UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASE NO. 10 Civ. 4300 (TPG)

SILVIA SEIJAS, *et al.*,

Plaintiffs,

-vs-

THE REPUBLIC OF ARGENTINA and
BANCO DE LA NACIÓN ARGENTINA,

Defendants.

DECLARATION OF PROFESSOR ARTURO C. PORZECANSKI

Pursuant to 28 U.S.C. §1746, Arturo C. Porzecanski declares as follows:

1. I, Arturo C. Porzecanski, submit this declaration in support of the action brought by Silvia Seijas, Heather M. Munton, Thomas L. Pico De Estrada, Emilio Romano, Ruben Weiszman, Anibal Campo, Maria Copati, Cesar Raul Castro, Hickory Securities Ltd., Elizabeth Andrea Azza, Claudia Florencia Valls, Rodolfo Vogelbaum, Eduardo Puricelli, and Ruben Daniel Chorni (collectively, the "Plaintiffs"), for a declaration that Banco de la Nación Argentina ("BNA" or "the Bank") is the alter ego of the Republic of Argentina ("Argentina"), and in support of the accompanying memorandum in opposition to BNA's and Argentina's converted motions for summary judgment. In this declaration, I set forth facts and opinions based on the evidence available to me and evaluate the degree of control exercised by Argentina over BNA. My conclusion is that Argentina exercises extensive day-to-day control over BNA and has been abusing the Bank's corporate form to such an extent that BNA has lost its separate existence. Their relationship is that of principal and agent.

I. Professional Background and Qualifications

2. I am a naturalized citizen of the United States and a full-time professor of international economics and finance at American University in Washington, D.C., with the academic title of Distinguished Economist in Residence. I was born and raised in Uruguay, South America, and came to the U.S. in 1968 at age 18 to begin a lifelong study of international economics, obtaining B.A., M.A., and Ph.D. degrees in that field, the last two at the University of Pittsburgh, with a regional specialization in Latin America. Following a two-year stint teaching and doing applied research on Latin American financial issues in Mexico City, I came to New York City and, in the 28 years from early 1977 until early 2005, I worked as an international economist on Wall Street. I started out as a junior economic and financial analyst at the venerable JP Morgan Bank, where I rose to become their senior advisor on Latin America. After a dozen years there, and then a stint as the chief economist of a New York bank, I went on to serve as the chief economist for emerging markets at several fairly large investment banking institutions based in New York City, the last of which was the European bank ABN AMRO. As such, I advised multinational companies, and institutional stock and bond investors, on the risks and opportunities of operating in the emerging markets generally – and in countries like Argentina, specifically.

3. During my nearly three decades on Wall Street, I gained considerable first-hand experience in the financial analysis of sovereigns and their state-owned banks, corporations and other entities for the purpose of assessing their creditworthiness. I would travel to countries like Argentina at least once, and usually two or three times, a year, mainly to dig up essential economic statistics and financial data, which in those days were often not disclosed to the public or even to analysts – nevermind being easily accessible to all via the Internet, as is the custom nowadays. Then, I would interview many government officials, private-sector business people,

diplomats, and representatives of civil society (labor unions, chambers of commerce, universities, think tanks, private consultancies, and the like) to obtain a thorough understanding of the context, and what stood behind, the facts and figures that I had managed to collect. And then I would develop views as to the economic, financial, and political risks and opportunities that a country like Argentina presented.

4. My upbringing in South America, and my professional career as a hands-on, tire-kicking economic and financial analyst from 1975 until 2005, taught me important lessons that I am bringing to bear on this Declaration. For example, I learned that in countries like Argentina, political institutions – including the courts – are weak, inefficient, and corrupt; the laws of the land are observed mostly in the breach; what you see is seldom what you actually get; and written commitments are often not taken seriously, such that a man's word is frequently his defaulted bond.

5. In the past decade, I have published numerous scholarly articles on sovereign debt issues at the intersection of international finance and international financial law, including two in leading law journals. One of these, published in 2005 and quoted often, is titled "From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default," and the other, being published just now, is titled "When Bad Things Happen to Good Sovereign Debt Contracts: The Case of Ecuador." Both of these articles aim to educate lawyers, bankers, analysts, and investors so they will operate under fewer illusions when they venture into the emerging markets, expecting that ethical and legal standards and practices we are used to in the United States will also hold elsewhere. A copy of my *curriculum vitae* is attached with more details of my publications, work experience, and educational background.

6. I wish to make clear that I have no, and have never had any, financial ties to Argentina, including to BNA. In fact, I have never bought or sold any Argentine government securities, and I have never made or withdrawn any investments in or from that country. I specifically never opened an account, or requested a loan or any other business service, from BNA.

7. The remainder of my declaration is organized as follows. I describe the practical difficulties encountered in developing an expert opinion on the issues at hand, and thus the precautions that must be taken when interpreting all of the declarations – Exhibits C through M of the Sullivan Declaration ("Sullivan Decl.") – that Defendants have recycled from the case *EM Ltd. and NML Capital, Ltd. v. Republic of Argentina and Banco de la Nación Argentina* in support of their Motion to Dismiss the Complaint of the current set of Plaintiffs. Then, I describe the ways by which Argentina has come to apply extensive day-to-day control over BNA – how it has altered and currently abuses BNA's corporate form, to a degree such that BNA has lost *de facto* its separate existence and is now Argentina's alter ego.

II. On the difficulties of developing an expert opinion

8. I approached the question of the nature and extent of the relationship between BNA and Argentina without prejudice, trained as I am to obtain and examine the facts before drawing any conclusions. However, it turns out that there is very little information on the financial performance and activities of BNA, and on developments in the relationship between BNA and Argentina, that is made public by either party. BNA is a financial institution founded in 1891, and is now the largest commercial bank in Argentina, with nearly 16,000 employees operating out of over 600 branches at home and abroad. Yet, all that the Bank reveals to the public about its financial performance and relationships is a single page summarizing its quarterly results –

and it does that with many months' delay.[1] Emailed requests for additional and more current information sent to the official identified on BNA's website as the proper contact person have gone unanswered.[2]

9. BNA's Charter twice refers to the Bank's responsibility to provide information on its activities. Article 6 reads: "The Bank shall submit its financial statements and profit and loss accounts to the National Executive Branch, *and shall publish them within ten business days after their certification by the Central Bank of the Argentine Republic.*" *See* Exhibit C to Sullivan Decl. (emphasis added). And Article 15, says, "The Board of Directors shall: . . . [Subsection "k"] Approve each year the general balance sheet of the Bank, the profit and loss account, and the management report, *all of which shall be forwarded to the National Executive Branch for information and publication*, pursuant to Article 6." *Id.* (emphasis added). Evidently, BNA and Argentina take their responsibilities under Article 6 very lightly, providing the barest of bones on the Bank's financial activities and performance to the public at large, publishing no quarterly or even annual reports, and revealing nothing about the nature and extent of their relationship with one another – except, evidently, when named as a defendant before the courts of the United States.

10. BNA's books are audited by the Auditor General of the Republic ("AGN") on a quarterly basis, and the Bank provides its key financial statistics to the Central Bank of the

[1] This single page is customarily posted on BNA's website at http://www.bna.com.ar/institucional/institucional_balance.asp. As of Feb. 16, 2011, BNA's balance sheet and earnings essentials shown were for the period ending March 31, 2010, *see* http://www.bna.com.ar/institucional/BCE_CONDENSADO_Marzo10.pdf. Although, as described later, BNA provides data to BCRA on a monthly basis, such that by Feb. 16, 2011, many facts and figures for BNA's condition as of end-October, 2010 could have been provided by BNA itself. The number of BNA employees and branches cited appears on BNA's website at http://www.bna.com.ar/institucional/institucional_cifras.asp.

[2] Email messages were sent to José Luis Olivero, BNA's Deputy Manager of Institutional Relations, the contact person indicated on http://www.bna.com.ar/institucional/institucional_prensa.asp, on Dec. 13, 2010 and again on Jan. 3, 2011. No reply has been obtained as of Feb. 16, 2011.

Argentine Republic ("BCRA"), the regulator of the country's banks, on a monthly basis. However, the AGN does not publish any documents submitted by BNA, circumscribing itself to providing a summary of its audit findings. Its latest published statement on BNA is typical of prior ones: it is merely three pages long; comments on the Bank's accounting practices and financial statements for the quarter ending on March 31, 2010; and cites only five figures, three of which relate to BNA's loan-loss provisions.[3] Therefore, the intent of Chapter 15-k of BNA's Charter – namely that the general balance sheet of the Bank, the profit and loss account, and the management report all be published by the National Executive Branch – is thwarted in actual practice.

