# 23-7370-cv(L),

## 23-7464-cv(XAP), 23-7614-cv(XAP)

## In the United States Court of Appeals for the Second Circuit

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.*

On Appeal from the United States District Court
for the Eastern District of New York
(No. 1:15-cv-02739) (Hon. Loretta A. Preska)

**Brief of Amicus Curiae American Association for Justice in Support of Plaintiffs-Appellees-Cross-Appellants**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice states it is a non-profit corporation. It has no parent company, and no publicly owned corporation owns 10% or more of its stock.

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## INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, securities matters, and other civil actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ confines its amicus brief to the first issue presented by the Argentine Republic: whether the case should have been dismissed on grounds of forum non conveniens or international comity. In doing so, AAJ emphasizes that participation in the capital market through U.S. stock exchanges provides an important basis for applying the lessons that can be derived from personal-jurisdiction precedents to the issue of forum non conveniens.

## INTRODUCTION AND SUMMARY OF ARGUMENT

When companies solicit financing through the New York Stock Exchange (NYSE), they should be held to the representations that induced an investment.

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[1] No party or its counsel had any role in authoring this brief. No person or entity—other than amicus curiae and its counsel—contributed money that was intended to fund preparing or submitting this brief.

Because the NYSE operates to assure those seeking financing and potential investors alike that their dealings will be protected by U.S. securities laws and regulations, resort to U.S. courts is available to both parties when either believes the other did not live up to its commitments.

In a case like this one, where the district court clearly had subject-matter jurisdiction as this Court has already found, and presided over the matter over a lengthy period of time, the exercise of its discretion to deny dismissal on grounds of forum non conveniens or international comity was well taken. This is true regardless of whether the underlying case sounds in U.S. securities law or the laws of another nation, because the United States has a significant interest in investor protection through the stock exchanges that should rarely yield to other considerations.

Today's increasingly globalized investment marketplace places a premium on the protection of investors who participate in domestic markets. Foreign-based companies receive significant benefits from listing on major and mature stock exchanges such as the NYSE. A major stock market provides unparalleled access to significant institutional investors within a diverse and extensive investor base, reduced capital costs, increased share value, enhanced capacity to handle large investments, and easy entry to markets that otherwise would be more challenging to access. Although many U.S. securities requirements are subject to waiver by a U.S. stock exchange as long as foreign companies comply with their home country's laws,

there remain other requirements that are unique to the U.S. marketplace and in place to protect investors' interests when companies utilize U.S. stock exchanges.

For these and other reasons discussed here, the objections based on forum non conveniens and international comity that Argentine Republic (hereinafter, the "Republic" or "Argentina") has made central to this appeal ring hollow. The Republic concedes in its Opening Brief that its arguments are less weighty against the New York-based investors, but ignores that the same guarantees and protections available to domestic investors by Argentina's use of the NYSE apply with full force to foreign-based investors. Moreover, the Republic's descriptions of both the decision below and the factors weighed in evaluating the jurisdictional elements are significantly skewed.

Forum non conveniens weighs a number of factors, while providing district courts with significant discretion. As amicus, AAJ submits that the use of a U.S. stock exchange for financing the company at the center of this dispute influences the determination on each of these factors. Moreover, by telling this Court that Argentina's courts would not recognize the claims that are plainly cognizable in U.S. courts, the Republic has conceded that no adequate alternative forum exists. By itself, that concession should be deemed determinative of this appeal.

International comity provides no further or alternative basis for reversal of the decision below. Not only does the choice of seeking capital investment through a

U.S. exchange undermine any claim based on the discretionary doctrine of adjudicative comity in the international context, but this Court's earlier determination that the Foreign Sovereign Immunity Act (FSIA) provides no refuge from liability also weighs against dismissal on international-comity grounds. Therefore, the district court ruling should be affirmed.

