No.

IN THE

Supreme Court of the United States

EM LTD. and NML CAPITAL, LTD.,

Petitioners,

v.

BANCO CENTRAL DE LA REPÚBLICA ARGENTINA and THE REPUBLIC OF ARGENTINA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), the presumption that a foreign state-controlled instrumentality is separate and independent from the foreign state can be overcome if the instrumentality "is so extensively controlled by its owner that a relationship of principal and agent"—that is, an alter-ego relationship—"is created." 462 U.S. 611, 629 (1983). The Fifth, Eleventh, and D.C. Circuits have held that a foreign state's extensive control over its instrumentality is sufficient to prove that the instrumentality is an alter ego of the foreign state, without any additional showing that this control extends to the instrumentality's day-to-day operations. In the decision below, however, the Second Circuit held that, to establish an alter-ego relationship, a creditor must show that the foreign state controls the instrumentality's "day-to-day operations."

The question presented is whether a foreign state's comprehensive exercise of control over its instrumentality's assets and significant financial transactions is sufficient to establish an alter-ego relationship under *Bancec*, without any additional showing that the state exercises its authority to control the instrumentality's day-to-day operations.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners EM Ltd. and NML Capital, Ltd. were plaintiffs-appellees below.

Respondents Banco Central de la República Argentina and Republic of Argentina were defendants-appellants below.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner NML Capital, Ltd. states that it has no corporate parent and that no publicly held corporation owns 10% or more of its stock. Petitioner EM Ltd. states that it has no corporate parent and that no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

EM Ltd. and NML Capital, Ltd. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-41a) is reported at 800 F.3d 78. The order and hearing transcript of the district court (*id*. at 42a-43a, 44a-73a) are unreported. The order of the court of appeals denying rehearing (*id.* at 74a-77a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2015. A timely petition for rehearing was denied on October 9, 2015.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA") are reproduced in the Appendix, *infra*, at 78a-103a.

STATEMENT

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that the question whether state-controlled instrumentalities such as banks or public corporations are separate and independent

[1] The court of appeals denied the petition for rehearing on October 9, 2015 (App., *infra*, 74a), and issued an amended order on October 15, 2015 to correct a non-substantive clerical error (*id.* at 76a).

from the foreign state is governed by the principles applicable to private corporations. In particular, a foreign state-controlled instrumentality is presumed to be independent from the state, but that presumption can be overcome, and the instrumentality can be held liable for the foreign state's conduct, if either: (1) the instrumentality "is so extensively controlled by its owner that a relationship of principal and agent"—that is, an alter-ego relationship—"is created," or (2) recognizing the instrumentality's separate legal status would work a "'fraud or injustice.'" *Id*. at 629 (internal quotation marks omitted).

In the thirty-two years since *Bancec* was decided, lower courts have struggled to identify the level of foreign-state control necessary to overcome the presumption that an instrumentality is independent from the state. Courts have looked to a wide variety of factors as evidence of an alter-ego relationship, including that the foreign state uses its instrumentality's property as its own, ignores corporate formalities, or controls its instrumentality's everyday business decisions. Employing ordinary alter-ego principles applicable to private corporations, those courts have consistently emphasized that no single factor is dispositive. By considering multiple factors, the lower courts thus have heeded this Court's direction not to determine alter-ego liability using a "mechanical formula." *Bancec*, 462 U.S. at 633.

In the decision below, the Second Circuit disregarded that instruction. The court of appeals deviated from the alter-ego standard applicable to private corporations by elevating one indicia of an alter-ego relationship above all others: The court held that a creditor must show that the foreign state controls its instrumentality's "*day-to-day* operations," App., *in-*

fra, 26a, and that proof of extensive control by the foreign state over its instrumentality's assets and significant financial transactions cannot *as a matter of law* establish an alter-ego relationship absent day-to-day control. On that basis, the Second Circuit rejected Petitioners' claims that the Republic of Argentina's central bank, Banco Central de la República Argentina ("BCRA"), is so extensively controlled by the Republic that it can be held liable for more than $3.5 billion in judgments that the Republic owes, but refuses to pay, to Petitioners.

According to the Second Circuit, Petitioners failed to state an alter-ego claim under *Bancec* despite their extensive allegations, in a detailed complaint, that Argentina has used BCRA as its piggy bank—and as its principal source of funding to repay the Republic's favored creditors—without regard for BCRA's supposed independence from the Republic. Petitioners' allegations recount Argentina's exploitation of its authority over BCRA's charter and its governors to extract more than $38 billion from BCRA through repeated transactions bearing multiple indicia of fraud, and to use those assets to pay some of Argentina's creditors, fund loans to businesses, and finance capital expenditures. Petitioners further alleged that the Argentine Government serially amended the BCRA charter, eliminating the requirement of congressional approval for changes to the Board, and frequently replaced BCRA's senior leadership in order to dominate the bank. In the Second Circuit's view, those allegations were irrelevant unless the Republic's officials *also* "exercise[d] significant and repeated control over the instrumentality's day-to-day operations," which the court of appeals viewed as the "touchstone inquiry" for estab-

lishing an alter-ego relationship under *Bancec*. App., *infra*, 25a.

The Second Circuit's "day-to-day operations" requirement is a dangerous and drastic departure from the approach of other circuits, as well as from the ordinary principles of corporate law that apply with equal force to state instrumentalities under *Bancec*. No other court of appeals has allowed a foreign state to avoid an alter-ego finding where it repeatedly exercised direct control over its instrumentality's assets and significant financial transactions, simply because it did not exercise day-to-day control over that instrumentality. To the contrary, three circuits have found sufficiently extensive control to create an alter-ego relationship under *Bancec* without even considering control over day-to-day operations. And in the context of private corporations, courts consider a wide range of factors as indicia of an alter-ego relationship, and frequently find alter-ego relationships without considering control over day-to-day operations. *Bancec* extends that same standard to state instrumentalities.

The Second Circuit's decision thus creates a circuit split, and a conflict with *Bancec*, on the level of control necessary to establish an alter-ego relationship under *Bancec*. The decision below grants foreign states unprecedented power to evade lawfully entered judgments by abusing and manipulating the corporate form of their state-controlled instrumentalities and warrants this Court's review.

A. FACTUAL BACKGROUND

1. Argentina's Default On Its Bond Obligations

The Second Circuit's decision is the latest in a series of cases addressing Petitioners' efforts to enforce more than $3.5 billion in unpaid judgments against the Republic of Argentina, which this Court recently considered in *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014) (holding—in favor of NML—that the FSIA does not "limi[t] discovery in aid of execution of a foreign-sovereign judgment debtor's assets"). Each of these cases arises from the Republic's 1994 Fiscal Agency Agreement (the "FAA"), under which Argentina issued bonds (the "FAA bonds") in New York. App., *infra*, 5a.

In light of Argentina's notorious "history of defaulting on, or requiring restructuring of, its sovereign obligations," *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007) ("*BCRA I*"), investors demanded the right to enforce Argentina's bond obligations in U.S. courts. Argentina thus waived its immunity from "any suit, action, or proceeding against it or its properties, assets or revenues with respect to the" FAA bonds, and any suit brought solely "for the purpose of enforcing or executing" a judgment based upon those bonds. App., *infra*, 6a. Investors purchased FAA bonds in reliance on those assurances.

In December 2001, Argentina initiated what was then the largest sovereign default in history, declaring a moratorium on payments of more than $80 billion in foreign debt, including the FAA bonds. *See NML Capital, Ltd.* v. *Banco Central de la República Argentina*, 652 F.3d 172, 175 (2d Cir. 2011) ("*BCRA*

II"). Rather than negotiate with creditors, Argentina devised a scheme to evade them. "[F]acing the possibility that foreign creditors would initiate legal action," Argentina directed its central bank, BCRA, to take "preventive measures by immediately transferring" BCRA's reserves in the United States to the Bank for International Settlements in Switzerland. C.A. J.A. 1300; *see also* App., *infra*, 169a ¶ 117.

Beginning in 2003, Petitioners brought actions against Argentina in the Southern District of New York to recover the amounts due on their defaulted FAA bonds. Argentina did not dispute that it had waived its jurisdictional immunity with respect to these suits in the FAA. *See BCRA II*, 652 F.3d at 176 & n.5.

Petitioners have obtained money judgments against Argentina totaling more than $3.5 billion. Yet despite the Second Circuit's finding that Argentina can "afford to service [its] defaulted debt," *NML Capital, Ltd.* v. *Republic of Argentina*, 727 F.3d 230, 246 (2d Cir. 2013), Argentina has refused to comply with these judgments and "publicly and repeatedly announced [its] intention to defy any rulings of [U.S. federal courts] with which [it] disagree[s]," *id*. at 238.

2. Argentina's Exploitation Of Its Central Bank

While refusing to comply with the judgments in favor of Petitioners, Argentina resolved to pay other foreign creditors through the use of U.S. bank accounts. Rather than pay with its own assets, however, Argentina commandeered the assets of its central bank, BCRA.

"BCRA was founded in 1935 as Argentina's Central Bank." App., *infra*, 25a. Under the original

terms of its charter, BCRA was established as "a self-administered institution" whose purpose, like that of many central banks, was to "preserve the value of currency" through "the preparation and implementation of . . . monetary and financial policy." C.A. J.A. 2786. To protect BCRA's financial autonomy, its charter originally provided that BCRA's monetary and financial policy "shall not be subject to any order, recommendation or instruction given by the National Executive Power." App., *infra*, 157a ¶ 98. The charter also originally placed strict limits on BCRA's ability to loan its reserves to the Argentine state. *See id.* at 117a-22a ¶¶ 34-35. And to ensure that BCRA's officers were not beholden to the executive branch, the charter originally allowed the President to appoint BCRA's governor, deputy governor, and directors only upon "agreement with the Senate," and provided for six-year terms with the possibility of reappointment. C.A. J.A. 1786; *see also* App., *infra*, 117a ¶ 34.

Notwithstanding these written protections, Argentina in fact exercises plenary control over its central bank's decisions. And it has exploited that authority to transform the bank into a second Treasury to accumulate funds and pay the Republic's favored creditors—all at the expense of BCRA's original objectives.

a. Since 2005, under the leadership of former President Nestór Kirchner and his successor and wife, President Cristina Fernández de Kirchner, Argentina has appropriated more than $38 billion from BCRA's reserves to pay off its preferred debts, including:

(1) more than $8 billion to pay off the government's debt to the International Monetary

Fund ("IMF") in 2005, App., *infra*, 123a-27a ¶¶ 37-45;

(2) $6.7 billion earmarked in 2008 to pay off the government's debt to the Paris Club, an informal group of creditor governments, *id.* at 127a-30a ¶¶ 46-51;

(3) $6.6 billion in 2010 in connection with the Republic's attempted creation of a "Bicentennial Fund" for eventual repayment of the government's preferred private creditors, *id.* at 130a-37a ¶¶ 52-62; and

(4) more than $17 billion from 2010 to 2012 to pay off a variety of the government's other debts, *id.* at 137a-39a ¶¶ 63-66.

In addition to using BCRA's reserves to repay Argentina's debts, the government has deployed them to fund loans to small businesses, App., *infra*, 142a ¶ 74, and has even "enable[d] the use of BCRA reserves to finance capital spending," C.A. J.A. 4149.

In exchange for the billions of dollars Argentina seized from it, BCRA received no meaningful consideration. Instead, Argentina issued to BCRA a series of non-transferrable—and "undoubtedly" unenforceable, *EM Ltd.* v. *Republic of Argentina*, 720 F. Supp. 2d 273, 300 (S.D.N.Y. 2010), *vacated by BCRA II*, 652 F.3d 172—government notes, typically with lengthy repayment periods and effectively zero percent interest, *see* App., *infra*, 117a-22a, 126a, 137a-39a ¶¶ 34, 44, 63-66. "In practice," the notes "are never paid back." C.A. J.A. 4173. As a result, by the time Petitioners filed their complaint, Argentina owed BCRA roughly $55 billion, with these receivables from Argentina amounting to more than half of the central bank's assets. App., *infra*, 142a ¶ 75.

b. To accumulate the reserves necessary to fund the Republic's objectives, Argentina has forced BCRA to pursue an inflationary monetary policy in violation of a critical directive in BCRA's charter.

Notwithstanding the charter's clear mandate that BCRA "shall not be subject to any order, recommendation or instruction given by the National Executive Power" with regard to "'the preparation and implementation of any monetary and financial policy,'" Argentina has repeatedly ordered BCRA to buy or sell reserves. App., *infra*, 125a, 157a ¶¶ 43, 98; *see also* C.A. J.A. 2786. For example, in advance of the IMF repayment, President Nestór Kirchner ordered BCRA to begin printing pesos to purchase U.S. dollars, thereby swelling its reserves. App., *infra*, 157a-59a ¶¶ 99-100. From October through December 2005, BCRA used its Federal Reserve Bank of New York ("FRBNY") account to acquire U.S. dollars through purchases from Argentine banks and spot transactions in Argentina's domestic foreign-exchange market. C.A. J.A. 4723-24. President Nestór Kirchner then arrogated to himself absolute power to set the precise level of BCRA's reserves in 2006, commanding BCRA to amass $30 billion by the end of the year. App., *infra*, 159a ¶ 101.

c. Argentina employed two strategies to acquire control over BCRA's decision-making apparatus, which it then used to allow the government to seize BCRA's reserves.

First, since 1999, Argentina has systematically amended BCRA's charter to remove every provision that guaranteed BCRA's independence.

Argentina amended BCRA's charter to permit the President to appoint BCRA officers for an unspecified time period without Senate confirmation.

App., *infra*, 117a ¶ 34. It then passed seventeen separate resolutions relaxing the legal restrictions on the amount of money that the Republic can "borrow" from BCRA. D.E. 72, at 36; *accord* App., *infra*, 117a-22a ¶¶ 34-35.

Argentina's exertion of total control over BCRA culminated in 2012 with the passing of Law 26.739, which expanded BCRA's mandate to include the promotion of "financial stability, employment, and economic development with social equity." App., *infra*, 139a ¶ 68. This provision effectively "'subordinated monetary policy to fiscal policy.'" *Id.* at 140a ¶ 71. Law 26.739 also eliminated the requirement that BCRA maintain reserves equal to the amount of money circulating in the economy, which, as one Argentine lawmaker explained, now gives the government "'a blank check . . . to finance itself with [BCRA's] reserves.'" *Ibid*. Moreover, the law authorizes Argentina to repay bilateral loans using BCRA's reserves, *id*. at 140a ¶ 69, and gives BCRA "special authority" to advance additional funds to the government with a more generous time-limit for repayment, C.A. J.A. 3690; *see also* App., *infra*, 117a, 140a ¶¶ 34, 70. Publications around the world, including *The Wall Street Journal* and *The Economist*, criticized this law for "'destroying the last vestiges of [BCRA's] independence,'" and for cementing BCRA's status as "'the piggy bank of [the Argentine] government.'" App., *infra*, 140a ¶ 71 (quoting *Kirchner Grabs the Central Bank*, Wall St. J. (Apr. 2, 2012), and *Piggy Bank, Rootling around for Cash*, The Economist (Mar. 31, 2012)).

Second, Argentina has used its increased control over BCRA's decision-making to remove any BCRA official who dared challenge the President's exploita-

tion of the bank for political ends, and has leveraged the threat of removal to control the decisions of BCRA's governors. The turnover rate for BCRA's governors consequently exceeds that of nearly every other central bank in the world. *See* App., *infra*, 144a ¶ 77. From 2001 to 2012, when Petitioners filed their most recent complaint, BCRA had seven different governors; six departed after disagreements with the government over monetary policy and/or BCRA's independence. *See id.* at 145a ¶¶ 78-79.

For example, in 2004, President Nestór Kirchner refused to reappoint Governor Alfonso Prat-Gay after a brief term because, as Prat-Gay later explained, he disagreed with President Kirchner "'about the degree of independence that a central bank should have.'" App., *infra*, 149a ¶ 85. In particular, Prat-Gay and Kirchner clashed over Prat-Gay's insistence that his appointment be ratified by the Argentine Senate and Prat-Gay's request to participate in appointing BCRA's Board of Directors. *See id*. at 147a-49a ¶¶ 83, 85. President Kirchner refused these requests—and replaced Prat-Gay—because he wanted BCRA's governor to serve without a defined term or mandate and wanted complete control over BCRA's Board of Directors. *See ibid.*

Prat-Gay's replacement, Martin Redrado, fared no better. After five years of yielding to the Kirchners' monetary policies, Redrado finally resisted the Republic's order to transfer nearly $6.6 billion in BCRA reserves to the Bicentennial Fund. App., *infra*, 149a-51a ¶¶ 86-88. In response, President Fernández de Kirchner immediately demanded his resignation, later fired him by emergency decree, and ultimately ordered police to lock him out of his office. *See id*. at 150a-52a ¶¶ 88-89.

Since 2012, Argentina has already replaced BCRA's governor three additional times. In 2013, Argentina replaced BCRA Governor Mercedes Marcó del Pont with Juan Carlos Fábrega because of concerns about Marcó del Pont's efficiency as governor. Buenos Aires Herald, *CFK Imposes Cabinet Reshuffle on Return* (Nov. 19, 2013), *available at* http://www.buenosairesherald.com/article/145536/cfk-imposes-cabinet-reshuffle-on-return. Less than a year later, Fábrega resigned after he "clashed with [President] Fernandez [de Kirchner] . . . over the exchange rate," Jerin Mathew, *Argentine Central Bank Chief Resigns After Apparent Clash with President Cristina Kirchner*, Int'l Bus. Times (Oct. 2, 2014), *available at* http://www.ibtimes.co.uk/argentine-central-bank-chief-resigns-after-apparent-clash-president-cristina-kirchner-1468148, and "f[ell] out of favor with the president," Ken Parks, *Argentina Central Bank Governor Juan Carlos Fabrega Resigns*, Wall St. J. (Oct. 1, 2014), *available at* http://www.wsj.com/articles/argentina-central-bank-governor-juan-carlos-fabrega-resigns-1412201234.

Fábrega's replacement, Alejandro Vanoli, was "viewed as sympathetic to the government's ramped-up interventions in the economy," and his appointment further "stoked concerns over the central bank's independence." Reuters, *Argentina's Markets Are Plummeting After an Interventionist Was Chosen to Head its Central Bank* (Oct. 2, 2014), *available at* http://business.financialpost.com/investing/argentina-stocks-bonds. Vanoli resigned when Mauricio Macri replaced Fernández de Kirchner as President of the Republic, leading Macri to appoint yet another BCRA governor, Federico Sturzenegger. *See* Taos Turner, *Argentine Central Bank Chief Alejandro Vanoli Resigns*, Wall St. J. (Dec. 9, 2015),

available at http://www.wsj.com/articles/argentine-central-bank-chief-alejandro-vanoli-resigns-1449699067.

B. PROCEEDINGS BELOW

1. Petitioners' Prior Alter-Ego Complaints Against BCRA

Faced with Argentina's refusal to pay the amounts due under the bond judgments while using BCRA's reserves to pay other creditors, Petitioners filed an action in September 2006 seeking a declaration that BCRA is Argentina's alter ego, and moved to attach BCRA's FRBNY account based on BCRA's alter-ego status. *See EM Ltd.*, 720 F. Supp. 2d at 275. Petitioners amended their complaint in November 2007 to seek money judgments holding BCRA liable for Argentina's defaulted debt. *See ibid.* After three-and-a-half years of litigation, the district court issued a 71-page decision granting the attachment motions and ruled that, at the time of the IMF repayment in December 2005, BCRA was Argentina's alter ego under the standard articulated by this Court in *Bancec*. *See id*. at 304.

a. The district court concluded that BCRA is Argentina's alter ego under *Bancec*'s "extensive control" test because Argentina's "control [over BCRA] . . . [i]s complete." *EM Ltd.*, 720 F. Supp. 2d at 299-300. The court emphasized that the IMF repayment "demonstrated that the Republic could draw on the resources of BCRA at will" to "serve the Republic's (not BCRA's) political and economic purposes." *Ibid*. Meanwhile, Argentina "ignored the mandate of BCRA's charter," "BCRA did the Republic's bidding," and BCRA's management "posed no obstacles to the Republic's use of the resources of

BCRA exactly as the Republic wished." *Id*. at 300. That "pattern," the district court found, "continues almost to the present day" and is "entirely inconsistent with any idea of central bank independence." *Ibid*.

The district court further reasoned that BCRA was Argentina's alter ego under *Bancec*'s "fraud or injustice" test because Argentina had "used BCRA to pay billions of dollars to get rid of debts which the Republic wished to be rid of," while refusing to "honor . . . judgments duly entered in this court." *EM Ltd.*, 720 F. Supp. 2d at 301-02. The district court thus "disregard[ed] the formal separateness of the Republic and BCRA" with respect to "the $100 million on deposit at the FRBNY" and authorized the attachment of those funds. *Id*. at 302.

b. In *BCRA II*, the Second Circuit vacated that attachment order on the sole ground that the FRBNY funds were among a limited class of assets that were "immune" from execution under Section 1611(b)(1) of the FSIA, which protects "'property . . . of a foreign central bank . . . held for its own account.'" 652 F.3d at 175-76; *see also id*. at 196-97. The court of appeals explained that such assets were immune "without regard to whether the bank . . . is independent from its parent state." *Id*. at 187-88. It therefore "intimate[d] no view" on "whether the District Court correctly determined that the Republic's control of BCRA was sufficient to disregard the presumption of juridical separateness under *Bancec*." *Id*. at 196 n.24.

2. The Present Complaint

On remand, Petitioners filed a third amended complaint, renewing their requests for a declaratory

judgment that BCRA is Argentina's alter ego and for money judgments holding BCRA jointly and severally liable for Petitioners' unpaid judgments against Argentina, but dropping their claims to attach the specific assets that the Second Circuit had found to be immune under the FSIA. App., *infra*, 105a, 171a-74a ¶¶ 1, 119-36. The complaint supplemented facts established in the earlier proceedings with additional allegations based on new evidence of Argentina's continued domination of BCRA through August 2012. *See id*. at 107a ¶ 6.

Both BCRA and Argentina moved to dismiss. At a September 2013 hearing, the district court denied their motions. App., *infra*, 44a-73a; *see also id.* at 42a-43a. It ruled from the bench that Petitioners had stated a "very legitimate claim . . . that for certain purposes BCRA is the alter ego of the [R]epublic," and therefore that Argentina's broad waiver of immunity in the FAA also applied to BCRA, as Argentina's alter ego. *See id.* at 72a. The court thus held that it had subject-matter jurisdiction under the waiver exception to the FSIA, *see* 28 U.S.C. § 1605(a)(1), and that Petitioners' alter-ego action could proceed on the merits, *see* App., *infra*, 72a-73a.[2]

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[2] The district court also agreed with Petitioners that BCRA's immunity was independently overcome, and subject-matter jurisdiction therefore existed, under the commercial activity exception to the FSIA, *see* 28 U.S.C. § 1605(a)(2), because Petitioners' action was based on Respondents' extensive "commercial activity" "in this district," App., *infra*, 70a-72a. The Second Circuit reversed that decision, *id.* at 36a-40a, which is not at issue in this petition.

3. The Second Circuit's Decision

Respondents appealed the denial of their motions to dismiss. On August 31, 2015, the Second Circuit reversed the district court's judgment and remanded with instructions to dismiss the complaint for lack of subject-matter jurisdiction under the FSIA. App., *infra*, 41a. Exercising appellate jurisdiction over the interlocutory appeal under the collateral-order doctrine, the court of appeals held that it "must (1) assume the truth of the Complaint's factual allegations, and then (2) assess whether these allegations are sufficient to establish that BCRA waived its sovereign immunity." *Id.* at 18a.

Applying those standards, the court of appeals held that BCRA was not subject to Argentina's waiver of sovereign immunity because Petitioners had not rebutted "the presumption [under *Bancec*] that BCRA is separate from Argentina." App., *infra*, 24a.

The court stated that Petitioners' allegations did not "support a claim of 'extensive control,' because whatever control Argentina exerted was not tied to BCRA's *day-to-day* operations." App., *infra*, 26a. The court identified several "factors that have been deemed relevant" to the extent of control under *Bancec*—including whether the state "uses [its] instrumentality's property as its own"—but deemed those factors relevant only to "answering the touchstone inquiry[,] . . . whether the sovereign state exercises significant and repeated control over the instrumentality's *day-to-day operations*." *Id.* at 24a-25a (emphasis added). According to the court, Argentina's conduct did not satisfy this standard because the Republic did not "use its influence over [BCRA's] directors in order to interfere with the instrumentality's ordinary business affairs." *Id.* at

28a. The court of appeals also rejected Petitioners' argument that recognizing BCRA's independence from the Republic would work "fraud or injustice." *Id.* at 32a-35a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's "day-to-day operations" requirement conflicts with this Court's decision in *Bancec* and with decisions by three other courts of appeal, and indeed goes beyond the holdings of every other circuit to address the alter-ego inquiry under *Bancec*.

No other court of appeals has ever endorsed the Second Circuit's singular focus on day-to-day operations at the expense of other evidence that a foreign state so extensively controls its instrumentality as to create an alter-ego relationship under *Bancec*, and three circuits have found an alter-ego relationship under *Bancec* without even considering control over day-to-day operations. Moreover, by imposing a heightened "day-to-day operations" requirement, the Second Circuit disobeyed this Court's directive in *Bancec* that foreign states are subject to the same alter-ego standards applicable to private corporations—standards that do not require control over a corporation's day-to-day operations for it to be adjudged an alter ego.

This Court should grant review of this exceptionally important question to restore uniformity to the decisions of the courts of appeal in this important area of law and to clarify the level of control that creates an alter-ego relationship under *Bancec*.

I. THE SECOND CIRCUIT'S "DAY-TO-DAY OPERATIONS" REQUIREMENT CREATES A CIRCUIT SPLIT.

The Second Circuit's adoption of a heightened standard requiring Petitioners to show that Argentina exercised control over BCRA's "day-to-day operations" (App., *infra*, 25a) conflicts with decisions by the Fifth, Eleventh, and D.C. Circuits and goes beyond the standards applied by any other circuit.

The Second Circuit held that a foreign state's extensive control over its instrumentality does not create an alter-ego relationship unless that control also extends to the instrumentality's day-to-day operations. No other circuit has imposed that requirement to ignore other evidence of a foreign state's direct control over its instrumentality's assets or significant financial decisions. To the contrary, the Fifth, Eleventh, and D.C. Circuits have each found that a foreign state exercised sufficient control over its instrumentality to establish an alter-ego relationship under *Bancec* without considering whether the state controlled its instrumentality's day-to-day operations. And the only other circuits to address day-to-day operations—the Fourth and Ninth Circuits—have invoked that factor where the other evidence of direct control did not approach the level of domination that Argentina exercises over the BCRA and its assets.

A. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM THE FIFTH, ELEVENTH, AND D.C. CIRCUITS.

The Fifth, Eleventh, and D.C. Circuits each recognize that a foreign state's extensive control over its instrumentality is sufficient to establish that the in-

strumentality is the foreign state's alter ego, without any additional showing that this control extends to the instrumentality's day-to-day operations. In three decisions—*Bridas S.A.P.I.C.* v. *Government of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006) ("*Bridas II*"), *S & Davis Int'l, Inc.* v. *Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000), and *TMR Energy Ltd.* v. *State Prop. Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005)—those circuits found alter-ego relationships between foreign states and their instrumentalities without considering who controlled those instrumentalities' day-to-day operations.

Each of those courts has applied *Bancec*'s "extensive control" test in slightly different ways: The Fifth and Eleventh Circuits have treated control over day-to-day operations as a relevant factor *supporting* an alter-ego determination, but neither of those courts has treated the absence of such control as dispositive. The D.C. Circuit has defined day-to-day operations broadly enough to encompass the kinds of transactions that Argentina dominated here. The Second Circuit's decision, and its myopic and exclusive focus on day-to-day control, thus cannot be reconciled with the decisions of those circuits.

Fifth Circuit. The Fifth Circuit has adopted a multi-factor approach to analyzing the extent of a foreign state's control over its instrumentalities under *Bancec*. Under that approach, a foreign state's control over its instrumentality's daily operations is treated merely as evidence supporting an alter-ego relationship, not an essential element. The Fifth Circuit has thus found sufficient control to establish an alter-ego relationship under *Bancec* without finding that the parent controlled its subsidiary's day-to-

day operations—a conclusion that would be impossible under the decision below.

The Fifth Circuit's multi-factor approach is most clearly articulated in *Bridas II*, and its predecessor, *Bridas S.A.P.I.C.* v. *Government of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003) ("*Bridas I*"). *Bridas I* outlined a "non-exclusive list" of twenty-one factors relevant to determining the extent of a parent state's control over its instrumentality. *Bridas II*, 447 F.3d at 417 (citing *Bridas I*, 345 F.3d at 360 n.11). Those factors include whether "the daily operations of the two corporations are not kept separate," but also numerous other considerations such as whether "the parent uses the subsidiary's property as its own" and whether "the subsidiary does not observe corporate formalities." *Bridas I*, 345 F.3d at 360 n.11. The court emphasized that "[n]o single factor is determinative" because "[a]lter ego determinations are highly fact-based, and require considering the totality of the circumstances in which the instrumentality functions." *Id.* at 359.

After remanding for further consideration of the factors outlined in *Bridas I*, the Fifth Circuit applied those factors in *Bridas II* to find an alter-ego relationship between the government of Turkmenistan and a state-owned production association. *Bridas II*, 447 F.3d at 419-20. The court emphasized several factors, including that "the Government 'did not really deal with [the association] at arm's length,'" "manipulated" the association "legally and economically" into repudiating a contract with the plaintiffs, and took steps to prevent the plaintiffs from collecting damages from the association. *Id.* at 419. The court did not address, however, the government's control over the association's daily operations. *Bridas I* and

II thus cannot be reconciled with the Second Circuit's holding that control over an instrumentality's day-to-day operations is the "touchstone" of an alter-ego inquiry. App., *infra*, 25a.