11. BCRA, for its part, publishes every month a compendium of vital statistics and selected ratios on all of Argentina's banks (e.g., their assets, liabilities, earnings, bad loans, profitability, and efficiency ratios, etc.), which includes BNA. However, it dedicates to the Bank, the country's largest financial institution, the same four standard pages – out of a grand total of 325 pages – which BCRA devotes to each and every other bank in that nation.[4] BCRA provides no explanatory text or commentary authored by BNA or otherwise. Fortunately, in terms of my ability to shed light on the questions at hand, the BCRA monthly report on Argentine financial institutions at least discloses how much each bank has lent to the non-financial public sector (namely, to the government, excluding state-owned banks BCRA, Banco de la Provincia de Buenos Aires, and Banco de la Ciudad de Buenos Aires).

[3] The latest AGN *(Auditoría General de la Nación)* audit, http://www.agn.gov.ar/informes/informesPDF2010/2010_228.pdf (last visited Jan. 28, 2011).
[4] Data on Argentina's banks appears in BCRA's monthly report titled *"Información de Entidades Financieras,"* see for instance http://www.bcra.gov.ar/pdfs/entfinan/201010e.pdf, pp. 126-129, with data through Oct. 30, 2010 (last visited Jan. 28, 2011).

12. The BCRA monthly report does not, however, reveal the extent of any banks' holdings of bonds and other promissory notes issued by federal, state, or local governments or by the central bank itself. This is a crucial piece of information of great relevance to the financial relationship between BNA and Argentina. Fortunately, for the sake of my inquiry, it turns out that BNA shares information on its quarterly financial accounts and operating results with the local affiliate of Fitch Ratings, one of the world's leading credit-rating agencies. It does so in order to obtain a rating for its operations in Argentina, Chile, and Uruguay, since the regulatory framework in all three countries is such that banks must be rated in order to attract institutional deposits. Therefore, I have made use of the Fitch Ratings quarterly reports on BNA, which provide data and are also descriptive and analytical, to supplement the cold facts published by BCRA and the scarce information published by the AGN. In particular, I will cite Fitch's data on BNA's holdings of bonds and notes issued by both the government and BCRA.[5]

13. Given the paucity of information made public directly or indirectly by BNA, specifically on the nature and extent of its relationship with Argentina, and absent a legally mandated discovery process allowing for depositions, interrogatories, and document production requests, I had to rely more than I wished on newspaper accounts, statements made publicly by BNA and other government officials, scholarly articles, and on other secondary and even tertiary sources. In the process of obtaining factual information to develop my expert opinions, I came to understand why BNA has a widespread reputation for lack of transparency and inadequate corporate governance. This poor reputation is quantified by an annual, independent ranking of

[5] The citations are to various issues of the quarterly report on BNA published by Fitch Argentina Calificadora de Riesgo, S.A. ("Fitch Ratings"), under the series "*Entidades Financieras Argentina Informe Trimestral: Banco de la Nación Argentina.*" The latest Fitch Ratings report on BNA, published in Dec. 2010 with data and estimates through Sep. 30, 2010, is available at http://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=593495 (last visited Jan. 28, 2011).

ethical standards, corporate social responsibility, and corporate governance at Latin America's forty largest financial institutions, according to which BNA always scores at or very close to the bottom.[6] Assessments of this type fly in the face of the claim, in the Declaration of BNA's former chairperson Mercedes Marco del Pont, that "The Board [of BNA] adheres to the implementation of the latest internationally recognized corporate good governance practices"– unless, of course, this is a case of good intentions yet to become a reality. Del Pont Decl., Exhibit E to Sullivan Decl., ¶8.

III. BNA's Governance: Turnover at the Board of Directors

14. BNA's Memorandum of Law in Support of its Motion to Dismiss the Complaint and the attached recycled Declarations (Exhibits C-M, Sullivan Decl.) flaunt the idea that BNA is governed much like any other corporation with which the Court may be familiar. "BNA's Charter provides for the Executive Branch of the Republic to appoint BNA's President and Board of Directors. This is the Republic's *only* role in BNA's management, and it is no different from the role that any sole owner plays in a corporation." [DE-7-Pg-14] (emphasis in original). As I will explain in this and subsequent sections, this is neither true *de jure* nor *de facto*.

15. As is typical of 100% state-owned companies in Argentina and most elsewhere, the President and other members of the Board of Directors of BNA are political appointees who serve at the pleasure of the Executive Branch. But the first notable fact is that they do not serve for very long. While their appointment is for a four-year term which may be renewed (Articles 10 and 12, Exhibit C to Sullivan Decl.), in practice, many Board members do not end up completing even a single four-year term. The presidency and vice-presidency of BNA, in

[6] In the last such ranking, developed by a specialist consulting firm and the financial magazine LatinFinance, a wholly owned subsidiary of the U.K. publishing group Euromoney Institutional Investor PLC, BNA came in 40th place out of 40 major banks in Latin America. *See*"Corporate Governance: Tussle at the Top," LatinFinance, Sept. 2008, http://www.latinfinance.com/article.aspx?articleID=2000594.

particular, are understood to be either a stepping stone to a higher office (for those who are obedient to the Executive Branch) or else a fast track to oblivion (for those who are insufficiently loyal). The consequent turnover at the helm has left BNA institutionally weaker than many of its state-owned counterparts in South America and around the world.

16. As can be seen in Figure 1, during the past eleven years, BNA has had ten presidents, and not one has completed a 48-month term. Some were promoted away after a couple of years – like Felisa J. Miceli who became Minister of Economy and Public Finance, and Mercedes Marcó del Pont who took over the BCRA in early 2010 – while others were pressured into resigning within months or even days of their appointment.

Figure 1

Presidents of Banco de la Nación Argentina (BNA)

Name	Period Served	Months in Office
Juan Carlos Fábrega	February 2010 – Now	
Mercedes Marcó Del Pont	January 2008 to February 2010	25
Gabriela Ciganotto	April 2006 to January 2008	21
Ricardo Jorge Lospinnato	December 2005 to March 2006	3
Felisa Josefina Miceli	June 2003 to December 2005	30
Horacio Ernesto Pericoli	April 2002 to June 2003	14
Enrique Olivera	January 2002 to April 2002	3
David Fernando Expósito	Dec. 26, 2001 to Dec. 28, 2001	0
Enrique Olivera	October 2000 to December 2001	14
Chrystian Colombo	December 1999 to October 2000	10

17. A good example of the latter group of castaways is Ricardo J. Lospinnato, who lasted less than four months as head of BNA, reportedly because he was insufficiently docile and did not kowtow to a Board member, Gabriela Ciganotto, who was particularly close to then President and Mrs. Néstor Kirchner. After she complained about Lospinnato to the Kirchners in late January 2006, President Kirchner immediately demoted the then BNA Vice President, Oscar Ferrari, so that Ciganotto would take over BNA's vice-presidency – a warning sign to Lospinnato that loyalty would be rewarded and an indication to Ferrari that he was disposable. Yet during the following weeks Lospinnato apparently grew resentful of Ciganotto's promotion, such that their relationship became even more strained. The situation was resolved in late March when Lospinnato was asked by the government to tender his resignation, which he did. Officials of the Ministry of Economy told members of the press that Mr. Lospinnato had been let go because he was unwilling to align himself with the goals of that Ministry.[7] And to reinforce the message that BNA must be headed by someone of unquestionable loyalty to the Executive Branch, Ms. Ciganotto was promoted again, this time to President of BNA – two promotions in the space of two months.

18. As this episode vividly illustrates, the second notable characteristic of the relationship between Argentina and its BNA Board appointees is that it is anything but a hands-off relationship. It regularly features interventions – including very public ones – designed to punish perceived disloyalties or else to reward servile attitudes. The previous BNA chairperson, Mercedes Marcó del Pont, has stated that "BNA's Charter does not provide the [E]xecutive [B]ranch of the Republic the power to remove the president of BNA or any of its directors.

[7] Virtually all of the newspapers in Buenos Aires reported the same behind-the-scenes drama at BNA in their March 31, 2006 editions. *See* "Echaron al titular del Banco Nación después de una dura pelea interna," *Clarín*, http://edant.clarin.com/diario/2006/03/31/elpais/p-00801.htm; "Desplazaron a Lospinnato del Nación," *La Nación*, http://www.lanacion.com.ar/nota.asp?nota_id=793313; "Diferencias arriba y peleas abajo," *Página 12*, http://www.pagina12.com.ar/diario/economia/2-65009-2006-03-31.html.