## I. THE FACTORS CONSIDERED AND THE ULTIMATE ASSESSMENT MADE BY THE DISTRICT COURT ON THE ISSUE OF FORUM NON CONVENIENS DESERVES THE DEFERENCE THIS COURT NORMALLY ACCORDS FORUM NON CONVENIENS DECISIONS.

The decision on whether to dismiss a case based on forum non conveniens "lies wholly within the broad discretion of the district court and may be overturned only when [appellate courts] believe that discretion has been clearly abused." *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1232 (2d Cir. 1996); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) ("The forum non conveniens determination is committed to the sound discretion of the trial court.").

Parties seeking to reverse a district court's decision on the forum non conveniens bear an extremely heavy burden:

> Reversal is warranted only where the district court's decision rests on an error of law or clearly erroneous factual finding, where its decision otherwise cannot be located within the range of permissible decisions, or where the district court has failed to consider all relevant factors or has unreasonably weighed those factors.

*Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp.*, 40 F.4th 56, 70 (2d Cir. 2022) (citing *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005)). Where, as is the case here, "the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft*, 454 U.S. at 257.

Notably, before this Court, there are two separate sets of plaintiffs, one foreign and one domestic. Under *Piper Aircraft*, different degrees of deference are accorded to the plaintiffs' choice of forum because of their domicile. *Id.* at 256. The Republic appears to challenge the New York (Eton Park) plaintiffs only in passing and without substantial argument, suggesting only that their venue choice was due no deference as a "tag-along plaintiff" with minor damages when compared to those of the Petersen investors. Opening Br. for Defendant-Appellant The Argentine Republic at 23 [hereinafter Op. Br.].

Even so, the Republic recognizes that a bifurcated analysis of the two separate sets of plaintiffs should occur. Op. Br. 31. However, the Republic engages in no separate analysis for the Eton Park plaintiffs. Their objection to venue for those plaintiffs was thus effectively waived. *See Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a settled appellate rule that issues adverted to in a perfunctory

manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (citations omitted).

Still, the foreign domicile of the Petersen plaintiffs is far from decisive. Forty years ago, this Court noted that the trend was against "according a talismanic significance to the citizenship or residence of the parties." *Alcoa S. S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 154 (2d Cir. 1980). That trend has only accelerated over time. *See* David Cluxton, *Getting FNC Back on the Right Track: A Critical Re-Evaluation of the Federal Doctrine of Forum Non Conveniens*, 41 U. Haw. L. Rev. 72, 114-17 (2018).

Instead, private and public factors weigh heavily in any analysis. Private factors center largely on convenience for the parties, including the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Piper Aircraft*, 454 U.S. at 241 n.6 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). Public factors take into account "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." *Id.* (citation omitted).

The district court explained why these factors tip comfortably against the Republic's motion to dismiss. AAJ believes that Appellees have also covered much of that ground well. However, neither the district court nor the Appellees gave sufficient focus to one overwhelming factor that strongly supports the decision below: the company's participation in the New York Stock Exchange (NYSE) to raise capital affects a decision that should have import for forum non conveniens in much the same way that various forms of consent and contractual forum-selection clauses change the personal-jurisdiction calculus. *Cf. Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 63 (2013) ("The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which "represents the parties' agreement as to the most proper forum.") (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)).

## II. THOSE WHO UTILIZE THE NYSE TO SEEK CAPITAL OR INVEST SHOULD UNDERSTAND THAT THEIR CHOICE HAS IMPLICATIONS FOR ANY SUBSEQUENT ADJUDICATION AND THAT THE UNITED STATES THEN HAS A SUBSTANTIAL INTEREST IN PROVIDING REDRESS.

### A. Foreign Companies Utilize U.S. Stock Exchanges Because They Provide Access to a Robust Market of Confident and Willing Investors Protected by U.S. Securities Laws.

The United States boasts the "largest, most sophisticated, and most innovative capital markets in the world," representing "about 40 percent of the global capital market," in large part due to the world's most comprehensive securities regulations

and "strong investor protections." *Our Goals*, U.S. Secs. Exch. Comm'n (Apr. 6, 2023), https://www.sec.gov/our-goals. Foreign companies list with U.S. stock exchanges because qualification for that market and the strong U.S. legal protections against fraud and risk will help attract capital.

