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## Don't Cry for Me Argentine Bondholders: Avoiding Supreme (Court) Confusion.

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**Argentina is in hot pursuit of multiple audiences before the Supreme Court: two petitions for writs of certiorari filed by Argentina are pending in the *NML v. Argentina* cases, and another is almost certainly on the way. In addition, a writ of certiorari has already been issued in another case against Argentina. With so much action involving Argentina in the high court, there is the potential for confusion between these multiple proceedings, which we clarify in this alert.**

The opinions and other papers relating to these cases, as well as our many prior client notes, are all available on our Argentine Sovereign Debt webpage:

[www.shearman.com/argentine-sovereign-debt](http://www.shearman.com/argentine-sovereign-debt).

### *NML Capital, Ltd. v. Argentina* (Supreme Court Docket No. 12-1494): Review of the Second Circuit's October 26, 2012 Decision (*Pari Passu*)

On June 24, 2013, Argentina filed a certiorari petition with respect to the Second Circuit's October 26, 2012 decision, in which the Second Court affirmed Judge Griesa's interpretation of the *pari passu* clause, his determination that the plaintiffs were entitled to a "Ratable Payment," and his conclusion that the Injunction did not violate the Foreign Sovereign Immunities Act ("FSIA"). However, the Court remanded the case to Judge Griesa to address certain issues relating to the operation of its Injunction.

As discussed in our June 27, 2013 note, we assess the likelihood that this petition will be granted as very low. Further, in its August 23 decision (as discussed in our August 27, 2013 note, at page 6), the Second Circuit expressed its view that this petition was premature, stating, "Apparently, Argentina filed a petition for certiorari in this matter on June 24, 2013, notwithstanding that, as of that date, no final order had yet issued in this case. See *Supreme Court Dkt. 12-1494*." We continue to be of the view that this petition will not be granted.

The Supreme Court is scheduled to consider this petition at its internal conference among the Justices that begins on September 30. Should the certiorari petition be denied (or granted), it will appear in an order of the Court shortly thereafter. (The Court's orders can be found on the Supreme Court's website, at [www.supremecourt.gov](http://www.supremecourt.gov).) It is possible that the Court will simply defer a decision pending the filing of the next certiorari petition in this case, discussed immediately below.

### ***NML Capital, Ltd. v. Argentina: Review of the Second Circuit's August 23, 2013 Decision (Pari Passu)***

On August 23, 2013, the Second Circuit released its opinion on Argentina's appeal from the Southern District's amended Injunction, as discussed in detail in our note of August 27. As expected, on September 6 Argentina and two bondholder groups filed rehearing petitions with the Second Circuit with respect to the August 23 decision. To date, those petitions remain pending and undecided.

As addressed in our August 27 note, we expect those rehearing petitions to be denied, at which time a 90-day clock will begin to run on Argentina's time to file a petition for a writ of certiorari in the Supreme Court with respect to the August 23 decision. Argentina's petition may well present the same FSIA and equity questions as in No. 12-1494. In addition, the Exchange Bondholders Group and Fintech Advisory, which filed rehearing petitions, may continue to assert their standing to appeal and file certiorari petitions presenting questions of interest to Exchange Bondholders – namely, violation of third-party rights and Fifth Amendment due process. A potential timeline for this process is set out in our August 27 note.

### ***NML Ltd. v. Argentina (Supreme Court Docket No. 12-842): Review of the Second Circuit's August 20, 2012 Decision (Discovery)***

Distinct from the disputes relating to the *pari passu* clause and the "Ratable Payment" issue, NML and the other plaintiffs are in litigation with Argentina over a large number of other issues, most of which are unlikely to have any impact on the Exchange Bondholders. One such issue is a dispute over the extent of post-judgment discovery that the plaintiffs may obtain from Argentina and the question of whether the FSIA restricts the scope of that discovery. On August 20, 2012, the Second Circuit issued a decision in which it concluded that the FSIA does not limit such discovery. (That decision is at 695 F.3d 201.) On January 7, 2013, Argentina filed a petition for a writ of certiorari with respect to that Second Circuit decision.

In that case, the Supreme Court requested the views of the Solicitor General as to the merits of Argentina's certiorari petition (known in Supreme Court parlance as a Call for the Views of the Solicitor General, or a "CVSG"). The Solicitor General has no deadline for responding to the Court's inquiry, but based on past response times, is likely to respond before year end, with the Court's decision on the certiorari petition to issue shortly thereafter.

### ***BG Group plc v. Argentina (Supreme Court Docket No. 12-138): Review of District of Columbia Circuit's January 17, 2012 Decision (Arbitration Award)***

Rounding out the picture of the Argentine caseload in the Supreme Court is this case, in which certiorari was granted on June 10, 2013, and argument before the Court has been set for December 2, 2013.

This case relates to an investment treaty arbitration brought by the BG Group against Argentina, arising from losses allegedly suffered by BG as the result of the Argentine "pesification" program in 2001 and 2002. BG won the arbitration but the DC Circuit Court refused to enforce BG's arbitration award. (That decision is at 665 F.3d 1363.) BG thereupon successfully petitioned for certiorari.

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Given the intense interest in all aspects of the litigation against Argentina, the various upcoming procedural and substantive decisions in all of these cases will likely receive significant publicity. However, care must be taken to treat them distinctly. In particular, it would appear unlikely that the FSIA discovery issue and the *BG* case will have an impact on the “Ratable Payment” issue and other matters of concern to Exchange Bondholders.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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