Whenever there has been a change in BNA's presidency, it is because of the resignation of the predecessor." Exhibit E to Sullivan Decl., ¶14. This was a highly misleading statement: BNA's charter is silent on how its directors may be removed – namely, it neither explicitly grants to, nor withholds from, the Executive Branch the authority to remove the President or any of the Bank's other directors. Therefore, the tenure of BNA officers and directors is actually *not* protected by the Charter. Moreover, Ms. Marcó del Pont conveniently forgot to mention that most resignations have been provoked by the Executive Branch: they were either tendered involuntarily, as in the case of the hapless Lospinnato and Ferrari in early 2006, or else they have been tendered voluntarily, as in her own case in early 2010 and that of Ms. Ciganotto in early 2006, as part of a promotion to a higher political appointment. In actual practice, therefore, members of BNA's Board of Directors serve at the pleasure of Argentina, which of course undermines the Bank's independence from the very top of its structure.

19. In sum, appointments to the Bank's Board of Directors are *not* the Republic's only role in BNA's management. Said appointments and the Board turnover that follows from routine friendly and forced early departures, as well as from promotions and demotions within the Board, are one of the ways by which Argentina exercises extensive day-to-day control over BNA. These interventions have rendered the Bank's Board of Directors highly dependent on instructions and signals coming from the government.

IV. BNA's Governance: Responsibilities of the Board of Directors

20. It is alleged that "BNA's Board of Directors has the same powers and responsibilities as the board of directors of stock corporations." [DE-7-Pg-14]. This is actually *not* the case. It should be clear even from a cursory reading of BNA's Charter, and also from the descriptions of

how the Board comports itself, *see, e.g.,* Defendant's Declarations, Exhibits 5-7, that the Board micromanages the Bank in a highly unusual manner.

21. The customary role of the board of directors in stock corporations is to determine the general policies which govern their operations – and then to delegate authority to professional executives who constitute the hands-on management. This is why most board meetings take place on a quarterly or at most a monthly basis – the boards of S&P 500 (i.e., the largest) U.S. companies meet on average fewer than nine times per year – and are relatively brief (four-to-six hours long, typically).[8] As per a recent report of the New York Stock Exchange Commission on Corporate Governance, "Board service is not expected to be a full-time job."[9] The reason is that "*[m]anagement has a fundamental role* in corporate governance. Working at the direction of the board, it has responsibility for managing the corporation on a daily basis, as well as executing the corporation's basic operations and strategy, with the goal of creating long-term sustainable growth in value for the corporation's shareholders. This includes developing and implementing the corporation's strategic plan, as well as developing appropriate measurement tools so that the corporation's performance against the plan can be measured and understood."[10]

22. For example, at Bank of America, the largest bank in the United States, "The basic responsibility of the Board is to oversee the Company's businesses and affairs, and to exercise reasonable business judgment on behalf of the Company. *In discharging this obligation, the Board relies on the honesty, integrity, business acumen and experience of the Company's management*, its outside advisors and the Company's independent registered public accounting

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[8] *See* "Spencer Stuart US Board Index 2010," pp. 24-25, http://content.spencerstuart.com/sswebsite/pdf/lib/SSBI2010.pdf.
[9] See "Report of the New York Stock Exchange Commission on Corporate Governance," Sept. 3, 2010, Sec. IV, Principle A.1., p. 24, available at http://www.nyse.com/pdfs/CCGReport.pdf.

[10] *Id.*, Sec. IV, Principle B.1., p. 27-28 (emphasis added).

firm."[11] The Board is charged with just a handful of specific responsibilities, like conducting annual self-evaluations and also an assessment of the Chief Executive Officer's performance. The Board must also "ensure that *management develops strategic plans for the Company's business* and periodically reviews these plans with the Board" and furthermore "that the Company, *through its management,* maintains high ethical standards and effective policies and practices designed to protect the Company's reputation, assets and businesses added."[12] As is evident, the Board of Directors of Bank of America delegates to the company's management the day-to-day running of the business. This is one of the reasons why it ordinarily meets six times per year.[13]

23. Even at Fannie Mae and Freddie Mac, government-sponsored financial enterprises chartered by the U.S. Congress, their board of directors have been charged with a similarly non-specific, policy-making role as per their respective founding charters.[14] "The Federal National Mortgage Association [Fannie Mae] shall have a board of directors . . . which shall determine the general policies which shall govern the operations of the corporation" (Sec. 308b) .[15] The current Fannie Mae Bylaws read: "General policies governing the operations of the corporation shall be determined by the Board of Directors" (Art. 4, Sec. 4.01).[16] At the Federal Home Loan Mortgage Corporation [Freddie Mac], meanwhile, "the Board of Directors shall determine the

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[11] "Bank of America Corporate Governance Guidelines As of December 14, 2010," http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NzQ0NDd8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1 (emphasis added).

[12] *Id.* (emphasis added).

[13] Information provided in writing to the author by the Investor Relations office of Bank of America via an email message dated Jan. 7, 2011.

[14] Both companies are currently operating under a conservatorship that began on Sep. 6, 2008, conducting their business under the direction of the Federal Housing Finance Agency.

[15] *See* "Federal National Mortgage Association Charter Act," http://www.fhfa.gov/GetFile.aspx?FileID=29.

[16] *See* "Fannie Mae Bylaws as amended through Jan. 30, 2009," http://www.fanniemae.com/governance/pdf/bylaws.pdf.

general policies that govern the operations of the Corporation" (Sec. 303. (a)(1)).[17] The reason for this general language is that even in U.S. state-related companies, the prevailing governance custom is for the board of directors to delegate to the company's management the day-to-day running of the business.

24. The situation is completely different at BNA, whose Charter spells out numerous managerial responsibilities for the Board of Directors – responsibilities which have remained unaltered through time, despite the Charter having been amended in recent decades (for example, in 1982, 2000, and 2010) in a variety of ways. To begin with, the government-appointed Chairman of BNA is responsible for all kinds of personnel decisions beyond picking the General Manager. As per the Charter's Article 14 (c-e), the Chairman gets to designate (for Board approval) the General Manager, the (currently eight) General Assistant Managers, and the very many Departmental Managers of this sprawling Bank; appoint, transfer, promote, and penalize officers and employees of the Bank; and propose (to the Board) the hiring of personnel for short periods of time (e.g., temporary employees and consultants). *See* Exhibit C to Sullivan Decl. The Board of Directors as a whole, as per the Charter's Article 15 (a-p), is tasked with, among other duties, setting the terms and conditions of BNA transactions (e.g., the interest rates, discounts, commissions, and other terms that will apply); the opening and closing of branches, agencies, and other representative offices at home and abroad; the purchase, sale, construction, or remodeling of all Bank buildings; the designation of directors, supervisors, trustees, or auditors in the companies or consortiums in which BNA participates; and of course the approval of the Chairman's personnel initiatives. *See* Exhibit C to Sullivan Decl.

25. In sum, at BNA, the Board of Directors exercises extensive day-to-day control over the Bank, and thus its managerial staff plays a largely passive, administrative role. This explains

[17] *See* "Federal Home Loan Mortgage Corporation Corporation Act," http://www.fhfa.gov/GetFile.aspx?FileID=30.

why the BNA Board is so very busy, as described by its previous chairperson, Mercedes Marcó del Pont. "The BNA Board is a very active board of directors. It meets weekly. In addition to establishing policies and procedures for the operation of more than 600 branches of BNA located in Argentina and around the world, with 45 more projected, the Board's activities include approving the terms and conditions of all important banking transactions, such as for example all loans in excess of 1,690,000 pesos. The Board exercises responsibility for all aspects of the operations of BNA."[18] Exhibit E to Sullivan Decl., ¶7. To put things in perspective, at the time of her writing, 1,690,000 pesos were equivalent to about 502,000 dollars at the official exchange rate prevailing on Oct. 28, 2008, a relatively small amount even by Argentine standards. They were also the equivalent of 0.006% of BNA's total gross loan portfolio as of Dec. 31, 2008.[19] It is inconceivable that such a miniscule loan amount would ever be considered "important" enough to require Board approval at any other financial institution – nevermind one the size of BNA.

26. Though burdened with so many managerial responsibilities, it should be noted that the BNA Board of Directors is not allowed to set its own compensation. Indeed, pursuant to the Charter's Art. 31, "The compensation of the Chairman, Vice-Chairman, Directors, and Supervisor shall be as established by the National Executive Power." Exhibit C to Sullivan Decl. This is another example of how BNA's Board of Directors *does not* have the same powers and responsibilities as the board of directors of stock corporations, which are empowered to set their

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[18] And that is not all that Board members do: as Ms. Marcó del Point has declared, "The Board currently divides itself into ten committees, including accounting, credit, personnel, systems, audit and international. In addition to the weekly meetings of the entire Board, these committees also meet weekly and are comprised of directors and management of BNA." Exhibit E to Sullivan Decl., ¶8.