Listing on the exchanges amounts to a "seal of approval" for foreign companies, especially those without substantial track records, because a listing receives the backing of recourse to U.S. law. For that reason, American courts play a critical role for defrauded investors. The availability of U.S. courts is critically important when the company's home country courts are not easily available, impractical as a venue for litigation, or otherwise problematic, as is often the case. Still, U.S. courts remain incredibly important to investor protection even when home country courts do not exhibit insurmountable or difficult problems.

Forum non conveniens should not be a means for forum shopping by defendants who seek to take advantage of local favoritism or the availability of limited redress in their home courts. *See Kloeckner Reederei und Kohlenhandel v. A/S Hakedal*, 210 F.2d 754, 757 (2d Cir.) (holding that dismissal was not available on grounds of forum non conveniens solely because the law of the original forum is less favorable to the defendant than the law of the alternative forum), *cert. dismissed*, 348 U.S. 801 (1954); *see also Iragorri v. United Techs. Corp.*, 274 F.3d 65, 75 (2d Cir. 2001) ("Courts should be mindful that, just as plaintiffs sometimes choose a

forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of forum non conveniens not because of genuine concern with convenience but because of forum-shopping reasons.").

Investors' concerns about fundamental fairness and thus needing the reassurances that come with listing on a domestic exchange may be heightened where, as here, the foreign company is state-owned, which brings with it natural questions about whether a foreign litigant would be disadvantaged in the courts of the nation that also owns the defendant.[2]

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[2] Consider, for example, that China has the world's second largest economy, after that of the United States. Tim Smart, *The 10 Largest Economies in the World*, U.S. News & World Rep. (Feb. 22, 2024), https://www.usnews.com/news/best-countries/articles/the-top-10-economies-in-the-world. Although its private sector has grown rapidly in recent decades, the line between state-owned enterprises and private companies remains indistinct because of a long tradition of "state dominance of the economy," local government ownership of otherwise private firms, and growing state ownership of corporate shares. Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 Geo. L.J. 665, 672 (2015). These structures often make classification as private or state-owned difficult. Still, as of January 8, 2024, 265 Chinese companies with a total market capitalization of $848 billion were listed on U.S. exchanges. *Chinese Companies Listed on Major U.S. Stock Exchanges*, U.S.-China Econ. & Sec. Rev. Comm'n (Jan. 8, 2024), https://www.uscc.gov/research/chinese-companies-listed-major-us-stock-exchanges. A considerable percentage of those companies have significant state control. *See* Li-Wen Lin, *State Ownership and Corporate Governance in China: An Executive Career Approach*, 2013 Colum. Bus. L. Rev. 743, 744-45 (2013) ("Pervasive state ownership has continued with no sign of vanishing as a salient feature of Chinese corporate governance."); Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 Stan. L. Rev. 697, 699 (2013) ("[T]he state sector dominates major industries in China and is increasingly active in global markets."). There are serious

*Footnote continued on next page.*

American courts help enforce securities law through private actions. The U.S. Securities and Exchange Commission lacks the capacity to police the modern securities market on behalf of investors, leaving investors to themselves to seek vindication in the courts. *See generally* Steven A. Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 Loy. U. Chi. L.J. 669, 670-71 (2014) (asserting that the "U.S. suffers from a more corrupt financial sector, a more rigged financial marketplace and a more fraud-ridden business environment than at any time since the Great Depression," requiring private securities litigation to combat it) (footnote omitted). Companies that list with the NYSE and other domestic exchanges are well aware of the availability of U.S. courts to investors who believe the companies have not lived up to the commitments made to induce investment.

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questions about whether Chinese courts hearing disputes provide a neutral forum committed to the rule of law. *See generally* Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the Three Represents), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 Transnat'l L. & Contemp. Probs. 29 (2006). Participation in U.S. exchanges, then, should enable investors to seek recourse in U.S. courts when disputes arise based on investment representations or other aspects of the investor-corporation relationship.