As the Second Circuit recognized, the Fifth Circuit has at times stated that the court "pay[s] particularly close attention to whether the government is involved in day-to-day operations" in applying *Bancec*'s extensive control test. *First Inv. Corp. of the Marsh. Is.* v. *Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 753 (5th Cir. 2012), *quoted at* App., *infra*, 25a n.59; *see also Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines,* 965 F.2d 1375, 1382 (5th Cir. 1992) (same) (citing *Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 178 (5th Cir. 1989)). But none of these cases held that an alter-ego finding is barred if the instrumentality retains control over its daily operations.

Indeed, *Walter Fuller* shows that the Fifth Circuit *does not* consider day-to-day control to be a necessary element of an alter-ego claim. The Fifth Circuit allowed a plaintiff's alter-ego claims against a Philippine instrumentality to proceed notwithstanding the district court's finding that the Philippines "'d[id] not control [its instrumentality's] day-to-day activities.'" 965 F.2d at 1381. The Fifth Circuit did not question that finding, and emphasized that the district court had applied the "correct legal standard" in finding an alter-ego relationship based on other factors. *Id.* at 1381. It nonetheless remanded to give the Philippines "an opportunity to offer [contrary] evidence about [its] relationship" with its corporation. *Id.* at 1383. If the Fifth Circuit had concluded that control over day-to-day operations was essential to the plaintiff's alter-ego claims, in contrast, the

court would instead have rendered judgment in favor of the Philippines, rather than remand for further factual development.

Nor was the foreign state's lack of control over its instrumentality's day-to-day operations dispositive in *Fujian Mawei* or *Hester*. In those cases, the Fifth Circuit found no alter-ego relationship because the foreign states involved did not exercise *any* direct control over the instrumentalities that were alleged to be their alter egos. In *Fujian Mawei*, the plaintiffs' principal allegations did not "even relate to [the corporation's] management" and thus "d[id] not show that [the foreign state] exercised control over" its corporation in any sense. 703 F.3d at 754. And in *Hester*, the foreign state merely "had a general supervisory role over" its corporation. 879 F.2d at 181. Although both cases noted the absence of day-to-day control, *see Fujian Mawei*, 703 F.3d at 754; *Hester*, 879 F.2d at 178, neither case suggested that factor would trump other evidence indicative of an alter-ego relationship, such as evidence that the foreign state controlled its instrumentality's assets or major financial transactions.

Eleventh Circuit. In *S & Davis International*, the Eleventh Circuit pierced the veil of a Yemeni government-owned corporation under *Bancec* without considering which entity controlled the corporation's day-to-day operations. 218 F.3d at 1298-1300. The court relied primarily on the plaintiff's allegations that Yemen's Ministry of Supply & Trade exercised direct control over a single transaction by "g[iving] orders to terminate [the corporation's] contract" with the plaintiff. *Id.* at 1299. The court explained that, "[b]y issuing direct orders to terminate the contract, the sovereign became more of a manag-

ing partner over its 'agency or instrumentality,'" rather than a "separate, independent entity." *Id.* at 1299-1300. On that basis, the court held that the Ministry was bound, for purposes of liability and jurisdiction under the FSIA's arbitration exception, by an arbitral award against the corporation. *Id.* at 1300-02.

The Eleventh Circuit's holding in *S & Davis International* is incompatible with the Second Circuit's day-to-day control requirement. The Eleventh Circuit did not find that Yemen or its Ministry exercised control over the corporation's day-to-day operations; instead, the court pierced the corporate veil based on a single transaction. Argentina's repeated exercise of control over BCRA's disposition of its assets presents an even stronger basis for alter-ego liability than Yemen's one-time interference with its corporation's contracts in *S & Davis International*.

D.C. Circuit. The D.C. Circuit similarly has found extensive control sufficient to create an alter-ego relationship under *Bancec* without considering control over day-to-day operations.

In *TMR Energy Ltd.*, the D.C. Circuit relied on *Bancec*'s alter-ego standard to determine whether a Ukraine-owned state property fund "ha[d] a constitutional status different from that of the State of Ukraine" for purposes of personal jurisdiction. 411 F.3d at 301 (emphasizing that *Bancec* "guides our way" with respect to that question). In holding that the fund "should not be treated as an independent juridical entity," the court relied entirely on the fund's "structural features": It emphasized that the fund was legally "subordinated and accountable to" the government, and "governed by the Constitution and legislative acts of Ukraine"; that its chairman

was "appointed and discharged" by the Ukrainian government; and that the fund's expenses were paid out of the national budget. *Id.* at 301-02. In contrast to the Second Circuit's approach, the D.C. Circuit did not consider whether Ukraine had used its authority to influence the fund's day-to-day operations.

Indeed, even when the D.C. Circuit has discussed a state's day-to-day control over its instrumentality, that court's understanding of day-to-day control deviates substantially from the decision below such that Petitioners would have prevailed if they had brought this action in the District of Columbia. In *McKesson Corp.* v. *Islamic Republic of Iran*, the court upheld a district court's finding that an Iranian government-owned corporation was an alter ego of the state and that the corporation's commercial activity was therefore attributable to Iran for jurisdictional purposes. *See* 52 F.3d 346, 351-52 (D.C. Cir. 1995). The court upheld the district court's finding that the government exercised control over the corporation's decisions about issuing dividends, and that "[*t*]*his extensive involvement in the day-to-day operations* of [the corporation] is evidence of a principal/agent relationship" sufficient to create an alter-ego relationship under *Bancec*. *Id.* at 352 (emphasis added). In other words, the "day-to-day operations" at issue were not mundane business operations, but rather important decisions about the distribution of corporate assets.

Under the standard in *McKesson*, Argentina's similar control over the distribution of BCRA's assets to the Republic would qualify as sufficient control over BCRA's day-to-day operations to create an alter-ego relationship under *Bancec*. Thus, even if control over that type of operation were necessary rather

than merely sufficient to create an alter-ego relationship in the D.C. Circuit, Argentina's control over BCRA would satisfy that standard. And because the D.C. Circuit does not require such control, the Second Circuit's decision is even further at odds with that circuit's approach.

B. THE "DAY-TO-DAY OPERATIONS" REQUIREMENT GOES BEYOND THE HOLDINGS OF THE FOURTH AND NINTH CIRCUITS ADDRESSING THAT ELEMENT OF CONTROL.

Outside the Fifth, Eleventh, and D.C. Circuits, only the Fourth and Ninth Circuits have addressed control of "day-to-day operations" under *Bancec*. In isolated statements in three decisions—*Flatow* v. *Alavi Found.*, No. 99-cv-2409, 2000 WL 1012956, 225 F.3d 653 (4th Cir. July 24, 2000) ("*Flatow I*"), *Flatow* v. *Islamic Republic of Iran,* 308 F.3d 1065 (9th Cir. 2002) ("*Flatow II*"), and *Doe* v. *Holy See*, 557 F.3d 1066 (9th Cir. 2009)—those courts have suggested that control over day-to-day operations is critical to alter-ego liability under *Bancec*'s "extensive control" test. These decisions suggest at least a deep division among the courts of appeal on the importance of day-to-day control in *Bancec*'s alter-ego analysis.

But none of these decisions went so far as the Second Circuit by denying an alter-ego allegation on that basis alone, despite other evidence of a foreign state's complete domination of its instrumentality's decision-making and the use of that control to seize the instrumentality's assets for its own benefit. Instead, each decision merely rejected alter-ego claims that would have failed under any circuit's standard. The Second Circuit's holding requiring control over day-to-day operations *despite substantial evidence of*

domination and control over decision-making and assets is thus unique among the circuits.

Fourth Circuit. In *Flatow I*, the Fourth Circuit held in an unpublished decision that Iran's ownership of a charitable organization, standing alone, was insufficient to make that organization Iran's alter ego under *Bancec*'s "extensive control" test. 2000 WL 1012956, at *5-*6. The court rejected the plaintiff's argument that the district court should have "applied a more lenient 'ownership' standard" rather than the ordinary "extensive control" test under *Bancec*, which the court characterized in passing as "focused on whether the foreign state controlled the day-to-day operations of the entity at issue." *Id.* at *5. Because the plaintiff offered no evidence of control other than ownership, the Fourth Circuit had no occasion to consider whether other evidence of extensive control could establish an alter-ego relationship without a showing that the foreign state controlled its instrumentality's day-to-day operations. The Fourth Circuit's isolated reference to day-to-day operations thus falls far short of the Second Circuit's singular focus on control of such operations.

Ninth Circuit. Like the Fourth Circuit, the Ninth Circuit has endorsed a day-to-day operations requirement only in passing, but has never relied on that standard to overcome other evidence of control as extensive and complete as is Argentina's domination of BCRA.

In *Flatow II*, the Ninth Circuit refused to treat an Iranian government-owned bank as Iran's alter-ego based solely on Iran's "limited supervision" of its banks through the exercise of "broad policymaking functions like those of the United States Federal Reserve." 308 F.3d at 1073. In *Doe*, the Ninth Circuit

similarly held that, under *Bancec*, separately incorporated divisions of the Catholic Church were legally distinct from the Holy See even though "the Holy See participated in creating th[ose] corporations and continues to promulgate laws and regulations that apply to them." 557 F.3d at 1080. In both cases, the Ninth Circuit suggested that "day-to-day control" was "require[d] to overcome the presumption of separate juridical status" under *Bancec*. *Ibid.*; *see also Flatow II*, 308 F.3d at 1073 (Iran's "limited supervision" of its banks "does not constitute day-to-day control sufficient to overcome the separate juridical entity presumption").

None of the allegations in *Flatow I*, *Flatow II*, or *Doe* even approaches Argentina's unchecked exercise of control over BCRA's acquisition and disposition of billions of dollars of its assets, which involved far more direct manipulation of BCRA's operations than was alleged in any of those cases. The Second Circuit thus stands alone in holding that a foreign state can avoid alter-ego liability by exercising comprehensive control over its instrumentality's significant transactions, so long as it avoids doing so on a day-to-day basis. Review is warranted to restore unity to the standard governing alter-ego determinations under *Bancec*.

II. THE SECOND CIRCUIT'S "DAY-TO-DAY OPERATIONS" REQUIREMENT CONFLICTS WITH THIS COURT'S HOLDING IN *BANCEC* THAT THE LEGAL STATUS OF FOREIGN STATE INSTRUMENTALITIES IS GOVERNED BY THE SAME PRINCIPLES APPLICABLE TO PRIVATE CORPORATIONS.

The Second Circuit's "day-to-day operations" requirement also conflicts with this Court's decision in

Bancec because it imposes an alter-ego test applicable to instrumentalities of foreign states that is more stringent than the alter-ego standard applicable to private corporations.

A. UNDER *BANCEC*, FOREIGN STATE INSTRUMENTALITIES ARE GOVERNED BY THE SAME ALTER-EGO STANDARDS AS PRIVATE CORPORATIONS.

In *Bancec*, this Court recognized that, under the FSIA, foreign states and their instrumentalities are "'liable *in the same manner and to the same extent as a private individual under like circumstances*.'" 462 U.S. at 620 (quoting 28 U.S.C. § 1606) (emphasis added). This Court determined, therefore, that the legal status of foreign state instrumentalities is governed by ordinary principles of corporate law: The same "presumption" of "separate legal status" applicable "with respect to private corporations" is "true also for governmental corporations." *Id.* at 626-28. And just as the separate "legal status of *private* corporations" can be disregarded where (1) "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or (2) recognizing that legal status "'would work fraud or injustice,'" "*similar equitable principles* must be applied" to foreign state instrumentalities. *Id.* at 628-30 (second emphasis added).

The two grounds for disregarding the separate legal status of foreign state instrumentalities under *Bancec* thus derive directly from—and must be interpreted in accordance with—"common-law corporate principles" governing private corporations. *Sachs* v. *Republic of Austria*, 737 F.3d 584, 594 (9th Cir. 2013) (en banc), *rev'd on other grounds sub nom. OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390

(2015); *see also Hester*, 879 F.2d at 177 (noting that *Bancec* "freely drew from American corporate law regarding the circumstances in which a corporation could be held not to be a separate entity from its owners"). "The text of the FSIA gives no indication that Congress intended [courts] to depart from the general rules regarding corporate formalities." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476 (2003). Accordingly, "[t]he fact that the shareholder is a foreign state does not change the analysis" of whether "the corporation and its shareholders are distinct entities." *Id.* at 475 (citing *Bancec*, 462 U.S. at 625-27). Instead, *Bancec*'s standard for overcoming a foreign state instrumentality's otherwise-separate juridical existence is fundamentally "similar to the 'alter ego' or 'piercing the corporate veil' standards applied in many state courts to determine whether the actions of a corporation are attributable to its owners." *Doe*, 557 F.3d at 1080.

B. THE ALTER-EGO ANALYSIS APPLICABLE TO PRIVATE CORPORATIONS DOES NOT REQUIRE CONTROL OVER DAY-TO-DAY OPERATIONS.

The Second Circuit's decision contravened *Bancec*'s instruction to apply the law relevant to private corporations because it elevated day-to-day control to a dispositive position in the alter-ego analysis. Under black-letter principles of corporate law, whether a parent corporation exercises day-to-day control over a subsidiary is merely one factor among many in an alter-ego analysis. *See* 1 Fletcher Cyc. Corp. § 41 (identifying relevant factors); 114 Am. Jur. Proof of Facts 3d 403 (same); *Weitz Co.* v. *MH Washington*, 631 F.3d 510, 521 (8th Cir. 2011) (same); *United States* v. *Jon-T Chems., Inc.*, 768 F.2d

686, 691-92 (5th Cir. 1985) (same). Courts also consider, for example, whether the parent company or shareholder "commingl[ed] corporate and personal assets and diver[ted] corporate funds," *Cancun Adventure Tools, Inc.* v. *Underwater Designer Co.*, 862 F.2d 1044, 1047-48 (4th Cir. 1988), ignored corporate formalities, *N.Y. State Elec. & Gas Corp.* v. *FirstEnergy Corp.*, 766 F.3d 212, 224 (2d Cir. 2014), and have common stock ownership, directors, and officers, *Oxford Capital Corp.* v. *United States*, 211 F.3d 280, 284 n.2 (5th Cir. 2000). *See also generally* 1 Fletcher Cyc. Corp. § 41.30; 114 Am. Jur. Proof of Facts 3d 403. In other words, "[n]o single factor is determinative." *Wachovia Secs., LLC* v. *Banco Panamericano, Inc.*, 674 F.3d 743, 752 (7th Cir. 2012); *see also Trs. of Detroit Carpenters Fringe Benefit Funds* v. *Indus. Contracting, LLC*, 581 F.3d 313, 318 (6th Cir. 2009) (holding that "no individual factor is outcome determinative" in determining whether two companies are alter egos).

To establish an alter-ego relationship in the context of private corporations, therefore, "control by the individual [or parent] must be active and substantial, but it need not be exclusive in a hypertechnical or day-to-day sense." *Valley Fin., Inc.* v. *United States*, 629 F.2d 162, 172 (D.C. Cir. 1980). Many courts accordingly have found private corporations to be the alter egos of their parents or owners without determining that the parent exercises its control on a day-to-day basis or controls routine transactions in the ordinary (day-to-day) course of business. *See*, *e.g.*, *United States* v. *WRW Corp.*, 986 F.2d 138, 143 (6th Cir. 1993) (piercing corporate veil based only on subsidiary's undercapitalization and lack of corporate formalities, without identifying control over day-to-day activities as a factor) (Kentucky law); *Eagle*

Air, Inc. v. *Corroon & Black/Dawson & Co. of Alaska, Inc.*, 648 P.2d 1000, 1004-05 (Alaska 1982) (piercing corporate veil based on shareholder's "drain[ing] though 'complex financial transactions" of the assets of the subsidiary corporation, without considering day-to-day operations) (Alaska law); *United Steelworkers of Am., AFL-CIO-CLC* v. *Connors Steel Co.*, 855 F.2d 1499, 1506 (11th Cir. 1988) (piercing corporate veil where parent exercised "the necessary degree of control" and subsidiary lacked "autonomy" from the parent, even where certain factors in the alter-ego analysis only "partially existed," without considering day-to-day operations) (federal law); *In re Carrano*, 530 B.R. 540, 556-57 (D. Conn. Bankr. 2015) (holding parent liable for corporation's liabilities where corporation controlled the actions and policies of the corporation with respect to a single transaction, but where corporation personnel controlled other aspects of the business) (Connecticut law).

The Second Circuit's deviation from *Bancec* cannot be brushed off as a mere disagreement about the standard applicable to private corporations. Instead, by elevating control over day-to-day operations from a mere factor to a dispositive requirement for treating a foreign state instrumentality as an alter ego of the state, the Second Circuit strayed even from the standard *that court* applies to private corporations. *See*, *e.g.*, *Atateks Foreign Trade, Ltd.* v. *Private Label Sourcing, LLC*, 402 F. App'x 623, 625-26 (2d Cir. 2010) (disregarding corporate form—without addressing day-to-day control—where owner "divert[ed] corporate funds" between entities without any "commercially reasonable explanation" and entities "did not deal with each other at arm's length"); *Wm. Passalacqua Builders, Inc.* v. *Resnick Developers S.*,

Inc., 933 F.2d 131, 140 (2d Cir. 1991) (alter-ego claims presented triable question where parent and subsidiary shared officers, "intermingl[ed]" funds, and "did not deal at arm[']s length with each other," without addressing day-to-day operations).

III. THE QUESTION PRESENTED IS IMPORTANT.

The Second Circuit's novel "day-to-day operations" requirement sets a dangerous and erroneous precedent that warrants this Court's review. The Second Circuit's decision elevates control over day-to-day operations from a mere factor to a mechanical and dispositive requirement. The decision will therefore hinder the enforcement of unpaid judgments against foreign states, and risk transforming *Bancec* into a dead letter by giving those states a roadmap to evasion: delegate everyday decision-making to independent managers, puppeteer major financial transactions to access funds at will for state expenditures, and hide behind empty corporate formalities to shield assets from creditors.

Imposing such a requirement also defies common sense. Why would the foreign state that wished to control its instrumentality's assets care about day-to-day transactions? Indeed, the fact that a foreign state exerts its control over an instrumentality through significant transactions that are *outside the normal course* of that entity's "daily business decisions" (App., *infra*, 27a) only *strengthens* the inference of fraud. *See*, *e.g.*, *Banco Nacional de Cuba* v. *Chem. Bank N.Y. Trust Co.*, 658 F.2d 903, 910 (2d Cir. 1981) ("[W]e will not ordinarily find the state and the instrumentality alter egos with respect to acts done by the instrumentality in the normal course of its commercial activities.").

Over thirty-two years have passed since this Court last addressed the standard for overcoming the presumption that a foreign state is independent from its instrumentality. This Court should revisit that standard now to ensure that judgment creditors of foreign states have access to meaningful relief in U.S. courts under a clear and uniform standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 7, 2016

APPENDIX

APPENDIX A

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2014
No. 13-3819-cv (L)
No. 13-3821-cv (CON)

EM LTD., NML CAPITAL, LTD.,
Plaintiffs-Appellees,

v.

BANCO CENTRAL DE LA REPÚBLICA ARGENTINA,
REPUBLIC OF ARGENTINA,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of New York.

No. 1:06-cv-7792—Thomas P. Griesa, *Judge*.

ARGUED: DECEMBER 10, 2014
DECIDED: AUGUST 31, 2015

Before: CABRANES, WESLEY, and HALL,
Circuit Judges.

Appeal from an order entered in the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) denying a motion to dismiss for lack of subject matter jurisdiction filed by defendant-appellant Banco Central de la República Argentina ("BCRA"). We hold that the District Court erred in: (1) imputing Argentina's waiver of sovereign immunity to BCRA based on an alter-ego theory; and (2) applying the commercial-activity exception to BCRA's use of its account with the Federal Reserve Bank of New York. Accordingly, we **REVERSE** the District Court's order of September 26, 2013, and we **REMAND** the cause with instructions to dismiss the complaint on sovereign immunity grounds.

* * *

JOSÉ A. CABRANES, *Circuit Judge*:

In December 2001, in the midst of a severe financial crisis, the Republic of Argentina ("Argentina" or "the Republic") declared a moratorium on principal and interest payments for more than $80 billion in sovereign debt, including bonds that were issued under a Fiscal Agency Agreement ("FAA"). Pursuant to two "exchange offers" in 2005 and 2010, Argentina "restructured" over 91% of the then-existing FAA bonds.[1]

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[1] "Debt restructuring" is a process that allows corporations and sovereign nations facing financial distress to reduce and renegotiate their debts. *See* David L. Scott, *Wall Street Words: An A to Z Guide to Investment Terms for Today's Investor* 97 (3d ed. 2003) ("Creditors having difficulty making interest and/or principal payments often restructure their debt to reduce the

Plaintiffs-appellees EM Ltd. ("EM") and NML Capital, Ltd. ("NML") (jointly, "plaintiffs") own FAA bonds that were *not* restructured. Since 2001, Argentina has refused to make any scheduled payments on these defaulted bonds. In 2003, plaintiffs filed suit in the United States District Court for the Southern District of New York, seeking to recover their unpaid principal and interest. Plaintiffs eventually obtained judgments against Argentina, which now total approximately $2.4 billion.

This appeal concerns plaintiffs' ongoing efforts to satisfy their judgments against Argentina by attaching funds held by Argentina's central banking authority, the Banco Central de la República Argentina ("BCRA"). In their third amended complaint ("TAC"), plaintiffs seek a declaratory judgment that BCRA is Argentina's "alter ego" and that, therefore, BCRA is liable for Argentina's debts. If successful, plaintiffs' stated intent is to use the declaratory

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size of the interest payments and to extend debt maturity."). We previously described Argentina's restructuring as follows:

> In 2005, Argentina initiated an exchange offer in which it allowed FAA bondholders to exchange their defaulted bonds for new unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar. In exchange for the new debt, participants agreed to forgo various rights and remedies previously available under the FAA.
>
> . . . .
>
> In 2010, Argentina initiated a second exchange offer with a payment scheme substantially identical to the 2005 offer.

NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 252 (2d Cir. 2012).

judgment to attach unspecified funds that BCRA holds in unnamed foreign jurisdictions.

As an instrumentality of a sovereign state, BCRA is ordinarily immune from lawsuits in American courts under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* ("FSIA").[2] Accordingly, BCRA moved to dismiss the TAC for lack of subject matter jurisdiction on sovereign-immunity grounds, as well as for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted. On September 26, 2013, the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) issued an order denying BCRA's motion.

Relevant to this appeal, the District Court concluded that BCRA had waived its sovereign immunity under two statutory exceptions. First, the District Court held that the FAA's express waiver of sovereign immunity also waived BCRA's immunity – un-

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[2] 28 U.S.C. § 1603 provides, in pertinent part, the following:

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity —
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . . .

der 28 U.S.C. § 1605(a)(1)[3]—because BCRA is Argentina's "alter ego." Second, the District Court held that BCRA's use of its account with the Federal Reserve Bank of New York ("FRBNY") constituted "commercial activity" in the United States, which waived BCRA's sovereign immunity under 28 U.S.C. § 1605(a)(2).[4]

Because neither of these statutory exceptions applies to this case, the District Court erred in denying BCRA's motion to dismiss for lack of subject matter jurisdiction. Accordingly, we **REVERSE** the District Court's order of September 26, 2013, and we **REMAND** the cause with instructions to dismiss the TAC with prejudice.

BACKGROUND

I. The Underlying Debt

In 1994, Argentina began issuing debt securities pursuant to a Fiscal Agency Agreement ("FAA bonds"). In light of Argentina's "history of defaulting on, or requiring restructuring of, its sovereign obligations,"[5] investors demanded that the FAA include a

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[3] 28 U.S.C. § 1605(a)(1) states in relevant part that a foreign state shall not be immune from jurisdiction if it "has waived its immunity either explicitly or by implication."

[4] 28 U.S.C. § 1605(a)(2) states in relevant part that a foreign state is not immune from any action "based upon a commercial activity carried on in the United States."

[5] *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007) ("BCRA I"); *see also id*. (recording Argentina's "many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations, as well as through . . . a diplomacy of default").

waiver of Argentina's foreign sovereign immunity as to "any suit, action, or proceeding against it or its properties, assets or revenues with respect to the" FAA bonds, and any suit brought "for the purpose of enforcing or executing" a judgment obtained in a related proceeding.[6] Argentina agreed to include this waiver of sovereign immunity in the FAA.[7]

In December 2001, Argentina declared a moratorium on principal and interest payments on more than $80 billion of foreign debt, including the FAA bonds.[8] Since then, Argentina has not made principal or interest payments on these bonds. In 2005 and 2010, Argentina successfully restructured over 91% of its debt by launching "global exchange offers," pursuant to which creditors holding the defaulted bonds could exchange them for new securities with modified terms that substantially reduced their value.[9] Plaintiffs EM and NML own FAA bonds that were *not* restructured.

Beginning in 2003, plaintiffs filed multiple actions against Argentina in the Southern District of New York in an effort to recover the full amounts due on their defaulted bonds. Argentina did not dis-

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6 J.A. at 329-30, 343-44.

7 Argentina "concedes that in the [FAA] governing the debt instruments owned by plaintiffs it clearly and unambiguously waived its right to assert its sovereign immunity from suit in claims regarding those instruments." *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 176 n.3 (2d Cir. 2011) ("*BCRA II*").

8 *See id.* at 175.

9 *Id.* at 176 & n.4.

pute that *its* sovereign immunity had been waived in the FAA. Plaintiffs eventually obtained numerous final judgments against Argentina, which now total approximately $2.4 billion.[10] These judgments remain unpaid.

II. Litigation Against BCRA

On December 15, 2005, Argentina's President, Néstor Kirchner, issued two emergency executive decrees – Decree 1599/2005 and Decree 1601/2005 (jointly, the "Decrees") – both of which involved funds held by BCRA.[11] The first decree provided that reserves held by BCRA in excess of the amount needed to support Argentina's monetary base[12] could "be used for payment of obligations undertaken with international monetary authorities."[13] The decree labeled these excess reserves "unrestricted reserves." The second decree directed the Ministry of Economy and Production to take the necessary steps to repay Argentina's debt to the International Monetary Fund ("IMF") out of the unrestricted reserves. As we previously noted:

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10 *Id.* at 176 & n.6.

11 Reproductions of Decree 1599/2005 and Decree 1601/2005—in Spanish and English translation—are provided in the J.A. at 579-88.

12 *See BCRA I*, 473 F.3d at 468 (defining "monetary base" as being "composed of the monetary circulation of Argentine pesos plus the demand deposits of the financial entities with BCRA, in checking accounts or special accounts") (citing Law No. 23,928 of 3/27/91 art. 6, *as amended by* Law No. 25,561 of 1/7/02 art. 4) (internal quotation marks and brackets omitted).

13 *Id.* at 468 (quoting Decree 1599/2005 art. 1, J.A. at 581).

> At the time of the Decrees, BCRA had approximately $26.8 billion in reserves and needed $18.4 billion to cover the monetary base; thus, approximately $8.4 billion in reserves became Unrestricted Reserves pursuant to the Decrees. On December 29, 2005, the Ministry issued Resolution No. 49, directing BCRA to repay [Argentina's] debt to the IMF and providing that, in exchange, [Argentina] would give BCRA a non-transferrable note.[14]

Soon after these Decrees were issued, plaintiffs made their first attempt to satisfy their judgments against Argentina by attaching funds held by BCRA. On December 30, 2005, plaintiffs moved in the Southern District of New York for an *ex parte* order to restrain funds held by BCRA. Plaintiffs asserted that the Decrees had the effect of transferring ownership of certain BCRA assets – including funds held in BCRA's account with the FRBNY – from BCRA to Argentina. The District Court entered temporary restraining orders with respect to, *inter alia*, the property held by BCRA in eight garnishee banking institutions, including the FRBNY.[15]

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14 *Id.*

15 *Id.* at 469. On January 3, 2006, the BCRA paid Argentina's debt to the IMF out of the BCRA's funds. The FRBNY funds that were subject to the restraining notices were not used in connection with that payment, although the parties disputed "whether the funds might have been used for this purpose in the absence of the court-ordered restraints on the transfer of the funds." *Id.*

On January 12, 2006, the District Court vacated the temporary restraining orders.[16] Plaintiffs appealed the District Court's decision, maintaining that the Decrees amounted to an expropriation by Argentina of BCRA's assets in order to pay Argentina's debt to the IMF, and that, consequently, the funds in BCRA's FRBNY account had become Argentina's property.

On January 5, 2007, we rejected plaintiffs' argument and affirmed the District Court's order, holding that "the Decrees did not alter property rights with respect to the FRBNY Funds" because they "did not create an attachable interest on the part of [Argentina] in the FRBNY Funds."[17] Although we thus rejected plaintiffs' transfer-of-ownership argument, we noted the difference between two theories of attachment – (1) that "the Decrees transferred to the Republic ownership or control over *the assets* of BCRA"; and (2) that Argentina controlled "*BCRA itself*" – *i.e.*, that BCRA was Argentina's alter ego.[18] We concluded that plaintiffs had not established that BCRA's funds were *transferred* to Argentina, but we noted that plaintiffs' allegations regarding Argentina's "misdeeds . . . might have lent some credence to" the alter-ego theory.[19] That is, we suggested that plaintiffs could potentially argue that BCRA was "so extensively controlled by [Argentina] that a relationship of principal and agent is created," or that recog-

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16 *Id.* at 470.

