meaning of the Bylaws and the legal effect of the security transfers. YPF does dedicate much of its briefing to disputing whether Plaintiffs have established the elements of a breach of contract claim, specifically whether Plaintiffs have demonstrated (i) that the Bylaws required YPF to enforce the tender offer requirements and related sanctions and (ii) causation. However, the first argument is, again, a legal question for the Court to resolve to the extent the Bylaws are unambiguous. As a result, many of the parties' arguments turn on the interpretation of the Bylaws and of Argentine law, matters that the Court must resolve as a matter of law. The Courts legal conclusions will, in large part,

resolve the parties' motions for summary judgment because, once the Court decides the legal issues, the relatively simple facts in this case will demand a particular outcome.

The Court therefore first considers whether Plaintiffs have carried their burden of demonstrating their entitlement to summary judgment on their breach of contract claims. In doing so, the Court will decide the frequently dispositive legal questions. To the extent Plaintiffs' claims survive, the Court will turn to the parties' arguments as to whether Argentine law nonetheless bars Plaintiffs' claims.⁵

A. Plaintiffs are Entitled to Summary Judgment Against the Republic on their Breach of Contract Claims

Plaintiffs argue that, under Argentine law, “the elements of a breach of contract to give rise to defendants’ civil liability are” largely similar to a common law breach of contract claim and include: “(1) the existence of a valid and binding contract; (2) a breach of that contract; (3) damages to the plaintiff; (4) that the damages were attributable to the breaching party; and (5) the breaching party acted negligently or willfully or was subject to strict

⁵ Though it will not so state every time, when the Court analyzes Argentine law it will be mindful of the “respectful consideration” to which the Republic is due. However, there is “cause for caution in evaluating the [Republic’s] submission[s]” concerning Argentine law because they were made not only in the “context of litigation” but in the “context of litigation” against the Republic itself. *Animal Sci. Prods*, 138 S. Ct. at 1869, 1873. The Court will therefore assign the Republic’s views “the appropriate weight” based on these circumstances. *Id.*

liability.” (Pls.’ Mot. 25 (citing Hicks Decls., Ex. 34 (Rovira Sept. 2021 Report for Pls.) ¶ 11; *id.*, Ex. 29 (Garro Sept. 2021 Report for Pls.) ¶ 13 (same); *id.*, Ex. 118 (Civil Code art. 1197)).) Defendants do not dispute that these are the elements of an Argentine breach of contract claim. Plaintiffs argue that these elements are clearly satisfied here. The Court considers each element in turn.

1. Plaintiffs’ Have Demonstrated the Existence of a Valid and Binding Contract Against the Republic but Not Against YPF

As to the first element, Plaintiffs argue that the Bylaws constitute a “valid and binding contract” that required the Republic to make a tender offer for YPF’s remaining outstanding shares if it acquired control of more than 49% of YPF’s capital stock. (Pls.’ Mot. 26.) The Republic disputes this element, arguing that Plaintiffs were required to be, but were not, security holders both today and when the Republic acquired legal title to Repsol’s shares in order to have standing to assert rights under the Bylaws. As to YPF, Plaintiffs argue that the Bylaws imposed a duty on YPF to “enforce the tender offer provision” and the sanctions in the Bylaws triggered by Argentina’s noncompliance because it is “obligated to abide by its bylaws.” (*Id.* (quoting *Petersen II*, 895 F.3d at 210).) YPF vigorously disputes that the Bylaws imposed any such obligation on it. The Court first addresses YPF’s argument that the Bylaws do not impose a duty to enforce Sections 7 and 28 of the Bylaws on it and then turns to the Republic’s argument regarding Plaintiffs’ right to enforce the Bylaws against it.

a. Plaintiffs' Breach of Contract Claims Against YPY Fail Because the Bylaws Do Not Require YPF to Enforce the Tender Offer Requirements or Sanctions for Failure to Do So

Plaintiffs' theory of liability against YPF rests on the assertion that YPF was obligated to force the Republic to make the required tender offer or, failing that, to enforce the sanctions contained in the Bylaws. YPF vigorously disputes that it owed any such duty based on the plain language in the agreement. This argument is a legal argument about the meaning of the Bylaws, which the Court may determine as a matter of law if the Bylaws are unambiguous. For the reasons set forth below, Plaintiffs' claim for breach of contract against YPF fails because the Bylaws do not impose an obligation on YPF to enforce Sections 7 and 28 of the Bylaws.

At the threshold, the Court rejects Plaintiffs' argument that the Court of Appeals' decision in *Petersen II* bars YPF from arguing that it did not have a duty to enforce the relevant Bylaws provisions. Plaintiffs argue that the Court of Appeals already held that "every corporation is obligated to abide by its bylaws" and that YPF had a specific contractual "obligation to enforce the tender offer provision" and the concomitant sanctions for failing to do so. (Pls.' Mot. 26 (citing *Petersen II*, 895 F.3d at 210).) In Plaintiffs' view, this establishes YPF's obligation to enforce the Bylaws as the law of the case and ends the matter. The Court disagrees. The Court of Appeals considered whether this Court's denial of YPF's

motion to dismiss on sovereign immunity grounds was proper, not whether the claims themselves were meritorious. *Petersen II*, 895 F.3d at 199. The Court of Appeals’ statement that “every corporation is obligated to abide by its bylaws,” *id.* at 210, and conclusion that Petersen’s “theory” of liability against YPF involved commercial rather than sovereign activity, pertained to Plaintiffs’ allegations and was not a binding conclusion that YPF had, pursuant to the language of the Bylaws and as a matter of Argentine law, the obligation to enforce the relevant Bylaws provisions. *Id.*; see also *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samurk-Kazyna JSC*, 813 F.3d 98, 107-08 (2d Cir. 2016) (noting in the FSIA context, relevant inquiry is only whether complaint “allege[s] facts sufficient to establish an exception to sovereign immunity” and does not require “analysis of each individual claim”). As such, the Court of Appeals did not decide this issue, and YPF is not foreclosed from arguing that the Bylaws did not impose this obligation on it. And, as YPF notes, if it was not obligated to enforce Sections 7 and 28, it could fail to do so and still “abide” by its Bylaws. (YPF’s Mot. 10.)

Turning to the merits, as with the common law, Argentine law looks first to the plain language of the agreement, interpreted in the context of the agreement as a whole, to determine the parties’ obligations. (Goodman Decl., Ex. 54 (Argentine Commercial Code (“ACC”)) Art. 217 (“The words of contracts and conventions must be understood in the sense given to them by general usage, even if the obligator claims to have understood them differently.”); *id.*, Ex. 54 (ACC) Art. 218 (the literal terms govern, except when they are ambiguous:

“Where it is necessary to interpret a contractual clause, the following bases shall serve for interpretation: 1) If there is ambiguity in the words, the common intent of the parties must be sought rather than the literal meaning of the terms.”); *id.*, Ex. 56 (Argentine Supreme Court of Justice, *Mevopal S.A. v. Banco Hipotecario Nacional*, 1985) at 307:2216 (“[W]hen the terms or expressions used in a contract are clear and conclusive . . . one has no option but to apply them, without the need for additional interpretative work . . .”).)