[19] As per the BCRA, the official exchange rate on Oct. 28 2008 was 3.368 Argentine pesos per one United States dollar. *See* Estadísticas e Indicadores, Cambiarias, Cotizaciones, http://www.bcra.gov.ar/index.asp, (last visitedJan. 28, 2011_. Also as per the BCRA, BNA's gross loan portfolio (loans plus provisions) stood at 27,091,900,000 pesos as of end-2008. *See* "*Información de Entidades Financieras: Setiembre 2010,*" p. 127, http://www.bcra.gov.ar/pdfs/entfinan/201009e.pdf.

own compensation. And this holds true as much for Bank of America as it does for government-sponsored Fannie Mae.[20] That the directors of corporations should be empowered to set their own compensation is also recognized as best practice in Argentina.[21]

27. Given the government's unchecked powers to appoint and *de facto* reshuffle and remove members of the BNA Board of Directors, and the reality that an unusually great deal of authority is vested in and exercised by that state-managed Board, Ms. Marcó del Pont's statement that "While there has been turnover in the Board of Directors . . . [,] BNA's management has remained extremely stable, a fact that itself evidences BNA's independence from the Republic", Exhibit E to Sullivan Decl., ¶15, evidences nothing of the sort. BNA's administrators, typical of a government-owned bureaucracy, tend to stay in their jobs for decades, if not for their entire working life. But that is irrelevant when, as I have shown here and will further demonstrate in the pages that follow, BNA is tightly controlled by Argentina through its hold on a Board of Directors full of pliant political appointees who are the ones that manage BNA day-to-day.

V. BNA's Role in Argentina's Lending Initiatives

28. BNA's Charter, Article 1, mandates that the Bank "shall coordinate its action with the economic-financial policies established by the national government." Exhibit C to Sullivan Decl. This is an understandable imposition, since BNA is a state-owned company. However, as I illustrate in this section through many examples, the Bank does not merely coordinate with Argentina: It behaves – and is expected to behave – as if it were part of the Executive Branch,

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[20] "Bank of America Corporate Governance Guidelines As of Dec. 14, 2010," *supra* at 11, and "Fannie Mae Bylaws as amended through Jan. 30, 2009," Art. 4, Sec. 4.12, *supra* at 15.

[21] *See* Instituto Argentino para el Gobierno de las Organizaciones (IAGO), "Código de Mejores Prácticas de Gobierno de las Organizaciones para la República Argentina," 2004, http://www.ecgi.org/codes/documents/argentina_2004_es.pdf.

faithfully executing the orders given by presidents and cabinet ministers, and demonstrating neither a capacity to take initiatives nor an ability to refuse any such instructions. As I document here, even though BNA reports to the National Executive Branch through the Ministry of Economy, it also follows the instructions given by the Ministry of Agriculture, the Ministry of Industry, and the Ministry of Planning. The evidence that follows supports a conclusion that BNA does not operate separately from Argentina, and thus that a relationship of principal and agent exists between Argentina and BNA.

29. In May 2002, acting upon a suggestion from the BCRA that was formalized in an Executive Decree (838/2002), the government ordered BNA to take over ownership of three small banks (Bisel, Suquía and Entre Ríos, later known as Bersa) which had been abandoned by a major French bank (Crédit Agricole) that had abruptly left Argentina in the wake of its major financial crisis that year.[22] Several months after BNA did as ordered and put them into a special-purpose trust, there arose a difference of views between the then Minister of Economy, Roberto Lavagna, and BCRA on how and when to privatize the three banks. In the end, Minister Lavagna decided that the banks should be sold at auction and, in a widely reported action, simply ordered BNA to proceed as he wished.[23] The banks were subsequently sold at auction by BNA.

30. Throughout the first half of 2004, farmers in Argentina lobbied the government for the chance to refinance their existing loan obligations at lower than then-prevailing market interest rates – especially what they owed BNA, by far their biggest lender. They became alarmed when, in late July of that year, the Bank foreclosed on and auctioned off a ranch in Tres

[22] Juan Carlos Fábrega, the former General Manager and now President of BNA, confirmed this takeover in ¶32 of his Declaration of Oct. 28, 2008, Exhibit F, Sullivan Decl., although he made no comment on how it came about.

[23] *See* "Ordenan rematar en la Bolsa a los bancos Suquía, Bisel y Bersa," *Clarín,* Oct. 31, 2002, http://edant.clarin.com/diario/2002/10/31/e-01201.htm; "Se venderán en la Bolsa los bancos Suquía, Bisel y Bersa," *La Nación,* Oct. 31, 2002, http://www.lanacion.com.ar/nota.asp?nota_id=445707.

Lomas, in the Province of Buenos Aires. whose owner had been attempting to renegotiate his loan.[24] The outcry that followed led to a meeting which took place at the presidential palace a couple of weeks later, between then President Néstor Kirchner and representatives of one of the main associations of rural producers (the *Confederaciones Rurales Argentinas*). At that meeting, Kirchner finally acceded to their request and ordered BNA to refinance the debts of some 7,000 farmers at interest rates that would be subsidized by the government.[25] And sure enough, once the necessary arrangements were made with the Ministries of Agriculture and Economy, BNA started to refinance farmers' debts with the Bank.[26]

31. During the second half of 2005, inflationary pressures accelerated in Argentina, with prices of beef, chicken, and pork products experiencing meaningful hikes. The government became alarmed and took a series of measures in late 2005 and early 2006 to halt and possibly reverse the food price increases. These included imposing higher export taxes and barriers to exports (to encourage producers to sell more at home and less abroad) and negotiating price freezes and other price-containment measures with farm producers. Livestock, hog, and poultry producers became very displeased with the government, and thus, in order to soothe them,

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[24] *See* "Refinanciación: ¿un cuento chino?," *Clarín,* July 31, 2004, http://edant.clarin.com/suplementos/rural/2004/07/31/r-00601.htm.

[25] *See* "El BNA refinanciará la deuda del campo," *La Nación,* Aug. 19, 2004, http://www.lanacion.com.ar/nota.asp?nota_id=628620.

[26] Mr. Fábrega acknowledged the existence of this refinancing facility in ¶33 of his Declaration of Oct. 28, 2008, Exhibit F, Sullivan Decl. He tries to minimize BNA's role as the intended target of the government's intervention by saying that "Participation in these programs is available to all of the other Argentine banks." However, the information posted by both the Ministry of Economy and the Ministry of Agriculture state specifically that the refinancing facility operates through BNA and is for the exclusive benefit of farmers with loans from BNA. See "Programa de Reprogramación con Bonificación de Tasa- FINAGRO," http://www.instrumentos.mecon.gov.ar/mensajes-ver-mensajes.php?id_prog=709&order=fecha%20desc&cantidad=3, "Programa de Reprogramación de Pasivos de Productores Agropecuarios en el Banco Nación," http://www.minagri.gov.ar/SAGPyA/areas/finagro/01-financiamiento/_archivos/000001-Cr%C3%A9ditos%20con%20bonificaci%C3%B3n%20de%20MinAgri/000006-Reprogramaci%C3%B3n%20de%20pasivos/000001_%20BNA%20Programa%20de%20Reprogramacion%20y%20Cancelaci%C3%B3n%20de%20Pasivos.pdf?PHPSESSID=a773c33fb1f152788b956da8d3caf252 (last vistedJan. 28, 2011).

officials at the Ministries of Agriculture and Economy came up with the idea of offering cheap loans to these farmers via BNA. In mid-January 2006, the then Economy Minister Felisa Miceli met with the leaders of four rural organizations and told them that she would come up with subsidized lines of credit for the benefit of cattle and dairy ranchers, and invited them to work out the details with officials from the Ministry of Agriculture.[27] Sure enough, by mid-February, Minister Miceli was able to announce the availability of up to 300 million pesos in subsidized credits for beef and dairy farmers through a program implemented by BNA.[28] A few days later, President Néstor Kirchner and Minister Miceli announced the further availability of up to 100 million pesos in loans to poultry producers and 50 million for pork producers. It was explained at the time that BNA's then-prevailing lending rate of 12.5% per annum would be cut to 6.5%, thanks to a government subsidy worth 6% per annum.[29]

32. Argentina's uncompetitive shipbuilding industry went into a sharp decline during the 1990s, because used ships were finally allowed to be imported into the country, and also because subsidies from federal and provincial governments on which the industry depended were cut back. In 2004, then President Néstor Kirchner tried to revive shipbuilding by persuading President Hugo Chávez of Venezuela to place an order for eight oil tankers to be built in Argentina, which he promised he would. The government entered into a formal commitment to provide financing for the shipbuilding industry in October of that year, and there followed drawn-out negotiations between Minister of Planning Julio De Vido, the management of the

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[27] *See* "Habría créditos a tasa subsidiada para producción de leche y carne," *Clarín,* Jan. 17, 2006, http://old.clarin.com/diario/2006/01/17/elpais/p-00801.htm.