17 *Id.* at 472.

18 *Id.* at 475 (emphasis in the original).

19 *Id.* at 480.

nizing BCRA's separate juridical status would "work fraud or injustice"[20] – and that, if successful, this claim would subject *all* of BCRA's assets to potential attachment by Argentina's judgment creditors.

In September 2006, while *BCRA I* was pending, plaintiffs commenced a new action seeking a declaratory judgment that, pursuant to *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), BCRA was liable for Argentina's debts. Specifically, plaintiffs argued that Argentina's consistent disregard for BCRA's independence had vitiated any presumption of separateness to which BCRA was entitled, transforming BCRA into Argentina's "alter ego."

In this new action, plaintiffs also pursued attachment orders against BCRA's FRBNY funds based on this alter-ego theory. On April 7, 2010, the District Court granted plaintiffs' attachment motions and ruled that, at the time of BCRA's repayment of Argentina's debt to the IMF (December 2005), BCRA was Argentina's alter ego.[21] The District Court also concluded that the attachment of BCRA's FRBNY funds did not violate § 1611(b)(1), which immunizes "property . . . of a foreign central bank . . . held for its own account." Accordingly, the District Court au-

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20 *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) ("*Bancec*") (internal quotation marks omitted) (applying corporate-law principles to determine circumstances under which separate juridical status of government instrumentality must be disregarded).

21 *See EM Ltd. v. The Republic of Argentina*, 720 F. Supp. 2d 273, 302-04 (S.D.N.Y. 2010).

thorized the attachment of the $105 million deposited in BCRA's FRBNY account.

This order was appealed and in 2011, in *BCRA II*, we vacated the attachment on the sole ground that the funds held in BCRA's FRBNY account were "immune" from execution under § 1611(b)(1).[22] We declined to reach the District Court's alter-ego determination and instead concluded that these funds were immune from attachment "without regard to whether the [BCRA] is independent from its parent state pursuant to *Bancec*."[23] We thus intimated no view as to "whether the District Court correctly determined that [Argentina's] control of BCRA was sufficient to disregard the presumption of juridical separateness under *Bancec*."[24] Accordingly, we vacated the District Court's attachment orders with respect to the FRBNY funds and remanded the cause to the District Court for further proceedings.

III. This Case Upon Remand

On remand, plaintiffs filed the TAC – the operative complaint for purposes of this appeal.[25] Pursuant to our ruling in *BCRA II*, funds held in BCRA's accounts with the FRBNY are immune from attachment. Accordingly, the TAC is framed more broadly – the declaratory judgment it seeks would establish: (1) that BCRA is the alter ego of Argentina; and (2) that BCRA is thus liable for any and all of Argenti-

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22 *See BCRA II*, 652 F.3d at 186-87.

23 *Id.* at 187-88.

24 *Id.* at 196 n.24.

25 *See* J.A. at 3026-83 (filed August 31, 2012).

na's debts.[26] Plaintiffs' stated purpose for seeking this judgment is to enable them to attach *any* asset held by BCRA *anywhere* in the world in satisfaction of their judgments against Argentina.[27] This option was arguably left open by *BCRA II*, which foreclosed the possibility of attaching assets deposited in BCRA's own accounts in the United States, but did not otherwise address plaintiffs' ability to reach BCRA assets elsewhere.

In November 2012, Argentina and BCRA moved to dismiss the TAC for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. Oral argument on this motion was held at a conference of the District Court on September 25, 2013. Plaintiffs argued that BCRA had waived its sovereign immunity on two grounds. First, plaintiffs asserted a theory of implied waiver – that is, because BCRA is the alter ego of Argentina, Argentina's express waiver of immunity in the FAA should be imputed to BCRA.[28] Second, plaintiffs asserted that BCRA waived its immunity by engaging in "commercial activity" in New York through its FRBNY account.[29]

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26 J.A. at 3027 (TAC ¶ 1).

27 *See* Special App. ("SPA") at 4 (9/25/13 Tr. 3:21-23) ("We would like to be able to have a judgment that holds BCRA liable for the judgments entered against Argentina that we may enforce as a judgment if we find assets anywhere."); *id.* at 10-13 (9/25/13 Tr. 9:10-12:15) (arguing that plaintiffs could take the declaratory judgment to California, Switzerland, or Germany and use it to attach BCRA's assets held in those jurisdictions).

28 *See id.* at 27-28 (9/25/13 Tr. 26:24-27:1).

29 *See id.* at 29-31 (9/25/13 Tr. 28:1-30:2).

In denying the motion to dismiss, the District Court explicitly adopted plaintiffs' arguments for jurisdiction. In its bench order, the District Court stated:

> What I'm going to do this afternoon is to deny the motions to dismiss the [TAC]. I believe there is jurisdiction in the way [plaintiffs' counsel] Mr. Cohen describes jurisdiction which makes it appropriate to entertain the action; and considering the provisions of the Foreign Sovereign Immunities Act, I believe that there is an implied waiver here and I believe there's commercial activity so that the provisions of 28 U.S.C. 1605(a)(1) and (a)(2) are applicable.
>
> This really is, denying a motion to dismiss, exactly what would emerge from a litigation that has problems. The plaintiffs' position has problems, as I've indicated. But I think those problems do not require the dismissal of the action.
>
> And I want to repeat something which I'm sure I've said maybe more than once this afternoon; and that is, we don't have a republic which is acting in a normal way as far as its debts. We don't have a situation [where] there is a completely regular dealing between the [R]epublic and BCRA the way that I'm sure would exist with the Bank of England or the Central Bank of Germany or France or certainly with the Federal Reserve Bank. We don't have that. We have irregularities.

> The reason that I believe the action should be held open is I think there is a very legitimate claim by the plaintiffs here that for certain purposes BCRA is the alter ego of the [R]epublic.
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> In the papers before me, the plaintiffs have made a very powerful case of that, and I so held in my earlier decision, and that holding was not what was disturbed by the Court of Appeals. So, there's a very good case of alter ego.
>
> I believe that the Court should entertain the idea that it would be desirable to have this Court with its experience in this case and its background in this case make some kind of formal ruling of alter ego which could be legitimately used in a proceeding in another state or a foreign country so that the plaintiffs do not have to go to the other state or the foreign country and start in again, once again, and maybe more than once again with this presentation about alter ego.
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> The motion to dismiss the action is denied.[30]

This appeal followed.[31]

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30 *Id.* at 32-34 (9/25/13 Tr. 31:19-33:7).

31 The TAC names both BCRA and the Republic of Argentina as defendants in this lawsuit, and both BCRA and the Republic have appealed the District Court's denial of their joint motion to dismiss the TAC.

DISCUSSION

I. Appellate Jurisdiction

In general, our appellate jurisdiction is limited to "final decisions" of district courts;[32] the District Court's order here is interlocutory. BCRA asserts, however, that we have jurisdiction under the "collateral order" exception to review BCRA's claim of sovereign immunity as a defense to subject matter jurisdiction.[33]

Under this exception, an interlocutory appeal is available for "a small class of 'collateral' rulings that do not terminate the litigation in the court below but are nonetheless sufficiently 'final' and distinct from the merits to be appealable without waiting for a final judgment to be entered."[34] To fit within the exception, the interlocutory order must: (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment."[35]

A denial of foreign sovereign immunity generally satisfies the conditions necessary to invoke the col-

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32 28 U.S.C. § 1291.

33 *See MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 383 (2d Cir. 2006).

34 *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146 (2d Cir. 2013) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

35 *Whiting v. Lacara*, 187 F.3d 317, 320 (2d Cir. 1999) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)) (internal quotation marks omitted).

lateral order doctrine.[36] For instance, in *Rein v. Socialist People's Libyan Arab Jamahiriya*,[37] we held that all three prongs of the above test were satisfied because: (1) the district court's ruling on sovereign immunity conclusively determined the issue of subject matter jurisdiction; (2) the issue of jurisdiction is separate from the merits; and (3) an appeal from final judgment cannot repair the damage caused to a sovereign that is improperly required to litigate a case.[38]

Notwithstanding the collateral-order doctrine, plaintiffs assert that we lack appellate jurisdiction here because the "immunity question cannot be decided without addressing [plaintiffs'] underlying

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36 *See Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 80 (2d Cir. 2013) (collecting cases); *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 153 (2d Cir. 2007); *see also Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763 n.6 (9th Cir. 2007) ("[E]ach of our sister circuits that has considered whether a denial of a motion to dismiss on grounds of foreign sovereign immunity is an appealable collateral order ha[s] unanimously held that it is.") (collecting cases).

37 162 F.3d 748, 755-56 (2d Cir. 1998).

38 *See id.* ("A sovereign that is required to litigate a case on the merits before it can appeal the assertion of jurisdiction over it has not been afforded the benefit of the immunity to which it is entitled."); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) ("[S]overeign immunity is an immunity from trial and the attendant burdens of litigation[.]") (internal quotation marks omitted); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993) (same in the context of state sovereign immunity under the Eleventh Amendment).

claims on the merits."[39] According to plaintiffs, BCRA's alter-ego status is a predicate to holding that the FAA's sovereign-immunity waiver binds BCRA and, therefore, resolving the immunity issue now would require an unnecessary and burdensome inquiry into the extent of Argentina's control over BCRA. Accordingly, plaintiffs urge us to defer review until the District Court issues a final judgment.[40]

These arguments are unpersuasive. We have consistently held that the threshold sovereign-immunity determination is immediately reviewable under the collateral-order doctrine.[41] In fact, this case is similar to *U.S. Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*,[42] in which we also reviewed the denial of a motion to dismiss brought by a purported foreign-state alter ego, and in which we held that a court reviewing a district court's sovereign-immunity decision must assess whether plaintiffs "have made a sufficient showing [of alter ego] *at*

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39 Plaintiffs-Appellees Br. at 21 (quoting *Grp. Health Inc. v. Blue Cross Ass'n*, 793 F.2d 491, 497 (2d Cir. 1986)).

40 In so arguing, plaintiffs principally rely on two cases from this Circuit, neither of which concerned motions to dismiss based on *sovereign immunity*. In *White v. Frank*, 855 F.2d 956 (2d Cir. 1988), we denied interlocutory review of a failed absolute-immunity defense, because immunity turned on whether defendants were liable for the constitutional tort of malicious prosecution. In *Grp. Health Inc. v. Blue Cross Ass'n*, 793 F.2d 491 (2d Cir. 1986), we similarly denied appellate review where absolute immunity turned on whether the defendant acted within the scope of its authority.

41 *See ante* note 36.

42 199 F.3d 94 (2d Cir. 1999).

this point in the litigation."[43] As the Supreme Court has held, "a question of immunity is separate from the merits of the underlying action . . . even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue."[44]

At this stage in the case, we must (1) assume the truth of the TAC's factual allegations, and then (2) assess whether these allegations are sufficient to establish that BCRA waived its sovereign immunity. If we are able to determine conclusively that the pleadings do not establish, as a matter of law, that BCRA waived its sovereign immunity, it would be inconsistent with the underlying purpose of the foreign-sovereign-immunity doctrine to subject BCRA to further burdensome litigation.[45]

Accordingly, we conclude that we have jurisdiction under the collateral-order doctrine to review the

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[43] *Id.* at 98 (emphasis supplied).

[44] *Mitchell v. Forsyth*, 472 U.S. 511, 528-29 (1985); *see also Johnson v. Jones*, 515 U.S. 304, 314 (1995) (a claim of immunity is immediately appealable even though it is "sometimes practically intertwined with the merits"); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 672-75 (2009) (jurisdiction proper over qualified immunity appeal concerning legal sufficiency of pleadings because "[e]valuating the sufficiency of a complaint is not a 'fact based' question of law"); *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 760-61 (2d Cir. 2003) (existence of qualified immunity under plaintiffs' version of the facts "turns on an issue of law" and is thus immediately appealable).

[45] *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008) (the foreign-sovereign-immunity doctrine "is designed to 'give foreign states and their instrumentalities some protection from the inconvenience of suit.'" (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003))).

District Court's threshold determination that BCRA waived its sovereign immunity pursuant to 28 U.S.C. § 1605(a)(1) (the express waiver exception) and 28 U.S.C. § 1605(a)(2) (the commercial activity exception).[46]

II. Sovereign Immunity

Moving to the merits of this appeal, the sole issue we consider is whether the District Court erred in its conclusion that BCRA waived its sovereign immunity. We review this conclusion *de novo*.[47]

There is no dispute that BCRA is an instrumentality of Argentina and that, unless one of the FSIA's

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[46] Because we conclude that the TAC fails to establish that BCRA waived its sovereign immunity, *see post* Section II, we need not and do not reach the issue of whether we have appellate jurisdiction (or pendent appellate jurisdiction) over BCRA's *other* asserted grounds for dismissal, which the District Court also rejected. These grounds include: (1) that plaintiffs lack Article III standing, because it is speculative whether the declaratory judgment sought by plaintiffs would redress their injury (*i.e.*, permit them to recover funds in other jurisdictions); and (2) that the TAC fails to state a plausible claim that BCRA is Argentina's alter ego. As to the first ground, we take no position on whether a declaratory judgment of the type sought here would satisfy the requirements of Article III. As to the second ground, plaintiffs' Rule 12(b)(6) argument overlaps substantially with our discussion of sovereign immunity, but we decline to exercise pendent appellate jurisdiction to review the District Court's denial of plaintiffs' 12(b)(6) motion. Rather, as we explain in detail below, the TAC is to be dismissed solely on sovereign-immunity grounds.

[47] *See Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129 (2d Cir. 2009) ("We review *de novo* legal conclusions denying [FSIA] immunity to a foreign state or its property.").

exceptions applies, BCRA is entitled to invoke its sovereign immunity as a defense to this lawsuit.[48] Here, the District Court concluded that two exceptions applied. First, it held that the FAA's express waiver of sovereign immunity under § 1605(a)(1) is imputable to BCRA (as Argentina's "alter ego"). Second, it held that BCRA's use of its account at the FRBNY constituted "commercial activity" in the United States within the meaning of § 1605(a)(2).

We address each exception in turn.

A. Alter Ego

1. Legal Standards

The controlling case for when an instrumentality of a sovereign state becomes the "alter ego" of that state is *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) – known as *Bancec*. In *Bancec*, the Supreme Court created a presumption that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."[49] According to the Court,

> [f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an in-

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48 *See 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 [FSIA] applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction. The District Court's conclusion that none of the exceptions to the Act applied therefore signified an absence of both competence and personal jurisdiction.").

49 *Bancec*, 462 U.S. at 626-27.

> strumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated.[50]

The Supreme Court drew support for this proposition in the legislative history of 28 U.S.C. § 1610(b),[51] the provision of the FSIA addressing the circumstances in which a judgment creditor may execute upon the assets of a foreign government's instrumentality:

> Section 1610(b) [of the FSIA] will not permit execution against the property of one agency

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50 *Id.* at 626 (footnote omitted).

51 28 U.S.C. § 1610(b) reads, in pertinent part, as follows:

> (b) . . . any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if —
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> > (1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver . . . .

> or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. [public] corporations or between a U.S. [public] corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another.[52]

Therefore, *Bancec* recognizes a statutory "presumption that a foreign government's determination that its instrumentality is to be accorded separate legal status" will be honored.[53] But this presumption of separateness may be rebutted by evidence establishing an alter-ego relationship between the instrumentality and the sovereign state that created it. Specifically, the presumption may be overcome and an alter-ego relationship established if: (1) the instrumentality "is so extensively controlled by its owner that a relationship of principal and agent is created"; or (2) the recognition of an instrumentality's separate legal status would work a "fraud or injustice."[54] As we previously noted, "both *Bancec* and

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[52] *Bancec*, 462 U.S. at 627-28 (quoting H.R. Rep. No. 94-1487, at 29-30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6628-29).

[53] *Id.* at 628.

[54] *Id.* at 629 (internal quotation marks omitted); *see Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984) ("[A] foreign state instrumentality is answerable just as its sovereign parent would be if the foreign state has abused the corporate form, or

the FSIA legislative history caution against too easily overcoming the presumption of separateness."[55]

2. Analysis

Under *Bancec*, we are thus required to presume that BCRA is legally separate and distinct from Argentina. This presumption is overcome only if the TAC alleges facts sufficient to establish that either: (1) Argentina so extensively controlled BCRA that a relationship of principal and agent was created; or (2) recognizing BCRA as a separate entity would work a fraud or injustice.[56]

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where recognizing the instrumentality's separate status works a fraud or an injustice.").

[55] *Letelier*, 748 F.2d at 795; *see also Seijas v. Republic of Argentina*, 502 F. App'x 19, 22 (2d Cir. 2012) (non-precedential summary order) (*Bancec* sets forth a "strong presumption" that an instrumentality has a "separate legal identity").

[56] The District Court did not clearly indicate which of these two theories it relied upon in making its alter-ego determination. It did, however, observe "that a general declaration of alter ego could . . . have effects or implications beyond what [the Court] would intend," and that "the idea that BCRA is in a general way liable for the debts of the republic goes way too far." SPA at 31-32 (9/25/13 Tr. 30:19-21, 30:25-31:2). While the District Court ultimately concluded that plaintiffs have a legitimate claim that BCRA is the alter ego of Argentina for "certain purposes," *id.* at 33 (9/25/13 Tr. 32:17), it did not specify what those purposes were.

Our precedent supports the view, however, that once an instrumentality of a sovereign state has been deemed to be the alter ego of that state under *Bancec*, the instrumentality and the state are to be treated as one and the same for all purposes. *See Letelier*, 748 F.2d at 794 ("The *Bancec* Court held that a foreign state instrumentality is answerable *just as its sovereign parent would be* if the foreign state has abused the corporate

For the reasons that follow, neither prong of this test has been satisfied. Therefore, the presumption that BCRA is separate from Argentina has not been rebutted. Because Argentina's express waiver of sovereign immunity in the FAA does not apply to BCRA, plaintiffs' reliance on the § 1605(a)(1) exception necessarily fails.

a. Extensive Control

We address first *Bancec*'s "extensive control" prong. While measuring the level of control exercised over an instrumentality by a foreign sovereign is fact-intensive, courts have articulated several indicia to guide the inquiry.[57] Among the factors that have been deemed relevant are whether the sovereign nation: (1) uses the instrumentality's property as its own; (2) ignores the instrumentality's separate status or ordinary corporate formalities; (3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government agencies; (4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and (5) issues policies or directives

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form, or where recognizing the instrumentality's separate status works a fraud or an injustice.") (emphasis supplied). Because we conclude that the TAC fails to plead facts that would establish that BCRA has become Argentina's alter ego for *any* purpose, we need not address the District Court's novel conclusion that an instrumentality may become an "alter ego" for just some, but not all, purposes.

[57] For instance, the Fifth Circuit in *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 416-18 (5th Cir. 2006), listed 21 factors to consider to determine whether the foreign state "complete[ly] control[led]" the instrumentality. *See also Letelier*, 748 F.2d at 794.

that cause the instrumentality to act directly on behalf of the sovereign state.[58] These factors are relevant to answering the touchstone inquiry for "extensive control": namely, whether the sovereign state exercises significant and repeated control over the instrumentality's day-to-day operations.[59]

BCRA was founded in 1935 as Argentina's Central Bank.[60] By statute, it is "a self-administered institution," which is charged with acting as Argentina's agent and depository before international

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58 *See, e.g.*, *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 352 (D.C. Cir. 1995); *Hester Int'l Corp. v. Fed. Republic of Nigeria*, 879 F.2d 170, 178 (5th Cir. 1989).

59 *See LNS Invs., Inc. v. Republic of Nicaragua*, 115 F. Supp. 2d 358, 363 (S.D.N.Y. 2000) (alter-ego test requires a showing that "the government exercises extensive control over the instrumentality's daily operations and abuses the corporate form"), *aff'd sub nom. LNC Invs., Inc. v. Banco Central de Nicaragua*, 228 F.3d 423 (2d Cir. 2000) (affirming "for substantially the reasons stated by the district court"); *Seijas*, 502 F. App'x at 22 (*Bancec* requires extensive control of subsidiary's "day-to-day activities" or abuse of the corporate form.); *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 753 (5th Cir. 2012) ("[W]e look to the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government." (internal quotation marks omitted)); *Doe v. Holy See*, 557 F.3d 1066, 1080 (9th Cir. 2009) (*Bancec* requires allegations "of day-to-day control" in order "to overcome the presumption of separate juridical status").

60 *BCRA II*, 652 F.3d at 177 (citing Law No. 24,144/92, ch. I, § 1 (Oct. 22, 1992, as amended) ("BCRA Charter")). An English translation of the BCRA Charter is provided in the J.A. at 2786-2800.

monetary, banking, and financial entities, as well as with regulating the Argentine banking system and financial sector.[61] BCRA's primary responsibility is to maintain the value of legal tender in Argentina – accordingly, it shall "exclusively issue banknotes and coins in the Argentine Nation," and "invest a portion of its external assets in deposits or other interest-bearing transactions with foreign banking institutions."[62] Moreover, BCRA is managed by an independent Board of Directors appointed by the "National Executive Power" with the consent of the national Senate.[63] BCRA has the authority to purchase and sell property, hold accounts, and sue and be sued in courts under its own name.[64]

Thus far, "on paper," BCRA appears to be a typical government instrumentality entitled to separate legal status.

However, plaintiffs argue, and the District Court presumably accepted, that BCRA's formal independence is belied by Argentina's extensive control over BCRA's day-to-day operations. Plaintiffs attempt to buttress this conclusion with three categories of factual allegations. Nonetheless, even if we assume the truth of all of them, these facts do not support a claim of "extensive control," because whatever control Argentina exerted was not tied to BCRA's *day-to-day* operations.

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61 BCRA Charter, arts. 1, 3-4 (J.A. at 2786-87); *see also id.* arts. 17-18, 21-22, 25 & 28-29 (J.A. at 2791-95).

62 *Id.* Arts. 30 & 33 (J.A. at 2795-96).

63 *See BCRA I*, 473 F.3d at 479 n.15.

64 *Id.*

First, the TAC alleges that Argentina systematically eliminated BCRA's legal independence by: (1) permitting the President to appoint BCRA officers for an unspecified period without Senate approval; and (2) removing BCRA governors who supported the central bank's independence from the executive branch.[65] But courts have consistently rejected the argument that the appointment or removal of an instrumentality's officers or directors, standing alone, overcomes the *Bancec* presumption.[66] The hiring and firing of board members or officers is an exercise of power incidental to ownership, and ownership of an instrumentality by the parent state is not synonymous with control over the instrumentality's day-to-day operations. Governments commonly exercise some measure of control over their instrumentalities, much like parent corporations commonly control certain aspects of otherwise independent subsidiaries. Missing from plaintiffs' allegations are any claims that Argentina's appointment of board members then caused it to interfere in and dictate BCRA's daily business decisions. Ensuring that a board of direc-

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65 *See* J.A. at 3056-66 (TAC ¶¶ 76-96).

66 *See Transamerica Leasing, Inc. v. La República de Venezuela*, 200 F.3d 843, 849 (D.C. Cir. 2000) ("If majority stock ownership and appointment of the directors were sufficient, then the presumption of separateness announced in *Bancec* would be an illusion."); *Foremost-McKesson*, 905 F.2d at 440 ("[M]ere involvement by the state in the affairs of an agency or instrumentality does not answer the question whether the agency or instrumentality is controlled by the state for purposes of FSIA."); *Hester Int'l Corp.*, 879 F.2d at 181 ("The two factors of 100% ownership and appointment of the Board of Directors cannot by themselves force a court to disregard the separateness of the juridical entities.").

tors of an instrumentality shares the sovereign's goals and policies for the instrumentality is not, by itself, extensive control. The sovereign must instead use its influence over these directors in order to interfere with the instrumentality's ordinary business affairs.

Second, the TAC alleges that Argentina issued executive decrees and legislative amendments to make it easier for the government to borrow from BCRA, and that Argentina subsequently borrowed tens of billions of dollars from BCRA in order to pay Argentina's debts to the IMF and other private creditors (but not to these plaintiffs).[67] However, as the United States argued before us as *amicus* in *BCRA II*,[68] the repayment by BCRA of Argentina's other debts does not establish the existence of an alter-ego

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67 *See* J.A. at 3036-56 (TAC ¶¶ 33-75) (BCRA's loans to Argentina between 2005 and 2010 included: (1) $8 billion to pay its debt to the IMF in 2005; (2) $6.7 billion to pay its debt to the Club of Paris in 2008; (3) $6.6 billion to pay its debt to private creditors in 2010; and (4) $17 billion from 2010 to 2012 to pay a variety of other debts). The "Club of Paris" is "an international organization established for the purpose of settling controversies concerning debts that were guaranteed or owed by LDC [Less Developed Country] governments to creditor governments." *BCRA I*, 473 F.3d at 466 n.2 (internal quotation marks omitted) (alteration in the original).

68 In *BCRA II*, we did not reach the District Court's earlier holding that BCRA was Argentina's alter ego. However, the United States—which appeared as *amicus* in *BCRA II* in support of the position of BCRA—argued in the alternative that the District Court's analysis of the alter-ego issue in that earlier case was flawed. The *amicus* brief of the United States from *BCRA II* has been included in the record for this appeal. *See* J.A. at 3543-3573.

relationship, because "central banks commonly perform payment functions for their governments, including central banks that are relatively independent from their governments."[69] Although the United States also argued that the IMF's status as a preferred creditor justified the payments,[70] that question goes to whether Argentina's choice to pay one set of creditors over another was legitimate—an in-

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69 J.A. at 3569; *see also id.* at 3552 ("[T]he United States urges the Court to clarify that the BCRA's involvement in repaying the IMF does not support disregarding the BCRA's separate juridical status.").

70 Specifically, the United States argued that Argentina's use of BCRA funds to repay the IMF did not justify ignoring BCRA's separate juridical status, because the

> decision to pay the IMF in preference to its other creditors was consistent with the long-standing policy of the United States and the other sovereign members of the IMF to recognize the preferred creditor status of the IMF. In order to protect the funds of its member states (including the funds invested by the United States), the IMF rightly expects to be paid even when other creditors are not. *See, e.g.*, International Monetary Fund, Financial Risk in the Fund and the Level of Precautionary Balances (Feb. 3, 2004) at 4 ("Member governments and other creditors have agreed to treat the Fund as a preferred creditor to help achieve its purposes. Preferred creditor status is fundamental to the Fund's financial responsibilities and the Fund's financing mechanism as this means that members give priority to repayment of their obligations to the Fund over other creditors thus protecting the reserve assets that other members have placed in the custody of the Fund.").

Id. at 3568-69. In fact, "[a]ccording to the IMF staff, many other countries had repaid the IMF out of international reserves held by the debtor country's central bank." *Id.* at 3569.

quiry that is unrelated to whether Argentina controlled BCRA in order to accomplish those payments.

Here, the Republic's plan to borrow money from BCRA was not executed by the Argentine government alone. Instead, the proposals received the necessary review and approval by BCRA's legal advisers and BCRA's Board of Directors,[71] and one BCRA Governor testified before Argentina's Congress that it made policy sense to permit the government to borrow funds from BCRA while its reserves earned relatively low interest.[72] Therefore, the Republic's decision to use BCRA to repay its debt to the IMF and other creditors is not indicative of the extensive control that concerned the Supreme Court in *Bancec*.[73]

Finally, the TAC alleges that Argentina and BCRA coordinated their activities in implementing an "inflationary" monetary policy.[74] However, governments and central banks – including the U.S. Government and the U.S. Federal Reserve – often consult and coordinate their actions with respect to monetary policy.[75] Whether the resulting policy is

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71 *See id.* at 3049-50 (TAC ¶ 61).

72 *See id.* at 3056 (TAC ¶ 75).

73 In *Seijas*, Banco de la Nación also allegedly made favorable loans to Argentina "in violation of its governing charter" and "to individuals and corporations" at the Republic's behest, but we held that this was not sufficient to establish that the bank lacked independence. *See* 502 F. App'x at 21; *ante* note 55.

74 *See* J.A. at 3066-76 (TAC ¶¶ 97-113).

75 *See, e.g.*, *id.* at 3593 (U.S. Treasury Department's Annual Report to Congress, covering Nov. 1, 1996 to Oct. 31, 1998) (de-

considered by some commentators as too "inflationary" or "deflationary" is irrelevant to the question of whether Argentina exercised day-to-day control over BCRA. It is not our role to second-guess monetary policy decisions made by foreign governments. We thus agree with the position of the United States in *BCRA II*—"central banks ordinarily have a high degree of interaction with their parent foreign governments," and as such, "courts should give significant deference to a foreign government's conduct vis-à-vis its central bank."[76] The alleged "coordination" of monetary-policy actions between Argentina and BCRA is simply not sufficient to establish "extensive control."

Considered cumulatively, these allegations certainly establish that the Republic sought the assistance of BCRA in responding to an extremely severe debt crisis, and that Argentina took steps to ensure that BCRA shared its policies and goals during this time. They do not establish, however, that the Republic so extensively controlled BCRA's day-to-day operations as to transform BCRA into the Republic's alter ego. Most of the actions allegedly taken by BCRA are governmental functions performed by most central banks – *i.e.*, paying a nation's creditors, controlling currency flows, and keeping foreign exchange deposits. Plaintiffs have not sufficiently al-

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scribing the coordinated June 1998 intervention in the foreign exchange markets by U.S. monetary authorities); *id.* at 3610 (handbook published by the Centre for Central Banking Studies) ("[H]owever independent a central bank is, the ultimate decisions on a country's currency . . . are usually taken by the government[.]").