The kernel of the dispute here is how the Bylaws’ use of passive voice when establishing the tender offer requirement, and the consequences of a failure to comply with the tender offer requirement, should be interpreted. For example, the Bylaws state that, if a potential acquirer failed to comply with the tender offer requirements, the potential acquirer “shall be forbidden to acquire shares or securities,” (Bylaws § 7(d)), but nowhere state that *YPF* “shall forbid” the acquisition. Similarly, Section 7(h) provides that shares acquired in breach of the tender offer requirements “shall not grant any right to vote or collect dividends or other distributions.” (Bylaws § 7(h).) It does not, however, provide that *YPF* “shall prevent” any entity that improperly acquired shares from voting or collecting dividends. Nor do Plaintiffs point to any language imposing an affirmative obligation on *YPF*. The Bylaws, in other words, are silent as to how these imperatives are to be enforced and *YPF*’s role in any such enforcement, and “[s]ilence . . . does not generally create ambiguity.” *Cf. Spinelli v. Nat’l Football League*, 96 F. Supp. 3d 81, 126 (S.D.N.Y. 2015).

Standing alone, the relevant provisions could, as the Court held at the motion to dismiss stage, plausibly be read to require YPF to enforce the tender offer requirements or the concomitant sanctions. However, in both the relevant provisions and the Bylaws more generally, the Bylaws are quite clear when an affirmative obligation is imposed and on whom it is imposed, and this context renders those provisions unambiguous. For example, the Bylaws unequivocally provide that “the *Bidder* shall [a]rrange a takeover bid;” “[t]he *Corporation* shall send” the notice by mail; and “[t]he *Board of Directors* shall call [sic] special meeting of class A shares of stock.” (Bylaws §§ 7(e), 7(f)(ii), (iii).) The Bylaws further require that “[t]he *Board*” shall meet at least once a quarter and that a meeting shall be called by “the *Chairman of the Board of Directors*,” (Bylaws § 15); that “[t]he absolute majority of the *board members*” shall constitute a quorum; that “[t]he *Board*” shall adopt resolutions by a majority vote of the members present, (Bylaws § 16); and that “[t]he *Board of Directors* shall have wide powers to organize, conduct and manage the affairs of the Corporation,” (Bylaws § 17). The fact that the Bylaws are careful to specify who owes what obligations and under what circumstances—including as to “the Corporation” itself—demonstrates that the Bylaws impose no affirmative obligation requiring YPF to enforce the relevant Bylaw provisions when the Bylaws do not say so. Read in context, Sections 7 and 28 are unambiguous and do not impose any duty on YPF.

Plaintiffs argue that this interpretation would lead to an absurd result because it would leave “nobody” to enforce the relevant provisions. (Pls.’

Opp’n 45-46.) The Court disagrees. That YPF was not required to enforce the relevant provisions does not mean that those provisions were unenforceable or without consequence. Indeed, as set forth in more detail below, the Court grants summary judgment to Plaintiffs on their breach of contract claim against the Republic based on the **Republic’s** failure to do what the Bylaws unequivocally required *it* to do. As such, the “shall” language still has meaningful force under the Court’s reading of the Bylaws, and there is no absurd result.

The Court also rejects Plaintiffs’ argument that the Argentine doctrine of *actos propios* estops YPF from taking a position contrary to its prior representations in its IPO Prospectus, SEC filings, and other statements. (Pls. Opp’n 46-47.) As the Court previously held, the alleged representations in these extraneous documents were substantially similar to the alleged promises in the Bylaws. *Petersen I*, 2016 WL 4735367, at *16. This remains true. (See, e.g., Hicks Decls., Ex. 3 (YPF Prospectus) at 10-11, 80-82 (“Any Control Acquisition carried out by the Argentine Government other than in accordance with the procedure described . . . will result in the suspension of the voting, dividend and other distribution rights of the shares so acquired”).) Given that the representations in these documents are substantively similar to the Bylaws and are at best ambiguous as to whether YPF would be required to enforce the Bylaws itself, they are necessarily not inconsistent with YPF’s current position.⁶

⁶ Plaintiffs also assert in footnotes that dismissal of the breach of contract claim against YPF necessitates revival of Plaintiffs’

The Court also finds that YPF was not a guarantor for the Republic's obligations. Under Argentine law, a company is not a guarantor for its shareholders unless: (i) the company expressly agrees to serve as guarantor; (ii) the company takes a unilateral act that is later ratified by the obligee; or (iii) there is a judicial or statutory mandate requiring the company to act as guarantor. (Goodman Decl., Ex. 27 (Kemelmajer Rebuttal Rep.) at ¶ 30 (citing the Argentine Civil Code, Arts. 1986, 1987, 1998).) Plaintiffs do not dispute this, and, indeed, disavow their reliance on a guarantor theory of liability, but argue in the alternative that YPF can be found to be a guarantor "if it agreed to serve as a guarantor, or if there is a legal mandate that compelled YPF to act as guarantor" and that the Bylaws and YPF's statements concerning the operation of the Bylaws are sufficient to find it is a guarantor. (Pls.' Opp'n 47-48.) Plaintiffs, however, never identify an express agreement by YPF to serve as a guarantor, just general statements concerning the Bylaws that Plaintiffs characterize as "guarantees." Nor do Plaintiffs identify any "legal mandate" compelling YPF to enforce the relevant Bylaws provisions.

The Court therefore finds that YPF was not obligated to enforce Sections 7 and 28 and,

promissory estoppel claims. (Pls.' Opp'n 43 n.22, 47 n.23.) Plaintiffs' assertion is hard to square with their expert's previous acknowledgment that Argentine law does not recognize promissory estoppel as an autonomous source of obligations. *Petersen I*, 2016 WL 4735367, at *16. However, the issue is not properly before the Court and the Court declines to consider whether Plaintiffs' promissory estoppel claims should be revived absent a proper application and briefing.

consequently, grants YPF's Motion for Summary Judgment.

b. Plaintiffs Were YPF Security Holders at the Necessary Times and Therefore Do Have Enforceable Contract Rights as Against the Republic

The Republic argues that Plaintiffs lack contractual standing to bring their claims because Plaintiffs: (i) are not currently security holders and (ii) were not security holders when the Republic acquired Repsol's shares in 2014.

i. Plaintiffs Held YPF Securities When the Republic Triggered the Tender Offer Obligation

The Court begins with the Republic's second argument, that Plaintiffs lack standing because they were not security holders when the Republic acquired Repsol's shares in 2014. This argument relies on a misreading of the Bylaws. According to the Republic, Section 28 provides that Section 7's tender offer requirement applies only to "acquisitions made by the" Republic and that "'acquire' means obtaining legal title." (Republic's Mot. 20-21.) Because the Republic did not complete the expropriation and gain legal title to Repsol's shares until 2014, the Republic argues that it could not have breached Section 7 before that date. (Republic's Mot. 23.)

However, pursuant to Section 28, Section 7 applies "if, as a consequence of such acquisition, the National Government becomes the owner, or exercises the control of" the requisite number of shares of YPF

by “any means or instrument.” (Bylaws § 28(A).) Indeed, the Court of Appeals interpreted Section 28(A) to “compel[] Argentina to make a tender offer in accordance with the procedures set forth in the [B]ylaws if ‘by *any means* or instrument’ it ‘becomes the owner [of], or exercises the control of,’ at least 49% of YPF’s capital stock.” *Petersen II*, 895 F.3d at 206.