[28] *See* "Créditos para los ganaderos," *Clarín,* Feb. 15, 2006, http://old.clarin.com/diario/2006/02/15/elpais/p-01402.htm.

[29] *See* "Lanzan créditos por $ 150 millones para los sectores avícola y porcino," La Nación, Feb. 22, 2006, http://www.lanacion.com.ar/nota.asp?nota_id=782870; "Apoyo a la producción de aves y de porcinos," La Nación, Feb. 25, 2006, http://www.lanacion.com.ar/nota.asp?nota_id=783503. The text of Minister Miceli's speech of Feb. 22, 2006, is available on the government's presidential website at http://www.casarosada.gov.ar/index.php?option=com_content&task=view&id=2438.

country's main shipyard, Río Santiago, and its owner, the Province of Buenos Aires. By early 2006, however, the company was still short of funds and sitting idle, and so its workers staged a violent protest in front of the Buenos Aires province governor's office demanding the transfer of more funds. Before long, Minister de Vido arranged to provide subsidized financing for the country's shipyards via BNA, and by mid-July of that year the program (loans provided by BNA and a subsidy to BNA paid by the Ministry of Planning from its own budget) was formally unveiled by President Néstor Kirchner.[30] BNA, of course, complied with this lending initiative and dutifully played its part.

33. In late 2008, the international financial crisis had repercussions in Argentina, particularly on its auto industry, based largely in the Province of Córdoba, which saw sales plummet. The auto factories started to furlough workers and, as time passed, the labor unions in Córdoba began noisy protests to demand government measures to prevent definitive layoffs. These protests targeted the offices of Córdoba Governor Juan Schiaretti, an ally of President Cristina Kirchner. When the situation did not improve in early 2009, the automakers began to lobby the government for support, and in mid-February they met with the then Minister of Production, Débora Giorgi, to request financial assistance and a reduction of their tax burden. Present at the meeting was the Secretary of Industry, Fernando Fraguío, who happened to be the former president of truck maker IVECO, an affiliate of the FIAT group.[31] Around that time, the labor unions in Córdoba were denouncing that IVECO, the country's sole truck maker, had sent

[30] *See* "El astillero Río Santiago vuelve a trabajar a plena capacidad," *Clarín,* Jan 14, 2004, http://old.clarin.com/diario/2006/01/14/elpais/p-03201.htm; "Astilleros: protesta con incidentes," *Clarín,* Feb. 28, 2006, http://old.clarin.com/diario/2006/02/28/elpais/p-00703.htm; Presidency of Argentina, "Apoyo a la industria naval y mercante," July 11, 2006, http://www.casarosada.gov.ar/index.php?option=com_content&task=view&id=2671; "Dan subsidios para construir barcos," *Clarín,* July 12, 2006, http://old.clarin.com/diario/2006/07/12/elpais/p-01302.htm.

[31] *See* "Las automotrices piden medidas para sostener la producción," *La Nación,* Feb. 19, 2009, http://www.lanacion.com.ar/nota.asp?nota_id=1101187.

pink slips to many of its workers, whose employment contracts would be discontinued at the end of March.[32] However, a few days before those layoffs were to become effective, President Cristina Kirchner announced from her official residence that BNA would be extending lines of credit to IVECO, and also to the buyers of IVECO trucks, in exchange for the company's promise to maintain its headcount at 2008 year-end levels. Sure enough, BNA obliged, a fact that Defendants do not deny.[33]

34. The truck maker's sales, however, did not increase significantly in the wake of this initiative, and thus seven months later, in October of 2009, when President Cristina Kirchner visited IVECO for a celebration marking its 40th anniversary in Argentina, the company's management lobbied her for still more government support. IVECO managers pointed out that many Argentine truckers were buying new vehicles in Brazil, because interest rates on truck loans were lower there thanks to a subsidy from that country's development bank. President Kirchner was evidently persuaded, and let it be known that she would come up with a plan to counter said low interest rates.[34] In the weeks that followed, IVECO and other representatives from the trucking industry held a series of meetings with officials from the Ministry of Tourism and Industry to work out the details, such that by late November of 2009 President Cristina Kirchner was able to announce the launch of a plan to encourage the exchange of old trucks for

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[32] *See* "Smata alerta sobre despidos en Iveco," *La Nación,* Feb. 18,2009, http://www.lanacion.com.ar/nota.asp?nota_id=1100974.

[33] *See* "Acuerdo para evitar despidos en Iveco ," *Clarín,* Mar. 28, 2009, http://edant.clarin.com/diario/2009/03/28/elpais/p-01886269.htm, BNA Press Release, Mar. 27, 2009, http://www.bna.com.ar/institucional/pensadoc/322_a.pdf. BNA President Fábrega did not contest the allegation made by other plaintiffs that this IVECO bailout illustrated how Argentina manipulates the Bank for its own political purposes. *See* ¶21 (b) of his Declaration of July 30, 2010, Exhibit F, Sullivan Decl.

[34] *See* "Cristina Kirchner prometió un plan para renovar camiones," *La Nación,* Oct. 23, 2009, http://www.lanacion.com.ar/nota.asp?nota_id=1189629; and "Cristina dijo que lanzará un plan canje para camiones," *Clarín,* Oct. 23, 2009, available at http://edant.clarin.com/diario/2009/10/23/elpais/p-02024761.htm.

new ones.[35] The plan involved a cash payment to all eligible truckers participating in the program, courtesy of the Ministry of Tourism and Industry, and also a low-interest-rate loan made by BNA underwritten by a government subsidy.[36] It became operative in March of 2010 – once the Bank had considered and approved the plan as developed by the Executive Branch.[37]

35. The government of Néstor Kirchner began curbing grain and beef exports in 2006 to make food more abundant and thus cheaper in the domestic market. At first, steep taxes were imposed on exports of wheat and other agricultural commodities, and then from March 2007 until October 2009, stringent quotas were imposed on how much wheat (and beef) could be exported. Wheat farmers were very upset during 2007-2009 by these government measures, and they joined ranchers and other farmers in a four-month strike in 2008 to protest the policies, putting up roadblocks on highways throughout rural areas and creating temporary food shortages in the capital city of Buenos Aires. Even after the export restrictions were loosened in October 2009 by President Cristina Kirchner, restless wheat farmers clamored for the government to compensate them and threatened to bring downtown Buenos Aires to a halt by parading at least one thousand tractors. In late October, the Minister of Domestic Commerce, Guillermo Moreno, allegedly met with wheat farm representatives and made them an offer of subsidies and loans from BNA.[38] The Minister of Agriculture, Julián Domínguez, met with the leaders in November and promised to help, and by late December he was reported to be working on a plan to prop up

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[35] *See* "Lanzarán un plan canje para camiones," *La Nación,* Nov. 22, 2009, http://www.lanacion.com.ar/nota.asp?nota_id=1202761; and

[36] *See* "Cristina anunció el plan canje de camiones," *Ámbito Financiero,* Nov. 26, 2009, http://www.ambito.com/noticias/imprimir.asp?id=495289.

[37] *See* Ministerio de Industria, "Se puso en marcha el plan para la renovación de la flota de transporte de carga," Mar. 10, 2010, http://www.industria.gob.ar/?p=2527.

[38] *See* "Un grupo de ruralistas confirma el tractorazo," *La Nación,* http://www.lanacion.com.ar/nota.asp?nota_id=1191123.

wheat prices by having the government enter the market as a buyer, and also by making low-cost loans available to farmers.[39] In mid-January 2010, wheat farmers and their representatives gathered in the capital to decide on renewed protest measures,[40] but President Cristina Kirchner defused the situation. First she announced that wheat prices would be propped up because BNA was making available a low-cost line of credit for wheat growers to hold on to their 2009/10 harvest until prices recovered, and two days later she said that BNA would be making low-cost loans available to millers to purchase wheat, both subsidized by the Ministry of Agriculture.[41] BNA, of course, soon complied.

36. It would appear that lately Argentina is exercising more frequent and more direct control over BNA's lending decisions than ever before, deepening their principal/agent relationship. For example, in early December of 2010, the Minister of Industry, Débora Giorgi, announced that BNA would be providing loans subsidized by the government to enable bus operators in the Greater Buenos Aires metropolitan region to purchase new buses – along the lines of the previously mentioned plan to enable truckers to purchase new vehicles (¶34).[42] A couple of weeks later, Minister Giorgi announced that BNA would be making available loans subsidized by her cabinet department to promote economic integration projects between Argentina and Brazil.[43] And a couple of weeks after that, in early January 2011, on the eve of yet another planned protest by farmers, the Minister of Agriculture, Julián Domínguez,

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[39] *See* "Gesto para el campo: el Gobierno comprará trigo para definir precios," *Clarín,* Dec. 24, 2009, http://edant.clarin.com/diario/2009/12/24/elpais/p-02107391.htm.