### B. The United States Maintains a Significant Interest in Protecting Investors Who Utilize Domestic Exchanges.

#### 1. *Listing on a U.S. Stock Exchange Triggers a Significant U.S. Interest in Protecting Investors, Regardless of the Domicile of the Investors.*

U.S. securities law makes explicit the substantial interest that the United States maintains in protecting investors from fraud and misrepresentation when companies utilize domestic exchanges to attract capital. These laws reflect the congressional judgment that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest." 15 U.S.C. § 78b. The Supreme Court has found that statement of interest influential in adopting a transactional test that recognizes the substantial interest of the United States when the "purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Morrison v. Nat'l Austl. Bank Ltd*., 561 U.S. 247, 269-70 (2010).

The considerable national interest that exists is also reflected in provisions of U.S. securities laws that protect investors against materially false and misleading statements in the offer or sale of securities, 15 U.S.C. §§ 77q(a)(2) and 78j(b), as well as 17 C.F.R. § 240.10b-5, and that protect against "engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3).

As the court below noted, the U.S. government, earlier in this case, asserted a "strong 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,' at a time when no U.S.-based plaintiff was a party in the matter. *Petersen Energia Inversora S.A.U. v. Argentine Republic*, No. 15 CIV. 2739 (LAP), 2020 WL 3034824, at *13 (S.D.N.Y. June 5, 2020).

That same motivating interest in the protection of investors utilizing domestic exchanges was expressed by Congress recently in enacting the 2020 Holding Foreign Companies Accountable Act, Pub. L. No. 116-222, 134 Stat. 1063. The Act empowered the U.S. Public Company Accounting Oversight Board's conduct of audit inspections for recalcitrant U.S.-listed foreign-based companies in order to protect investors through the threat of delisting the companies on U.S. exchanges. 15 U.S.C. § 7214. Though not at issue in this matter, the Act demonstrates the scope of the concern and the extent of the U.S. interest in companies that use U.S. stock exchanges, a choice that the listed companies make fully aware of the American jurisdictional interests that accompany that choice.

Moreover, in the context of this case, this Court has already recognized that Argentina's acquisition of a controlling stake in YPF without a tender offer amounted to the "repudiation of a contract that had a direct effect in the United States." *Petersen Energia Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895

F.3d 194, 211 (2d Cir. 2018), *cert. denied sub nom. YPF S.A. v. Petersen Energia Inversora S.A.U.*, 139 S. Ct. 2741 (2019). The case is thus affected with U.S. interest.

Elsewhere, this Court has also recognized the type of "'bona fide connection' to the United States" that trading on domestic exchanges provides. *See DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir. 2002). It has held that "considering that defendants sought out business opportunities in this country by registering stock on American exchanges, filing statements with the SEC and conducting the bulk of its business in the United States—as well as the claim that most plaintiffs conducted their stock transactions within the United States—a legitimate interest exists in trying this securities fraud litigation here." *Id*. Those factors present in *DiRienzo* and largely present here (with the bulk of business notation excepted) support trying the case here.

The Republic's contrary assertion that the U.S. exchange listing "has no bearing on these cases," Op. Br. 36, does not withstand scrutiny. The Republic provides a weak basis for distinguishing *DiRienzo* by focusing on how the stock was purchased, *id.* at 35, rather than this Court's emphasis on "registering stock on American exchanges," 294 F.3d at 28, and thus fails to come to grips with relevant precedent. Instead, it proffers two unreported state trial court orders as a counterweight. Op. Br. 36. The cited orders, however, cannot overcome decisions that hold otherwise and appear to be premised on a rationale (Germany's

"compelling interest in interpreting its own statute" [3]) rejected by the Supreme Court in *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co*., 585 U.S. 33, 36 (2018), where the Court found that no deference is due a foreign government's interpretation of its own laws.