This reading is required by the plain language of the Bylaws, where ownership and the exercise of control are disjunctive. Thus, the tender offer obligations are triggered by either acquisition of ownership of more than 49% of YPF’s capital stock or acquisition of control of more than 49% of YPF’s capital stock. The acquisition or control could occur “by any means.” (Bylaws § 28.) This is precisely what occurred.

Pursuant to the plain language of the YPF Expropriation Law, the control could not possibly have occurred any later than May 7, 2012, the date of which the Republics “exercise[d] all the political rights associated with the shares.” (YPF Expropriation Law Art. 9.) Thus, by no later than May 7, 2012, the Republic “exercise[d] the control of . . . at least 49% of the capital stock” and was therefore obligated to make a tender offer, which it did not do. (Bylaws § 28.) Plaintiffs were security holders on May 7, 2012, and therefore the Republic’s argument that they lack standing based on the Republic’s failure to acquire legal title until 2014 is meritless.

ii. Plaintiffs' Accrued Breach of Contract Claims did not Transfer with their YPF Securities

The Court also rejects the Republic's argument that Plaintiffs lack standing because they are not currently security holders. The Republic's argument misapprehends Plaintiffs' claims. The Republic argues that Plaintiffs lack contractual standing to enforce the Bylaws because an action to enforce bylaws is a corporate claim and Plaintiffs no longer hold the securities that provide the right to enforce this corporate claim. (Republic's Mot. 16-19.) But Plaintiffs are not suing to enforce the Bylaws. Rather, Plaintiffs' claims are based on their accrued breach of contract claims for the damage caused to them when, while they were still security holders, they failed to receive the compensated exit that Sections 7 and 28 promised. (Petersen Complaint ¶¶ 50-54; Pls.' Opp'n 15-16.) Plaintiffs do not sue to force the Republic to make a tender offer today or to participate in the corporate governance of YPF but to be compensated for the Republic's failure to make a tender offer in 2012 that would have allowed Plaintiffs to exit YPF entirely. Properly framed, Plaintiffs' claims survive under both New York and Argentine law.⁷

The Republic's arguments fail under New York law. The "rights in the security against the issuer

⁷ The Republic argues that "New York law governs the transfer of YPF ADS, including whether Plaintiffs transferred their right to bring a claim for a breach of YPF's Bylaws." (Republic's Mot. 16.) Plaintiffs dispute this but argue that it makes no matter because they retain standing under either New York or

generally include participatory rights in the corporation, such as the right to attend meetings, vote, and inspect corporate records, as well as rights to corporate assets, such as the right to receive dividends.” *Consol. Edison, Inc. v. Ne. Utils.*, 318 F. Supp. 2d 181, 192 (S.D.N.Y. 2004), *rev’d on other grounds*, 426 F.3d 524 (2d Cir. 2005). Such participatory rights automatically transfer upon the sale of a security. *Id.* But, pursuant to New York General Obligations Law section 13-101, “[t]here must be some acts or words indicating an intent to transfer an accrued” cause of action, and that “assignment must be express.” *Id.* at 186. Thus, accrued causes of action do not automatically transfer with the sale of a security. *Id.*; *see also Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 373 n.126 (S.D.N.Y. 2007); *Pac. Life Ins. Co. v. Bank of N.Y. Mellon*, No. 17-cv-1388 (KPF) (RWL), 2022 WL 1446552, at *14 (S.D.N.Y. Feb. 22, 2022); *Broadbill Partners L.P. v. Ambac Assurance Corp.*, No. 653869/2012, 2014 NY Slip Op 30647(U), at *10 (Sup. Ct. Mar. 12, 2014).⁸ Here Plaintiffs’ breach of

Argentine law. The Court does not decide which law applies because when the claims are properly characterized, Plaintiffs have standing under either body of law.

⁸ The Republic’s heavy reliance on *FDIC v. Citibank N.A.*, No. 15-cv-6574, 2016 WL 8737356 (S.D.N.Y. Sept. 30, 2016) is misplaced. That case involved bonds and turned on New York General Obligation Law 13-107, which provides that “a transfer of any bond shall vest in the transferee all claims or demands of the transferor” “[u]nless expressly reserved in writing,” precisely the opposite of the general rule that an assignment must be express. Nor does the Court find out-of-state cases persuasive where there has been no showing that the relevant states have a similar express transfer requirement to New York.

contract claims accrued no later than May 7, 2023, while they were security holders. Absent an express assignment, those accrued causes of action did not transfer with the YPF ADRs under New York law.

The same result follows from the application of Argentine law. The Republic argues that, under Argentine law, “a shareholder making a claim under corporate bylaws in Argentina must maintain its shareholder status throughout the proceeding” or else lose its standing and have its claim extinguished. (Republic’s Mot. 19 (citing Rafael M. Manóvil Rebuttal Expert Report (“Manóvil Rebuttal”) [dkt. no. 368-2] ¶ 25).) The Republic cites its expert’s opinion in support of this proposition, but the expert’s opinion and the sources he relies on all pertain to participatory rights in a corporation, such as the right to “challenge[] resolution[s].” (Manóvil Rebuttal ¶ 25.) The Republic’s argument fails because it relies on two related propositions with which the Court disagrees, (i) that “a claim *under* corporate bylaws” is necessarily a claim to *enforce* corporate bylaws and (ii) that Plaintiffs are therefore trying to enforce the Bylaws. The Court is unpersuaded that a claim that *arises* from corporate bylaws is always a claim to *enforce* corporate bylaws or that Plaintiffs’ specific claims are properly characterized as such. Indeed, as set forth above, Plaintiffs are not seeking to participate in YPF’s management, force the Republic to make a tender offer today, or enforce the sanctions contained in the Bylaws. Thus, even giving the Republic’s statement of Argentine law “respectful consideration”—even assuming that it is correct—it is irrelevant to Plaintiffs’ claims. And the Republic makes no other argument showing that an accrued

cause of action for damage to property automatically transfers with that property.

Plaintiffs, on the other hand, identify the Argentine case National Civil Chamber of Appeals, Room E, “*Perrino, Elizabeth Liliana c. Tschubarov, Adrián y otro*”, 09/10/2010. TR La Ley: AR/JUR/61577/2010). (Attached as Ex. 136 to Hicks Decls.) There, the Argentine court found that a transfer of property did not “involve[] a transfer of the legal standing” to an accrued claim for compensation for damage to that property where the conveying document was silent as to whether the claim for property damage was transferred with the property and no provision of the civil code spoke directly to whether a transfer nonetheless occurred as a matter of law. (*Id.* at 4-5.) Though, as the Republic notes, this case involved a tort claim for damage to real property and not a breach of contract claim (Republic’s Reply 8), the Court does not read the Argentine court’s reasoning to turn on the source of the claim but on whether there was an accrued claim for compensation and either an express assignment or a statutory directive that an assignment necessarily occurred. The Court is persuaded that *Perrino* accurately reflects Argentine law and that Argentine law requires that there be an affirmative and express legal basis, whether contractual or statutory, to find that an accrued claim has been transferred with property. The Court finds that there is no evidence of an express assignment here and that the Republic has not identified any statutory provision directly applicable to Plaintiffs’ claims and, therefore, finds that Plaintiffs did not transfer their breach of contract claims when they transferred their YPF ADRs. Thus,

Plaintiffs retain standing to assert their claims under Argentine law as well.

Consequently, the Court finds that Plaintiffs have demonstrated that there is no question of fact as to the first element of their breach of contract claim, that there is a valid contract that Plaintiffs are entitled to enforce, against the Republic.