[40] *See* "El campo advierte que el martes decidiría medidas de protesta," *Clarín,* Jan. 9, 2010, http://edant.clarin.com/diario/2010/01/09/elpais/p-02116308.htm.

[41] *See* "El Gobierno anunció créditos a la molinería para frenar otra protesta del campo," *La Nación,* Jan. 13, 2010, http://www.lanacion.com.ar/nota.asp?nota_id=1221476.

[42] *See* Ministry of Industry, "Giorgi y Schiavi presentaron un plan para renovar la flota de colectivos urbanos del AMBA," Dec. 3, 2010, http://www.industria.gob.ar/?p=5209.

[43] *See* Ministry of Industry, "Ofrecen financiamiento a tasas de un dígito para pymes que encaren proyectos de integración productiva en el Mercosur," Dec. 16, 2010, http://www.industria.gob.ar/?p=5410.

announced still another BNA facility to make loans available to wheat farmers through BNA, to hold on to their 2010-2011 harvest until prices improve – this time at a heavily subsidized interest rate of zero percent.[44]

37. In sum, as these instances illustrate, BNA does not operate separately from Argentina because its marching orders, in the form of various lending initiatives, come from the Executive Branch, and thus a relationship of principal and agent exists between Argentina and BNA. According to the official communiqués I have perused and the information posted on various government websites I have visited, eligibility for access to the loans made available by BNA at the behest of the Executive Branch is often established by the ministry that provides the subsidy component – namely, by the Ministry of Agriculture or Industry, say, rather than by BNA itself.[45] These government ministries apparently are the ones that decide whether a loan applicant is qualified or not to receive credit from BNA. Therefore, although the Bank probably observes formalities such as having its administrative staff and Board of Directors assess and approve all the government's lending initiatives BNA is expected to implement, the Bank is best viewed largely as a rubber-stamping loan administrator that operates at the beck and call of the Executive Branch. I could find no evidence that BNA's Board of Directors has ever seen a government lending initiative it did not like, and thus refused to participate in or implement.

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[44] *See* "Posterga el agro un plan de protesta," *La Nación,* Jan. 6, 2011, http://www.lanacion.com.ar/nota.asp?nota_id=1339206.

[45] For example, those farmers interested in applying for the BNA loan refinancing program described in ¶30 are referred by the Ministry of Economy website to the Ministry of Agriculture rather than to BNA. *See* http://www.instrumentos.mecon.gov.ar/mensajes-ver-mensajes.php?id_prog=709&order=fecha%20desc&cantidad=3. The same applies to the BNA loan facility for dairy farmers described in ¶31. *see* http://www.instrumentos.mecon.gov.ar/mensajes-ver-mensajes.php?id_prog=725&order=fecha desc&cantidad=3. It also applies for the BNA loan program for poultry producers described in ¶31. *See* http://www.instrumentos.mecon.gov.ar/mensajes-ver-mensajes.php?id_prog=728&order=fecha desc&cantidad=3 (last visited Jan. 28, 2011).

38. This description of how BNA functions in practice is consistent with the possibility that BNA operates with greater autonomy when it comes to its routine banking business of taking in deposits from the public and of making loans other than those imposed by the will of the Executive Branch. The previous BNA chairperson, Mercedes Marcó del Pont, has stated that "within the framework of supporting small business loans, BNA analyzes each prospective loan and assesses the risks independently of any input from the [E]xecutive [B]ranch. Moreover, the Board will not approve a loan that does not meet BNA's credit standards." Exhibit E to Sullivan Decl., ¶10. It makes sense that the Bank should analyze each loan proposal submitted to it by applicants that are not covered by the many special-purpose loan programs created for BNA by the Executive Branch. It is likewise believable that BNA's micro-managing Board of Directors could reject individual loans that do not meet its credit standards. The question I am unable to answer, given that BNA does not provide information on how it actually operates, is whether the Bank has ever rejected any loan application filed by someone who met the terms and conditions specified by the Executive Branch for eligibility under one of the many BNA loan programs the government has launched. I have not found any complaints of the sort in the press, which is indicative of BNA's routine acceptance of loan applications filed by the large number of beneficiaries of the multiple BNA credit channels opened by the Executive Branch.

VI. BNA's New Role as a Source of Funding for Argentina

39. Pursuant to BNA's Charter Art. 3, "The primary purpose of the Bank is to provide financial assistance to micro, small, and medium-sized companies, regardless of their economic activity." Exhibit C to Sullivan Decl. Here I will show that, in the past couple of years, Argentina has been siphoning off the Bank's loanable funds in a manner that violates the spirit and the letter of BNA's Charter, Art. 3 and 25. I will further document that BNA appears to

have colluded with Argentina to make lending and investment decisions that have caused the Bank to stray away from its historic and Charter-mandated mission. As a result, I conclude that Argentina has abused BNA's corporate form; that a relationship of principal and agent has now been established between Argentina and BNA; and thus that there is evidence to conclude that BNA is no longer separate from Argentina.

40. BNA was established in October 1891 in the wake of a major financial and economic calamity – the infamous Baring Crisis – that forced the liquidation of the two government-owned banks then in existence, Banco Nacional and Banco de la Provincia de Buenos Aires, and caused all but one of the country's private banks to suspend operations for a while. The newly created BNA gained the confidence of depositors, and grew to become the country's most important commercial bank in the 1890s, because despite being the national government's principal fiscal agent at a time when there was no separate central bank, its founding law "put severe limits on the amount of credit that could be extended to the federal treasury."[46] The Bank was not allowed to lend to any provincial or municipal governments or state-owned entities; its ability to lend to the national government was capped at a small fraction of its capital; and it could not use deposits to fund any loans to the government.[47]

41. When BNA's founding law was modernized and superseded by a Charter adopted in 1978, Art. 3 and 25 kept true to that vision of the Bank as one that would fund the private sector and not the government. The former (Art. 3) spelled out six objectives for the Bank, none of which were to lend to the government, and the latter (Art. 25) stated that BNA could not lend to the federal government, provinces, or municipalities, or to their entities or agencies, unless they

[46] *See* GERARDO DELLA PAOLERA and ALAN M. TAYLOR, STRAINING AT THE ANCHOR: THE ARGENTINE CURRENCY BOARD AND THE SEARCH FOR MACROECONOMIC STABILITY, 1880-1935, p. 33, 107 (University of Chicago Press 2001).

[47] *Id.*, pp. 107-108.

received a special guarantee from the Ministry of Finance allowing for the effective, automatic reimbursement of any loan.[48] In other words, any BNA loans to the public sector were meant to be exceptional and self-liquidating in nature, and this unequivocal language was maintained with minor modifications in subsequent revisions of the Bank's Charter in 1982, 2000, and 2010.

42. In late 2008, when other Plaintiffs alleged that BNA was lending to Argentina to fund infrastructure projects or to pay down the government's debts, Juan Carlos Fábrega, the former General Manager and now President of BNA, gave the impression of refuting such claims by stating that "BNA may not lend to the Republic, the provinces, or municipalities. This prohibition is contained in Art. 25 of the Charter, which in turn explicitly provides the types of guarantees and availability of set-off of funds on deposit to make such loans." ¶34 of Fábrega,Declaration of Oct. 28, 2008, Exhibit F, Sullivan Decl. Professor Geoffrey Miller, who provided expert testimony for Defendant BNA at the same time, was equally emphatic: "One would expect, if BNA were simply an arm of the National Government, that the latter would assert and exercise the power to draw funds out of the Bank at will. Quite the opposite is true. The prohibition on lending to the government provides additional evidence in the Bank's fundamental law that BNA operates as an autonomous entity separate and apart from the National Government." Miller Declaration of Oct. 30, 2008, Exhibit H, Sullivan Decl., ¶22.

43. While Mr. Fábrega's reading and understanding of his employer's Charter was crystal clear, he was either woefully ignorant of the facts or else he purposely misled the Court. Prof. Miller, for his part, provided an insightful spin on the BNA Charter but did not check the then-available data to see if his conjecture had any basis in reality. As it turns out, according to information published on a monthly basis by BCRA – BNA's regulator – before and after October 2008, BNA had been lending to a variety of government entities for many years. As of

[48] *See* Law 21799, Boletín Oficial de la Rep. Argentina, Jun. 16, 1978.