2. *Personal Jurisdiction Precedent Provides Useful Lessons in Evaluating the Issues Raised by Forum Non Conveniens.*

The decision of a foreign company to list on a U.S. exchange amounts to an agreement to subject itself to U.S. laws and U.S. courts when investors allege a violation of their rights. Lessons about how that consent obviates any claim of inconvenience can be drawn from the jurisprudence concerning personal jurisdiction.

In *Pennsylvania Fire Ins. Co. v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93 (1917), the Supreme Court held that a Missouri statute that made consent to personal jurisdiction a condition of doing business in the state comported with due process. *Id.* at 95. That ruling was reaffirmed recently in *Mallory v. Norfolk S. Ry. Co*., 600 U.S. 122 (2023), where the Court upheld personal jurisdiction based on a similar Pennsylvania statute that made a foreign company's qualification to do business and

[3] Op. Br. 36 (citing *Rosenfield v. Achleintner*, No. 651578/2020, slip op. at 33, 53-55 (N.Y. Sup. Ct. Mar. 22, 2023)).

receive the benefits of Pennsylvania law contingent on consent to personal jurisdiction.

The Court held consent to litigate in a court could be derived from a number of sources. Contracts, for example, may include a forum-selection clause that will be enforced even when litigation in the designated forum is inconvenient. *See id.* at 145; *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 20 (1972) (holding that clause designated the High Court of Justice in London as the exclusive forum for a casualty suffered in North American waters). It may be premised on a stipulation to submit to the jurisdiction of a specific court. *See Petrowski v. Hawkeye-Sec. Ins. Co.*, 350 U.S. 495, 496 (1956) (stipulation waived insurer's right to object to personal jurisdiction); *Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964) (holding Spanish General Consul to stipulation in vessel charter that implicitly consented to personal jurisdiction in New York federal court).

Personal jurisdiction is also subject to constructive consent through the use of certain court procedures. *See Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) (holding implied consent to personal jurisdiction as a "condition of opening its courts to the plaintiff"). A defendant is also deemed to have waived any objection to personal jurisdiction by consenting to litigate future disputes in particular courts. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982). And, of

course, personal jurisdiction is subject to waiver, either by affirmative act or through inadvertence by failing to raise a timely objection. *Id*. at 703-04, 705-06.

As Justice Jackson recently wrote, whether these objections are relinquished expressly or constructively, "the basic teaching" of *Ins. Corp.* is that "[w]hen a defendant chooses to engage in behavior that 'amount[s] to a legal submission to the jurisdiction of the court,' the Due Process Clause poses no barrier to the court's exercise of personal jurisdiction." *Mallory*, 600 U.S. at 148 (Jackson, J., concurring) (quoting *Ins. Corp*., 456 U.S. at 704-05). The same considerations have important and potentially conclusive implications for forum non conveniens.

3. *The Same Considerations that Are Decisive in Personal-Jurisdiction Cases Ought to Guide the Factors Considered in Deciding Forum Non Conveniens Questions.*

Although submission to personal jurisdiction does not equate to agreement to waive forum non conveniens objections, the lessons drawn from personal-jurisdiction jurisprudence help answer the factors that must be weighed to determine whether prudence suggests a different forum. Sensibly, when a corporate defendant has submitted itself to personal jurisdiction by virtue of its decision to do business through a mechanism that obligates it to abide by U.S. law, as when it registers for the NYSE, the forum should usually be deemed convenient, and a motion to dismiss the claim based on forum non conveniens should normally fail, absent special circumstances that have not been asserted here.

By choosing to list with the NYSE, the Republic made a voluntary choice to conduct its business through American auspices and subject itself to American legal requirements. The consequences of listing with the exchanges were clear, and the alternative of listing with exchanges in other nations were plentiful but eschewed by the Republic. As *Morrison* made clear, although the Exchange Act does not apply extraterritorially, it does apply to "transactions in securities listed on domestic exchanges." 561 U.S. at 267. It is important to note that the key requirement in the Exchange Act is listing, rather than sale through the exchange.