2. Plaintiffs' Have Demonstrated the Remaining Elements of Their Claim Against the Republic

The Court now turns to the remaining elements of Plaintiffs' breach of contract claim against the Republic, which are not in serious dispute.

As to the second element, breach, Plaintiffs argue that the Republic breached Sections 7 and 28 of YPF's Bylaws because the Republic never made the required tender offer. The Republic does not dispute that the Republic never made any tender offer pursuant to Sections 7 and 28. (Defendants' Counter 56.1 ¶ 94.) The Court therefore finds that there is no question of fact as to whether the Republic breached Sections 7 and 28.

Plaintiffs satisfy the third element, damages, and the fourth element, attribution of those damages to the Republic, as well. Plaintiffs argue that they were damaged because they did not receive the cash payment to which they were entitled when the Republic took over YPF and that their damages were caused by the Republic's failure to make a tender offer. (Pls.' Mot. 28.) The Court finds that Plaintiffs were damaged by the Republic because Plaintiffs were entitled to receive a tender offer that would have provided them with a compensated exit but did not.

Finally, Plaintiffs have satisfied the fifth element because the Republic was subject to strict liability. Plaintiffs argue that they are not required to demonstrate that the breach is due to the Republic's fault because the Bylaws obliged the Republic to achieve a specific result—to undertake a tender offer pursuant to the Bylaws—and Plaintiffs assert that, under Argentine law, if a breaching party promises to achieve a specific result (*obligación de resultado*), the breaching party is strictly liable and the non-breaching party is not required to demonstrate fault. (Pls.' Mot. 29 (citing Hicks Decls., Ex. 29 (Garro Sept. 2021 Report for Pls.) ¶ 17; *id.*, Ex. 34 (Rovira Sept. 2021 Report for Pls.) ¶ 27; *Petersen II*, 895 F.3d at 206).) Defendants do not dispute that this is an accurate description of Argentine law or that the Bylaws called for a specific result. In any event, the Court agrees that the Bylaws called for a tender offer, which is a specific result.

Outside of the arguments set forth above, the Republic does not challenge the Plaintiffs' articulation of Argentine law regarding the elements of a breach of contract claim or the factual evidence described above demonstrating satisfaction of each of those elements vis-à-vis the Republic. Thus, Plaintiffs are entitled to summary judgment on their breach of contract claims unless, as the Republic contends, their meritorious claims are nonetheless barred. Therefore, the Court now turns to the Republic's various legal arguments.

B. The Republic's Argentine Law-Based Arguments as to Breach of Contract

1. Plaintiffs' Claims are Cognizable Under Argentine Law

The Republic argues that Plaintiffs' claims are not cognizable for four reasons. The Republic first argues that Argentine law does not permit one shareholder directly to demand that another shareholder comply with corporate bylaws because, according to the Republic, corporate bylaws do not create bilateral contracts or obligations. (Republic's Mot. 26.) The Republic next asserts that a shareholder may only seek to enforce corporate bylaws via the mechanisms set forth in Argentina's General Corporations Law ("GCL"). (*Id.* at 27.) The Republic then asserts that, in any event, Argentine law limits Plaintiffs' recovery to the remedies contained in the Bylaws. (*Id.* at 28-29.) Finally, the Republic argues that under Argentine law, Plaintiffs' failure to pursue specific performance bars their damages claim. (*Id.* at 29-30.)

a. Plaintiffs' Claims are Based on a Bilateral Obligation and Are Enforceable Against the Republic

The Court rejects the argument that the Republic's obligations under Sections 7 and 28 were not bilateral. The Court assumes without deciding that bylaws are usually plurilateral and that plurilateral obligations are not subject to breach of contract claims under Argentine law. But it does not follow that bilateral obligations transform into plurilateral ones simply because a party or parties put those bilateral obligations into their corporate bylaws.

(See Hicks Decls., Ex. 135 (Manóvil Tr. for Defs.) 90:8-93:21 (Republic's expert acknowledging corporate bylaws can contain bilateral contracts).) Even accepting that bylaws are usually plurilateral, the question here is not whether bylaws in the abstract are generally plurilateral but whether the specific obligations contained in Sections 7 and 28 are plurilateral or bilateral.

The Court finds that the promises in Sections 7 and 28 are bilateral. The Republic, which both drafted the Bylaws and ordered YPF to adopt them (Executive Order 1106/93 at 1), promised that *it* would “make a tender offer *for the remainder of YPF's outstanding shares . . .* in accordance with the procedures set forth in the bylaws if ‘by any means or instrument’ it ‘bec[a]me[] the owner [of], or exercises the control of,’ at least 49% of YPF's capital stock” *Petersen II*, 895 F.3d at 206-7 (quoting Bylaws § 28) (emphasis added). In other words, based on the plain language of the Bylaws, the Republic promised security holders that *it* would provide *them* with a compensated exit if it reacquired control over the requisite number of shares. Security holders accepted that promise when they purchased shares in YPF. The promise was not made, and the obligation was not owed, to YPF or to the world at large but to specific and identifiable persons, the remaining shareholders, and was owed by a specific and identifiable person, the Republic. This bilateral obligation could as easily have been created via a shareholder agreement or a simple contract. It was thus a bilateral agreement, and the fact that it is contained in the Bylaws does not change its nature.

**b. Plaintiffs' Claims are Governed
by the Argentine Civil Code**

The Court also rejects the argument that the GCL governs and precludes Plaintiffs' breach of contract claims. The Argentine Civil Code governs "[u]nless modified" by a provision in the Argentine Commercial Code, which includes the GCL. (*See* Hicks Decls., Ex. 30 (Garro Dec. 2021 Report for Pls.) ¶ 24 ("Unless modified by this Code, the civil law applies to all matters and business transactions.") (quoting ACC Art. 207).) The question, then, is whether the GCL provisions governing intra-corporate disputes apply to Plaintiffs' claims, thereby displacing the breach of contract claim Plaintiffs bring under the Argentine Civil Code.

The Court finds that they do not. The Republic argues that the existence of mechanisms in the GCL by which shareholders can propose and challenge shareholder resolutions should be interpreted to require that every dispute related in any way to corporate bylaws proceed via these mechanisms, regardless of whether the dispute relates to corporate resolutions, or even corporate governance or plurilateral obligations. (Republic's Mot. 27.)⁹ But the GCL by its terms governs challenges to corporate

⁹ The Court is unpersuaded that the fact that other shareholders pursued remedies under the GCL evidences its applicability. The existence of these claims demonstrates no more than that some shareholders considered GCL claims to be viable. It tells the Court little to nothing about whether the GCL displaces the Civil Code in this instance. Further, the availability of an alternate route, particularly an imperfect one, does not necessarily mean that the availability of that route eliminates a different one.

resolutions. Read broadly, perhaps it governs corporate governance disputes more generally. But Plaintiffs are not bringing claims challenging corporate resolutions or challenging how YPF has been governed post-nationalization. They are suing the Republic for breach of its bilateral obligation to make a tender offer upon acquisition of the requisite number of shares, thereby allowing Plaintiffs to exit YPF entirely rather than engage in an intra-corporate battle with the Republic. This is what Sections 7 and 28 promised, and it is illogical to suggest that Plaintiffs' right directly to enforce the Republic's bilateral obligation was somehow modified or displaced by ill-fitting and indirect intra-corporate procedures governing challenges to resolutions simply because the bilateral obligation was contained in the Bylaws. Again, the nature of the obligation does not change because of its placement in the Bylaws. No more does its placement in the Bylaws suddenly subject it to inapposite GCL provisions directed at disputes over corporate resolutions as opposed to bilateral obligations. The Republic has not pointed to anything in the GCL that governs, or modifies, the claim that Plaintiffs actually bring or any provision of the GCL that states that bilateral obligations to make a tender offer are the proper subject of the intra-corporate dispute resolution provisions contained in the GCL. The Court therefore finds that the Argentine Civil Code applies.