76 *Id.* at 3570-71 n.*.

leged that these actions, or any others, were the result of Argentina's substantial control over the business decisions or daily functions of BCRA.[77] Thus, these actions, standing alone, are not the type of activities that illustrate a complete takeover of BCRA's day-to-day operations by the Republic.[78]

Because the facts alleged do not establish that the Republic exercised extensive control over BCRA's day-to-day operations, the first prong of the *Bancec* test has not been met.

b. Fraud or Injustice

The second prong of the *Bancec* alter-ego test asks whether the recognition of BCRA as a separate entity would work a "fraud or injustice." The purpose of this prong is to prevent foreign states from

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[77] *See, e.g.*, *McKesson Corp.*, 52 F.3d at 352 (finding *Bancec* presumption rebutted where "[r]outine business decisions, such as declaring and paying dividends to shareholders and honoring [the instrumentality's] contractual commitments" were dictated by the sovereign state); *Hester Int'l Corp.*, 879 F.2d at 178 (giving example of extensive control where "all checks in excess of a certain amount [had to] be signed by a government-appointed director, a governmental agency was required to approve all invoices for shipments exceeding a certain amount, and the . . . government generally exercised direct control over its operation").

[78] By rejecting plaintiffs' argument that BCRA should be held liable for all of Argentina's debts—*see* SPA at 20-21 (9/25/13 Tr. 19:25-20:1) ("I don't buy the idea that BCRA is liable for all the debts of the [R]epublic.")—the District Court implicitly agreed that the pleadings do not demonstrate that BCRA has become the Republic's alter ego for all purposes. *See also ante* note 56.

"avoid[ing] their obligations by engaging in abuses of corporate form."[79]

For instance, in *Bancec* itself,[80] the presumption that Cuba's instrumentality – Bancec – was a separate juridical entity was rebutted, because Cuba had dissolved Bancec and taken complete control of its assets in 1961. Because Cuba effectively absorbed Bancec, the Supreme Court granted Citibank recourse against Cuba as the controlling principal and real beneficiary of the lawsuit that Bancec had filed against Citibank. Similarly, in *Bridas S.A.P.I.C.*,[81] the Fifth Circuit found "fraud or injustice" where Turkmenistan dissolved a state-owned oil company that was in breach of a joint venture with plaintiff, and replaced it with an under-capitalized state-owned oil company endowed with newly-enacted immunity protection. And in an unpublished district court case relied on by plaintiffs, *Kensington International Ltd. v. Republic of Congo*,[82] the Republic of Congo structured its relationship to its purportedly independent oil company by, *inter alia*: (1) designing the company's corporate structure to allow Congo to engage in "unnecessarily complex transactions and charades for the purpose of confounding its creditors";[83] (2) passing all proceeds from oil sales on to the government, rather than permitting the company

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79 *Letelier*, 748 F.2d at 794.

80 462 U.S. at 615-16, 632.

81 447 F.3d at 417.

82 No. 03 Civ. 4578 (LAP), 2007 WL 1032269 (S.D.N.Y. Mar. 30, 2007).

83 *Id.* at *9.

to exercise its right to collect a percentage on transactions; and (3) commingling state and company assets.

The common thread in these cases is that the sovereign states at issue abused the corporate form. In *Bancec*, Cuba sought relief in a court of the United States while simultaneously trying to shield itself from liability by asserting its claim through its dissolved instrumentality. In *Bridas*, Turkmenistan transferred assets from one instrumentality to another in order to escape liability.[84] And in *Kensington*, Congo created a "sham" entity with purported sovereign immunity in order to shield its own assets from judgment creditors.

Plaintiffs' allegations here fall far short of the flagrant frauds and injustices exhibited in these other cases. At bottom, plaintiffs' claim is that it would be a fraud or injustice to allow Argentina to use funds from BCRA to pay certain "preferred" creditors while at the same time "stiffing" plaintiffs. As noted above, at least in the case of the IMF, there is nothing irregular or fraudulent about Argentina recognizing a preference for repaying one set of creditors over another.

Moreover, plaintiffs *do not* allege that BCRA's separate juridical status has been actively used by Argentina to block plaintiffs' enforcement attempts against Argentina itself, or that Argentina has transferred *its* funds to BCRA in order to shield them from

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84 *See also Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 648-49 (5th Cir. 2002) (piercing the corporate veil where a company transferred its operations from one party to another to avoid liability).

plaintiffs. Although plaintiffs do allege that BCRA transferred some of the funds deposited in its FRB-NY account to the Bank of International Settlements in Switzerland, this action did nothing to frustrate plaintiffs' ability to collect on their judgments against Argentina. As we held in *BCRA II*, funds deposited in BCRA's own account were in any event immune from attachment.[85] Therefore, as a practical matter, BCRA was only guilty of moving funds from one attachment-proof account to another.

Plaintiffs' factual allegations simply do not show that Argentina has used BCRA to frustrate the collection efforts of its creditors, or that Argentina treated BCRA as a "sham" entity to hide its own assets. These allegations simply do not establish that the recognition of BCRA's separate status would work a "fraud or injustice" within the meaning of *Bancec*.

Because the TAC fails to counter, much less overcome, the presumption that BCRA and Argentina are legally separate entities, BCRA does not constitute Argentina's "alter ego" for the purposes of this suit. Argentina's express waiver of its own sovereign immunity in the FAA, therefore, may not be imputed to BCRA. Accordingly, we conclude that the express waiver exception – § 1605(a)(1) – does not apply to this case.[86]

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85 *BCRA II*, 652 F.3d at 196-97 (citing 28 U.S.C. § 1611(b)(1)).

86 If we were to determine that these allegations *did* rebut the *Bancec* presumption, we would then be required to resolve two additional legal questions before recognizing a waiver of BCRA's sovereign immunity under § 1605(a)(1): (1) whether Argentina's waiver of immunity in the FAA covered a declara-

B. Commercial Activity

The second exception to sovereign immunity relied upon by the District Court is the "commercial activity" exception codified at 28 U.S.C. § 1605(a)(2), which, in relevant part, provides that a foreign state is not immune in an action "based upon a commercial activity carried on in the United States." This exception applies only when there exists "a degree of closeness" between the gravamen of plaintiffs' complaint and the commercial activities engaged in by the foreign state or instrumentality.[87]

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tory judgment such as the one requested here—*i.e.*, one designed to permit attachment of unspecified funds in unnamed foreign jurisdictions; and (2) whether that waiver may be imputed to BCRA, such that BCRA would then be held liable for all of plaintiffs' judgments against Argentina. Because we conclude that the TAC fails at the first step—*i.e.*, that the TAC does not rebut the presumption that BCRA is a separate juridical entity—we need not, and do not, reach these additional questions.

[87] *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 156 (2d Cir. 2007) (internal quotation marks omitted); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993) (in order for a suit to be based upon commercial activity carried on in the United States, that commercial activity must form the foundation for "those elements of a claim that, if proven, would entitle [the] plaintiff to relief under his theory of the case"); *Reiss v. Société Centrale Du Groupe Des Assurances Nationales*, 235 F.3d 738, 747 (2d Cir. 2000) ("To sustain jurisdiction on this basis, there must be a significant nexus . . . between the commercial activity in this country upon which the exception is based and a plaintiff's cause of action.") (citation and internal quotation marks omitted); *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000) (the FSIA's commercial activity exception requires "a degree of closeness between the acts giving rise to the cause of action and those need-

Here, the gravamen of the TAC is that BCRA, as Argentina's purported alter ego, is liable for the judgments resulting from Argentina's default on its FAA bonds.[88] As noted above, BCRA was not a party to the FAA and was not involved in Argentina's decision to cease making principal and interest payments on FAA bonds. Therefore, the gravamen of plaintiffs' claim on the merits is based on a series of actions taken by BCRA *after* 2001.

However, none of these actions after 2001 – loans made by BCRA to Argentina, coordination of monetary policy, the appointment and removal of BCRA governors – are commercial activities that occurred in the United States.[89] In fact, BCRA's only alleged commercial activity in the United States was its use of its FRBNY account to purchase dollars. Plaintiffs assert that these dollars allowed BCRA to make loans to Argentina, which Argentina then used to re-

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ed to establish jurisdiction that is considerably greater than common law causation requirements"). *See also ante* note 4.

88 As stated above, the TAC's claim on the merits is that the BCRA is the "alter ego" of Argentina and, therefore, BCRA's funds should be generally attachable to satisfy Argentina's debts. Separately, plaintiffs have invoked BCRA's "alter ego" status as a basis for waiving BCRA's sovereign immunity. Accordingly, the facts underlying plaintiffs' merits and jurisdictional claims overlap significantly. This opinion concerns only the basis for jurisdiction—*i.e.*, the waiver of BCRA's sovereign immunity—not the merits of plaintiffs' request for a declaratory judgment.

89 *See* 28 U.S.C. § 1605(a)(2) (stating in relevant part that a foreign state is not immune from any action "based upon a commercial activity carried on *in the United States*") (emphasis supplied).

pay dollar-denominated debts to creditors other than plaintiffs.[90]

The fact that these dollars were delivered to BCRA's account with the FRBNY, however, is entirely incidental to plaintiffs' claim on the merits-that claim would be no different had BCRA deposited those dollars in any other bank abroad. In this way, plaintiffs' claims are similar to those asserted in *Kensington International Ltd. v. Itoua*.[91] There, a creditor of the Republic of Congo alleged that a state-owned oil company had entered into pre-payment agreements in exchange for oil rights, which caused Congo's oil revenues to be diverted away from the creditor. The creditor attempted to invoke the FSIA's commercial activity exception on the grounds that: (1) the oil at issue was shipped to the United States; and (2) the premium payments were made in the United States. We rejected the creditor's argument, however, reasoning that the requisite nexus did not exist between the commercial activity in the United States (the shipment of oil and the premium payments), and the gravamen of the complaint (the pre-payment agreements executed in France). Because the alleged activity in the United States was

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90 As we previously noted, it is entirely unremarkable that BCRA maintained a foreign-central-bank account at the FRBNY. *See BCRA II*, 652 F.3d at 177 ("Like many central banks around the world, BCRA maintains a foreign central bank account at the FRBNY in which, among other things, it manages dollar-denominated reserve holdings."); *see also id.* at 177 n.7 ("FRBNY provides accounts in which approximately 250 foreign central banks and monetary authorities manage foreign exchange reserve holdings and other property.").

91 505 F.3d 147 (2d Cir. 2007).

entirely incidental to the improper conduct, we declined to apply the commercial-activity exception to waive sovereign immunity.[92]

As in *Kensington*, the claim here also lacks any nexus between BCRA's commercial activity in the United States (the purchase of dollars through the FRBNY account) and the gravamen of the complaint (the alter-ego claim, which turns on loans made by BCRA to Argentina in Argentina). It is similarly incidental that BCRA purchased these dollars using an account in the United States. Whatever adverse consequences plaintiffs allegedly suffered from the BCRA's loans to Argentina, they would have suffered the same consequences had BCRA used any other bank account in the United States or abroad.

Accordingly, adopting plaintiffs' theory for jurisdiction here would dramatically expand the scope of the commercial-activity exception to sovereign immunity. Any allegation of the wrongful use of dollars outside the United States would conceivably lead to a sovereign immunity waiver, so long as the plaintiff could show that these dollars were acquired in U.S.-based transactions. Given New York's role as a financial center, every country and every central bank would be at risk of losing their sovereign immunity on this basis. As the United States argued as *amicus* in *BCRA II*, weakening the immunity from suit or attachment traditionally enjoyed by the instrumentalities of foreign states could lead foreign central banks, in particular, to "withdraw their reserves from the United States and place them in other countries. Any significant withdrawal of these re-

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92 *Id.* at 156-58.

serves could have an immediate and adverse impact on the U.S. economy and the global financial system."[93]

Because such a capacious understanding of the commercial-activity exception is inconsistent with the FSIA's presumption that foreign states and instrumentalities enjoy sovereign immunity, we decline to adopt plaintiffs' proposed rule. Accordingly, we hold that the commercial-activity exception to sovereign immunity – § 1605(a)(2) – does not apply to this case.

CONCLUSION

We do not condone or excuse Argentina's continuing failure to pay the judgments duly entered against it by the District Court. Our decision that BCRA may invoke its own sovereign immunity in this lawsuit is not intended to allow the Republic to avoid its bargained-for obligations, or to continue shirking the debts it has the ability to pay, although we suspect that this will be a predictable and unfortunate outcome of our decision.

Nonetheless, BCRA is entitled to invoke its own sovereign immunity as a defense to this lawsuit, unless one of the exceptions codified in the Foreign Sovereign Immunities Act ("FSIA") applies. Because both of the exceptions relied upon by plaintiffs fail as

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93 J.A. at 3550-51 (citation omitted); *cf. Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 62 (2d Cir. 2009) ("Undermining the efficiency and certainty of [electronic] fund transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York's standing as an international financial center.").

a matter of law, the District Court erred in denying BCRA's motion to dismiss under the FSIA.

In summary, we hold the following:

(1) We have jurisdiction under the collateral-order doctrine to review the District Court's threshold determination that BCRA waived its sovereign immunity pursuant to 28 U.S.C. § 1605(a)(1) (the express waiver exception) and 28 U.S.C. § 1605(a)(2) (the commercial activity exception).

(2) *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*") sets a high bar for when an instrumentality will be deemed an alter ego of its sovereign state. On these facts, neither prong of the *Bancec* test is satisfied—Argentina does not exercise sufficiently extensive control over BCRA's day-to-day operations, and recognizing BCRA's separate status would not constitute a "fraud or injustice" within the meaning of *Bancec*. Accordingly, Argentina's sovereign-immunity waiver in the FAA may not be imputed to also waive BCRA's independent sovereign immunity.

(3) BCRA's use of its FRBNY account is too incidental to the gravamen of plaintiffs' claim to serve as the basis for waiving BCRA's sovereign immunity under the commercial-activity exception to the FSIA.

Accordingly, we **REVERSE** the District Court's order of September 26, 2013, and we **REMAND** the cause with instructions to dismiss the Third Amended Complaint with prejudice.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EM LTD. and NML CAPITAL, LTD., Plaintiffs, - against - BANCO CENTRAL DE LA REPÚBLICA ARGENTINA and THE REPUBLIC OF ARGENTINA, Defendants.	06 Civ. 7792 (TPG) **ORDER**

Plaintiffs EM Ltd. and NML Capital, Ltd. bring this action for a declaratory judgment against defendants Banco Central de la República Argentina ("BCRA") and the Republic of Argentina (the "Republic") and for money damages against BCRA, as an alter ego of the Republic. The Republic and BCRA filed separate motions to dismiss the plaintiffs' third amended complaint.

For the reasons stated by the court at oral argument on September 25, 2013, defendants' motions to dismiss are denied.

This order resolves the motions located at Doc. Nos. 168 and 174.

SO ORDERED.

Dated: New York, New York
September 26, 2013

s/

Thomas P. Griesa
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NML CAPITAL, LTD., et al.,

Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,

06 CV 7792 (TPG)

Defendants.

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New York, N.Y.
September 25, 2013
3:10 p.m.

BEFORE:

HON. THOMAS P. GRIESA,

District Judge

* * *

(Case called)

THE COURT: This revisits some issues we've had, so I'm not going to handle the argument in the usual way. The presentation by the plaintiffs is very powerful, to say the least.

It builds on an earlier decision which I rendered when we were dealing with possible attachment or

execution of money at the federal reserve. And I held at that time that BCRA was the alter ego for the purpose of dealing with that fund. The Court of Appeals reversed, but did not really reverse in any sense to any degree what I had said about the alter ego issue. Now there is more information relevant to the alter ego issue which the plaintiffs have brought up.

The problem is whether it is appropriate to enter a declaratory judgment. I'm looking now at the plaintiff's brief, page 33: Declaratory relief will resolve the ongoing dispute between plaintiffs and defendants regarding whether BCRA can be held liable for the republic's debts to plaintiffs.

At page 34: There is no doubt that declaratory relief would serve a useful purpose in settling the legal relations at issue and in affording relief from the controversy giving rise to this proceeding. It would confirm and reduce to a final judgment this Court's prior ruling on the issue of whether BCRA can be held liable for the republic's debts to plaintiffs.

Now, I don't recall that we have had some ongoing controversy about whether BCRA would be liable for the debts of the republic. We had the one issue about the fund at the Federal Reserve Bank, but we haven't been having an ongoing issue about whether BCRA would be liable for the republic's debts to the plaintiffs. Have we? I don't know of such ongoing controversy.

MR. COHEN: You're absolutely correct that in the context of an attachment your Honor found that BCRA is the alter ego of Argentina.

THE COURT: Either go to the lecturn or keep seated because the microphones don't reach too well.

MR. COHEN: It's Robert Cohen from Dechert for NML Capital.

In the context of the attachment, you found that BCRA was the alter ego of Argentina. The benefit of a declaratory judgment will be that that issue will be resolved for once and for all; that is, the assets.

THE COURT: For once and for all to take care of what issues?

MR. COHEN: Finding assets that we can enforce against. We would like to be able to have a judgment that holds BCRA liable for the judgments entered against Argentina that we may enforce as a judgment if we find assets anywhere.

THE COURT: Before this third-amended complaint, I've never been asked to hold that BCRA is liable for in a general way for the debts of the republic to these plaintiffs.

I don't think I've even ever been asked to do that before.

MR. COHEN: That would be the consequence of an alter ego finding; that is, the alter ego will be the same as Argentina and its assets will be available as a general proposition for the debts of Argentina.

THE COURT: This just jumps way too fast too far.

MR. COHEN: Actually, this was in our first complaint as an allegation. A request for relief in our very first complaint was that you enter a money judgment. It was, in fact, your Honor's suggestion

that we break that out as a separate cause of action, that we ask for a money judgment against BCRA as a consequence of the declaration that they are one.

This goes this goes back to 2005/2006, your Honor. And the first time we sought to attach assets at BCRA was on the basis that there had been an announcement that Argentina was going to use funds at BCRA to repay the IMF loan. And we brought an ex parte attachment proceeding.

THE COURT: But that was about the fund at the federal reserve, right?

MR. COHEN: Yes. And we said the evidence that we'll be able to present to you will show such complete domination and control.

THE COURT: I know that, but the thing is, that related to an attempt to attach or execute upon a very specific fund and that was the money, a hundred million dollars or so, at the Federal Reserve Bank.

MR. COHEN: Yes.

THE COURT: Maybe it was pleaded, and it doesn't make a lot of difference, but I have never really had any litigation about the broader issue of whether BCRA would be liable in a general way for the debts of the republic to the plaintiffs.

In my view and, obviously, it's true as a matter of fact, it's a very different matter to deal with a specific fund, and we had a lot of evidence about that fund, what it was and so forth. It was evidence about that fund.

The question of whether the BCRA in a general way is liable for the debts of the republic, I've never made any holding about that, and I really have never even had a litigation, I don't think, and I could be forgetting something, but I don't think I really had the issue come up and really be discussed among us about a general liability.

MR. COHEN: I'll put it in context, your Honor.

When we did that attachment action and filed our complaint, one of the first amended complaints had a cause of action, a separate cause of action, asking for a money judgment. That response to that motion, that complaint, was deferred. We kept extending the time to deal with the issue of that complaint until after the Second Circuit resolved the attachment of the assets that your Honor was focusing on.

Always in the background was the ultimate issue of alter ego. And, your Honor, when you focused on the assets that we were seeking to attach, one of the things that you needed to address was is BCRA the alter ego of Argentina. Because if it's not, I don't even have to worry about whether that asset is being used for commercial activity and all the other issues.

So, the finding that BCRA was, in fact, the alter ego was a predicate to get to the analysis of the assets at question. And it was what the Second Circuit focused on, these assets.

THE COURT: You're not really getting my question. I held, and still believe it is correct, although the Court of Appeals reversed me on another point, but I believe it is correct to say and I think it was correct to say that BCRA was the alter ego of the re-

public for the purpose of dealing with that particular fund.

I want you to focus on this: In my view, and I think it's transparent, that is to say, BCRA was the alter ego of the republic in order to deal with that particular fund; it goes way beyond that to say that BCRA is liable in a general way for the debts of the republic.

MR. COHEN: All we are asking for, your Honor, is for you not to dismiss the complaint but to allow us to persuade you that BCRA is, in fact, for all purposes the alter ego. That's not a ruling you need to make today.

All you need to do today is say we pled enough to survive any motion to dismiss and we have jurisdiction. And then we'll get on with proving the merits of the case. We're not moving for summary judgment today; we're not asking you to find that ultimate conclusion today.

THE COURT: I really have a question of whether there is a cause of action here for declaratory relief. Maybe you just don't want to address it. I don't know.

But the thing is, it seems to me on this motion to dismiss, I'm looking at page 33 of your brief, "Declaratory relief will resolve the ongoing dispute between plaintiffs and defendants regarding whether BCRA can be held liable for the republic's debts to plaintiffs."

That's in your own brief.

MR. COHEN: And that means liable in a general sense as the alter ego for the debts that are owed to us by the republic. That's the question.

MR. RIVKIN: David Rivkin representing EM Limited, the other plaintiff. Let me put those statements in context.

THE COURT: Please. That's fine.

MR. RIVKIN: As Mr. Cohen said, we're not asking you today to issue a declaratory judgment that they are liable for all the debts going forward.

We have properly pled an alter ego complaint. We have pled a complaint that has jurisdiction. We have pled the facts that show that. The language on which you have focused was in response to an argument that BCRA made in their motion to dismiss.

That motion said the Court should exercise its discretion under the declaratory judgment act to decline jurisdiction and dismiss the complaint, and then it went on to say an alter ego declaration would neither serve a useful purpose nor finalize the controversy or offer relief from uncertainty.

First of all, BCRA recognizes that this is a discretionary act on your part.

THE COURT: You're not getting my question at all.

MR. RIVKIN: I think I am. We have pled a declaratory judgment act. They are asking you to decline jurisdiction on a discretionary basis because they think ultimately it might not serve any purpose.

THE COURT: You're not really addressing my question at all. Now, I have a question, and that is,

whether there is a purpose to be served within the meaning of the declaratory judgment statute, a purpose to be served to have declaratory relief. And to say that all that's going on is a motion to dismiss and so forth, of course.

But the question before me is, is this a meritorious claim, and I don't think either of you want to really address that.

MR. COHEN: I can tell you what we would do if we get to declaratory judgment and how would it help us.

THE COURT: Yes.

MR. COHEN: What are we going to do practically with the declaratory judgment or the money judgment that we have asked for?

Your Honor, has allowed us to have discovery into the assets of BCRA. Let's assume that we can find that BCRA has deposits at the Federal Reserve Bank in California. I want to take my judgment that they are liable to me for the amounts that are owed under the bonds, go to California and attach that account without having to go through an alter ego proceeding in California.

Another example, your Honor, you may remember BIS, the Bank for International Settlements in Geneva where Argentina moved its money to BCRA's account there. We tried to take discovery and your Honor declined to give it to us because you developing didn't think you have jurisdiction over BCIS, but you said you would be willing to help us if that came up again.

BIS has immunity from attachment; its own immunity. It has told our counsel in Switzerland and it's in the record that if.

THE COURT: What is BIS?

MR. COHEN: It's the Bank for International Settlement. It's sort of the central bank for central banks. It's where central banks deposit money.

THE COURT: It's not Argentine.

MR. COHEN: No. It's in Switzerland. It's an international organization. And Argentina has deposited essentially all of its reserves at the BIS disproportionate to any other central bank. It has moved its money there because it enjoys it thinks immunity from attachment. The immunity belongs to BIS itself under Swiss law. BIS can't be sued unless it allows itself to be sued.

It has said the reason it's not willing to allow us to reach those funds is because BCRA is separate from Argentina and Argentina is our debtor.

THE COURT: Say that again.

MR. COHEN: It has said it will not –

THE COURT: Who has said?

MR. COHEN: The Bank for International Settlements, BIS. When we tried to attach funds there. It asserted its immunity.

THE COURT: Did you bring a proceeding in Switzerland?

MR. COHEN: We did, your Honor. It asserted its immunity, and that immunity was upheld. But it said the reason that it asserted that immunity was

because BCRA, in its view, was separate from Argentina; and BCRA, the Central Bank of Argentina, had the account at BIS. So, BIS was not going to let anyone attach it. It wasn't the same entity.

THE COURT: But the proceeding you brought in Switzerland was against whom?

MR. COHEN: Argentina on the basis that the money in the account at BIS belonged to Argentina; on the basis that both it was its money and it was the alter ego of BCRA.

THE COURT: I take it that the actual deposit was in the name of BCRA.

MR. COHEN: That's correct. It was on that basis that BIS declined to waive its own immunity and allow the proceeding to go ahead but indicated that if there was reason to believe that if BCRA was in fact one in the same with Argentina, it might look at it differently. I'm not representing to the Court that it will, but we have reason to believe it might. And that suggests that we may be able to have access to $40 billion that's on deposit at the BIS if we can take to BIS a declaration from this Court that in this Court's view, BCRA is in fact the alter ego of Argentina. That's one very practical example.

That example gets repeated when I suggest that BCRA has money on deposit at other places around the world. We know at one time they had funds on deposit in Germany, Euro dollar deposits, Euro deposits. If we could go to Germany and argue that they're the alter ego, we might be able to attach those assets.

Now, declarations from lawyers in England and France and Germany have been submitted in support of the motion to dismiss to suggest that it's a waste of time; we can't do that. My representation to the Court is each one of those declarations is equivocal in some important respect.

It's the lawyers' view that a court would probably do something or it was unlikely it would do something. We would like to take the declaratory judgment and a money judgment to Frankfurt and argue that the alter ego ruling should be recognized there and that we should have access to those funds. Those are the practical ways in which we would be able to take advantage of a judgment against BCRA. It's not purely hypothetical.

MR. RIVKIN: If I may just add one other thing. The purpose of the declaratory judgment act, of course, since you're asking why a declaratory judgment, is so that we don't need to relitigate the issue. That's why you ask for a declaratory judgment when there's an ongoing controversy so the same issue doesn't need to be relitigated every place whether we find assets in California or Switzerland or otherwise.

As Robert said, having this declaratory judgment settles that ongoing dispute between us and BCRA about whether they are the alter ego. Otherwise, we have to litigate it in the context of particular assets over and over again, and we've seen how long it can take to litigate that.

What we're asking you to do and the reason why parties ask for a declaratory judgments is to have a ruling on the issue that can then be used to resolve future issues.

MR. NEUHAUS: May I be heard.

THE COURT: Can I question the lawyer for BCRA.

MR. NEUHAUS: That's me. Joseph Neuhaus from Sullivan & Cromwell.

THE COURT: I know this is in the record, but just refresh my memory. What does BCRA do?

MR. NEUHAUS: It's the Central Bank of Argentina.

THE COURT: As the central bank, again, what does it do?

MR. NEUHAUS: It's a separate instrumentality that engages in all kinds of activities, supervising the stock market, it engages in foreign exchange trading to maintain the value of the currency and a whole lot of other activities that central banks traditionally do.

If I may respond to what was just said.

THE COURT: Can you just continue with my question for a moment.

MR. NEUHAUS: Sure.

THE COURT: You see, what has happened in this litigation, there's been a lot of evidence of certain things that BCRA does, but what I'm really trying to get beyond that and you're responding, but can you just elaborate on what you've just said a little bit.

MR. NEUHAUS: There is in the record this statute of the charter of the central bank which lists all of its duties and they include all kinds of duties.

It's very much like what the fed does here. It's a little bit broader because they have a jurisdiction over the banking system generally.

THE COURT: You mean in Argentina.

MR. NEUHAUS: In Argentina.

For example, banks have to post reserves to secure their foreign exchange and that's posted with the central bank. They do supervise, as I said, the stock exchange. They do engage in trading to maintain the currency. There's a whole host of activities.

THE COURT: Are you indicating that local banks have deposits at the central bank?

MR. NEUHAUS: Yes, local banks do have deposits. They have a requirement that they post certain reserves to secure their own holdings of foreign exchange. That's just one of many functions.

THE COURT: Please don't read the statute.

MR. NEUHAUS: I won't. I'm just trying to remind myself of some of the functions.

THE COURT: What does the central bank disburse money for? In other words, they take in certain entities deposit money with them. What do they disburse money for?

MR. NEUHAUS: For example, those entities may reduce their reserves, the banks may reduce their reserves and a central bank would of course, disburse that money. The bank would also use foreign exchange, let's say, they have dollar reserves, they would use those funds to buy pesos. If it was in the bank's view necessary to maintain the value of the currency, they would pull pesos out of the market

and they would use dollars, for example, to buy the pesos in the Argentine market.

It's one of the things central banks do to maintain the value of the currency every day.

THE COURT: I think that's one of the kinds of things the Court of Appeals referred to.

MR. NEUHAUS: Yes. They do print money. They also issue debt, domestic debt.

THE COURT: In what way do they print money? Do they buy?

MR. NEUHAUS: They're responsible for the supply of pesos in the Argentine economy. It's a whole host of central banking functions that are engaged in by all central banks around the world.

I'm not sure whether that's responsive to your questions.

THE COURT: It is. A declaratory judgment, if I might just address a little bit of what was said, it's not intended to be a stepping stone to other litigation. A declaratory judgment is supposed to end litigation. So, the concept that you go and get a declaratory judgment in order then to take it somewhere else is not how a declaratory judgments are supposed to work.

If they were to work that, it wouldn't make any sense. In this case, for example, they haven't found any assets in the United States that are attachable. They're not likely to find any assets anywhere in the world that are attachable because central bank immunity around the world in most countries, and certainly in all the countries they mentioned, is much

stronger than in the United States. And that's what the evidence here says and they haven't offered any evidence, any declarations, anything, that suggests otherwise in this record so that the BIS's immunity is absolute. It is not subject to attachment except under a treaty that creates the BIS.