As the district court correctly stated, there are three parts to the forum non conveniens inquiry: (1) determining the degree of deference that should be afforded the plaintiffs' choice of venue; (2) assessing whether the alternative forum is adequate; and (3) evaluating whether a balancing of the private and public factors favors one forum or another. *Petersen Energia*, 2020 WL 3034824, at *6 (citing *Iragorri*, 274 F.3d at 73-74). An analysis of the factors in light of the U.S. interests involved due to registration with the NYSE supports affirmance of the district court.

*a. The decision to list with the NYSE supports deference to the plaintiffs' choice of venue.*

The company's decision to list with a U.S. exchange supports deference to the plaintiffs' choice of venue. As already established, not only does that choice subject Argentina's act of expropriation without tendering a buyback offer to subject-matter jurisdiction in the U.S. courts, *see Petersen Energia*, 895 F.3d at 212, but it also

operates as an implicit agreement with the plaintiff's decision to sue in the U.S. courts in order to vindicate its investor rights because, as in the personal-jurisdiction cases, it amounts to a form of consent to jurisdiction that forum non conveniens cannot trump. The connection to U.S. interests confirms the plaintiffs' election of U.S. courts.

*b. The decision to list with the NYSE and the protections that act of listing affords under U.S. law to investors, which are unavailable in Argentina, suggests that no adequate alternative forum exists.*

The Republic asserts an interest in having the issues in this case decided in its own courts applying its own law and further claims that the court below got Argentine law wrong "at nearly every turn." Op. Br. 42. While AAJ does not have a view on the validity of that assertion concerning Argentine law, taken at its word, the Republic's description of its law strongly suggests that no adequate forum exists in Argentina.

The Republic first asserts that Argentine law does not recognize Plaintiffs' breach-of-contract claims. *Id.* at 43-49. It asserts that no enforceable bilateral agreement can exist under Argentine law without a written document that contains explicit obligations owed from each shareholder to the other. *Id.* at 48. It then argues that neither the experts nor a plain reading of YPF's bylaws contains that type of bilateral promise. *Id. at* 48. Thus, it concludes no action for breach of contract could exist or would be cognizable in an Argentine court.

Plainly, our courts recognize a claim for breach of contract. *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co.*, 375 F.3d 168, 177 (2d Cir. 2004). The familiar elements for a breach of contract include: "'(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages.'" *Id.* (quoting *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996)). By-laws are deemed a form of contract. *See Rogers v. Hill*, 60 F.2d 109, 113 (2d Cir. 1932) (holding that a by-law "became part of the contract of employment. It was a promise which the corporation must keep until the by-law is repealed or changed."); *Mgmt. Techs., Inc. v. Morris*, 961 F. Supp. 640, 646 (S.D.N.Y. 1997) ("[A] company's certificate of incorporation and by-laws in substance are a contract between the corporation and its shareholders and among the shareholders inter se.").

Nonetheless, Argentina denies that its failure to live up to its promise to buy back stock after an expropriation, which induced the investment, constitutes a viable cause of action and further asserts that an Argentine court would deny any recovery. Op. Br. 50. That position, unwittingly, perhaps, informs this Court that no viable alternative forum exists in Argentina, because its total rejection of the cause of action cognizable here would frustrate the U.S. interests at stake and the protections it provides to investors.

An alternative forum is deemed inadequate "where the remedy offered by the other forum is clearly unsatisfactory" or "where the alternative forum does not permit litigation of the subject matter of the dispute." *Piper Aircraft*, 454 U.S. at 255 n.22; *see also Cap. Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998) (citing *Piper Aircraft*, 454 U.S. at 255 n.22). Even if the identical cause of action does not exist, the alternative forum must at least recognize "alternative legal actions to address the wrongdoing [alleged]." *Norex Petroleum*, 416 F.3d at 158.

In addition, by relying so heavily on what it expects an Argentine court to do in refusing to recognize these claims, the Republic appears to be engaged in the type of forum shopping that this Court has condemned as an inappropriate ground for asserting forum non conveniens. *See Kloeckner Reederei*, 210 F.2d at 757; *Iragorri*, 274 F.3d at 75.