c. Section 7(h) is not a Penalty Clause

The Republic next argues that, even if it can be sued for breach of contract, Plaintiffs are not entitled

to damages because Section 7(h) is a penalty clause that serves as Plaintiffs' exclusive remedy under Argentine law. (Republic's Mot. 28-29.) Article 655 of the Argentine Civil Code provides that "the penalty or fine imposed [by the contract] takes the place of compensation for damages and interest, upon a breach." Contractual penalties are limited by the terms of the contract, and, under Article 655, the non-breaching party "will not be entitled to other compensation, even if he proves that the penalty is not sufficient compensation." In the Republic's view, the Bylaws "supply their own explicit 'penalties'—namely, that shares acquired in breach of the tender-offer obligations 'shall not grant any right to vote or collect dividends or other distributions that the Corporation may carry out'; or '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.'" (Republic's Mot. 28 (quoting Bylaws §§ 7(h), 28(C).) Thus, per the Republic, the Bylaws define the penalties for breach of the tender offer obligation, and Plaintiffs are limited to pursuit of those penalties.

The Court disagrees. Article 653 of the Argentine Civil Code provides that: "The penalty clause may only have as its object the payment of a sum of money, or any other performance that may be the object of the obligations, either for the benefit of the non-breaching party or a third party."¹⁰ Thus, to be a valid penalty

¹⁰ The parties have submitted conflicting translations of Article 653 in their various submissions. The Court, following its own review of the language contained in Article 653, adopts the translation set forth by the Republic on page A-6 of the appendix

clause, Article 653 requires that the clause provide for either (i) “the payment of a sum of money” or (ii) “any other performance that may be the object of the obligations.” The Court reads Article 653, which provides a mechanism for a penalty to replace the damages that would normally be imposed on a breaching party, implicitly to require the breaching party to make “the payment of the sum or money” or to provide the “other performance.”

Section 7(h) certainly does not provide for the “payment of a sum of money” by the Republic, even if the Court credits the Republic’s argument that, in a hypothetical world where the Republic complied with Section 7(h) and forwent its dividends, the remaining shareholders would indirectly benefit by receiving a greater share of the dividends from YPF. The Republic would not be paying any sum of money in that scenario; money to which the Republic was not entitled would simply be distributed accordingly.

Nor does Section 7(h) call for an alternate “performance” by the Republic. To be sure, the sanctions contained in Section 7(h), if enforced, would make it less desirable to breach the Bylaws and would certainly encourage compliance by an acquiror who, unlike the Republic, would suffer the consequences of breach. But the Court is not persuaded that this alone is sufficient to serve as a “performance that [is] the object of the obligations.” Rather, the plain language of Article 653 requires a substitute performance of the obligation at issue, not just the loss of some rights that

of selected laws submitted with its Motion for Summary Judgment (dkt. no. 373-1).

might encourage compliance. Section 7(h) simply operates to strip the Republic, or any acquirer, of rights they would otherwise have. It does not require an alternative performance of their tender offer obligations. Thus, the Court does not find Section 7(h) to be a penalty clause that bars Plaintiffs' damages.

d. Plaintiffs May Pursue Damages

Finally, the Republic argues that under Argentine law Plaintiffs were required to seek specific performance or termination of the relevant Bylaw provisions and that, having failed to do so, they are not entitled to compensatory damages. (Republic's Mot. 29-30.) The Court disagrees. Article 505 of the Argentine Civil Code permits the nonbreaching party to seek the following remedies: (i) performance from the breaching party, (ii) performance in-kind from a third party at the cost of the breaching party, and (iii) damages. In the Republic's view, the order in which the remedies are listed imposes an obligation on the nonbreaching party to pursue the remedies in that order. (Republic's Reply 20-21.) But nothing in the plain language of Article 505 states that the order of remedies is mandatory on the nonbreaching party. Though not binding, the authorities cited by the Republic's expert certainly suggest that the breaching party may not avoid specific performance by offering to pay damages if the nonbreaching party seeks specific performance (Manóvil Rebuttal ¶ 65 (citing sources)), but it does not follow from this proposition that the nonbreaching party—the party meant to be protected and made whole—is so limited and must accommodate the breaching party's preference to provide a remedy the innocent nonbreaching party

does not want and which would not make him or her whole.

The Court does not read Article 889 of the Argentine Civil Code to change this analysis. Article 889 provides that:

If performance becomes impossible by fault of the debtor, or if he has made himself responsible for force majeure, either through a contractual clause that allocates to him the risks that they might bring, or because he is in default, the primitive obligation, either to give or to do something, is converted into the obligation to pay damages.

The Republic argues that this provision demonstrates that money damages are available *only* when performance is impossible due to the breaching party's fault. (Republic's Mot. 29-30; Republic's Reply 20-21.) But the word only does not appear anywhere in Article 889 such that it can be read to state that damages are not available under any other circumstances.

Furthermore, Article 889 must be read alongside its sibling, Article 888, which provides that: "The obligation is extinguished where the performance that forms its matter becomes physically or legally impossible without the debtor's fault." Thus, Articles 888 and 889 are better read to govern when an obligation is extinguished entirely and when a Plaintiff may still pursue a remedy, not to modify Article 505 or to impose impossibility as a requirement for the pursuit of money damages. At base, the Court reads Article 889 simply to provide a straightforward explanation that when specific performance is impossible due to the fault of the breaching party,

damages remain an available remedy, as opposed to when specific performance is impossible through no fault of the breaching party, in which case no remedy is available.

Thus, the Court reads Article 505 to provide Plaintiffs with both the right to pursue damages and the right to elect damages as their remedy instead of specific performance.

2. Plaintiffs' Claims Do Not Challenge the Republic's Sovereign Activity

The Republic next argues that Plaintiffs' claims impermissibly challenge the Republic's sovereign acts. Before addressing the parties' arguments, a brief explanation of the Bylaws clarifies the issues at play here. In the normal course, an entity that wished to acquire shares exceeding the amount that would trigger a tender offer obligation was required to provide YPF with notice. (Bylaws § 7(f)(i).) This "notice date" would then be used to calculate the tender offer price that the acquiring entity was required to offer to all outstanding YPF shareholders pursuant to certain formulae. (Bylaws § 7(f)(v) (A-D).)