So, the concept that you could ever take a declaratory judgment from the United States and go elsewhere and get somebody to recognize it in order to allow attachment of funds is completely fanciful and speculative.

THE COURT: The problem that exists in this case is what I'll call irregularities. What you have is something that I hope would not exist with England or Germany, and that is a republic which will not pay its just debts. And what you further have is what I would call irregular usage of the central bank, whether irregular is the best word, but I think everybody knows what I'm talking about.

This is what I talked about in my original decision. It's what is talked about in the complaint here, and that is, that this is not the bank of England; it's not the Federal Reserve Bank of the United States. It is a bank which is the central bank of a country that will not pay its contractual just debts as reflected in a very recent Court of Appeals decision, which I'm sure you have read.

Then what you have, in addition to what I'm sure is very regular, very legitimate central bank functions which you've described very well, what you have is the use of the central bank in ways that I have described in an earlier decision and I describe here.

What you have is a problem that would not exist if all were regular and all were honest which is what you would like to be talking about, but it doesn't exist here. And that's the problem of the Court. It doesn't exist.

You've got a dishonest situation in the republic, and dishonesty basically is what has been found by our Court of Appeals. To say that it should be treated in the regular way, of course, you'd argue that, but we don't have a regular situation, and that's my problem.

MR. NEUHAUS: May I. When I mentioned Germany and England and so forth, I wasn't trying to compare the activities of the Central Bank of Argentina.

THE COURT: When it happens in Germany and England, probably things are pretty regular, but they are not regular in Argentina. They are not regular.

MR. NEUHAUS: I was trying to make a different point. I'm sorry if I was unclear.

I was just responding to the point that they could take a declaratory judgment from this Court and go to England and attach assets.

THE COURT: I know.

MR. NEUHAUS: Okay.

THE COURT: Maybe that's the point you were making, but I'm talking about a different point.

MR. NEUHAUS: At this stage on a motion to dismiss, your Honor, the question I think is the one

that you posed, which is, is this an appropriate case for a declaratory judgment.

We submit, and we think that the record indicates, that there is no way that a declaratory judgment would in fact resolve anything.

If a declaratory judgment is needed to obtain an attachment in England or in Switzerland, bring the attachment, you bring the action where the assets are.

And one reason for that, your Honor, is that a declaratory judgment here –

THE COURT: You see, what you're talking about, of course, it's correct, but what the Court is faced with is that for 11 years or so because of the refusal of the republic to pay its contractual just debts, the plaintiffs have been seeking ways to recover. They're seeking ways to recover against somebody who owes them a lot of money and won't pay. And it's been going on since 11 or 12 years.

The thing is that there is some merit to the idea that a finding by this Court confirming what I have already found would be of legitimate use to the plaintiffs here in their ongoing effort to recover on their very large judgments.

MR. NEUHAUS: May I respond on that.

THE COURT: Yes.

MR. NEUHAUS: As your Honor said a few minutes ago, your Honor addressed alter ego in the context of a particular fund.

Your Honor has not, as far as I know, ever held that BCRA is liable for all the debts of the republic

which is the declaration that they're seeking, in a general way, which would require a very expensive inquiry into the republic's control over the day-to-day activities across the waterfront.

THE COURT: Let me just say very quickly, I don't buy the idea that BCRA is liable for all the debts of the republic.

MR. NEUHAUS: That is the declaration they're seeking; that is the cause of action they're seeking.

THE COURT: What Mr. Cohen spoke of is something that would be more specific. And it is certainly conceivable that the plaintiffs could find some deposit or some asset of BCRA which would legitimately be available to help satisfy the unpaid judgment debt.

MR. NEUHAUS: And if they do, your Honor, then they bring an alter ego action.

THE COURT: The thing is, let us suppose they find something in California or the Cayman Islands or somewhere. So, they go to the court in California or the Cayman Islands or Spain or wherever, and they sue BCRA. Then they say BCRA, this asset, this account should be available to help pay the judgment debt because the judgment debt, of course, is the debt of Argentina, but for the purpose of dealing with this asset, you should consider BCRA the alter ego of the republic.

That's really what I did with the federal reserve situation; and the Court of Appeals didn't disturb it for that reason. But the thing is, what the plaintiffs are saying is, they should have available to them the findings of this Court memorialized in a formal way

so that they don't have to go around and start anew this idea of the alter ego situation.

In other words, right now what exists is my finding and holding in the federal reserve situation which is not now a formal judgment. They're trying to get a formal declaration which they can say represents the formal declaration of the Southern District of New York. They'd like to have it embodied in a judgment, in a declaration which doesn't exist right now.

MR. NEUHAUS: Your Honor, that's a very different beast than what they have now because there's been no trial. There's been no evidence. Everything was based on newspaper articles. So, you're talking about an immense proceeding to examine individuals.

THE COURT: I don't think it's such an immense proceeding at all.

MR. NEUHAUS: Your Honor, you have to get testimony.

THE COURT: What would be so immense about it?

MR. NEUHAUS: They challenge decisions about whether to increase reserves at a particular time. We have offered evidence in our papers here that says that was in response to a fluctuation in exchange rates. They say it was at the command of the president at that time.

THE COURT: All they're saying is we ask the Court not to dismiss this case.

Actually, they're not asking at this moment for a judgment. Right?

MR. COHEN: That's correct.

MR. NEUHAUS: That's correct. This is a motion to dismiss.

THE COURT: And you're opposing the motion to dismiss, but you're not asking for an affirmative judgment on this motion.

MR. COHEN: That's correct, just to be able to pursue the action; that's all we're asking for.

MR. RIVKIN: And obtain the discovery to prove the points that Mr. Neuhaus says we can't prove. Once again, Argentina is trying to cut us off from the legitimate processes of these courts to inquire into their actions.

THE COURT: Trying to cut off what?

MR. RIVKIN: Trying to cut off discovery, trying to cut off an inquiry. Mr. Neuhaus raises a specter of a trial on the alter ego action.

THE COURT: I'm sorry. I missed your name.

MR. RIVKIN: David Rivkin, again, for EML.

My point was, what Mr. Neuhaus was saying by trying to raise a false specter, as you said, of a massive trial on the alter ego issue is, once again, cut us off from the legitimate processes of this Court.

We have a right to be able to pursue our claim that it's an alter ego and producing the evidence and convincing you of that finding eventually and to enter a different kind of declaratory judgment. But what Mr. Neuhaus is saying is we're not going to be

able to prove it. It's going to be a big trial. That's not what one decides on a motion to dismiss.

MR. NEUHAUS: The reason I was mentioning that is that is why declaratory judgments are not used to set up findings that can be used in other proceedings. Declaratory judgments are supposed to end litigation, end disputes.

MR. COHEN: Can I respond to that one point.

THE COURT: What you really will not reckon with is the peculiar circumstances of this litigation. What you've said might apply to some simple, straight-forward litigation, but this is not what we have here.

You are now entering into the arena, and you've been here before, of a very unusual litigation which is caused by the republic. The extraordinary length and difficulty of all of this is caused by the republic's failure, intentional failure to pay its just debts.

We don't have a standard, simple, straightforward, nice, easy kind of litigation that you're talking about. We've got a different animal.

Now, let me ask this: Is there anything in the Foreign Sovereign Immunities Act which requires dismissal of this action, Mr. Cohen?

MR. COHEN: No, your Honor.

MR. NEUHAUS: I take it that's a question more to me.

THE COURT: I'll take an answer from anybody.

MR. NEUHAUS: The answer is yes, your Honor. The Foreign Sovereign Immunities Act does not

permit this action to go forward. They have to find an exception to the immunity of the central bank.

They have argued two exceptions, your Honor: One is waiver by the republic, not by the central bank; and the other is commercial activities that are the basis, they claim, of the alter ego action.

On the first, waiver, your Honor, the Second Circuit in its opinion in this case in 2011 squarely held that the republic's waiver does not extend to the BCRA, even assuming that the alter ego was established.

THE COURT: That was in applying 1611.

MR. COHEN: 1611.

MR. NEUHAUS: But the Second Circuit in that decision very clearly relied on waiver decisions from 1605, the section that's at issue here, so the test is the same. Just because you're an alter ego does not mean that the waiver that the republic gave in 1994, long before any alter ego relationship is said to have arisen, applies to the bank.

The cases that they rely on in this case are all cases in which the controlled entity was acting as an agent in giving the waiver, in doing the activity at issue. That's not the case here.

Here, the alter ego evidence starts in 2001 when all the turnover in directors and the governors of the bank is alleged to have started. The waiver was given in 1994. The waiver is not a product of control by the republic on these allegations.

The Second Circuit didn't say because they're an alter ego, the republic's waiver applies to the bank.

The Second Circuit said, no, the waiver doesn't mention the bank; therefore, it doesn't apply. And there's been no waiver of immunity under the Foreign Sovereign Immunities Act. So, the waiver, your Honor, doesn't work.

The second basis that they argue for jurisdiction under the Foreign Sovereign Immunities Act is that the commercial activity in the United States is the heart of the alter ego claims. The Second Circuit requires a very close connection between what they call the gravamen of the complaint and the activities in the United States.

The gravamen of the complaint in this case is the alleged control by Argentina of the bank, and again, across the waterfront, across the entirety of its activities because that's the test, that you have to have an overarching, day-to-day control test.

So, the gravamen of the complaint is all about the control exercised by Argentina over the bank, and all of that happens in Argentina. All of the alleged direction to accumulate reserves or the directions alleged to lend money to Argentina, all of that, the directions all occur in Argentina.

You can't just say, well, there's some link into the United States. There are other circuits that say as long as one element of the cause of action occurs in the United States, that is enough. The Second Circuit has expressly rejected those cases. They rely on those cases from the Eighth and Ninth Circuits, but the Second Circuit in a case called *Kensington v. Congo* says no, it has to be the gravamen of the complaint.

THE COURT: Mr. Cohen, just start at the beginning. The Foreign Sovereign Immunities Act exists.

MR. COHEN: Yes, your Honor.

THE COURT: BCRA is a foreign entity within the meaning of the Foreign Sovereign Immunities Act.

MR. COHEN: Yes.

THE COURT: There's a special part of the statute that deals with central banks, but aside from that, obviously, the Republic of Argentina is a foreign sovereign within the meaning of the act.

MR. COHEN: Yes.

THE COURT: The BCRA is a foreign sovereign within the meaning of the act. Just start at the basics.

How is there jurisdiction to bring this action against the BCRA? Go to the basics.

MR. COHEN: Two grounds, your Honor. Jurisdiction immunity was waived in the FAA by Argentina. And if BCRA is the alter ego of Argentina, that waiver applies to BCRA. Now, that's law that has been around for a long time. In fact, the *Kensington* case that they cite which was before Judge Preska and which I and Cleary were both involved in found exactly that; that a waiver by the sovereign waives the immunity for its alter ego instrumentality. And in that case, the Court found that the state-owned oil company was the alter ego and that the waiver in the applicable documents of immunity from jurisdiction under the FSIA applied to that alter ego.

What Mr. Neuhaus is arguing is that that law has been completely upset by the Second Circuit's ruling with respect to the attachment.

Your Honor was exactly right: All the Second Circuit said was if you're applying 1611, we're going to look for an explicit waiver with respect to central bank assets. It doesn't matter if it's alter ego. It doesn't matter if it's Argentina's money. If it's used as a monetary authority, as a central bank, and it's in the name of Argentina –

THE COURT: You're not now suing under 1611.

MR. COHEN: Not at all, your Honor.

THE COURT: You're suing under the basic.

MR. COHEN: Jurisdiction, waiver, breach of contract and they're liable for it.

THE COURT: The Section being 1605.

MR. COHEN: 1605, your Honor.

Our second theory is that they have, the BCRA itself, has engaged in commercial activity in this district, and it has done that – the gravamen argument, the nature of our claim, the alter ego claim, I'm sorry, the declaratory judgment claim has to arise out of the activity in the jurisdiction is exactly right.

In the case that he cites, *Kensington*, the reason why the court, the Second Circuit found that there wasn't commercial activity here was because there was nothing that the contract at issue there had to do with New York.

THE COURT: Start again. I was looking at it.

MR. COHEN: Sure.

THE COURT: Start at the commercial activity discussion again.

MR. COHEN: Yes. The argument that Mr. Neuhaus has made is that under the case called *Kensington* the Second Circuit found that the connection between this jurisdiction and the claimed wrong was not close enough. There wasn't enough in New York to allow the commercial-activity-in-New-York exception to apply and that's because there were oil transactions happening around the world but not enough in New York.

Here, we have a claim for a breach of a fiscal agency agreement governed by New York law, subject to jurisdiction in New York, payable in New York, payable by a fiscal agent in New York that is being breached, and payment to us is due in New York.

The gravamen of our complaint is that they should be liable for that debt, the debt that results from the breach of the contract that is focused in New York.

THE COURT: The commercial activity by the republic.

MR. COHEN: By BCRA in New York. BCRA is acting in New York to gather dollars that are used to repay debt to others and not to us, and now, in violation of the contract –

THE COURT: Where is it in the record that BCRA is acting in New York? Where is that in the record?

MR. COHEN: The account at the Federal Reserve Bank, your Honor. They have had that ac-

count for forever and they have it today. And they still use it to gather dollars and remit it to the BIS.

They have an account at the Federal Reserve Bank, and they say that it's crucial that they have that account. You may remember back in 2010 we had an attachment again and they said we can't do our business through BIS in Switzerland; we need to have this account in New York in order to function.

So, there's no doubt that they are acting in New York and that it's crucial to the way they function. They need to be able to move dollars on a regular basis in order to function.

So, the connection between our case, the gravamen of our claim, is that those activities by BCRA are crucial to the perpetration of the fraud or injustice that is the alter ego claim that we are asking you to decide.

We have jurisdiction, both on the waiver of immunity that's imputed to BCRA and on BCRA's activities in this jurisdiction which are the gravamen of our complaint. So, there's no doubt, in our view, that there is no basis to argue that there is any FSIA immunity that applies here.

THE COURT: I'm looking at 1605 now. 1605(a)(1) is about waiver. 1605(2) is about commercial activity.

MR. COHEN: We rely on both of those, your Honor.

You'll notice that in 1605(a)(1) which talks about waiver it says either explicitly or implicitly. That's very different than the explicit waiver that is required under 1611 and in certain other sections. So,

the jurisdictional waiver can be implicit and has been interpreted to be applicable to entities that are found to be alter egos of the sovereign.

THE COURT: The thing that still concerns me, I mentioned this at the outset, and it still concerns me about the plaintiffs' motion, is that a general declaration of alter ego could really have effects or implications beyond what I would intend.

Here's what I'm talking about: I believe that there could be some account or some assets of the BCRA which would be legitimately attached or executed on to satisfy the judgment debts here; and, on the other hand, the idea that BCRA is in a general way liable for the debts of the republic goes way too far.

There certainly have been what I'll call irregularities in the deals between the republic and BCRA, but everything is not irregular. BCRA has legitimate functions as far as the money supply of Argentina and so forth. And the assets of BCRA in a general way cannot, in my view, be said to be applicable to the judgment debts of plaintiffs here.

But in view of the way the republic uses BCRA in what I'll call an irregular way, the kind of thing I've talked about in an earlier decision and you have enlarged upon in your pleading here, it seems to me that there could very well be some account or some asset which would legitimately apply to the judgment debt here.

This arises, to some extent, from the way that the republic uses BCRA in a way that departs from the way the Bank of England would be used, or the

Central Bank of Germany would be used. The republic does not do things in a regular way.

What I'm going to do this afternoon is to deny the motions to dismiss the third-amended complaint. I believe there is jurisdiction in the way Mr. Cohen describes jurisdiction which makes it appropriate to entertain the action; and considering the provisions of the Foreign Sovereign Immunities Act, I believe that there is an implied waiver here and I believe there's commercial activity so that the provisions of 28 U.S.C. 1605(a)(1) and (a)(2) are applicable.

This really is, denying a motion to dismiss, exactly what would emerge from a litigation that has problems. The plaintiffs' position has problems, as I've indicated. But I think those problems do not require the dismissal of the action.

And I want to repeat something which I'm sure I've said maybe more than once this afternoon; and that is, we don't have a republic which is acting in a normal way as far as its debts. We don't have a situation there is a completely regular dealing between the republic and BCRA the way that I'm sure would exist with the Bank of England or the Central Bank of Germany or France or certainly with the Federal Reserve Bank. We don't have that. We have irregularities.

The reason that I believe the action should be held open is I think there is a very legitimate claim by the plaintiffs here that for certain purposes BCRA is the alter ego of the republic.

In the papers before me, the plaintiffs have made a very powerful case of that, and I so held in my earlier decision, and that holding was not what was dis-

turbed by the Court of Appeals. So, there's a very good case of alter ego.

I believe that the Court should entertain the idea that it would be desirable to have this Court with its experience in this case and its background in this case make some kind of a formal ruling of alter ego which could be legitimately used in a proceeding in another state or a foreign country so that the plaintiffs do not have to go to the other state or the foreign country and start in again, once again, and maybe more than once again with this presentation about alter ego.

The motion to dismiss the action is denied. And that's all we can do this afternoon. I'm sure that we'll schedule further proceedings in an appropriate way.

Thank you.

(Adjourned)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of October, two thousand fifteen.

EM Ltd., NML Capital, Ltd.,

Plaintiffs - Appellees,

v.

Banco Central de la Republica Argentina, Republic of Argentina

Defendants - Appellants.

ORDER
Docket Nos:
13-3819 (Lead)
13-3821 (Con)

Appellee NML Capital, Ltd. filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of October, two thousand fifteen.

EM Ltd., NML Capital, Ltd.,

Plaintiffs - Appellees,

v.

Banco Central de la Republica Argentina, Republic of Argentina

Defendants - Appellants.

AMENDED ORDER
Docket Nos:
13-3819 (Lead)
13-3821 (Con)

Appellees, NML Capital, Ltd., and EM Ltd., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX F

28 U.S.C. § 1602

§ 1602. Findings and declaration of purpose

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. § 1603

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

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

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune

from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

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

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(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;

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

and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitra-

tion takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of

notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that

had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110-181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1605A

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign

state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Opera-

tions, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action,

shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1606

§ 1606. Extent of liability

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.

28 U.S.C. § 1607

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a

form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States

of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the

agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the for-

eign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in

aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

APPENDIX G

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EM LTD. and NML CAPITAL, LTD., Plaintiffs, v. BANCO CENTRAL DE LA REPÚBLICA ARGENTINA and THE REPUBLIC OF ARGENTINA, Defendants.	:	No. 06-CV-7792 **THIRD AMENDED COMPLAINT**

Plaintiff EM Ltd. ("EM"), through its attorneys Debevoise & Plimpton LLP, and Plaintiff NML Capital, Ltd. ("NML"), through its attorneys Dechert LLP and Gibson, Dunn & Crutcher LLP (collectively, the "Plaintiffs"), bring this action for a declaratory judgment against Defendant Banco Central de la República Argentina (the "Central Bank") and Defendant The Republic of Argentina ("Argentina" or the "Republic") (collectively, the "Defendants"), and for money judgments against the Central Bank, as an alter ego of Argentina, and allege as follows:

PRELIMINARY STATEMENT

1. This is an action for a declaratory judgment pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57 to determine and resolve questions of actual controversy involving the relationship between the Central Bank and Argentina. In addition, Plaintiffs seek money judgments adjudging the Central Bank, as Argentina's alter ego, jointly and severally liable to satisfy the judgments that have been awarded, or will be awarded, to EM and NML against Argentina based on the Republic's default on its external sovereign debt.

2. EM has a final, non-appealable judgment against Argentina which, with interest as of August 31, 2012, totals $812,546,554.60 million. NML has five final, non-appealable judgments against Argentina which, with interest as of August 31, 2012, total $1,678,609,873.96, as well as six other actions pending in this Court against Argentina in which judgments have yet to be entered. NML has been granted summary judgment in all six pre-judgment cases. When final judgments have been entered in all eleven of NML's actions, NML estimates they will, together with interest, total close to $2.6 billion. Both EM's and NML's actions are based on Argentina's default on its external sovereign debt in late 2001.

3. As a result of Argentina's concerted efforts to avoid paying its creditors, including its systematic removal of assets from the United States so that its creditors cannot reach them, EM and NML have been unable to collect or secure assets to pay their billions of dollars of judgments and claims against Argentina.

4. Over the past eleven years, the Argentine government utilized billions of dollars of reserves nominally held by the Central Bank to repay the Republic's own debts, replaced six Central Bank Governors when they dared to disagree with the Executive Branch on matters involving central banking independence and/or the implementation of central banking policy, legislated to itself tight control over the Central Bank, and took over the Central Bank's function as regulator of monetary policy to promote the political objectives of the Executive Branch. In taking these actions, Argentina is exploiting the $47 billion in foreign-currency reserves that the Central Bank continues nominally to hold. *El pago del cupón se lleva otro 4% de las reservas del BCRA*, LA NACION (Dec. 15, 2011); *Argentina's Stocks, Bonds Extend Gains Ahead Of Long Weekend*, DOW JONES (Dec. 23, 2011). Argentina so extensively controls the Central Bank that a principal-agent relationship exists between them, thereby rendering the Central Bank an alter ego of Argentina.

5. It would be manifestly unjust to give effect to the legal fiction that the Central Bank and Argentina are juridically separate entities because Argentina admittedly exploits that fiction in its ongoing wrongful efforts to evade paying the Republic's creditors, including Plaintiffs. EM and NML are entitled to declaratory judgments expressly adjudging the Central Bank to be an alter ego of Argentina. Consequently, the assets of the Central Bank ought to be treated as Argentina's own and, like any other commercial assets of Argentina, made available to satisfy Plaintiffs' judgments and expected judgments. Furthermore, money judgments should be entered

against the Central Bank expressly adjudging it jointly and severally liable for EM's and NML's separate judgments, and NML's anticipated separate judgments, against Argentina.

6. Plaintiffs file this Third Amended Complaint on consent to set forth facts that have arisen since the Second Amended Complaint was filed. The currently existing (and voluminous) documentary evidence supporting Plaintiffs' allegations is referenced throughout the Third Amended Complaint. Some of that evidence was served on Defendants as exhibits to Plaintiffs' Complaint, First Amended Complaint, and Second Amended Complaint, as well as exhibits to motions seeking provisional relief filed by Plaintiffs on September 28, 2006. Plaintiffs are prepared to provide any and all of the evidence referenced herein for immediate inspection upon request by the Court or the Defendants. Plaintiffs also expect that discovery will reveal additional documentary and testimonial evidence supporting the allegations in this Third Amended Complaint.

THE PARTIES

7. Plaintiff EM is a limited liability corporation organized under Cayman Islands law with its registered office at Queensgate House, 113 South Church Street, George Town, Grand Cayman, Cayman Islands.

8. Plaintiff NML is a limited liability corporation organized under Cayman Islands law with its registered office at Huntlaw Corporate Services, The Huntlaw Building, 75 Fort Street, PO Box 1350, Grand Cayman, Cayman Islands.

9. Defendant Argentina is a foreign state as defined under 28 U.S.C. § 1603(a).

10. Defendant the Central Bank, both as an agency or instrumentality of Argentina and as an alter ego of Argentina, is a foreign state as defined under 28 U.S.C. § 1603(a). The Central Bank is headquartered at Reconquista 266, C1003ABF, Buenos Aires, Argentina, but it maintains assets outside of Argentina, including in the Southern District of New York.

JURISDICTION AND VENUE

11. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1605(a)(1) because Argentina has consented to the jurisdiction of this Court and waived any claim of immunity with respect to this action – including but not limited to sovereign immunity – pursuant to Section 22 of an October 19, 1994 Fiscal Agency Agreement (the "FAA"), and the terms and conditions of the bonds purchased by Plaintiffs. In the FAA, which governs both EM's and NML's bonds, Argentina "irrevocably waive[d] and agree[d] not to plead any immunity from the jurisdiction of any . . . court to which it might otherwise be entitled" in connection with any action to enforce a judgment based on Plaintiffs' bonds. The terms and conditions of these bonds extend this waiver to any action to enforce such a judgment against any of Argentina's "revenues, assets or properties." This waiver can be imputed to the Central Bank as an alter ego of Argentina.

12. This Court also has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1330(a) and 1605(a)(2) because EM's and NML's claims are based

both upon commercial activities that Argentina undertakes in the United States, and upon activities that the Central Bank undertakes in the United States as fiscal agent for and as an alter ego of Argentina.

13. This Court has personal jurisdiction over both Argentina and the Central Bank pursuant to 28 U.S.C. § 1330(b), which extends personal jurisdiction over a foreign state that is not immune from suit and which has been properly served with process pursuant to 28 U.S.C. § 1608(a).

14. Venue is proper in this District pursuant to 28 U.S.C. § 1391(f)(1) because a substantial number of the events and omissions that gave rise to this action, including the entry of separate judgments (and anticipated judgments) against Argentina in favor of EM and NML, occurred in this District, and the Central Bank maintains assets in this District against which Plaintiffs hope to enforce their judgments and anticipated judgments.

FACTUAL ALLEGATIONS

I. PLAINTIFFS' JUDGMENTS AND ANTICIPATED JUDGMENTS AGAINST ARGENTINA

15. At a hearing on October 31, 2003, this Court ruled that the prerequisites set forth in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1610(c), for execution in aid of a judgment against a foreign state had been met, and that judgment creditors could seek execution after January 29, 2004. Argentina has never challenged this ruling.

A. EM

16. Since December 2001, Argentina has been in default on a global debt security (referred to here for simplicity as a "bond") in which EM beneficially owned an interest. On April 10, 2003, EM filed an action against Argentina in this Court seeking to recover hundreds of millions of dollars in principal and accrued interest that Argentina owes to it on this bond.

17. On September 12, 2003, this Court granted EM's motion for summary judgment, holding that EM had an "unconditional legal right to collect on the bond" as a result of Argentina's default. *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507, 2003 WL 22120745, at *2 (S.D.N.Y. Sept. 12, 2003). The Court entered an amended final judgment in the amount of $724,801,662.56 in favor of EM on October 27, 2003 (the "EM Judgment"), which became final and non-appealable on November 30, 2004, after the Court of Appeals affirmed the EM Judgment on August 31, 2004, and Argentina did not seek further review. *See EM Ltd. v. Republic of Argentina*, 382 F.3d 291 (2d Cir. 2004).

18. Post-judgment interest accrues on the EM Judgment, pursuant to 28 U.S.C. § 1961, at the rate of 1.3%. As of August 31, 2012, the amount of the EM Judgment including interest owed by Argentina is $812,546,554.60.

B. NML

19. Since December 2001, Argentina has been in default on certain Argentine securities beneficially owned by NML, including NML's beneficial interests in certain global bonds and certain Floating Rate Ac-

crual Notes which matured on April 10, 2005 (collectively referred to here for simplicity as the "bonds"). NML is the plaintiff in eleven actions pending before this Court seeking to recover, in aggregate, approximately $2.6 billion dollars in principal and accrued interest that Argentina owes to it on these bonds: *NML Capital, Ltd. v. Republic of Argentina*, 03 Civ. 8845 (TPG) ("NML-1"); *NML Capital, Ltd. v. Republic of Argentina*, 05 Civ. 2434 (TPG) ("NML-2"); *NML Capital, Ltd. v. Republic of Argentina*, 06 Civ. 6466 (TPG) ("NML-3"); *NML Capital, Ltd. v. Republic of Argentina*, 07 Civ. 1910 (TPG) ("NML-4"); *NML Capital, Ltd. v. Republic of Argentina*, 07 Civ. 2690 (TPG) ("NML-5"); *NML Capital, Ltd. v. Republic of Argentina*, 07 Civ. 6563 (TPG) ("NML-6"); *NML Capital, Ltd. v. Republic of Argentina*, 08 Civ. 2541 (TPG) ("NML-7"); *NML Capital, Ltd. v. Republic of Argentina*, 08 Civ. 3302 (TPG) ("NML-8"); *NML Capital, Ltd. v. Republic of Argentina*, 08 Civ. 6978 (TPG) ("NML-9"); *NML Capital, Ltd. v. Republic of Argentina*, 09 Civ. 1707 (TPG) ("NML-10"); and *NML Capital, Ltd. v. Republic of Argentina*, 09 Civ. 1708 (TPG) ("NML-11").

20. Final judgment for $284,184,632.20 was entered for NML in NML-1 on December 18, 2006 (the "NML-1 Judgment"). Post-judgment interest accrues on the NML-1 Judgment, pursuant to 28 U.S.C. § 1961, at the rate of 4.95%. As of August 31, 2012, the amount of the NML-1 Judgment including interest owed by Argentina is $374,448,111.66.

21. Final judgment for $311,177,898.00 was entered for NML in NML-2 on June 1, 2009, as amended on June 16, 2009 and October 26, 2011 (the "NML-2 Judgment"). Post-judgment interest accrues

on the NML-2 Judgment, pursuant to 28 U.S.C. § 1961, at the rate of 0.49%. As of August 31, 2012, the amount of the NML-2 Judgment including interest owed by Argentina is $316,160,428.03.

22. Final judgment for $533,378,361.00 was entered for NML in NML-3 on June 1, 2009, as amended on June 16, 2009 (the "NML-3 Judgment"). Postjudgment interest accrues on the NML-3 Judgment, pursuant to 28 U.S.C. § 1961, at the rate of 0.49%. As of August 31, 2012, the amount of the NML-3 Judgment including interest owed by Argentina is $541,918,728.80.