September 30, 2008, for example, BNA had loans to government and state-related obligors on its books valued at 7.6 billion pesos, the equivalent of 2.4 billion dollars at the then-prevailing exchange rate.[49] The total included loans to the Ministry of Economy, provincial and municipal governments, and miscellaneous state-owned entities.[50] This (7.6 *billion* pesos) is too large an amount for the then General Manager (now President) of BNA to have missed or forgotten to mention – especially at a financial institution where the Board of Directors, to recall, vets all loans in excess of 1.69 *million* pesos (¶25).

44. In the more than two years since then, BNA's credit spigot has been pried fully open, such that the government of Argentina has become by far the Bank's largest single borrower. The impetus was provided by text buried in the Argentine National Budget Law for 2009, enacted in November 2008, whose Art. 74 specified that the Executive Branch could thereafter borrow from BNA an amount equivalent to 30% of the Bank's deposits from the non-financial public sector – provided that the funds were utilized to pay government creditors or to fund infrastructure projects, and that the appropriate guarantees for payment were issued to BNA. Exhibit C within Exhibit F, Sullivan Decl. To put this expanded power to borrow from BNA in its proper perspective, consider that since government deposits at BNA were 39.47 billion pesos as of September 30, 2008, Argentina was thereby giving itself immediate access to 11.8 billion pesos from the Bank.[51] During 2009 Argentina applied for and was duly granted two loans by BNA for a total of 8.3 billion pesos, and then the government requested and was duly provided

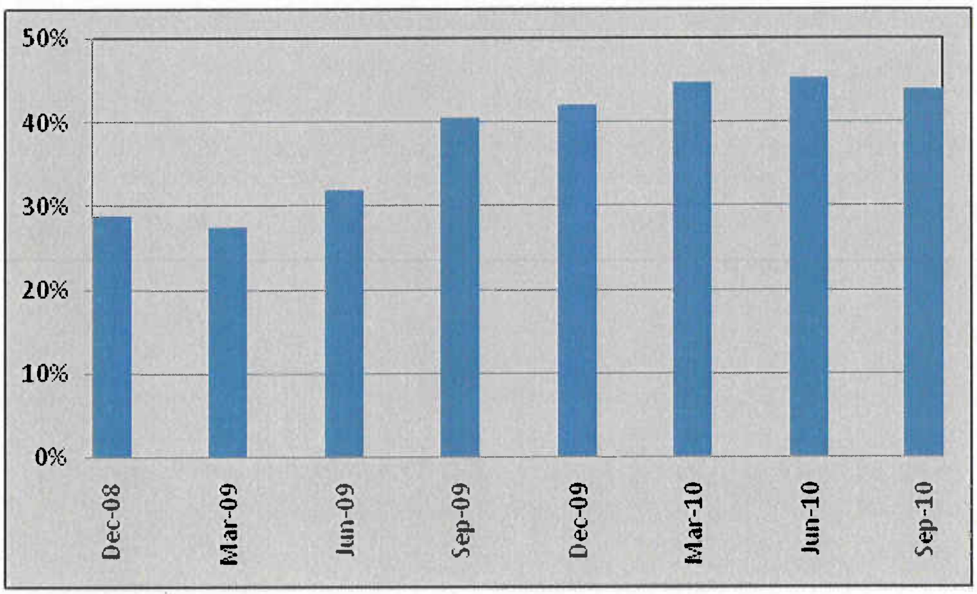
[49] *See* BCRA, *"Información de Entidades Financieras: Noviembre 2008,* p. 131, with data on BNA's assets and liabilities from Dec. 2006 through Nov. 2008, http://www.bcra.gov.ar/pdfs/entfinan/200811e.pdf.

[50] *See* Fitch Ratings, *"Entidades Financieras Argentina Informe Trimestral: Banco de la Nación Argentina,"* Dec. 2008, http://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=419572.

[51] *See* BCRA, *supra* at 49.

with a further three loans totaling 5.65 billion pesos in January 2010.[52] *See* Fábrega Decl. of Oct. 28, 2008, Exhibit F, Sullivan Decl. According to Mr. Fábrega, all of the loans were to enable Argentina to repay its creditors [¶7(a)]. In September of 2010, BNA reportedly authorized an additional loan that the government had requested in the amount of 1.2 billion pesos.[53] Therefore, Argentina has had the power to use, and has made heavy use, of its expanded power to borrow from BNA – a total of 15.15 billion pesos.

Figure 2: BNA Loans to the Government (Percent of total gross loans)[54]



45. The many and sizeable loans that the government has applied for and obtained from BNA are having a dramatic effect on the composition of the Bank's overall loan portfolio, as can be seen in Figure 2. Prior to obtaining its first 2009 loan from the Bank, the non-financial public sector accounted for less than 30% of BNA's total loan portfolio. However, within one year, the share of BNA's loan portfolio dedicated to the government had jumped to 45% of total. This is a

[52] The 2010 loans included one denominated in U.S. dollars ($156 million), which for these calculations I translated into pesos at the exchange rate prevailing on Jan. 28, 2010, when the dollar loan was approved.
[53] *See* "Gobierno toma $ 1.200 millones del Banco Nación para financiarse ," *Ámbito Financiero,* Sep. 3, 2010, http://www.ambito.com/noticias/imprimir.asp?id=541088.

[54] Source: Author's calculations based on BCRA, *"Información de Entidades Financieras,"* various issues.

hugely significant development for a financial institution with numerous government-mandated, special-purpose loan programs aimed at helping the private sector, and whose primary purpose is to provide financial assistance to small and medium-sized companies. In absolute terms, BNA's exposure to the non-financial public sector leaped from the previously mentioned 7.6 billion pesos in September 2008 to 18.8 billion pesos by September 2010.[55] One can only wonder if, when confronted with the facts, Prof. Miller would now be moved to conclude the opposite of what he did in his Declaration (¶42): namely, that since the National Government has asserted and exercised the power to draw funds out of BNA at will, it is evident that the Bank does *not* operate as an autonomous entity separate and apart from the National Government, and has become simply another arm of Argentina.

46. The facts also show that, beyond disbursing several huge loans to the government in rapid-fire succession, BNA has been making extra funds available to Argentina by purchasing ever-increasing amounts of bonds issued by the government and also by BCRA, rather than by private-sector issuers. Neither BNA nor BCRA publish this information, but as mentioned earlier (¶12), BNA does reveal it to Fitch Ratings, and they in turn publish it every quarter. According to the credit-rating agency's reports, BNA held 11.25 billion pesos in non-marketable government bonds as of September 2010, more than double the 5.38 billion pesos of said bonds it held as of September 2008. The Bank's overall holdings of various government and BCRA bonds stood at 38 billion pesos as of September 2010, up from 31 billion pesos two years earlier.[56] I have thought it fit to make mention of and include BNA's holdings of BCRA notes and bonds because Argentina has also been borrowing heavily from its central bank in the past

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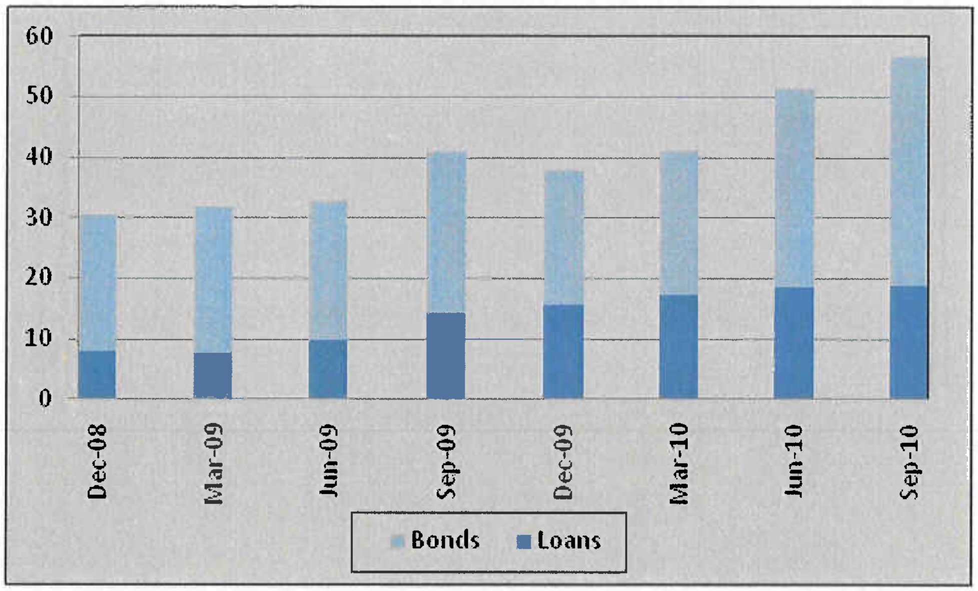
[55] As of this writing, the latest figure published by BCRA for BNA's lending to the government is 18.9 billion pesos. *See "Información de Entidades Financieras," supra* at 4, p. 127.