Because the Republic never provided notice and instead acquired the shares via expropriation, Plaintiffs chose a counterfactual notice date, February 13, 2012, that they assert represents the date on which the Republic should have provided notice pursuant to the Bylaws if it did not breach. (Pls.' Mot. 33-35.) Using this date as the input, Plaintiffs utilize the formulae set out in Section 7 to calculate the tender offer price that they assert the Republic was required to offer. (*Id.*) This represents the amount that

Plaintiffs would have received if the Republic abided by the Bylaws. (*Id.*)

This, the Republic argues, is equivalent to asserting that the Republic had an obligation to provide notice and commence a tender offer on February 13, 2012, prior to the expropriation of Repsol's YPF shares. (Republic's Mot. 31-33.) And this, per the Republic, is necessarily an attack on the Republic's authority to expropriate the shares without abiding by the tender offer requirements. (*Id.*) Because expropriation is a sovereign act, imposing limitations on it implicates both sovereign immunity and the act-of-state doctrine. (*Id.*) Thus, according to the Republic, Plaintiffs' claims are now barred by these doctrines. (*Id.*)

The Republic's argument misconstrues Plaintiffs' position. Plaintiffs' argument concerns how damages should be calculated now as a consequence of what the Republic did, not an argument about what the Republic could or could not do before it expropriated the relevant shares. Under Plaintiffs' theory, the Republic could have expropriated the shares any day it wanted (and the Republic did so). Plaintiffs simply advocate a theory of damages that says that the date the Republic did choose controls the date the Republic should have provided notice pursuant to the Bylaws and that this date can be used to calculate what the tender offer price should have been. Plaintiffs' theory of damages calculation does not implicate the Republic's sovereignty in any way.

3. Plaintiffs' Claims Are Not Barred by Argentine Public Law

The Republic argues that Article 28 of Argentina's General Expropriation Law bars Plaintiffs' claims for two reasons. First, that Article 28 eliminates any obligations that impede an expropriation or its effects and that, therefore, the tender offer requirements do not apply. Second, that Article 28 provides Plaintiffs' exclusive remedy because it provides that third parties with rights in the expropriated property must seek their relief from the expropriated party. Neither argument is availing.

a. Article 28 Does not Eliminate Plaintiffs' Claims

Article 28 provides: "No action by third parties may impede the expropriation or its effects. The rights of the claimant shall be considered transferred from the thing to its price or to the compensation, leaving the thing free of any encumbrance." In the Republic's view, enforcing the Bylaws and requiring a tender offer "would impermissibly 'impede' the expropriation and its 'effects,' by placing an 'encumbrance' on the expropriated property." (Republic's Mot. 34.) Thus, in the Republic's view, it received the expropriated shares with "original title" and "free" of encumbrances, such as the tender offer obligation. (*Id.*)

The Court assumes without deciding that Article 28 eliminates any restrictions that third parties placed on the property itself. It makes no matter for at least two reasons. First, the Republic, and not a third party, drafted the Bylaws and ordered that they be implemented by the then-wholly-owned YPF. The

Court can understand why, to take the Republic's expert's example, Article 28 would bar a group of homeowners from "agree[ing] among themselves that, if the Republic acquired the property of one of [their homes] through any means, it must offer to purchase the property of all of them." (Alejandro Juan Uslenghi Opening Expert Report ("Uslenghi Opening") [dkt. no. 366-1] ¶ 108.) Such conduct would interfere with the Republic's sovereign power without its consent. The better analogy, however, is a scenario where the Republic agreed with a group of prospective homeowners that it would acquire all of their homes or none of them in order to convince those homeowners to establish a town to the Republic's benefit -- in other words, where the Republic and not a "third party" imposed the restriction on itself and agreed to abide by it. That is what occurred with the Bylaws, and, by its plain language, Article 28 does not apply to a restriction created by the Republic itself.

Second, the tender offer obligation is not attached to the shares that the Republic acquired. The Republic has the sole right to, and use of, the expropriated shares. Plaintiffs do not claim otherwise. The "encumbrance," to the extent it can be so termed, derives not from the expropriated shares but from the contractual obligations the Republic undertook when it revised the Bylaws to require it to make a tender offer if it acquired a certain number of shares. Plaintiffs are not asserting "rights" in the "thing" but contractual rights derived from the Bylaws.

Setting these bars aside, the Republic's remaining arguments that the tender offer requirement would "impede the expropriation or its effects" are

unavailing. The Republic first argues that because it only wanted to acquire a 51% stake in YPF, requiring it to acquire more would be an impediment. (Republic's Mot. 36.) But as the Court of Appeals previously held, "there is no provision in the YPF Expropriation Law itself . . . that the law compelled Argentina to acquire *exactly* 51% ownership in YPF and no greater ownership position." *Petersen II*, 895 F.3d at 208 (internal quotations omitted). The Republic seeks to inject its preferred interpretation of the YPF Expropriation Law via Article 28, but no part of the YPF Expropriation Law was "impeded" if no provision required it to acquire exactly 51%.

The Republic next argues that the YPF Expropriation Law intended that YPF continue operating as a publicly traded company, which would be incompatible with the Republic's purchase of all the outstanding shares. (Republic's Mot. 36.) The Republic's ownership of all of the shares at one point in time has nothing to do with whether the shares or the company remain publicly traded. The Court has no doubt that the Republic could have publicly resold the shares it purchased via the tender offer to investors at an appropriate price. Nothing about the tender offer requirement prevents this.

Third, the Republic argues that the YPF Expropriation Law provided for the expropriated shares to be distributed at a fixed proportion between the federal government and the provinces of Argentina and that requiring the Republic to acquire a higher percentage would upset this balance. (*Id.* at 36-37.) This assumes that the Republic could not distribute any shares acquired via a tender offer to the

provinces to restore the desired balance, which is by no means clear. But setting this aside, the YPF Expropriation Law governs only the expropriated shares. (Hicks Decls., Ex. 112 (YPF Expropriation Law) § 8.) Nothing about the tender offer requirements “impedes” the actual objects of the law, as expressed in its plain language, from occurring.

b. Article 28 Does Not Provide Plaintiffs’ Exclusive Remedies

Finally, the Republic argues that Article 28 “provides specific” and exclusive “avenues of relief for third parties, like Plaintiffs, who claim to have been injured as a result of an expropriation of another’s property.” (Republic’s Mot. 37.) The Republic explains that the Plaintiffs’ claims have been “transferred from the [expropriated] thing to its price or to the compensation.” (*Id.* (quoting Art. 28) (alteration in original).) In other words, whatever Plaintiffs’ claims were worth, that amount was included in the compensation the Republic ultimately paid to Repsol for the expropriated shares, and Plaintiffs should have sought compensation from Repsol. (*Id.* at 37-38.) Indeed, Repsol and the Republic agreed, sans the Plaintiffs, that payment to Repsol would extinguish third party claims and that Repsol would either obtain discontinuances from those third parties or indemnify the Republic. (*Id.*)

The Court once more disagrees. As set forth above, Plaintiffs are not enforcing rights against the expropriated property but against the Republic for its independent breach of its contractual obligations. The Repsol shares were not the source of the tender offer obligation. Extinguishing any claims based on the

Repsol shares cannot have any effect on claims that are not based on the Repsol shares themselves. To the extent the Republic believes that its agreement with Repsol encompasses these claims and requires Repsol to indemnify it, it can seek compensation from Repsol. But their agreement cannot extinguish Plaintiffs' separate rights and claims.