23. Summary judgment for $71,098,000.00 in principal, with interest yet to be calculated, was granted to NML in NML-4 on April 10, 2008. NML calculates that the amount of prejudgment interest owed by Argentina in NML-4 as of August 31, 2012, is $145,759,163.55.

24. Final judgment for $148,781,936.00 was entered for NML in NML-5 on June 1, 2009, as amended on June 16, 2009 (the "NML-5 Judgment"). Postjudgment interest accrues on the NML-5 Judgment, pursuant to 28 U.S.C. § 1961, at the rate of 0.49%. As of August 31, 2012, the amount of the NML-5 Judgment including interest owed by Argentina is $151,164,208.22.

25. Summary judgment for $300,000 in principal, with interest yet to be calculated, was granted to NML in NML-6 on April 10, 2008. NML calculates that the amount of prejudgment interest owed by Argentina in NML-6 as of August 31, 2012, is $588,881.00.

26. Summary judgment for $16,719,628.00 in principal, with interest yet to be calculated, was granted to NML in NML-7 on March 4, 2009. NML calculates that the amount of prejudgment interest owed by Argentina in NML-7 as of August 31, 2012, is $42,484,846.84.

27. Final judgment for $290,270,631.00 was entered for NML in NML-8 on June 1, 2009, as amended on June 16, 2009 (the "NML-8 Judgment"). Post-judgment interest accrues on the NML-8 Judgment, pursuant to 28 U.S.C. § 1961, at the rate of 0.49%. As of August 31, 2012, the amount of the NML-8 Judgment including interest owed by Argentina is $294,918,397.26.

28. Summary judgment for $81,080,000.00 in principal, with interest yet to be calculated, was granted to NML in NML-9 on September 28, 2011. NML calculates that the amount of prejudgment interest owed by Argentina in NML-9 as of August 31, 2012, is $150,840,552.45.

29. Summary judgment for $30,000.00 in principal, with interest yet to be calculated, was granted to NML in NML-10 on September 28, 2011. NML calculates that the amount of prejudgment interest owed by Argentina in NML-10 as of August 31, 2012, is $431,723.92.

30. Summary judgment for $140,889,549.00 in principal, with interest yet to be calculated, was granted to NML in NML-11 on September 28, 2011. NML calculates that the amount of prejudgment interest owed by Argentina in NML-11 as of August 31, 2012, is $310,541,278.20.

II. THE CENTRAL BANK IS ARGENTINA'S ALTER EGO

31. An instrumentality of a foreign state is considered to be the alter ego of its parent when the state controls the instrumentality so extensively that a principal-agent relationship is created between them, or when giving effect to the nominal separateness of the instrumentality would work a fraud or injustice. In this case, Argentina has completely controlled the Central Bank at least since 2001, and continues to do so today. Moreover, Argentina has admittedly exploited the legal fiction of the Central Bank's independence unjustly and fraudulently to avoid paying the Republic's creditors, including EM and NML.

32. Argentina's dominance over the Central Bank is demonstrated in myriad ways, four of which are summarized below and described in detail in ¶¶ 33-113:

- **Argentina owns the Central Bank and, by law, can control nearly all of its activities**. Under the charter governing the Central Bank, which was initially set forth in Law 24.144 (the "Central Bank Charter"), the Argentine government owns the Central Bank and all profits it generates, and has the legal power to control all but a few of the Central Bank's functions. In other words, the Central Bank has extremely limited "***legal*** independence." In recent years, Argentina has severely cabined these few remaining areas of the Central Bank's nominal autonomy and made even the putative legal inde-

pendence of the Central Bank a fiction as a matter of Argentine law.

- **Argentina can use, has used, and to this day continues to use the Central Bank's assets at will.** In December 2005, at the insistence of late former President Néstor Kirchner, the Argentine Congress made billions of dollars of Central Bank reserves available to repay certain of the Republic's debts. Almost simultaneously, President Kirchner issued a presidential decree commanding the Central Bank to make an early repayment of nearly $10 billion to the International Monetary Fund ("IMF") in January 2006 – notwithstanding that this payment violated the Central Bank Charter. The Argentine government has since used Central Bank reserves routinely to pay off the Republic's other debts, including to commercial creditors like Plaintiffs. In March 2012, the Argentine Congress enacted current President Cristina Fernández de Kirchner's proposed legislation making it significantly easier for Argentina to use Central Bank reserves to satisfy the Republic's debts.

- **Argentina controls the day-to-day activities of the Central Bank by replacing any Central Bank official who refuses to do its bidding**. The Argentine government is able to puppeteer the Central Bank by threat of replacing its chief official, the Central Bank Governor. For more than a decade, and in violation of the Argentine Constitution, that position has been appointed on an interim basis through a process that side-steps the Argentine Congress – thereby arming the government with power to replace

any Governor by presidential decree. Argentina has had an astounding ***seven*** Central Bank Governors since 2001 (with three in office for less than a year), notwithstanding that the position purportedly holds a 6-year term. Many of those former Governors have expressly acknowledged that their early departures resulted from efforts to assert some degree of Central Bank independence.

- **The Argentine government dictates monetary policy and controls how it is implemented by the Central Bank.** In the area of developing and implementing monetary policy – the most critical of the Central Bank's few nominally independent functions – the Argentine government has utterly dominated the Central Bank for most of the past decade. Since late 2004, former President Kirchner and President Fernández de Kirchner have forced the Central Bank to pursue highly inflationary policies to serve the government's own political aims in violation of the Central Bank's mandate under its Charter first and foremost to protect the value of the currency. President Fernández de Kirchner continues the Argentine government's domination of the Central Bank. Through the Executive Branch's interference, Argentina has taken over the day-to-day Central Bank activities of buying and selling currency and securities in open market operations, and it has commandeered the responsibility of determining the level of reserves that the Central Bank shall maintain.

A. Argentina Owns The Central Bank And, By Law, Can Control Nearly All Of Its Activities

33. According to Article 1 of its Charter, "[t]he Central Bank . . . is a self-administered institution of the National State governed by the provisions of [its Charter] and other related legal rules." The Argentine government owns the Central Bank and all profits it generates. Central Bank Charter, Art. 1 & 38. When the Complaint was filed, the Central Bank Charter provided that the Argentine government could control virtually everything the Central Bank did, subject to two limitations. *First,* the Central Bank could only lend money to the government under limited circumstances, and subject to clear restrictions on the amount and term of the loan. *Id.*, Art. 19(a) & 20. *Second*, the Central Bank was required to "primarily and essentially maintain the value of legal tender," and in performing this function, to "not be subject to any order or instruction given by the National Executive Power." *Id*., Art. 3. Since the Complaint was filed, even these two limitations – which Argentina routinely directed the Central Bank to violate – have been amended to the point that they have been rendered meaningless.

34. In the past thirteen years, the Argentine government enacted numerous laws that have either amended the Central Bank Charter to serve the government's own policies, enabled the government to exert more control over the Central Bank, or both. The effect of these laws was: *(1)* to increase the amount of money that the Central Bank can itself loan to the government and to expand the circumstances under which such loans can be made; *(2)* to

direct the Central Bank otherwise to make money available for the government's use; *(3)* to increase the already considerable control the government has over the selection and removal of Central Bank officials; and/or *(4)* to expand the market for higher risk government bonds, thereby allowing the government to borrow more money. To illustrate:

- **Executive Decree 1373/1999**, enacted on November 24, 1999, changed the mechanism by which the Governor, Vice-Governor, Directors and Trustees of the Central Bank are appointed, granting the Argentine President the authority to fill these posts "in commission" without seeking confirmation by the Argentine Senate. The Executive Branch has used this power to control Central Bank officials by depriving them of a clear 6-year term and mandate from the Senate.
- **Executive Decree 439/2001**, enacted on April 17, 2001, granted Argentina's banks, which are regulated by the Central Bank, the ability to use Argentine government bonds to meet their reserve requirements, thereby increasing the captive market for these high-risk government bonds. Decree 439/2001 also made it easier for the Central Bank to advance funds to the government by removing certain pre-existing limitations on such advances.
- **Law 25.561**, enacted on January 6, 2002, *(1)* dismantled Argentina's convertibility currency system, *(2)* transferred extraordinary powers that allow Argentina's President, in effect, to rule by decree, and *(3)* enabled the Argentine government to seize for its own use billions of dollars

in reserves that, under the prior convertibility regime, the Central Bank was legally required to maintain.

- **Law 25.562**, enacted on February 6, 2002, amended the Central Bank Charter to implement further the dismantling of Argentina's convertibility currency system, and to allow the Central Bank to "loan" the Argentine government even more money.
- **Executive Decree 401/2002**, enacted February 28, 2002, like Decree 439/2001, expanded the market for Argentine government bonds by increasing the ability of Argentine financial institutions, which are regulated by the Central Bank, to comply with their reserve requirements by holding high-risk Argentine sovereign debt.
- **Law 25.780**, enacted August 27, 2003, again increased the amount of money the Central Bank was authorized to "loan" the Argentine government.
- **Decrees 1599/2005 and 1601/2005**, enacted on December 15, 2005, required the Central Bank to use its reserves to pay debts owed by the Republic to the IMF.
- **Decree 1394/2008**, enacted on September 2, 2008, required that $6.7 billion of Central Bank reserves be used to pay debts owed by the Republic to the Paris Club.
- **Law 26.422**, enacted on November 5, 2008, modified the Central Bank Charter to again increase the amount of money the Central Bank may "loan" the Argentine government, and provided

that such loans could be used for payment of the Republic's liabilities denominated in foreign currency.

- **Executive Decree No. 296/2010**, enacted on March 1, 2010, provided that the Argentine government could use the Central Bank's so-called "freely available reserves" to repay debts of the Republic to international financial institutions.
- **Executive Decree No. 297/2010**, also enacted March 1, 2010, applied Decree No. 296/2010 by mandating the use of $2.187 billion of the Central Bank's reserves to pay debts of the Republic maturing in 2010 that were owed to international financial institutions, with the Central Bank receiving a non-transferrable Argentine government note in return.
- **Executive Decree No. 298/2010**, also enacted March 1, 2010, created the Argentine Fund for the Reduction of Indebtedness (the "Debt Reduction Fund") to pay private bondholders. It was initially funded with $4.382 billion of the Central Bank's reserves and is managed by the Ministry of Economy. In exchange for its reserves, the Central Bank received non-transferrable Argentine treasury notes that pay an interest rate equal to the London Interbank Offered Rate ("Libor") minus 1% – i.e. at effectively zero percent interest.
- **Executive Decree No. 2054/2010**, enacted on December 22, 2010, mandated that $7.504 billion of Central Bank reserves be transferred to the Debt Reduction Fund to pay private holders on bonds maturing in 2011, with the Central Bank

receiving non-transferrable Argentine government notes in return.

- **Executive Decree No. 276/2011**, enacted on March 3, 2011, mandated that $2.174 billion of Central Bank reserves be used to pay debts owed by the Republic to international financial institutions maturing in 2011, in exchange for a 10-year non-transferable Argentine government note that accrued interest at a rate of Libor minus 1% – i.e. at effectively zero percent interest.
- **Law 26.728**, enacted on December 27, 2011, increased the available resources of the Bond Payment Fund to $5.674 billion, funded by the Central Bank's reserves and managed by the Ministry of Economy.
- **Law 26.739**, enacted on March 22, 2012, amended the Central Bank Charter to redefine its purpose – which now includes both promoting monetary and financial stability and promoting employment and economic development with social equity. By eliminating the requirement that the Central Bank's primary mission be to control inflation, this amendment cut back dramatically on the little remaining pretense of legal independence the Central Bank enjoyed. Law 26.739 also amended the Central Bank Charter to increase, once again, the amount of money the Central Bank may loan the Argentine government and the maximum time-period for its reimbursement.
- **Resolution No. 131/2012**, passed by the Ministry of Economy on April 26, 2012, requires the Central Bank to "loan" $5.674 billion of freely available reserves to the Argentine government,

in exchange for a 10-year non-transferable Argentine government note that accrued interest at a rate of Libor minus 1%. – i.e. at effectively zero percent interest.

- **Executive Decree No. 928/2012**, enacted on June 21, 2012, mandated that $2.179 billion of Central Bank reserves be used to pay debts maturing in 2012 that were owed to international financial institutions, in exchange for 10-year non-transferable Argentine-government notes that accrued interest at a rate of Libor minus 1% – i.e. at effectively zero percent interest.

35. The laws, decrees, and resolutions described in Paragraph 34 demonstrate that the Central Bank has no independence from the Argentine government. The Argentine government simply changes the law whenever there is a nominal legal barrier to the Central Bank serving the government's political whims. Indeed, the central focus of these laws is to effectuate the Argentine government's desire to use the Central Bank's reserves to fund its profligate spending habits and selectively pay favored creditors of the Republic, as detailed below.

B. Argentina Can Use, Has Used, And To This Day Continues To Use The Central Bank's Assets At Will

36. The Argentine government's total disregard for the Central Bank's financial autonomy and its unfettered utilization of the Central Bank's assets unequivocally prove the Argentine government's complete appropriation and assimilation of the Central Bank. In the words of one Argentine official, "[Argentina's] reserves ***belong*** to the Government,

not to Central Bank." *Reserves top US$25 billion: Increase of 5.524 billion so far this year*, CLARÍN (Aug. 2, 2005). The government has used Central Bank reserves for itself repeatedly for over a decade – and continues to do so at record pace. As of July 2012, the government's use of Central Bank reserves reached a decade high. *Baten récord los préstamos del Banco Central al Tesoro*, ÁMBITO FINANCIERO (July 16, 2012).

IMF Repayment

37. On December 15, 2005, former President Kirchner announced his intention to use billions of dollars of Central Bank reserves to make an early and complete repayment of Argentina's $9.8 billion dollar debt to the IMF. This was accomplished – without the approval of the Central Bank – through two new presidential decrees that were later rubber-stamped by the Argentine Congress.

38. The first Decree, Decree 1599/2005, declared that the amount of Central Bank reserves ostensibly necessary to back up 100% of the monetary base would be referred to as "restricted" reserves, with only reserves exceeding this amount to be referred to as "unrestricted" reserves. Decree 1599/2005. At the time, Argentina's total reserves equaled US $26.8 billion, and the amount ostensibly needed to support the monetary base was deemed to be US $18.4 billion – which left US $8.4 billion (or approximately one-third of total reserves) as "unrestricted" reserves. The first Decree additionally instructed that, "[a]s long as the monetary effect is neutral, the unrestricted reserves may be used for payment of obliga-

tions undertaken with international monetary authorities." *Id*.

39. The second Decree, Decree 1601/2005, confirmed that "the current level of international reserves amply exceeds the margins necessary to maintain appropriate monetary and exchange policies" and provided that "it is necessary and appropriate to order [implementation of] the mechanisms for payment of the pending debt to the INTERNATIONAL MONETARY FUND." Decree 1601/2005. Accordingly, the second Decree "instructed" the Argentine Ministry of Economy and Production to "take the pertinent steps" to repay the Republic's debt to the IMF using "unrestricted" reserves. *Id.*

40. On December 29, 2005, the Argentine Ministry of Economy and Production issued Resolution No. 49, directing the Central Bank to repay Argentina's debt to the IMF and instructing "the SECRETARIAT OF THE TREASURY and the SECRETARIAT OF FINANCE, both reporting to this Ministry, . . . to implement an exchange of liabilities held by the NATIONAL GOVERNMENT with the CENTRAL BANK . . . as compensation for the transactions conducted with the [IMF]." Resolution 49. Resolution No. 49 accomplished this "exchange of liabilities" by directing the issuance of a ten-year term "[n]on-transferable note" to the Central Bank. *Id.*

41. As a result, over $8 billion of "unrestricted" reserves – roughly a third of the Central Bank's total reserves at the time – were used to repay on January 3, 2006 the IMF's $9.8 billion loan, even though that debt was owed by the Republic, and not the Central Bank. *See Yesterday Argentina stopped being a cred-*

itor of the Monetary Fund; LA NACIÓN.COM (January 4, 2006). Argentina was roundly criticized at the time for running "roughshod over the central bank's legal independence." *Kirchner and Lula: different ways to give the Fund the kiss off; Argentina, Brazil and the IMF*, THE ECONOMIST (Dec. 24, 2005).

42. Argentina's extraordinary actions in commandeering Central Bank assets to make an early repayment in full of the Republic's debt to the IMF were not only "roughshod," they were in direct derogation of at least two Articles of the Central Bank Charter.

43. *First*, under Article 3 of the Central Bank Charter then in force, the Central Bank ought not have been "subject to any order or instruction given by the National Executive Power" concerning "the preparation and implementation of any monetary and financial policy" (*see* ¶ 33 above). Central Bank Charter, Art. 3. The management of foreign currency reserves, and specifically the selling and buying of foreign currency, is an integral part of any nation's monetary policy. It is the method used by countries to protect the value of their own currency. By dictating that reserves also be used to service foreign debt – a function that necessarily leads to an aggressive accumulation of reserves (and can lead to inflation) – the Executive Branch interfered with the Central Bank's ability to prepare and implement monetary policy. *Id.* Indeed, the Executive Branch disrupted the Central Bank's primary role of safeguarding the value of Argentina's currency, and dictated how the Central Bank should use one of the most important levers of implementing monetary policy. *See id.* (the

Central Bank "shall primarily and essentially maintain the value of legal tender").

44. *Second*, Article 19(a) of the Central Bank Charter prohibits the Bank from lending funds to the Republic except as provided under Article 20 (*see* ¶ 33 above). Central Bank Charter, Article 19(a). The non-transferable, non-negotiable (and almost certainly unenforceable) "note" given by Argentina to the Central Bank in exchange for the use of "unrestricted" reserves to repay the IMF had a term of 10 years. Thus, on its face, the "note" violated the Article 20 requirement that any Central Bank loan to the Republic must be repaid within 12 months. Moreover, the "note" appeared to be a sham employed by Argentina to create the illusion that the Central Bank received something in exchange for the "unrestricted" reserves because, among other reasons, Argentina is rumored to have ***defaulted*** on the ***very first interest payment*** ($200 million) on the "note" when it came due on July 3, 2006. *A guarded rumor under lock and key: Economy Ministry failed to repay debt to the Central Bank?*, CLARÍN (Aug. 12, 2006). According to the Argentine press, "[t]he issue is not so much the amount in question – about 200 million dollars – but rather how the decisions of the political power weigh upon an entity that preserves very little of the independence that it is supposed to have pursuant to law." *Id.*

45. After Argentina made its early and complete repayment of $9.8 billion to the IMF on January 3, 2006, it continued to accumulate billions of dollars more in "unrestricted" reserves. *See Half the Reserves Paid to the Fund Already Recovered*, LA NACIÓN (May 6, 2006); *Reserves Grow 25 Percent over*

the Year, LA NACIÓN (May 6, 2006). Yet that accumulation was reportedly not being deposited into the Central Bank's foreign exchange accounts, but rather was being deposited into an account held in the name of Argentina for other uses to be dictated by the Executive Branch. *See Argentina Raises Money for Upcoming Debt Payment,* GLOBAL INSIGHT (July 27, 2006) ("[T]he Central Bank has been increasing its daily purchases in the foreign exchange market, while trying to avoid excessive pressure over the exchange rate. Consequently, purchases are not being made to recompose its foreign reserves but rather for the Treasury.").

Paris Club Repayment

46. Less than three years later, Argentina once again commandeered, by presidential decree, billions of dollars from the Central Bank through the issuance on September 2, 2008 of Decree 1394/2008 – this time to repay Argentina's debt to the Paris Club, which is an informal group of creditor governments. *Government to pay Paris Club debt with reserves*, CLARÍN (Sept. 3, 2008). Decree 1394/2008 refers to Decree 1599/2005 which, as described in ¶ 39 above, designated (by Executive fiat) those Central Bank reserves in excess of the amount necessary to support the Argentine monetary base as "unrestricted" reserves available for the payment of debt obligations with international monetary organizations. *See* Decree 1394/2008. After noting that "the current level of reserves comfortably surpasses the margins necessary for sustaining the monetary and exchange rate policies," Decree 1394/2008 ordered the repayment of Argentina's $6.7 billion debt to Paris Club members using the so-called "unrestricted" reserves.

See Paris Club: new payment proposal drafted, ÁMBITO FINANCIERO (Sept. 5, 2008).

47. The decision to repay Argentina's debts to Paris Club members using Central Bank reserves was made by President Fernández de Kirchner and her husband without even ***consulting*** the Central Bank. *The Ways of the Presidential Couple: the K Way,* PERFIL (Sept. 14, 2008); *see also The similarities with 2005,* LA NACIÓN (Sept. 7, 2008) ("[T]he decision was made by the governing couple and the only ones who were informed were current Cabinet Chief Sergio Massa, Legal and Technical Secretary Carlos Zannini, and Minister of Economy, Carlos Fernandez."); *A decision that leaves a legal question mark,* LA NACIÓN (Sept. 3, 2008) ("Reports indicate that while the measure announced by Cristina Kirchner yesterday was being adopted, the chairman of the Central Bank was absent from the decision-making table."). This was but one more demonstration of Argentina's complete control over the Central Bank, of the Central Bank's lack of a separate legal and financial existence, and of Argentina's willingness to use Central Bank assets to pay off the Republic's debt when doing so suits the Executive Branch's purposes. *See Satisfying the creditors,* THE ECONOMIST (Sept. 4, 2008) ("Ms Fernández has rustled up the cash [to pay the Paris Club] by helping herself to 15% of the central bank's foreign-currency reserves . . . highlighting the bank's tenuous independence"); *Argentina, In A Jam, Is Forced To Rethink "Holdout" Debt*, DOW JONES (Sept. 11, 2008) (according to a Lehman economist the payment "erases altogether any doubt over the independence of the central bank and the property of the reserves.").

48. That the Central Bank Charter contains in Article 20 an explicit limitation on lending to the Argentine government was of no concern to President Cristina Fernández de Kirchner (*see* ¶¶ 33, 45 above). Instead, she simply issued Presidential Decree No. 1472/2008, which provided that *(a)* the Central Bank reserves used to pay the Paris Club would be repaid with a government security, presumably similar to the note the Central Bank received for the IMF payment, and *(b)* the payment to Paris Club would be exempted from the Central Bank Charter's limitation on loans to the government. Decree 1472/2008. The Argentine press has described Decree 1472/2008 as a "decision to subjugate the Central Bank's autonomy" and as demonstrating that in the Kirchners' "autocratic model the Central Bank is another agency of the Executive Branch." *The reserves, once again in the government's sights,* LA NACIÓN (Sept. 22, 2008).

49. Tellingly, despite the issuance of Decree 1472/2008, President Cristina Fernández de Kirchner's unilateral decision to use Central Bank reserves to repay Argentina's debt to Paris Club members still failed in at least two ways to comport even with the minimal limitations previously imposed by her husband on the use of Central Bank reserves to repay Argentina's debts.

50. *First*, in Decree 1599/2005, former President Néstor Kirchner proclaimed the so-called "unrestricted" reserves available for the repayment of Argentina's debt obligations with international monetary organizations (*see* ¶ 39 above). But the Paris Club, unlike the IMF, is not an international monetary organization. The Paris Club does not have any

legal status at all; it is an informal group of creditor nations that coordinate efforts to reschedule debt due to them by developing countries. *See Paris Club: new payment proposal drafted,* AMBITO (Sept. 5, 2008) ("But clearly, the Paris Club isn't one [an international monetary organization].").

51. *Second*, whereas the Central Bank was technically the debtor to the IMF (although both Argentina and the Central Bank publicly acknowledged that such debt in fact belonged to Argentina, and not the Central Bank), the Argentine Treasury is the debtor to the Paris Club members. The Central Bank does not have any relationship, nominal or otherwise, to the Paris Club. *See An error in the decree authorizing payment to the Paris Club gives license to million-dollar lawsuits,* CRONISTA (Sept. 4, 2008) ("[T]he debtor to the Paris Club is the Treasury.").

Bicentennial Fund

52. On December 14, 2009, President Fernández de Kirchner authorized the so-called Bicentennial Fund for Debt Reduction and Stability ("Bicentennial Fund") by Emergency Decree No. 2010/2009. Emergency Decree No. 2010/2009. The Bicentennial Fund was to be used for the repayment of certain debts due in 2010 that were owed by the Argentine government to private-sector creditors. *Argentina Takes Steps to Lower Risk Perception*, DOW JONES INT'L NEWS (Dec. 14, 2009). The fund was to be created by a transfer of nearly US $6.6 billion from the Central Bank reserves to the Argentine Treasury that effectively constituted a loan with zero interest. *Argentine Zero*

Interest Loan Proves Irresistible, BLOOMBERG (Dec. 20, 2009).

53. Implementation of the Bicentennial Fund was met with resistance in Argentina outside the Executive Branch. The Central Bank's then-Governor, Martín Redrado, delayed implementation of Decree No. 2010/2009 before he was forced to resign by President Fernández de Kirchner (*see* ¶¶ 89-91 below). Redrado reportedly hesitated, in part, out of concern that any transfer of the Central Bank's reserves into the Bicentennial Fund would make "funds held by the Central Bank abroad vulnerable to claims [for attachment and restraint] by [Argentina's] creditors." *Socialism for Foes, Capitalism for Friends; Argentina Under the Kirchners*, ECONOMIST (Feb. 27, 2010); *Government Already Alerted to Funds Seizure*, LA NACIÓN (Jan. 13, 2010).

54. Members of the Argentine Congress also questioned whether Decree No. 2010/2009 violated the Central Bank Charter, and argued that a transfer of Central Bank reserves into the Bicentennial Fund would evidence the Central Bank's lack of independence. *Argentine Opposition Fights Kirchner's Debt Plan*, WALL ST. J. (Dec. 30, 2009). Alfonso Prat-Gay, who had served as Governor of the Central Bank from 2002 to 2004 before becoming a member of the Argentine Congress, believed Decree No. 2010/2009 was illegal – because the Central Bank should be an independent institution and not have its reserves appropriated at the Executive Branch's will. *See Harsh Criticism by the Opposition to the Use of BCRA Funds*, LA NACIÓN (Dec. 15, 2009) ("[Prat-Gay] warned that the measure adopted by the Government was illegal, because the BCRA 'is an

independent entity and the Government cannot appropriate its reserves.'").

55. Other observers harshly criticized the Bicentennial Fund as violating the independence ostensibly required by the Central Bank Charter, because President Fernández de Kirchner had acted without the required Congressional approval. *See, e.g.*, *The Reserves Belong to Cristina,* ÁMBITO FINANCIERO (Dec. 16, 2009) (explaining that central bank reserves belong to the central bank and "cannot be transferred . . . to any fund whatsoever"); *The Government Frees Up Resources to Raise Cash and Maintain Spending*, CLARÍN (Dec. 15, 2009) ("A collateral effect of the decision [to create the fund] is that it further blurs the lines between the Central Bank and the State."); *Argentina to Tap Reserves for Debt Payment Fund*, REUTERS (Dec. 14, 2009) (according to Goldman Sachs senior economist, use of Central Bank reserves for debt repayment is "clearly negative from an institutional standpoint" because "it weakens the central bank and provides the government with extra rope to extend a notoriously profligate spending stance that is often shaped according to political criteria"); *Argentina Govt's Move to Woo Investors Becomes a Headache*, DOW JONES INT'L NEWS (Dec. 21, 2009) ("Latest speculation suggests the Treasury may now . . . take reserves as and when they're needed.").

56. Several Argentine lawmakers filed a request to stay implementation of the Bicentennial Fund, and they sought a declaration that Decree No. 2010/2009 was an unconstitutional exercise of power absent legislative approval. *Argentine Opposition Fights Kirchner's Debt Plan*, WALL ST. J. (Dec. 30,

2009). The request was granted on January 8, 2010; the Executive Branch appealed. On January 22, 2010, while the Argentine federal courts were in recess, an interim appellate court upheld the stay pending approval of the Bicentennial Fund by the Argentine Congress. National Court of Federal Administrative Appeals, *Pinedo et al.–Inc. Med. (8-1-2010) v. Executive Branch—Decree 2010/09*, No. 142/2010 (Jan. 22, 2010) (Arg.).

57. President Fernández de Kirchner was unwilling to leave the Bicentennial Fund's fate in the hands of a newly unsympathetic Congress following the elections. On February 5, 2010, after the regular term of the federal courts recommenced, the Executive Branch filed an extraordinary appeal and sought both an immediate lifting of the stay, and that the case be forwarded to the Supreme Court. *BCRA: The Government Asks the Court to Free the Reserves*, LA NACIÓN (Feb. 5, 2010). On February 24, 2010, the appellate court refused to lift the stay, but granted the request to forward the case to the Argentine Supreme Court for further review. *Argentine Court Upholds Freeze on Reserves Plan*, REUTERS (Feb. 24, 2010). The Supreme Court was not expected to issue a decision contradicting whatever Congress decided. *Argentine Debt Plan Blocked*, FIN. TIMES (Feb. 25, 2010).

58. On March 1, 2010, at the opening of the new Congressional session, President Fernández de Kirchner announced that she had "revoked" (by presidential decree) Decree No. 2010/2009 relating to the Bicentennial Fund because of "judicial overstepping" in a "strictly political" issue. Decree No. 296/2010, *Official Gazette of the Argentine Republic*, No. 31,853

(Mar. 1, 2010)); *At Congress Opening Session, "I revoked the 2010 Bicentennial Fund decree," CFK Announces*, BUENOS AIRES HERALD (Mar. 1, 2010).