The Republic's heavy reliance on its asserted claims about how an Argentine court would view this action actually weighs heavily against its motion to dismiss on the basis of forum non conveniens. It certainly has not satisfied its burden to "demonstrate that an adequate alternative forum exists." *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991). That failure is sufficient by itself to affirm the decision below without weighing other factors. *See Norex Petroleum*, 416 F.3d at 157 ("If the movant fails to carry this burden [of showing an adequate

alternative forum exists], the forum non conveniens motion must be denied regardless of the degree of deference accorded plaintiff's forum choice."); *DiRienzo*, 294 F.3d at 29 ("A *forum non conveniens* motion cannot be granted absent an adequate alternative forum.").

*c. The Republic provides no basis to suggest it has private-factors considerations to support its argument.*

The private factors part of the forum non conveniens equation is also informed by the decision to list on the NYSE. The private factors consider practical problems that trial would entail. The Republic does not provide this Court with private-factors arguments on its side of the fulcrum, likely because there are none. In its original forum non conveniens motion below, it similarly failed to provide significant support for this argument. For example, it told the district court that the relevant witnesses were in Argentina, but the court below accorded that naked assertion no weight because the Republic did "not identif[y] witnesses they would call at trial who would be unwilling to appear." *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, No. 15-CV-2739(LAP), 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 S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194 (2d Cir. 2018), *cert. denied sub nom. YPF S.A. v. Petersen Energia Inversora S.A.U.*, 139 S. Ct. 2741 (2019).

Given its failure when it bears the burden, the Republic fails to provide a basis to claim that private interests provide some type of basis to counter the public-factor considerations.

*d. The decision to list with the NYSE supports plaintiffs' side of the public-factors considerations.*

The public-factors portion of the equation decisively favors affirmance of the decision below because of the implications of the NYSE listing. The U.S. interest already described puts significant weight in having this controversy decided here, rather than in Argentina.

In furtherance of those interests, AAJ notes two things that should guide this Court. First, despite the Republic's overwhelming reliance on its a claim that the district court got Argentine law wrong, the argument provides a weak reed upon which to seek reversal and cannot bear the weight that the Republic gives it. U.S. courts do not defer to a foreign government's construction of its own laws, even if that position should usually receive "respectful consideration." *Animal Sci. Prod.,* 585 U.S. at 36. Here, the defendant is the foreign government itself with a clear and obvious self-interest in the result of the matter. In those circumstances, the Supreme Court has held that "[w]hen a foreign government . . ., as here, offers an account [of its law] in the context of litigation, there may be cause for caution in evaluating the foreign government's submission." *Id*. at 43.

Second, the company at issue advertised the opportunity to invest through a prospectus. *Petersen Energia*, 2020 WL 3034824, at *3. That prospectus told investors that the company's by-laws reflect Argentine law and are enforceable through actions brought exclusively in an Argentine court." *Id.* Yet, as the district court found, the by-laws contained no provision that said as much. *Id.* Thus, its claim of what might be viewed as a forum-selection clause that should guide this Court's decision is illusory.

In addition, the by-laws, not the prospectus as an incomplete summary of terms, governs the parties' rights and obligations and amounts to the type of contract that sets the terms of the agreement. *Id.* at *5. Due to the absence, then, of an applicable forum-selection clause, *id.*, as well as the commitment to observe U.S. securities laws through listing on the NYSE, Argentina has little basis for asserting, as it does, that "plaintiffs' claims never should have seen the inside of a New York courtroom." Op. Br. 4.

In the end, the observation this Court made in *DiRienzo* provides a persuasive response to the Republic's argument: "While the complaint alleges a fraud that was largely executed in Ontario, neither the dissemination of the allegedly misleading statements nor the plaintiffs' losses were localized there." 294 F.3d at 32. Similarly, while the Republic asserts that the expropriation was effected in Argentina, the

dissemination of the buyback promise that provides the core allegation of the plaintiffs was localized here.