C. The Appropriate Measure of Damages

The Republic vigorously disputes Plaintiffs' calculation of damages, arguing that: (i) Plaintiffs' damages must be determined in pesos as of the date judgment is entered and then be converted to U.S. Dollars, (ii) the tender offer provisions are invalid because Argentine law precludes disproportionate windfall pricing of shares, (iii) February 13, 2012 is not the proper notice date, (iv) Plaintiffs' application of Formula D is incorrect because it should have been based on quarterly, as opposed to daily, price/income ratios, and (v) Plaintiffs have applied the wrong prejudgment interest rate.¹¹ Save for its argument

¹¹ The parties also dispute whether the Petersen Plaintiffs are entitled to consequential damages, which is in part based on a factual argument regarding the Republic's state of mind. The Court reserves judgment on the proper standard for consequential damages under Argentine law and whether there is a material factual dispute as to the Petersen Plaintiffs' entitlement to consequential damages, though it notes that determining the Republic's state of mind is thorny. The Petersen Plaintiffs stated that they would forgo such damages if the Court granted them summary judgment on their direct damages in order to expedite the resolution of the dispute. (Pls.' Reply 72.) Though, as set forth below, the Court has found an issue of fact as to the proper calculation of Plaintiffs' direct damages, the Petersen Plaintiffs may consider this issue of fact sufficiently

regarding the proper notice date, the Republic's arguments are all legal arguments that the Court can resolve as a matter of law. The Court addresses the Republic's sole factual argument first, before turning to its legal arguments.

1. There is a Question of Fact as to the Proper Notice Date

As set forth above, if the Republic complied with its obligations, it would have been required to provide YPF with notice of its intent to acquire a sufficient number of shares to trigger Section 7 prior to acquiring those shares. (Bylaws § 7(f)(i).) Plaintiffs assert, and the Republic does not dispute, that the Bylaws and Argentine regulations establish that the notice date must precede the consummation of a control acquisition by at least forty business days. Section 7(f)(i) of the Bylaws provides that the acquiring party “shall notify [YPF] in writing about the takeover bid at least fifteen business days in advance to the starting date thereof.” (Bylaws § 7(f)(i).) Section 7(f)(vii) of the Bylaws further provides that the tender offer must remain open for “a minimum term of TWENTY (20) days and a maximum term of THIRTY (30) days” from the date the bid is authorized by the Comisión Nacional de Valores de Argentina (“CNV”), Argentina's securities regulator. (*Id.* § 7(f)(vii).) CNV regulations require that a tender offer be open for at least twenty-five business days. (Hicks Decls., Ex. 29 (Garro Sept. 2021 Report for Pls.) ¶¶ 30(h), 31); *id.*, Ex. 34 (Rovira Sept. 2021 Report for

minor to forgo consequential damages nonetheless to facilitate a speedier resolution.

Pls.) ¶ 68.) Adding the fifteen business days' advance notice and the minimum twenty-five business days that the offer must remain open results in a notice date at least forty business days before the tender offer is completed and an acquirer consummates its acquisition.

In the normal course, the "notice date" would be used to calculate the tender offer price that the acquiring entity was required to offer to all outstanding YPF shareholders pursuant to certain formulae. (Bylaws § 7(f)(v) (A-D).) Pursuant to the Bylaws, the applicable formula is whichever formula provides the "highest" tender offer price. (*Id.* § 7(f)(v).) It is undisputed that between February 13, 2012 (Plaintiffs' chosen counterfactual notice date) and May 7, 2012 (the date the Republic asserts it acquired control of the requisite number of shares), Formula D provides for the higher tender offer price. (Defendants' Counter 56.1 ¶ 116.)

The Court agrees that the tender offer price the Republic would have been required to offer if the Republic complied with the Bylaws is the appropriate measure of Plaintiffs' compensatory damages. Based on the Bylaws, that tender offer price must be calculated by determining the date on which the Republic should have provided notice and applying Formula D based on that date. The Court also agrees that, based on the Bylaws and Argentine regulations, that counterfactual date is forty days prior to the acquisition of control of the requisite number of shares.

However, the Court finds that there is an issue of fact as to when the Republic acquired control of the

shares. As the Court previously held, the event that triggered the Republic's tender offer obligations was its acquisition of control of the shares, not its intervention in or acquisition of control of YPF. Plaintiffs assert that the Republic has already admitted that "following the April 16 intervention, it 'occupied 51% of YPF's Class D shares'" (Pls.' Mot. 19 (citing the Republic's Answer, dated July 8, 2019 [dkt. no. 98] at ¶ 36)), implying that the occupation of 51% of YPF's shares occurred on April 16, 2012. It is based on this date that Plaintiffs identify February 13, 2012 as the appropriate counterfactual notice date. However, the Republic's Answer does not fix the precise date of the occupation as April 16, stating instead that, following intervention, the Republic "then temporarily occupied 51% of YPF's Class D shares pending implementation of legislation declaring these shares to be of public utility and subject to expropriation." (Republic's Answer ¶ 36.) The Intervention Decree itself only states that the intervenor would have the powers of the "Board of Directors and/or the President" of YPF. (Intervention Decree § 3.) The Republic now contends that the Intervention Decree "permitted the intervenor to exercise the powers of the YPF Board and/or President of the company—irrespective of share ownership" but that the YPF Expropriation Law is what "provided for the temporary occupation of 51% of YPF's shares." (Republic's Mot. 23.) The Republic is bound by its admission that the occupation occurred while the YPF Expropriation Law was pending and cannot now take the position that occupation of the shares did not occur until passage of the YPF Expropriation Law. *See, e.g., W. World Ins. Co. v. Stack Oil Co.*, 922 F.2d 118, 122

(2d Cir. 1990) (binding defendant to admission made in answer for purposes of summary judgment motion). Nonetheless, the admission Plaintiffs rely on does not establish the precise date on which the Republic occupied 51% of YPF's shares or precisely what "occupation" of the shares entailed and whether such "occupation" is equivalent to "control" of those shares. Because the Court cannot identify the date on which the Republic triggered its tender offer obligation, it cannot determine the counterfactual notice date, and thus cannot quantify Plaintiffs' compensatory damages.

2. The Republic's Legal Arguments Fail

The Republic also makes a series of legal arguments in an effort to reduce or eliminate Plaintiffs' damages, all of which the Court rejects.

First, the Republic argues that, pursuant to New York's judgment-day rule, Plaintiffs' damages must be determined in pesos as of the date judgment is entered and then be converted to U.S. Dollars. (Defs.' Joint Opp'n 42-48 (citing N.Y. Jud. Law § 27(b)).) The Court disagrees. The judgment-day rule is limited to causes of action "based upon an obligation denominated in a currency other than currency of the United States." N.Y. Jud. Law § 27(b). Where the obligation is not "denominated in a currency other than a currency of the United States" New York's judgment-day rule does not apply. *Nature's Plus Nordic A/S v. Nat. Organics, Inc.*, 78 F. Supp. 3d 556, 557-58 (E.D.N.Y. 2015). The majority of the cases applying the judgment-day rule have done so in the context of confirmed arbitration awards and agreements identifying payment for a

sum certain and denominated in the foreign currency expressly. *See, e.g., Dye v. Kopiec*, No. 16CV2952LGSKNF, 2019 WL 2527218, at *1 (S.D.N.Y. May 10, 2019), *report and recommendation adopted*, No. 16 CIV. 2952 (LGS), 2019 WL 2525410 (S.D.N.Y. June 19, 2019) (promissory note); *Commissions Imp. Exp. S.A. v. Republic of the Congo*, No. 14-MC-187 (AJN), 2020 WL 4040753, at *2 (S.D.N.Y. July 17, 2020) (confirmed arbitration award); *Weiss v. La Suisse, Societe d'Assurances sur la Vie*, 293 F. Supp. 2d 397, 408 n.5 (S.D.N.Y. 2003) (insurance policy expressly denominated in Swiss francs). Here, however, the Bylaws are silent as to denomination, and Plaintiffs are suing for the breach of the Republic's obligation to perform its tender offer obligation under the Bylaws, not for a sum certain denominated in pesos. As such the judgment-day rule does not apply, and "the Court is left with the general rule that where damages are sustained in a foreign currency, 'New York courts apply the breach day rule, whereby the appropriate measure of damages is the equivalent of such foreign currency in terms of dollars, at the rate of exchange prevailing at the date of breach.'" *Nature's Plus Nordic A/S v. Nat. Organics, Inc.*, 78 F. Supp. 3d 556, 557-58 (E.D.N.Y. 2015).