59. Simultaneously, President Fernández de Kirchner announced her issuance of a different set of decrees authorizing the use of approximately $6.6 billion in Central Bank reserves to repay creditors of the Argentine government – the same amount and use of Central Bank reserves previously contemplated by "revoked" Emergency Decree No. 2010/2009. Emergency Decree No. 298/2010 authorized the use of approximately US $4.4 billion of Central Bank reserves to repay debts coming due in 2010 to Argentina's private creditors by creating the Debt Reduction Fund. The Debt Reduction Fund specifically contemplated repayment of the Boden 2012 bonds, the Bonar V bonds, as well as other maturities with private bondholders. Decree No. 297/2010, by contrast, authorized the use of approximately US $2.2 billion of Central Bank reserves to repay Argentina's multilateral lenders where such transfer of reserves would have a neutral monetary effect. Decree No. 297/2010, Decree No. 298/2010, Resolution No. 104/2010, Resolution No. 105/2010, *Official Gazette of the Argentine Republic*, No. 31,853 (Mar. 1, 2010); Press Release, Presidency of the Argentine Republic, Cristina Fernández Opens New Regular Session of the Congress of Argentina (Mar. 1, 2010).

60. That same day (March 1), US $6.6 billion in Central Bank reserves was transferred into accounts held in the name of the Argentine Treasury at the Central Bank in Argentina. *Argentine Central Bank Sends $6.6 Billion in Funds to Treasury*, BLOOMBERG

(Mar. 1, 2010); *Argentina President Changes Tack to Tap Reserves*, FIN. TIMES (Mar. 2, 2010).

61. The Executive Branch micro-engineered the events of March 1, 2010 to circumvent both legislative and judicial review of the Bicentennial Fund. *See "The President's Speech Was a Mockery to Both the People and Parliament," Lawmaker*, BUENOS AIRES HERALD (Mar. 1, 2010) (former Central Bank Governor Alfonso Prat-Gay described these events "as a 'disrespect for the judicial and the legislative branches'"); *accord A Crazy Day at the Central Bank*, CRÍTICA DE ARGENTINA (Jan. 23, 2010); *New Twist in Argentine Currency Fight*, WALL ST. J. (Jan. 26, 2010). For example:

- The Kirchners reportedly met on Sunday, February 28, with Central Bank Governor, Mercedes Marcó del Pont, and Argentina's Economy Minister, Amado Boudou, to provide detailed instructions for the following morning. They planned a transfer of Central Bank reserves timed almost simultaneously with President Fernández de Kirchner's speech to Congress on March 1, in order to surprise the opposition and minimize the risks of any interference. *Maniobras Secretas para Eludir Buitres y Congreso*, ÁMBITO FINANCIERO (Mar. 2, 2010); *Toman Reservas del BCRA con Otro DNU*, LA NACIÓN (Mar. 2, 2010); *El BCRA ya separó el dinero para pagar*, LA NACIÓN (Mar. 2, 2010).
- Marcó del Pont agreed with the Kirchners' plan and clarified that she would need to obtain on Monday morning the consent of Central Bank legal advisors. Accordingly, neither Marcó del Pont

nor Boudou accompanied President Fernández de Kirchner to Congress. At the Kirchners' direction, Boudou stayed behind at the Ministry of Economy, and Marcó del Pont – together with Argentina's Finance Secretary – remained at the Central Bank to ensure a smooth execution of the agreed plan. *El Gobierno Capturó Los U$S 6.569 Millones de las Reservas con Dos Nuevos Decretos*, EL CRONISTA (Mar. 2, 2010); *Economía Festeja la Resurrección del Fondo para Pagar con Reservas*, LA NACIÓN (Mar. 2, 2010).

- The new decrees were signed by President Fernández de Kirchner's Cabinet on Monday morning, shortly before her speech. While she spoke, the Central Bank Board met and (with the exception of two members linked to former Governor Martín Redrado) also endorsed the new decrees. The process of transferring US $6.6 billion of Central Bank reserves then began during President Fernández de Kirchner's speech. Accordingly, the Argentine Congress were not told either that the new decrees were ready to be printed officially or that the reserves already had been transferred until after her speech was concluded. *Una Jugada Armada en Secreto para Soprender a la Justicia y a la Oposición*, EL CRONISTA (Mar. 2, 2010); *Con Dos Votos en Disidencia, el BCRA hizo el giro al Tesoro*, ÁMBITO FINANCIERO (Mar. 2, 2010); *La Oposición Resiste en la Justicia*, LA NACIÓN (Mar. 2, 2010).

62. In early May 2010, a bill was introduced by President Fernández de Kirchner's Congressional supporters to ratify the transfer of reserves. That legislation was passed by the Argentine Senate on

May 5, 2010, which was the only requirement necessary for ratification. *Argentine Senate Approves Use of Reserves to Pay Debt*, REUTERS (May 6, 2010); *Senate OKs Use of Reserves to Pay Debt*, LA NACIÓN (May 6, 2010).

Debt Reduction Fund and Other Uses of Central Bank Reserves Under Mercedes Marcó del Pont

1. The Debt Reduction Fund

63. Current Central Bank Governor Mercedes Marcó del Pont has repeatedly agreed to transfer Central Bank reserves to the Treasury and has defended the use of Central Bank reserves to pay debt since her appointment in May 2010 (*see* ¶¶ 71, 93-96 below). Immediately thereafter, the Argentine government used US$1.833 billion in Central Bank reserves to repay the country's outstanding debt. *E.g, Government Used $1.83 Billion for Debt Payment, said Cristina*, EL CRONISTA (May 4, 2010); *Argentine Senate Approves Use of Reserves to Pay Debt*, REUTERS NEWS (May 6, 2010). Only a few months later, in early August 2010, Argentina used US $2.2 billion in Central Bank reserves to pay a coupon due on the Boden 2012 bond. *Argentina Coupon Payment May Ease Path to Debt Sale*, REUTERS (Aug. 3, 2010). By the end of 2010, the Argentine government had used $4.3 billion in Central Bank reserves. *Payment Made with Reserves and No Chaos Ensues*, PÁGINA 12 (Nov. 9, 2010).

64. In January 2011, pursuant to Decree 2054/2010 issued on December 22, 2010, approximately $7.5 billion in Central Bank reserves were transferred to the Debt Reduction Fund. Decree

2054/2010, Art. 22; *Argentina Central Bank Approves $7.5B Loan To Pay Foreign Debt*, DOW JONES (Jan. 11, 2011); *By Decree, Government Extends 2010 Budget and Allocates $7.5 Billion from Central Bank for Debt Payment*, ÁMBITO FINANCIERO (Dec. 29, 2010). In return, the Ministry of Economy issued a Treasury Bond worth US$7.504 billion. Resolution 1/2011.

65. In March 2011, the Ministry of Economy borrowed $2.2 billion in Central Bank reserves to pay debt obligations to the World Bank and IADB, pursuant to Decree 276/2011. Decree 276/2011 is separate from the Debt Reduction Fund (which was created by Decree 298/2010 and funded by Decree 2054/2010). Decree 276/2011 creates a separate fund, which seeks to cancel debt arising from maturities from multilateral credit organizations, as opposed to private debtholders. Decree 276/2011; *UPDATE: Argentina Taps Central Bank Reserves Again to Pay Creditors*, DOW JONES (Mar. 4, 2011); *$2.174 Billion Debt Paid with Dollars from Central Bank*, CLARÍN (Mar. 5, 2011); *Argentina's Economy Ministry Borrows $2.12B from Central Bank*, DOW JONES (Mar. 18, 2011); Argentine State Public Debt, Nat'l Bureau of Public Debt (March 31, 2011). The Minister of Economy passed Resolution 64/2011 issuing a Treasury Bond for US$2.121 billion. *See* Resolution 64/2011.

66. Also in March 2011, $1.5 billion in Central Bank reserves were used to make principal and interest payments on Bonar V bonds, which were issued in 2006, had a 5-year term, and reached maturity in March of 2011. *See Reserves Used to Pay Debt*, CLARÍN (Mar. 29, 2011). In August 2011, $2.2

billion in Central Bank reserves were used to pay the Boden 2012 bonds. *Central Bank Reserves Drop by $1.4 Billion Due to Boden 12 Payment*, EL CRONISTA (Aug. 4, 2011). Both payments were expressly referred to in the decree that created the Debt Reduction Fund. *See* Decree 298/2010.

2. Other Uses

67. As of March 2012, the Central Bank had approximately $47 billion in total reserves – but had run out of so called "unrestricted" reserves. This was problematic for President Fernández de Kirchner, because Argentina's 2012 budget earmarked up to $5.7 billion in "unrestricted" reserves to repay private creditors. *See Central Bank Assets, Full of Bonds*, CLARÍN (Mar. 10, 2012). To dodge the problem, she decided to eliminate all remaining nominal limits on the Central Bank's (and therefore the government's) ability to cut back on what constitutes "unrestricted" reserves – thereby freeing up still more money for the government's use.

68. Law 26.739, which was promulgated in Decree 462/2012, accomplished this. Law 26.739; Decree 462/2012; *Argentina Wants to Tap More Central Bank Reserves*, REUTERS (Mar. 1, 2012); *Gov't Enacts Central Bank's Charter Reform*, Buenos Aires Herald (Mar. 28, 2012). The new legislation eliminated the Convertibility Law's requirement that the Central Bank maintain reserves in an amount equal to the monetary base and redefined the Central Bank's mission to include promoting monetary stability, financial stability, employment, and economic development with social equity. This had the effect of further tightening the Argentine government's control,

allowing it to use as much of the Central Bank's reserves as it wishes to pay the Republic's debts. *Argentina Set To Free Up Bank Reserves*, FIN. TIMES (Mar. 6, 2012).

69. The new legislation also allows Argentina to repay bilateral loans using the Central Bank's reserves. According to Marcó del Pont, this will allow Argentina to avoid making "brutal fiscal cuts" or seeking debt on the costly global market. *Argentina Says Can Rebuild Reserves Used to Pay Debt*, REUTERS (Mar. 6, 2012).

70. Additionally, the new legislation amended Article 20 of the Central Bank Charter to authorize the Central Bank to temporarily transfer to the Treasury additional temporary transfers equal to 10 percent of the cash resources that the Argentine government has obtained in the last twelve months (*see* ¶ 33 above). *See Amplían el límite para que el Banco Central asista al Tesoro*, LA NACIÓN (Mar. 9, 2012).

71. The new legislation has been widely criticized as evidencing the Argentine government's domination of its Central Bank. *See Piggy Bank, Rootling around for Cash*, THE ECONOMIST (Mar. 31, 2012) ("[T]he [central] bank has lost the last shred of its legal independence and become the piggy bank of President Cristina Fernández's government"); *Kirchner Grabs the Central Bank*, WALL ST. J. (April 2, 2012) ("Argentina's Franken-state stormed the central bank last month, destroying the last vestiges of independence."). According to former Central Bank Governor Martín Redrado: "With no definition of ["unrestricted"] reserves, it will be up to the [Central Bank] board to decide the amount of reserves need-

ed. The central bank will be at the end of the phone to do the Treasury's bidding. They've opened a parallel treasury that is subject to no kind of control." *Argentina Set to Free up Bank Reserves*, REUTERS (Mar. 6, 2012). Opposition lawmaker Federico Pinedo called the bill "one of democracy's most sinister laws[; t]he Government is just looking for a blank check in order to finance itself with the Central Bank's reserves." *Pinedo calls bill to amend Central Bank Charter 'sinister,'* BUENOS AIRES HERALD (Mar. 11, 2012). Abel Viglione, an economist at think-tank Fiel, opined that this is another thinly-disguised asset grab that "subordinates monetary policy to fiscal policy." *Argentina set to free up bank reserves*, FIN. TIMES (Mar. 6, 2012). In addition, in August 2012, a federal prosecutor opened a criminal fraud investigation into President Fernández de Kirchner and Marcó del Pont for violating the law with their extensive use of the Central Bank's reserves to pay Argentina's debts and restrictions on dollar sales. *See, e.g.*, Eliana Raszewski, Argentine Prosecutor Probes Fernandez on Controls, Clarin Says, BLOOMBERG (Aug. 28, 2012); Argentine Leader Could Face Criminal Fraud Probe, ASSOCIATED PRESS (Aug. 29, 2012).

72. On April 26, 2012 the Economy Ministry announced that, pursuant to a Resolution dated April 20, Argentina had issued a Treasury bill of up to $5.7 billion to be bought in several installments by the Central Bank using its reserves. Resolution 131/2012. That amount, which (not coincidentally) is identical to the amount earmarked in the country's 2012 budget, would be used by Argentina to repay its debts. *Argentina issued note of up to $5.7 billion to Central Bank*, BLOOMBERG (April 26, 2012).

73. On July 6, 2012, it was announced that the Argentine government planned to use $4.2 billion in Central Bank reserves to repay the country's debt during the third quarter of 2012. *Argentina to Use $4.2 Bln in Central Bank Reserves to Pay Debt*, WALL ST. J. (July 6, 2012); *More Reserves for Debt Payment*, ÁMBITO FINANCIERO (July 6, 2012). Included among the planned repayments was a $2.2 billion final installment on the Boden 2012 bond due August 3, 2012. *Puesta en escena hoy del Gobierno: celebran el pago final del Boden 2012*, CRONISTA (Aug. 3, 2012).

74. President Fernández de Kirchner has even begun to use Central Bank reserves to fund government projects. For example, in October 2010, President Fernández de Kirchner introduced loans to encourage small businesses to invest in Argentina and assist local production. These loans seek to keep dollars in the country and limit the outflow of dollars that has troubled Argentina in the past. To incentivize small businesses to participate, these loans carry a negative interest rate. Most importantly, these loans are funded by Central Bank reserves. *Free Pesos Leave Fernandez With Shunned Loans: Argentina Credit*, Bloomberg (Aug. 1, 2012). In essence, the government has directed the Central Bank to make loans available and to assume all related costs. *See* Central Bank Communication "B" 9911 (Sept. 24, 2010).

75. As a result of the Argentine government's extensive use of the Central Bank's reserves to pay its debts and fund the fiscal deficit, the Argentine government now owes the Central Bank, in dollars and pesos, approximately $55 billion. These debts consti-

tute more than half of the Central Bank's assets – most of the balance of which are comprised of the Central Bank's $47 billion in reserves. And as a result of the March 2012 amendments to the Central Bank Charter, the Central Bank is directly funding the Argentine government's deficit through "temporary advances." *Argentina Central Bank to Continue Lending to Federal Government*, WALL ST. J. (August 17, 2012) (reporting that Marcó del Pont stated that the Central Bank "will provide funding equivalent to 10% of what the government collects in total tax revenue"). As comments made by the Central Bank's governor to the Argentine Chamber of Deputies in March 2012 make clear, all of this is the result of the Argentine government's decision that it is better fiscal policy to fund itself and its fiscal deficit using the Central Bank's reserves than to issue new debt at the yields that the markets would demand from Argentina:

> In all this, beyond the issue of sovereignty, there is a basic question of what is rational from an economic point of view. If the international reserves were yielding the Central Bank 12%, we would probably doubt whether the best alternative is to use the reserves. Now then; comparing the yield that the Central Bank's deposits are getting in other international organizations, it is clearly evident what cost is involved in issuing external debt, and what the cost is of using the reserves. If we analyze the yield on the BODEN 2015 bond, we will notice that it is around 10%.

Testimony of Mercedes Marcó del Pont, Joint Meeting of the Committees of Finance, Budget and Treasury, and General Legislation of the National Chamber of Deputies, March 7, 2012.

C. Argentina Controls The Day-To-Day Activities Of The Central Bank By Replacing Any Bank Official Who Refuses To Do Its Bidding

76. One of the most effective means for a government to exert control over its central bank is by sending a clear message that any bank official who refuses to implement the government's wishes or attempts to assert the bank's independence, can – and will – be replaced with another official who will follow the government's instructions. Consequently, there is a broad consensus among central banking experts that high turnover of central bank officials is a strong indication that the bank is controlled by the parent state. Alex Cukierman, Steven Webb & Bilin Neyapti, *Measuring the Independence of Central Banks and Its Effect on Policy Outcomes*, THE WORLD BANK ECONOMIC REV. Vol. 6, No. 3 at 363-67 (1992).

77. Argentina is infamous for the high turnover rate of its Central Bank Governor (the Central Bank's chief official). For the last 80 years, Governor turnover has been among the highest – if not the highest – of any central bank in the world. The average tenure for a Governor since 1935 has been eighteen months (compared to over five years, on average, for central banks in developed countries). *Id.* at 365; *accord* List of Central Bank presidents and tenures at http://www.bcra.gov.ar.

78. This pattern has continued under Argentina's current political leadership. Argentina has had a remarkable seven Central Bank Governors since 2001: Pedro Pou, Roque Maccarone, Mario Blejer, Aldo Pignanelli, Alfonso Prat-Gay, Martín Redrado, and Mercedes Marcó del Pont. Governors Maccarone, Blejer and Pignanelli were each in office for less than a year. Pursuant to the Central Bank Charter, the Governor is appointed for 6-year terms with the possibility of re-appointment. Charter, Art. 7.

79. The departures of all but Marcó del Pont (who remains the Central Bank Governor) were preceded by disagreements with the Argentine government over the country's monetary policy (which, under the Central Bank Charter, must be made and implemented free of government interference (*see* ¶ 33 above)) and/or the Central Bank's independence from the government generally. In each case, the Argentine government's view prevailed over that of the Central Bank's chief official. The experiences of former Governors Blejer, Pignanelli, Prat-Gay, and Redrado are particularly illustrative.

April 2001 – September 2004

80. Pedro Pou served as Central Bank Governor from August 5, 1996 to April 25, 2001. Roque Maccarone served from April 25, 2001 to January 18, 2002. Mario Blejer served from January 28, 2002 to June 25, 2002. Aldo Pignanelli served from June 25, 2002 to December 11, 2002. Alfonso Prat-Gay served from December 11, 2002 to September 23, 2004.

81. Former Governor Mario Blejer identified the Argentine government's increasing encroachment on

the Central Bank's independence as the reason for his departure from the Central Bank in 2002 after only four months. *See Minister to Meet IMF over Aid Talks Problems: Argentina*, FINANCIAL TIMES (June 26, 2002) ("In his resignation letter, Mr. Blejer had complained about growing infringements on central bank independence by the economy ministry. Now analysts say that much of the structure of the central bank has been filled by political appointees who respond to various parts of the executive branch."). Two weeks after his resignation, Blejer told an interviewer that he and then Argentine Economy Minister Roberto Lavagna clashed over the Central Bank's independence. *Interview: Mario Blejer*, CENTRAL BANKING (Jan. 2003). Blejer "thought it was important to preserve central bank independence," while Lavagna "had a different conception." *Id*. at 28.

82. Former Governor Mario Blejer was replaced with Aldo Pignanelli. The Financial Times noted that, with Pignanelli's appointment, the Economy Ministry "gained more control over the notionally-independent central bank by getting its candidate appointed to the board of directors and taking over its press office." *Minister to Meet IMF over Aid Talks Problems: Argentina*, FINANCIAL TIMES (June 26, 2002). Apparently, that was not yet enough control over the Central Bank, and Pignanelli was replaced after only five months. Differences between Pignanelli and the Argentine Economy Ministry leading to his resignation were reportedly "the result of a culture based on the mistaken belief that the Central Bank can be constantly subjected to political winds of fortune and even at the Treasury's service." *Editori-*

al I: The New President of the BCRA, LA NACIÓN (Dec. 12, 2002). As Argentina's daily newspaper La Nación added:

> The fruit of this culture is that in a little more than eighteen months the [Central Bank] has had five presidents, when the term of that autonomous entity's head is six years. The contrast with countries such as the United States – where there have only been five Federal Reserve chairmen in the last fifty years – is obvious. . . . [The] final success [of Pignanelli's replacement] won't depend so much on his person and the technical ability of those who will doubtless accompany him, but rather on the political leadership exhibiting its willingness to respect the [Central Bank's] autonomy, in order to avoid political short-circuits and ensure that the set term for that important entity's president is respected. *Id*.

83. Former Governor Aldo Pignanelli was replaced by Alfonso Prat-Gay, who served the final twenty months of the six-year term collectively held by the four former Central Bank Governors preceding him. Although Prat-Gay was widely acclaimed as a central banking superstar, former President Kirchner refused to reappoint him and in September 2004 replaced him by presidential decree with Martín Redrado. *See* Executive Decree 1236/2004 (replacing Prat-Gay with Martin Redrado). The international financial community was shocked by this turn of events. By all independent accounts, Prat-Gay had done a superb job during his brief tenure, and significantly, he was the first person to be

awarded Euromoney's prestigious "central bank Governor of the year" award after leaving office. Euromoney stated that Prat-Gay "built a credible central bank from almost nothing" and was "Argentina's most internationally respected policymaker." *Argentina ditches its respected central bank governor on eve of crucial bond exchange; Alfonso Prat-Gay is central bank governor of the year*, EUROMONEY INSTITUTIONAL INVESTOR (Sept. 1, 2004).

84. The only credible explanation for former President Kirchner's decision not to reappoint former Governor Prat-Gay is that he was "widely known to oppose central tenets of [the Kirchner] administration's economic philosophy." *Id.*; *see also* Alejandro Alonso*, Dispute Over Policies Sparks Change in Argentina CenBnk Chief*, THE MAIN WIRE (Sept. 17, 2004) ("Prat-Gay had repeatedly clashed with the administration . . . on the government's handling of the debt restructuring, the Central Bank's role in influencing the foreign exchange rate as well as the use to be made of the country's increasing foreign reserves").

85. The Argentine press reported that, in addition to clashing with former President Kirchner over debt restructuring and the use of reserves, former Governor Prat-Gay had made two requests that were unpalatable to the Executive Branch. *First*, Prat-Gay asked that, if he were to continue as Governor, his appointment be ratified by the Argentine Senate so that he could have a full six-year term and a mandate from the Senate. *Second*, Prat-Gay asked that he have some input over who would be appointed to the Central Bank directorships. Former President Kirchner refused, reportedly because he wanted

Prat-Gay to serve without a defined term or mandate, and because he wanted full control over director appointments. *Kirchner Changes Central Bank to Avoid Rifts in Debt Negotiations,* PÁGINA/12 (Sept. 18, 2004). In resigning, Prat-Gay explained "basically the president and I have different views of what the role of the central bank should be." *Argentina ditches its respected central bank governor on eve of crucial bond exchange; Alfonso Prat-Gay is central bank governor of the year*, EUROMONEY INSTITUTIONAL INVESTOR (September 1, 2004). That difference, according to Euromoney, was "about the degree of independence that a central bank should have." *Id*.

September 2004 – January 2010

86. Former Governor Prat-Gay was replaced by Martín Redrado, who was initially described as "a man most analysts consider unlikely to assert much in the way of independence" – as one government official opined, "Redrado is Kirchner." *Id.*; *A payment to the Fund was the spark that started the fire,* PÁGINA 12 (September 19, 2004); *see also Profits and losses,* PÁGINA/12 (Sept. 18, 2004) ("[T]he technical conditions and lineage of the pawns used in power games count for little. The only thing that matters is their willingness to play the required role at the opportune moment."). According to a Latin America analyst at Credit Suisse First Boston, the replacement of Prat-Gay with Redrado "'solidifie[d] the prospect that the Central Bank will remain under the control of the ministry of economy and Kirchner. . . . Prat-Gay got fired because he was trying to be independent.'" *Argentina ditches its respected central bank governor on eve of crucial bond exchange; Alfon-*

so Prat-Gay is central bank governor of the year, EUROMONEY INSTITUTIONAL INVESTOR (Sept. 1, 2004).

87. For over five years, the Kirchner administrations did not find it necessary to fire Redrado, because he implemented their wishes dutifully. For example, when the U.S. financial crisis hit in October 2008, former President Kirchner simply called Redrado to give him explicit instructions on how the Central Bank should respond on a day-to-day level. As the Argentine press described just one day:

> [The] telephone of Martín Redrado . . . never stopped receiving messages by order of Néstor Kirchner. The former President . . . spoke at least three times with the Head of Cabinet, Sergio Massa. Automatically, the official called Redrado, who instantly offered 1 billion dollars to depressurize the meteoric rise of the dollar. Just an hour had passed since the start of operations.

Kirchner Gave the Order to Intervene, LA NACIÓN (Oct. 30, 2008).

88. Redrado's relationship with the Kirchner administrations dramatically changed in December 2010 when, pending advice from the Central Bank's legal counsel, he resisted the immediate transfer of nearly US $6.6 billion in Central Bank reserves to the Bicentennial Fund as directed by Emergency Decree 2010/2009 (*see* ¶ 54 above). On January 6, 2010, President Fernández de Kirchner publicly demanded Redrado's immediate resignation. The demand stemmed from her view that decisions regarding use of Central Bank reserves rest with the Executive Branch, rather than the Central Bank. *See Argenti-*

na Seeks Central Bank Ouster Over Debt Plan, BLOOMBERG (Jan. 6, 2010) (quoting Cabinet Chief Aníbal Fernández as saying that the decision to use Central Bank reserves to repay sovereign debt "'is a decision of the president [of Argentina], who is the one in charge of evaluating the pace of economic activity and determining economic policies based on that,'" and that "'these policies aren't discussed at the [C]entral [B]ank because it's the president [of Argentina] who makes decisions'"); *The Reserves, or Your Job*, ECONOMIST (Jan. 7, 2010) (quoting Cabinet Chief Aníbal Fernández as saying "'[i]t wasn't Redrado who accumulated the reserves . . . [i]t was [the Kirchners'] government. In this country, it's not the [G]overnor of the Central Bank that makes the decisions.'"); *Argentina 'Kills' Bank Independence, Moody's Economy.com Says*, BLOOMBERG (Jan. 6, 2010) (quoting Moody's analyst Juan Pablo Fuentes that the firing of Redrado "underscores the lack of importance the government attributes to the central bank's independence").

89. When Redrado did not submit his resignation and maintained that he could not be fired without the participation of the Argentine Congress, President Fernández de Kirchner fired him by emergency decree on January 7, 2010. Executive Decree 18/2010; *see also Central Banker Steps Down, Vows Legal Action*, AGENCE FRANCE PRESSE (Jan. 8, 2010) ("Martin Redrado has agreed to step down but "will not resign" and will take his case to court, his spokesman said only hours after President Cristina Kirchner issued a decree sacking Redrado for refusing to authorize a payment toward the national debt."). An Argentine federal judge ordered Re-

drado's reinstatement on January 8, 2010. *Court Reinstates Fired Central-Bank Chief*, WALL ST. J (Jan. 9, 2010). The Executive Branch immediately appealed and, at the same time, the Central Bank Board effectively stripped Redrado of his authority – with President Fernández de Kirchner labeling him a "squatter" at the Central Bank. *Battle for Control at Argentina's Central Bank*, FIN. TIMES (Jan. 25, 2010); *Argentine Gov't Appeals Rulings on Central Bank*, REUTERS (Jan. 9, 2010); *BCRA Board of Directors Takes Another Step to Corner Redrado*, LA NACÍON (Jan. 15, 2010).

90. On January 29, 2010, Redrado finally capitulated and tendered his resignation. *Argentina Bars Central Banker—Latest Bid to Oust Redrado Follows Ban on Using Reserves to Pay Debt*, WALL STREET J. (Jan. 26, 2010); *The End of the Redrado Era: A Timeline*, EUROMONEY MAGAZINE (March 4, 2010). In a press conference that day, Redrado accused President Fernández de Kirchner of "tr[ying] to destroy the [C]entral [B]ank." *Argentine Central Bank President Quits Over Reserves*, BLOOMBERG (Jan. 30, 2010). Redrado has subsequently explained that "'I had to leave the bank because I wasn't very obedient.'" *Fernandez Says Investors to Do Well in Argentine Swap*, BLOOMBERG (Apr. 16, 2010).

January 2010 – Present

91. President Fernández de Kirchner had tapped Miguel Angel Pesce, a senior Central Bank official who publicly expressed support for the Bicentennial Fund, to act as the Central Bank's interim Governor after she fired Redrado. *See The Central Bank Vice-President Puts More Pressure on Redrado*, ÁMBITO

FINANCIERO (Jan. 7, 2010) (quoting Pesce as stating that "'[t]he only thing that can be done is comply'" with the decree creating the Bicentennial Fund "because that decision by the Chief Executive has the 'force of law'"). Pesce moved quickly to try to implement the Bicentennial Fund. *Pesce Arrived Early and Authorized the Account, But Did Not Manage to Transfer Funds*, CLARÍN (Jan. 9, 2010). He additionally ordered that Argentine banks conduct their foreign currency transactions through the Central Bank's account at the Bank for International Settlements in Basel, Switzerland (the "BIS"), rather than through the Central Bank's account at the Federal Reserve Bank of New York. *Arrangements Made for Carrying Out Foreign Exchange Operations in Switzerland in Order to Avoid the Seizing of Accounts*, LA NACIÓN (Jan. 8, 2010). This was consistent with the Central Bank's policy – unique among central banks – of keeping virtually all of its liquid reserves at the BIS (at virtually no return of interest) to seek to exploit the immunities against attachment and execution that it offers.

92. On February 3, 2010, President Fernández de Kirchner appointed Mercedes Marcó del Pont as Central Bank Governor. Decree 1378/2010. Marcó del Pont, then president of state-owned Banco de la Nación Argentina, was described as a "[Kirchner] administration loyalist." *Kirchner Directs Foreign Reserves Into Debt Payments*, WALL ST. J. (Mar. 2, 2010). Observers believed that Marcó del Pont would accede to the whims of the Executive Branch. *See Argentina Bank Won't Be Independent, Goldman Says*, BLOOMBERG (Feb. 4, 2010) (quoting Goldman Sachs economist as saying "'[t]he new president is

very closely aligned with the government and won't have an independent voice'"); *Socialism for Foes, Capitalism for Friends; Argentina Under the Kirchners*, ECONOMIST (Feb. 27, 2010) (reporting that "[e]ventually the president got her way and Mr. Redrado was replaced with a more pliant figure").