This Court contrasted the situation of utilizing a U.S. exchange with a case decided in the First Circuit that reached a different result. In the First Circuit case, the court sustained a motion based on forum non conveniens because the "Canadian stock at the center of the alleged securities fraud was traded only on Canadian stock exchanges, and that its sellers had made no effort to market it in the United States except in response to unsolicited inquiries." *Id.* (characterizing *Howe v. Goldcorp Invs., Ltd*., 946 F.2d 944, 952-53 (1st Cir. 1991)). Here, the facts are quite different.

The utilization of a U.S. exchange thus plays an outsized role in weighing the public factors in a forum non conveniens inquiry.

## III. INTERNATIONAL COMITY PROVIDES NO ALTERNATIVE BASIS FOR REVERSING THE DISTRICT COURT.

Alternatively, the Republic asserts that this Court should reverse the district court on the basis of international comity. Mutual respect for national sovereignty provides the basis for international comity. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). It is a doctrine of abstention when asserted in the form of adjudicatory comity, *In Re: Vitamin C Antitrust Litig.*, 8 F.4th 136, 144 (2d Cir. 2021), and "not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency." *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005). It allows a U.S. court "to decline to

exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction." *Id.* at 424. Such an exercise of discretion "is appropriate so long as the foreign proceedings are procedurally fair and . . . do not contravene the laws or public policy of the United States." *Id.*

As shown in discussing forum non conveniens, the U.S. has a strong public policy in protecting investors based on representations that induced the investment in the first place. The Republic has told this court that its courts would not recognize that commitment as a breach of contract, in contrast to the treatment it would, and did, receive here. As such, given the strong U.S. public policy and interest that Argentina cannot match and the inadequacy of its courts to hear this dispute, the same factors that work to refute the Republic's forum non conveniens argument serve to counter its international comity argument. *Cf. In Re: Vitamin C*, 8 F.4th at 144 ("As a general matter, international comity 'takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.'") (quoting *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996)).

While courts are not well positioned to weigh issues of international relations, *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 59 (2d Cir. 2005), and international comity concerns play somewhat to a recognition of that reality, *see In Re: Vitamin C*, 8 F.4th at 143, this Court's application of the Foreign Sovereign

Immunities Act, 28 U.S.C. § 1601 *et seq*., recognized the balance that is relevant here. *See Petersen Energia*, 895 F.3d at 204-11.[4] The FSIA represents a congressional determination "to follow international law principles, namely, that granting foreign sovereigns immunity from suit both recognizes the 'absolute independence of every sovereign authority' and helps to 'induc[e]' each nation state, as a matter of 'international comity,' to 'respect the independence and dignity of every other.'" *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co*., 581 U.S. 170, 171 (2017) (quoting *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 575 (1926)). When a nation does not qualify for that immunity, a foreign policy conclusion exists that international comity does not require deference. For that reason, this Court's 2018 determination that the FSIA posed no obstacle to proceeding with this case in the U.S. courts answers the arguments made by the Republic here as well that deference to international comity that might otherwise require dismissal.

[4] The U.S. government, in this very matter, also explained the strong U.S. interest in assuring that foreign nations operating commercial enterprises and entering U.S. markets be held to their obligations in U.S. courts. *See Petersen Energia*, 2020 WL 3034824, at *13.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court, denying dismissal for reasons of forum non conveniens or international comity.

Respectfully submitted,

*/s/ Robert S. Peck*

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April 1, 2024

## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 32(g)(1) and Local Rules 29.1 and 32.1(4), I certify that the foregoing brief is proportionately spaced using 14-point Times New Roman font and contains 6,301 words, excluding the parts exempted from length limits by Federal Rule 32(f).

Dated: April 1, 2024

*/s/ Robert S. Peck*
Robert S. Peck

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## CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2024, I electronically filed the foregoing amicus brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 1, 2024

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