Second, the Republic argues that the tender offer price is invalid under Argentine GCL Article 13(5) because it is "inflated." (Defs.' Joint Opp'n 48-49.) GCL Article 13(5) invalidates contractual provisions that provide for "the determination of a price to acquire the share of one partner by another that is notably far from the real value at the time it is effective." Initially, the Court finds that Article 13(5) is inapplicable on its face. By its plain language, GCL Article 13(5) only

applies to provisions that define the price for internal share transfers. But Section 7 of the Bylaws applies to any acquirer, regardless of its status as a YPF shareholder. It is thus not a provision governing or setting the price for the acquisition of shares by one shareholder from another but by any person acquiring a defined number of shares. Nor, as a practical matter, did the obligation imposed by Section 7 even derive from the Republic's status as a shareholder. Rather, it derived from its acquisition of the requisite number of shares regardless of its shareholder status.

Furthermore, as Plaintiffs argue, the Republic does not cite a single case in which GCL Article 13(5) was used to reduce the price to which the selling shareholder was entitled because of GCL Article 13(5). (Pls.' Reply 56.) The Court is persuaded by the Republic's expert that by its terms Article 13(5) applies to both upward and downward departures and could theoretically apply to reduce the amount that an acquirer is required to pay. (Manóvil Rebuttal ¶ 135.) However, as the Republic's expert states, GCL Article 13(5) is meant to "preserve the integrity" of the shareholder's share (*id.*) and serves to protect a shareholder from being "forced" to buy or sell shares at an unfair price. (*Id.* ¶¶ 134, 138 ("[I]t will be equally contrary to the law *to have to* acquire the share at a price higher than the fair one" (emphasis added)).) But the Republic was not "forced" to trigger the tender offer obligation when it did, nor would it "protect the integrity" of either an acquirer's share or a seller's share to allow an acquirer unilaterally to trigger a tender offer obligation at a time when the tender offer price would be high and then seek refuge from its own conduct in GCL Article 13(5). In the absence of any

authority to the contrary, and indeed with the authority it has been provided indicating that GCL Article 13(5) has been interpreted to prevent a weaker party from being disadvantaged, the Court interprets GCL Article 13(5) implicitly to require that the “unfair” price is being imposed on the acquirer or the seller and not initiated by their own voluntary conduct.

Third, the Republic argues that Plaintiffs’ application of Formula D is incorrect because the calculations should have been based on quarterly, as opposed to daily, price/income ratios. The Bylaws require that the ratio used be the “*highest* price/income ratio for the Corporation during the two-year period immediately preceding the notice date.” (Bylaws § 7(f)(v)(D) (emphasis added).) Over a two-year period, if the day with the “highest” price-to-income ratio does not happen to be one of the days when the company releases quarterly earnings, then the Bylaws clearly require applying a different day’s ratio. Thus, Plaintiffs’ application of Formula D based on the daily price/income ratios is correct and required by the Bylaws.

Fourth, the Republic argues that Plaintiffs have applied the wrong prejudgment interest rate in seeking to apply New York law to this issue and that Argentine law governs. (Defs.’ Joint Opp’n 54-55.) The Republic argues that in Argentina, federal administrative law courts retain jurisdiction over cases involving the Republic and “typically apply prejudgment interest at the average borrowing rate published by the Central Bank of the Argentine Republic.” (*Id.*) Plaintiffs’ counter that New York law

is appropriate but that the Court has discretion to apply the commercial rate that “Argentine courts apply in commercial matters, which is between 6% and 8%.” (Pls.’ Reply 73.) The Court agrees that the commercial rate applied by Argentine courts is the appropriate measure as this case involves purely commercial obligations. However, the Court reserves judgment on the precise rate it will utilize.

D. The Republic’s Motion for Summary Judgment on the Good Faith and Fair Dealing Claim

The Republic argues, and Plaintiff agrees, that Argentine law does not recognize a separate cause of action for breach of an implied duty of good faith and fair dealing where the alleged duty is not contained in the contract. (Republic’s Mot. 39; Pls.’ Opp’n 73.) The Republic’s motion for summary judgment on Plaintiffs’ good faith and fair dealing claim is therefore granted.

IV. Conclusion

In sum, the Republic’s motion for summary judgment (dkt. no. 360) is GRANTED as to Plaintiffs’ claim for breach of the duty of good faith and fair dealing and is otherwise DENIED, YPF’s motion for summary judgment (dkt. no. 367) is GRANTED, and Plaintiffs’ motion for summary judgment (dkt. no. 359) is GRANTED as to liability against the Republic but DENIED as to damages against the Republic and DENIED in its entirety as to YPF. The parties’ letter motions for oral argument are also DENIED as moot.

The Clerk of the Court shall close the open motions at dkt. nos. 359, 360, 367, 379, and 411 in Civil Case Number 15-cv-2739. The Clerk of Court

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shall close the open motions at dkt. nos. 289, 291, 294, 308, and 341 in Civil Case Number 16-cv-8569. Counsel shall confer and inform the Court by letter of how they propose to proceed within fourteen days.

SO ORDERED.

Dated: New York, New York
March 30, 2023

[handwritten: signature]
LORETTA A. PRESKA
Senior United States
District Judge

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Appendix H

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

No. 15-cv-2739

PETERSEN ENERGIA INVERSORA S.A.U.,
PETERSEN ENERGIA S.A.U.,

Plaintiffs,

v.

ARGENTINE REPUBLIC, YPF S.A.,

Defendants.

Filed: Sept. 9, 2016

OPINION & ORDER

LORETTA A. PRESKA, United States District Judge:

Plaintiffs Petersen Energia Inversora, S.A.U. and Petersen Energia, 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. Background¹

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

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

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).) 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 €15,101,000 (*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] (“Pl. 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

state² 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 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

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)). “[I]nstrumentality 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.)

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 contract³ and concerns the effects of sovereign acts on commercial obligations rather than the sovereign acts themselves.

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.

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).

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 falls 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 performance 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. Env’tl. 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. 27-12] 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] . . . 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. (Pl. 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 Ghanaian plaintiff had well-founded fear of prosecution if he brought action in Ghanaian 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 factors⁴ "tilts strongly in favor of trial in the foreign forum." *See R.*

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 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 Int'l, 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)).

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 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 20- 21.) “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(RO), 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 Argentina⁵

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.

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.

(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 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

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)).

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.

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 [handwritten: 9], 2016

[handwritten: signature]
LORETTA A. PRESKA
Senior United States
District Judge

Appendix I

RELEVANT STATUTORY PROVISIONS

28 U.S.C. §1602

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. §1605(a)(2)

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * *

(2) in which the action is based upon 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 commercial 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. §1606

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.