[56] *See* Fitch Ratings, "*Entidades Financieras Argentina Informe Trimestral: Banco de la Nación Argentina,*" Dec. 2008, supra at 50, and Dec. 2010, http://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=593495.

couple of years, likewise to pay off its preferred creditors. Since money is eminently fungible, it is entirely possible that some portion of the cash used by BNA to purchase BCRA bonds has ended up in the government's own pockets.[57]

Figure 3: BNA Loans to the Government and Holdings of Government and BCRA Bonds Outstanding (Billions of Argentine pesos)[58]



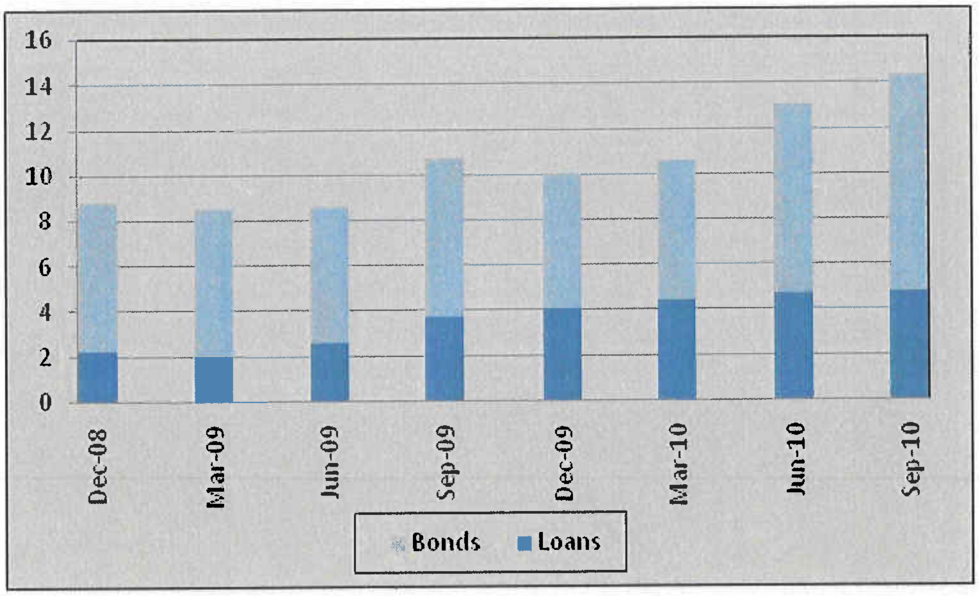
47. As can be observed in Figure 3, the cumulative impact of BNA loans made to the government, and of bonds purchased from both the government and BCRA, has meant that the Bank has nearly doubled its exposure to Argentina's public sector in less than two years, from 30.5 billion pesos at the end of 2008 to 56.7 billion pesos as of September 31, 2010. A similar though less steep trajectory is evident once all figures in pesos are translated into U.S. dollars at prevailing exchange rates. As can be seen in Figure 4, the cumulative impact of BNA loans made to the government, and of bonds purchased from both the government and BCRA, has resulted in a more than 60% jump in the Bank's exposure to Argentina's public sector in less

[57] *See* "UPDATE: Argentina To Borrow $7.5 Bln Of Central Bank Reserves," *The Wall Street Journal,* Jan. 7, 2011, http://online.wsj.com/article/BT-CO-20110107-708641.html.

[58] Author's calculations based on Fitch Ratings and BCRA, *supra* at 5 and 54.

than two years, from the equivalent of 8.8 billion dollars at the end of 2008 to 14.3 billion dollars as of September 31, 2010.

Figure 4: BNA Loans to the Government and Holdings of Government and BCRA Bonds Outstanding (Billions of US dollars)[59]



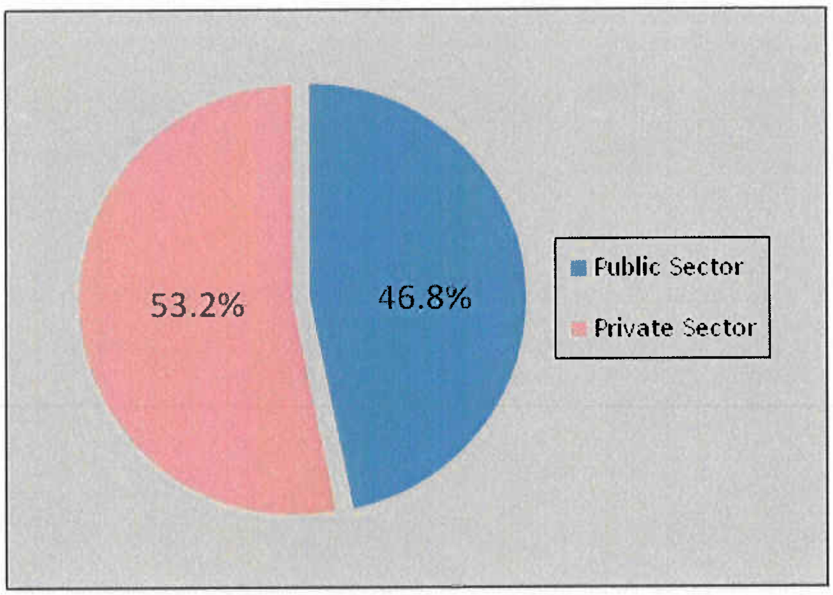
48. In sum, in the past few years, Argentina has increasingly served itself to BNA's loanable funds in contravention with the Bank's historic mission, as well as the spirit and letter of the Bank's Charter. BNA was established to attract deposits and then channel the proceeds to the private sector, and particularly to small and medium-sized companies – and decidedly not to extend credit to the government, nevermind to help it pay off Argentina's preferred creditors. As per the most recently available figures, nearly half of the Bank's total loan portfolio is now dedicated to public sector obligors, with the national government (Argentina) figuring most prominently among them. Moreover, BNA appears to have colluded with Argentina by stepping up its purchases of government and BCRA bonds, thereby putting even more of its financial

[59] Author's calculations based on Fitch Ratings and BCRA, *supra* at 5, 19 and 54.

resources at Argentina's disposal rather than in the hands of its intended customers. As can be observed in Figure 5, almost half of BNA's total assets are currently lent to or invested in the public sector.

Figure 5: Recipients of BNA Loans and Investments

(Percent of total assets as of September 30, 2010)[60]



49. As a result of my analysis of the evolution of BNA's assets and particularly its loan and investment portfolios, I conclude that Argentina has abused BNA's corporate form; that a relationship of principal and agent has now been established between Argentina and BNA; and thus that there is evidence to conclude that BNA is no longer separate from Argentina.

VII. Conclusion

50. In this declaration, I have set forth facts and opinions based on the evidence available to me on the issue of the degree of control exercised by Argentina on BNA. I approached the question at hand without prejudice, trained as I am to obtain and examine the facts before

[60] Author's calculations based on Fitch Ratings and BCRA, *supra* at 5 and 54.

drawing any conclusions. I discovered that BNA is tightly controlled by Argentina in several ways. First, the Bank's Board of Directors is unusually submissive because its members have no job security and are frequently promoted, demoted or asked to resign by the Executive Branch until the government gets the obedience it wants out of it. Second, this docile Board of Directors actually micromanages the Bank in a way that is inconceivable in the United States – even for a state-related financial institution; BNA's senior staff plays a largely passive, administrative role. As a result of these two defining features, Argentina exercises, through its handpicked and pliant Board, extensive day-to-day control over BNA.

51. Third, the Bank routinely gets its marching orders, in the form of multiple lending initiatives, directly from the Executive Branch. BNA loans, mostly accompanied by subsidies, are habitually used by the government to appease disgruntled farmers, bail out money-losing industries, and distribute favors to various constituencies. There is no evidence that BNA's Board of Directors has ever seen a government lending initiative it did not like, and thus refused to participate in or implement. And fourth, in the past couple of years, Argentina has been siphoning off the Bank's loanable funds in a manner that violates the spirit and the letter of BNA's Charter. Contrary to its avowed mandate to help small and medium-sized companies, the Bank has been pressured into lending large sums to the government to enable it to pay its preferred creditors. BNA has also put on its books a huge position in government and central bank securities. Indeed, almost half of BNA's total assets are currently lent to or invested in the public sector.

52. These factual observations lead me to conclude that Argentina has abused BNA's corporate form; that a relationship of principal and agent has been firmly established between

Argentina and BNA; and thus that BNA does not operate as an autonomous entity separate and apart from the National Government: the Bank is simply another arm of Argentina.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 16^{th} day of February, 2011.

Arturo C. Porzecanski