93. At the time of her appointment, Marcó del Pont's record reflected that she did not support Central Bank independence. While a member of the Argentine Congress, Marcó del Pont had sponsored a bill in 2007 that "sought to redefine the role of the [C]entral [B]ank so that it would work more closely with the government on enacting economic policy." *Argentine Bank President Is Formally Dismissed*, N.Y. TIMES (Feb. 4, 2010). The bill specifically would have amended the Central Bank Charter to change its primary mission from "preserv[ing] the value of the currency" to include "keeping a high level of activity" and maximizing the use of "human resources and materials available." Charter Act No. 24,144, Central Bank of the Argentine Republic; Charter of the Central Bank of the Republic of Argentina. Law 24,144 and Amendments Thereto: Amendment to Article 3 (Mission and Functions, File No. 1218-D-2007, Parliamentary Process 022 (30/03/2007), sponsored by Mercedes Marcó del Pont, et al.)).

94. True to her record, Marcó del Pont quickly collaborated with Argentina's Minister of Economy, Amado Boudou, officially to shift even more authority for monetary policy away from the Central Bank and to the Economy Ministry. *Argentina Govt Seizes Moment to Make Changes at Central Bank*, DOW JONES INT'L NEWS (Feb. 4, 2010). The shift was accomplished in part by the formation, pursuant to De-

cree No. 272/2010, of an "Economic Council" consisting of the Central Bank and the Economy Ministry. Decree No. 272/2010. Certain decisions regarding monetary policy would be made by that Council (rather than the Central Bank), and the Central Bank would play a greater role in managing the state's economic affairs. *Economy and the BCRA Agreed to Maintain the Dollar and Synchronize the Rhythm of Public Spending*, EL CRONISTA (Feb. 19, 2010).

95. In March 2012, Marcó del Pont enthusiastically supported President Fernández de Kirchner's proposed legislation to amend the Central Bank Charter and the nation's Convertibility Law – thereby ensuring the Argentine government unfettered access to Central Bank reserves (*see* ¶¶ 68-74 above). *Argentina Says Can Rebuild Reserves Used to Pay*, REUTERS (Mar. 7, 2012); *Argentina's Marcó Del Pont Defends Central Bank Reform*, DOW JONES (Mar. 3, 2012). Argentina's unlimited access to the Central Bank's reserves is all but unique compared to typical relationships between governments and their central banks.

96. Despite Marcó del Pont's acquiescence, President Fernández de Kirchner has continued to keep Marcó del Pont's appointment – like the appointments of her predecessors – "in commission." As a result, Marcó del Pont can be removed at any time at the president's whim. *Marcó del Pont, una presidenta a tiro de decreto*, LA NACIÓN (Mar. 13, 2012). The status of Marcó del Pont's appointment violates Article 99(19) of the Argentine Constitution, which requires that such appointments (a) be made only when the Senate is in recess, and (b) expire at the end of the next legislative session if not confirmed.

Argentine Constitution Art. 99(10); *accord Controversial Changes to Central Bank Regulations*, LA NACIÓN (Nov. 30, 1999); *Appointment to the Board by Decree*, CLARÍN (Nov. 30, 1999).

D. The Argentine Government Dictates Monetary Policy And Controls How It Is Implemented By The Central Bank

97. During the administrations of former President Kirchner and President Fernández de Kirchner, the Executive Branch has forced the Central Bank to implement whatever monetary policies it deemed to be politically expedient. At times, this meant accumulating dollars and issuing pesos to artificially depress the price of Argentine exports – causing massive inflation and forcing the Central Bank to violate what then was a core provision in its Charter: that it preserve the value of the peso. At other times, the Executive Branch has reversed course and ordered the Cental Bank to ***sell*** dollars – causing an appreciation of the peso – in order to punish its political opponents. And at still other times, the Executive Branch has ordered the Central Bank to try to achieve a politically optimal valuation of the peso just before an election cycle to manufacture short-term economic vitality. Although the Executive Branch has sought to conceal this economic mismanagement by manipulating statistics, independent economists agree that the result has been massive inflation – something an independent Central Bank would have been duty-bound to act to prevent. The Executive Branch's comandeering of monetary policy further demonstrates that the Central Bank is nothing more than an agent of the Republic.

1. Accumulating Dollars and Depreciating the Peso

98. The primary duty of an independent central bank is to maintain the value of the national currency. Until March 2012, this duty was enshrined as the Central Bank's sole objective in its Charter: "[The Central Bank] shall primarily and essentially maintain the value of legal tender." Former Central Bank Charter, Art. 3. Importantly, this duty was supposed to be fulfilled by the Central Bank without interference or pressure from the government. *Id.* ("As regards the preparation and implementation of any monetary and financial policy, BCRA shall not be subject to any order or instruction given by the National Executive Power."). But in direct violation of this restriction, Argentina controlled the Central Bank's formulation and day-to-day implementation of monetary policy. In March 2012, Argentina removed these nominal restrictions to legally authorize its interference. The result has been soaring inflation since late 2004. As a further result, a consensus has developed over the past several years that Argentina "manifestly does not have the rigid Central Bank independence of much of the world." *The economy this year*, BUENOS AIRES HERALD (Sept. 28, 2008).

99. Beginning in late 2004, acting on the orders of former President Kirchner, the Central Bank began purchasing dollars on a daily basis – and, as a consequence, releasing more pesos into the Argentine economy. *See* Daniel Fernandez Canedo, *Focus: Dollarcreates pressure peak and interest rates rise fast and strong,* CLARÍN (June 23, 2005) ("[The] Central Bank is following the President's wishes to the letter.

So, day by day, [the] Central Bank is buying more dollars, to which end it is issuing more pesos."). Former President Kirchner initially forced the Central Bank to adopt this policy for purely political reasons. Specifically, he wanted the Central Bank to continue accumulating reserves (thereby increasing the amount of pesos in circulation) in order to keep down the value of the Argentine peso relative to the U.S. dollar. *ARGENTINA: Still growing but inflation a worry*, LATIN AMERICA ECONOMY & BUSINESS (July 26, 2005) (observing that "government's refusal to let the peso appreciate against the dollar . . . has kept Argentine exports competitive"). This strategy would increase worldwide demand for Argentine goods – and presumably bolster the popularity of the Kirchners and their allies among various agricultural and industrial export sectors in the run-up to congressional elections held in October 2005.

100. After the October 2005 elections, the Argentine government continued to pressure the Central Bank to accumulate dollars for another political reason – to finance the government's debts. *See Argentine c-bank makes record dollar purchase in 2006*, LA NACIÓN (July 6, 2006) ("Argentina must cancel a debt of some $3.0 bln (2.35 bln euro) at the beginning of next month, which is the reason BCRA [is buying] U.S. dollars at present"); *Argentina: bearish thoughts on the peso*, EUROMONEY INSTITUTIONAL INVESTOR (Feb. 6, 2006) ("Now, however, BCRA is continuing to purchase dollars, following the government's prepayment of U.S. $10bn to the IMF, in order to replenish stocks"); *Economy ministry asks Central Bank for nearly ARP 5 billion*, LA NACIÓN (Dec. 28, 2007) ("To ring in the New Year with no unwelcome

surprises and pay liabilities in the next few days, the Ministry of Economy decided to ask the Central Bank to come to the rescue, requesting nearly ARP 5 billion in temporary advances that will be arranged today before the close of the voluntary debt markets.").

101. One particularly glaring example of how completely the Argentine government has usurped the Central Bank's responsibility for monetary policymaking is former President Kirchner's announcement in mid-2006 that it was for ***him*** to quantify the precise level of reserves to be maintained by the Central Bank. He exercised this self-given authority by dictating that the Central Bank's reserves must reach US$30 billion by the end of that year. *See* Martin Boerr, *At this rate, the Central Bank's surplus will only last a year*, INFOBAE PROFESIONAL (Aug. 14, 2006) ("The experts . . . made it clear that the accumulation of reserves is not so much a policy of the Argentine Central Bank as an idée fixe of President Néstor Kirchner."); *US$634 million payout*, AMBITO FINANCIERO (Aug. 14, 2006) ("The idea is for [Argentina] to have US$30 billion in international reserves by the end of [2006], because Néstor Kirchner has made this the target"). Of course, under the version of the Central Bank Charter that was operative at that time, the government was prohibited from even influencing the process whereby the level of reserves held by the Central Bank is determined – let alone establishing a numerical target.

102. The strategy had the benefit of providing former President Kirchner with a piggy bank of export taxes. But domestic observers, like the Argentine financial paper Ambito Financiero noted that

this strategy was also irrational – because in order to purchase the dollars the Central Bank issued bonds that yielded 11% interest, while the Bank's investment in dollars only yielded 6% interest. That is, the Central Bank guaranteed that it would lose money by using borrowed money for an investment that yielded roughly half of what the Central Bank was required to pay to borrow the money. As Ambito Financiero noted:

> Everything seems to indicate that the "accumulation" of foreign currency is an undesired effect of a disorganized monetary policy for which the only purpose is to keep the exchange rate high so as to be able to continue charging export duties to generate the necessary cash to test a hegemonic power project. . . .

What they don't tell us about the reserves, AMBITO FINANCIERO (June 7, 2007).

103. Argentina's reserves continued to grow at a remarkable pace. By March of 2008, Argentina announced that its reserves exceeded U.S. $50 billion. *Smiles for Cristina: reserves pass the USD 50 billion mark. The messenger: Redrado*, AMBITO FINANCIERO (March 13, 2008). Argentina's vigorous efforts to increase reserves include having required the Central Bank to borrow dollars from other banks using speculative Argentine government securities as collateral. *See Inflated reserves?*, AMBITO FINANCIERO (June 3, 2008).

2. <u>Selling Dollars and Appreciating the Peso</u>

104. Shortly after the Central Bank passed the $50 billion mark in accumulated reserves, the Kirchners ordered the Central Bank to begin ***selling*** dollars. *Fernandez peso gambit may backfire as Argentina slows*, BLOOMBERG (July 7, 2008) (noting that the Central Bank had sold over a 2-month period about US$2.6 billion, breaking a five-year policy of buying dollars). This Executive Branch directive caused the value of the Argentine peso to rise relative to the U.S. dollar, which in turn caused a decrease in the worldwide demand for Argentine exports. The temporary shift in monetary policy was motivated at least in part by the desire to ***punish*** Argentina's agricultural sector for its nation-wide strike in opposition to the Kirchners' tax policies. *Central Bank bets on recovering reserves with cheap dollar,* EL CRONISTA (June 25, 2008) (quoting a source as stating, "Néstor [Kirchner] . . . even planned to take [the exchange] to $2,20 so that all the defiant sectors would feel the pain"); *They say that Kirchner could drop it to 2,80,* CLARÍN (June 18, 2008) (quoting former President Kirchner as telling industrialists, in an effort to get their support for the government's policies against the agricultural sector, that "if you don't get behind the government's plan, we can make the dollar fall to $2,80,"and as telling Central Bank officials that "[i]f we need to spend part of the reserves to lower the price of the dollar, we'll do it."); *Fernandez peso gambit may backfire as Argentina slows,* BLOOMBERG (July 7, 2008) (noting that Cristina Fernández de Kirchner was using "the peso as a weapon to quell striking farmers"); *With*

the dollar low, Kirchner also plans to punish industrialists, EL CRONISTA (June 6, 2008) ("The 'lesson' of a low dollar, proposed initially to punish the countryside, also aims to discipline the industrial sectors. In simplified terms, it is Néstor Kirchner's opinion that the rise in the exchange rate is a source of daily satisfaction."). Ironically, the agricultural sector is among those whose electoral support the Kirchners previously curried by ordering the Central Bank to accumulate dollars and fuel an export-driven economy. *Once a government supporter, rural Argentina now an opponent*, NEW YORK TIMES (July 2, 2008) ("[Cristina Fernández de Kirchner] rode to victory in part because of her support from the countryside . . . who benefited from her husband's fiscal policies[.]")

105. The Kirchners continued to utilize Argentina's monetary policy as a tool for silencing the agricultural sector's criticism of their administration. For example, in early September 2008 they instructed the Central Bank to sell over US$100 million in reserves in order to slow down recent increases in the value of the dollar that were strengthening demand for Argentine exports. As confirmed by one official with access to the President's office, the decision "was Néstor's order, to teach a lesson to the countryside." *For Néstor, Nothing Happened*, CRÍTICA DE LA ARGENTINA (Sept. 13, 2008).

3. Maintaining a "Politically Correct" Exchange Rate

106. Leading up to Argentina's 2009 mid-term elections, President Fernández de Kirchner ordered the Central Bank to use all means necessary to maintain a "politically correct" exchange rate and

thereby avoid the perception that her administration was mismanaging the economy. In March 2009, for example, she ordered the Central Bank to "take actions . . . to contain the dollar" in an attempt "to prevent the exchange rate of United States currency from becoming a factor that could divert votes." *US$ 1 Billion Sought from International Organizations to Contain the Dollar*, EL CRONISTA (Mar. 25, 2009)). Her motivation was transparent; as the Argentine financial press reported at the time, "halting or at least significantly slowing the rise of the Dollar does stem from economic interests, but mainly from political ones." *Central Bank to Take Action Today to Halt Dollar Rise*, ÁMBITO FINANCIERO (Mar. 25, 2009) (explaining that "[e]xcessive devaluation could mean a hard blow for the Government, especially as the elections draw near"); *see Redrado Floods Market with Dollar Futures that Will Mature During the Elections*, EL CRONISTA (June 4, 2009) (reporting on the President's decision "to tame the domestic [dollar-to-peso] exchange market at all costs, using measures as aggressive as necessary, to ensure an 'ideal' rate of exchange for the dollar ***at election time***." (emphasis added)). So motivated were the Kirchners – in fact, Néstor Kirchner also was running for a Congressional seat – that the Central Bank had sold in the first six months of 2009 reserves worth approximately US$878 million – or 80% of all dollars sold in during the entire year in 2008. *Sale of Dollars by Central Bank Now Amounts to 80% of Everything "Sacrificed" in 2008*, EL CRONISTA (June 17, 2009). Later in 2009 and in 2010, the Executive Branch reversed course again, and the Central Bank resumed purchasing dollars.

4. Concealing Inflation

107. During those times that it ordered the Central Bank to purchase hundreds of millions of dollars daily, the Executive Branch directed the Central Bank not to "sterilize" those purchases by removing a corresponding amount of pesos from circulation. The failure to sterilize is largely responsible for the country's soaring inflation. *See* Fernando Laborda, *Recipes that proved his failure*, LA NACIÓN (Dec. 1, 2005) ("The root of the problem is the monetary policy of supporting the dollar. It is the government who is causing inflation, and it then pressures companies to not raise prices. . . . This drop was not due to a reduction in revenue, but rather to an increase in spending, probably on account of the elections."); *The BCRA pays big to maintain US dollar rate*, LA NACIÓN (Oct. 19, 2005) (noting that the Central Bank continued to buy hundreds of millions of U.S. dollars despite resulting inflation); *Argentina economy: Government rebuffs currency concerns*, THE ECONOMIST (Aug. 12, 2005) ("the dollar purchases by the Central Bank are expanding the money supply and thereby contributing to rising inflation.").

108. As a result of the Executive Branch's intervention, Argentina's inflation exceeded 11% in 2005. *The economy grows strong, but inflation becomes again a threat*, CLARÍN (Sept. 22, 2005). Independent economists then warned in 2006 that, if the policy continued, Argentina could face an inflation rate of 15% during that year and 18% in 2007. *Warning by international banks that inflation could reach 18% in 2007*, LA NACIÓN (Apr. 5, 2006) (explaining inflationary effect of the "decision not to adopt market mechanisms to lower prices"). This

warning proved prescient, as a group of independent economists determined that the average CPI (consumer price index) growth since January 2007 was in fact 15%. *Analysts calculate actual inflation*, LA NACIÓN (July 15, 2007). Inflation continued to pose an increasingly significant threat to the Argentine economy, with independent estimates in 2008 calculating inflation to have reached its highest levels – 25% – in several years. *Cristina in the land of make believe*, THE ECONOMIST (May 1, 2008). Argentina's inflation rate, as estimated by independent economists, remains approximately 25% today. *Argentina Central Bank to Continue Lending to Federal Government*, WALL ST. J. (August 17, 2012).

109. According to Bank of America's chief economist, Mickey D. Levy, growing inflation in Argentina is the result of "the [Central Bank's] lack of independence from the government." Hugo Alcado Mon, *They warn of inflation and debt*, LA NACIÓN (Nov. 4, 2005). Standard & Poor's has also questioned the lack of independence of Central Bank's monetary policy from the Argentine government in light of Argentina's escalating inflation. *Standard & Poor's Criticized the BCRA's Monetary Policy,* LA NACIÓN (Oct. 24, 2005).

110. It is therefore not surprising that the Executive Branch has resorted to outright manipulation of Argentina's "official" inflation statistics. It accomplished this sleight of hand primarily by interfering with the activity of Argentina's National Statistics and Census Institute (known as "INDEC") – just as it created the inflation problem by interfering with the Central Bank. As The Economist observed in 2008:

> Since January 2007, the official inflation rate has been doctored to remain in single digits, while the true figure has soared above 20%. When current President Cristina Fernández de Kirchner succeeded her husband as president last December, it was hoped that she might help restore the government's computational credibility, given that she had promised during her campaign to revamp the national statistics bureau. Those expectations have now been dashed. Rather than stopping the meddling that took place during Néstor Kirchner's administration, the new index merely formalises it.

Hocus-pocus: Argentina's way with sums, THE ECONOMIST (June 12, 2008); *see also* ("*Economics for Dummies*, WALL ST. J., (Feb. 20, 2007) ("Recently the Peronist government of President Néstor Kirchner sacked an official at its National Statistics and Census Institute for refusing to agree to alter the 'methodology' used to calculate inflation"); *Analysts calculate actual inflation*, LA NACIÓN (July 15, 2007) ("The heavy-handed manipulation of the retail price index has created a huge gap between what is reported by INDEC and private calculations, which double the official estimate."); *Brazil and Argentina: the tortoise and the hare*, THE ECONOMIST (Mar. 19, 2008) (the government has "resorted to . . . baldly lying about the inflation rate").

111. The Executive Branch has a strong incentive to hide Argentina's true inflation rate: much of the Republic's outstanding debt is structured in the form of bonds whose yields are indexed to inflation. Thus, by creating the illusion of lower inflation,

Argentina can repay those lenders less than what is truly owed. *IMF close to declaring that INDEC is unreliable,* LA NACIÓN (July 30, 2008); *If the INDEC recovers, USD 3.4 billion in debt will have to be paid,* PERFIL (Aug. 16, 2008). In fact, according to the former head of INDEC, "'Argentina is in default. What was done with the indexes is a form of concealed default'" and that "a surge of lawsuits could be generated against the State from the holders of bonds adjusted by the CER [Reference Stabilization Rate]." *Concealed default,* AMBITO FINANCIERO (Aug. 25, 2008).

112. The controversy over data manipulation by INDEC became so widespread that the IMF eventually instructed Argentina to use better tools for measuring inflation. *See IMF questions INDEC: will say that there are other indicators for inflation*, CLARÍN (Mar. 22, 2008); *IMF close to declaring that INDEC is unreliable,* LA NACIÓN (July 30, 2008) (reporting that the IMF was on the verge of declaring that INDEC's statistics could not be trusted); *Don't lie to me, Argentina*, THE ECONOMIST (Feb. 25, 2012) ("The IMF has 'noted' that Argentina is failing in its obligation to provide it with reliable figures, and made recommendations and set deadlines for it to improve. However, when Argentina ignores it, the fund merely wrings its hands, laments the 'absence of progress' – and feebly sets a new deadline."). Earlier this year, The Economist refused to continue publishing INDEC's inflation statistics because political manipulation had made them too inaccurate to be useful to The Economist's readers. *Id.* ("We are tired of being an unwilling party to what appears to be a deliberate attempt to deceive voters and swindle investors.").

113. Not surprisingly, the Central Bank was complicit in the Argentine government's manipulation of inflation figures. The Central Bank's own unrealistically low inflation projection for 2008, between 7%-11%, ***precisely*** matches that of INDEC, leading one Argentine newspaper to comment that "Redrado is completely aligned with the position coming from administration officials." *Central Bank says inflation won't exceed 11% in 2008,* CLARÍN (Dec. 27, 2007). When asked about inflation after a speech before the Council of the Americas, President Fernández de Kirchner explicitly invoked the Central Bank's inflation figures to shore up the credibility of INDEC's projections. *See Speech of the President to the Council of the Americas in New York, September 25, 2008*, ("The truth is that the expectations of . . . the Central Bank coincide in the Report, more or less, with the statistics of the INDEC.") *available at* http://www.casarosada.gov.ar/index.php?option=com_content&task=view&id=5034&Itemid=66 (last visited Sept. 29, 2008). The disparity between the official rate of inflation and the real rate of inflation remains just as wide today, with economists estimating that the real rate of inflation is approximately 25%, rather than just under 10% as reported by INDEC. *Argentina Central Bank to Continue Lending to Federal Government*, WALL ST. J. (August 17, 2012).

III. GIVING JUDICIAL RECOGNITION TO THE CENTRAL BANK'S ILLUSORY INDEPENDENCE WOULD INJURE EM AND NML

114. Recognizing the Central Bank's illusory independence to shield the Central Bank's assets from Argentina's creditors would injure EM and NML by unjustly assisting the Republic in avoiding

the satisfaction of valid judgments that already exist (and that are anticipated to be entered) against it.

115. As this Court has observed: "[T]he Republic has thus far used every imaginative way in law and propriety to – and maybe not such propriety, but anyway, they want to block these plaintiffs from ever recovering a dime." Hearing Transcript (May 30, 2008) at 12:7-14; *id*. at 26:2-23 ("I am not impressed with the morality of the Republic of Argentina in its absolute steadfast refusal to honor its lawful debts."). Earlier this year, the Court explained that the "overriding problem" in this litigation is "the lawlessness of the Republic," which has turned "the most clear-cut obligations in the debt instruments . . . into a dead letter" by refusing to pay those debts. Hearing Transcript in No. 08 Civ. 6978 (TPG) (Feb. 23, 2012) at 49.

116. Argentina's dealings with its Central Bank are entirely consistent with the Court's observations regarding the Republic's steadfast refusal to satisfy valid judgments entered against it. At the same time that Argentina has exercised such extensive control over the Central Bank that a principal-agent relationship exists, Argentina has sought to shield the Central Bank's assets by contending that they technically are not Argentina's property. That contention is demonstrably false, as evidenced by the examples above describing Argentina's actions both before and after it defaulted on its debt obligations.

117. The falseness of Argentina's contention that the Central Bank's assets are not Argentina's property is further evidenced – and tacitly acknowledged – by the words of Argentina's former Cabinet

Chief, Alberto Fernandez, in describing some of the measures taken by the Republic ***even before its default*** to avoid satisfying its post-default legal obligations to its creditors. As Fernandez stated:

> Reserves of the Central Bank of the Argentine Republic on deposit in New York banks have been withdrawn, funds on deposit in the New York branch of Banco Nación have been repatriated, and salaries of Argentine officials posted to other countries are being deposited in Argentina or paid in the form of cash sent via diplomatic pouch, which has immunity.

The government is protecting itself from attachment, LA NACIÓN, (Feb. 5, 2004). In fact, between mid-2001 and 2003, the Central Bank, acting on the advice of the Argentine government and its "international counsel," transferred billions of dollars of foreign exchange reserves out of the United States to the BIS in Switzerland. There would have been no reason to shield those reserves from possible attachment unless they in fact belong to Argentina.

118. Argentina's domination and control over the Central Bank causes its purportedly separate juridical status to work a fraud and injustice on Plaintiffs. The Central Bank is at the heart of all efforts to pay the Republic's debts. It serves as the Republic's centralized collection point and repository for the U.S. dollars, which the Republic needs to pay dollar-denominated debt. It invests those dollar reserves with the BIS, and then employs those reserves solely at the Argentine government's discretion and direction to pay only creditors favored by the Repub-

lic. However, when disfavored creditors – such as Plaintiffs – seek to attach or execute upon the Central Bank's dollar reserves, Argentina seeks to invoke the Central Bank's purportedly separate status to block those creditors' efforts to be paid out of the same pool of dollars. This constitutes a fraud or injustice on Plaintiffs.

COUNT I

(For Declaratory Judgments)

119. EM and NML repeat and reallege each and every allegation of Paragraphs 1 through 118 of this Third Amended Complaint as set forth herein.

120. A justiciable and actual controversy exists before this Court with respect to whether the Central Bank is an alter ego of Argentina. A declaratory judgment resolving this question is likely *(1)* to prevent future harm to EM and NML resulting from Argentina's abuse of the Central Bank's nominal independence to shield its assets from the Republic's creditors, *(2)* to clarify or settle the legal rights of the parties to this action, and/or *(3)* to terminate a principal source of the insecurity and/or controversy that brought about this action.

121. An instrumentality like the Central Bank is an alter ego of its parent state when the parent state controls the instrumentality so extensively that a principal-agent relationship exists between them, or where giving effect to the nominal separateness of the instrumentality would work fraud or injustice.

122. In this case, Argentina undoubtedly controls the Central Bank, as demonstrated by the facts set forth above. Moreover, the nominal distinction

between Argentina and the Central Bank is illusory and only serves to aid Argentina in improperly shielding its assets from creditors like EM and NML.

123. Accordingly, EM and NML are entitled to a declaratory judgment expressly adjudging the Central Bank to be an alter ego of Argentina.

COUNT II

(For Money Judgment Against The Central Bank In Favor Of EM)

124. EM repeats and realleges each and every allegation of paragraphs 1 through 123 of this Third Amended Complaint as set forth herein.

125. On October 27, 2003, this Court entered the EM Judgment against Argentina for $724,801,662.56. The EM Judgment became final and non appealable on November 30, 2004. As of August 31, 2012, the amount of the EM Judgment including interest owed by Argentina is $812,546,554.60.

126. As an alter ego of Argentina, the Central Bank is jointly and severally liable for all of Argentina's obligations. Accordingly, EM is entitled to a money judgment expressly adjudging the Central Bank jointly and severally liable for the EM Judgment.

COUNTS III-VII

(For Money Judgment Against The Central Bank In Favor Of NML)

127. NML repeats and realleges each and every allegation of paragraphs 1 through 123 of this Third Amended Complaint as set forth herein.

128. On December 18, 2006, this Court entered the NML-1 Judgment against Argentina for $284,184,632.20. The NML-1 Judgment became final and non-appealable on February 16, 2007. As of August 31, 2012, the amount of the NML-1 Judgment including interest owed by Argentina is $374,448,111.66.

129. On June 1, 2009, this Court entered the NML-2 Judgment, as amended on June 16, 2009 and October 26, 2011, against Argentina for $311,177,898.00. The NML-2 Judgment became final and non-appealable on November 25, 2012. As of August 31, 2012, the amount of the NML-2 Judgment including interest owed by Argentina is $316,160,428.03.

130. On June 1, 2009, this Court entered the NML-3 Judgment, as amended on June 16, 2009, against Argentina for $533,378,361.00. The NML-3 Judgment became final and non-appealable on September 16, 2011. As of August 31, 2012, the amount of the NML-2 Judgment including interest owed by Argentina is $541,918,728.80.

131. On June 1, 2009, this Court entered the NML-5 Judgment, as amended on June 16, 2009, against Argentina for $148,781,936.00. The NML-5 Judgment became final and non-appealable on September 16, 2011. As of August 31, 2012, the amount of the NML-5 Judgment including interest owed by Argentina is $151,164,208.22.

132. On June 1, 2009, this Court entered the NML-8 Judgment, as amended on June 16, 2009, against Argentina for $290,270,631.00. The NML-8 Judgment became final and non-appealable on Sep-

tember 16, 2011. As of August 31, 2012, the amount of the NML-8 Judgment including interest owed by Argentina is $294,918,397.26.

133. As an alter ego of Argentina, the Central Bank is jointly and severally liable for all of Argentina's obligations. Accordingly, NML is entitled to a money judgment expressly adjudging the Central Bank jointly and severally liable for the NML-1, NML-2, NML-3, NML-5, and NML-8 Judgments.

COUNTS VIII THROUGH XIII

(For Money Judgments Against The Central Bank In Favor Of NML)

134. NML repeats and realleges each and every allegation of paragraphs 1 through 123 of this Third Amended Complaint as set forth herein.

135. NML expects to be awarded separate judgments against Argentina in each NML-4, NML-6, NML-7, NML-9, NML-10, and NML-11. As of August 31, 2012, the estimated amount of principal and accured interest in these six actions owed by Argentina is $960,763,622.97.

136. As an alter ego of Argentina, the Central Bank is jointly and severally liable for all of Argentina's obligations. Accordingly, NML will be entitled to separate money judgments expressly adjudging the Central Bank jointly and severally liable for any judgment awarded against Argentina in each NML-4, NML-6, NML-7, NML-9, NML-10, and NML-11.

WHEREFORE, based on the allegations set forth above and/or additional facts that will be revealed through discovery EM and NML pray for declaratory

and money judgments against the Central Bank and Argentina,

a. declaring, pursuant to 28 U.S.C. § 2201, that the Central Bank is an alter ego of Argentina,

b. adjudging the Central Bank jointly and severally liable for the judgments that have been awarded, and that will be awarded, to EM and NML against Argentina based on Argentina's default on its sovereign debt,

c. for interest, costs, fees and other expenses associated with this action, including reasonable attorney fees, and

d. such other legal or equitable relief as this Court deems just and proper.

Dated: August 31, 2012

New York, New York

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