UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| NML CAPITAL, LTD., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant. | 08 Civ. 6978 (TPG)<br>09 Civ. 1707 (TPG)<br>09 Civ. 1708 (TPG) |

**DECLARATION OF STEPHEN CHOI**

Pursuant to 28 U.S.C. § 1746, Stephen Choi declares as follows:

1. I am the Murray and Kathleen Bring Professor of Law at the New York University Law School. I received a Ph.D. in economics with a focus on corporate finance and industrial organization from Harvard University in 1997. I received a J.D. from Harvard Law School in 1994 where I graduated first in my class and was a Supervising Editor of the Harvard Law Review. While at Harvard Law School I was awarded the Fay Diploma, the Sears Prize, and the Irving Oberman Memorial Award. Before joining the New York University Law School faculty I was the Roger J. Traynor Professor of Law at the University of California, Berkeley Law School.

2. My primary research focus is in the area of securities regulation. I have published over 50 articles in journals including the Yale Law Journal, Stanford Law Review, California Law Review, Columbia Law Review, University of Chicago Law Review, Michigan Law Review, Southern California Law Review, Journal of Empirical Legal Studies, Journal of Legal Studies, and Journal of Law, Economics, and Organization. Several of my papers have been recognized by Corporate Practice Commentator's annual survey as one of the ten best articles in the areas of corporate and securities law. I am also the co-author of a casebook on securities regulations used in law schools in the United States (Securities Regulations: Cases and Analysis 3rd Edition, published by Foundation Press).

3. I have written several articles that deal directly with sovereign bonds, sovereign bond covenants, and the pricing of sovereign bonds. These articles are:

- The Dynamics of Contract Evolution, forthcoming New York University Law Review (with Mitu Gulati and Eric Posner)

- The Evolution of Contractual Terms in Sovereign Bonds, forthcoming Journal of Legal Analysis (with Mitu Gulati and Eric Posner)

- Pricing Terms in Sovereign Debt Contracts: a Greek Case Study with Implications for the European Crisis Resolution Mechanism, 6 Capital Markets Law Journal 163 (2011) (with Mitu Gulati and Eric Posner)

- Contract as Statute, 104 Mich. L. Rev. 1129 (2006) (with Mitu Gulati) [cited in *NML Capital, Ltd. v. The Republic of Argentina* (2nd Cir., October 26, 2012)].

- Innovation in Boilerplate Contracts: The Case of Sovereign Bonds, 53 Emory L. J. 929 (2004) (with Mitu Gulati)

- Why Lawyers Need to Take a Closer Look at Exit Consents, International Financial Law Review 15 (September 2003) (with Mitu Gulati)

4. I have taught securities regulation since I entered legal academia and presently teach the course at NYU to over 100 students. I taught corporation law a number of times while a professor at the University of California, Berkeley Law School. I will teach corporation law next spring at NYU. I was the chair of the Association of American Law Schools' section on Securities Regulation for 2006-2007, a member of the Board of Directors of the American Law and Economics Association for 2007-2010, and a former term member of the U.S. Council on Foreign Relations for 2000-2005. In addition, I have made numerous presentations relating to corporate and securities issues.

5. I am being compensated at a rate of $900 per hour for my independent review, analysis, and testimony provided in this case. My compensation is not contingent upon my conclusions or on the outcome of this matter.

6. I have been asked by counsel at Gramercy Funds Management LLC to give an opinion on the effect of the Second Circuit's opinion in *NML Capital Ltd. v. The Republic of Argentina* (2nd Cir., October 26, 2012) and this court's February 2012 injunction on the risk of non-payment facing those holders of the Republic's sovereign bonds that exchanged their bonds during the 2005 and 2010 Argentine exchange offers (the "Exchange bondholders"). I have also been asked to give an opinion on the impact of non-payment on the Exchange bondholders. Lastly, I have been asked to give an opinion on the effect of the Second Circuit's *NML Capital* opinion on the ability of sovereigns that face financial distress to restructure their sovereign debt.

7. Based on my analysis of relevant news articles, the Republic's history with defaults, price and yield data on the Exchange bonds, and credit rating agency ratings for the Republic's sovereign debt, I conclude that the Second Circuit's *NML Capital* opinion and this court's February 2012 injunction materially increase the risk of non-payment for the Exchange bondholders. Non-payment would have an immediate and irreversible negative impact on the Exchange bondholders. Lastly, the Second Circuit's *NML Capital* opinion materially undermines the ability of sovereigns in financial distress to engineer value-increasing debt restructurings that would benefit the sovereign and the group of all sovereign debt holders.

Material Increase in Risk of Non-Payment for Exchange Bond Holders

8. I base my opinion that the Second Circuit's *NML Capital* opinion and this court's February 2012 injunction materially increase the risk of non-payment for the Exchange bondholders on several factors.

9. First, the Republic President Cristina Fernández de Kirchner and members of her cabinet have expressed publicly their strong opposition to making any payments to NML Capital and other holdout bondholders.[1]

10. Second, history supports the credibility of the public pronouncements of the Republic's President and her cabinet that the Republic will not pay the holdout creditors. The Republic's relationship with outside creditors is one marked with a long history of many incidents where the Republic either defaulted or came close to defaulting (avoided only through restructuring) on its sovereign debt obligations. In the 1820s, the Republic defaulted on bonds it had sold on the London stock exchange. In the 1890s, the Republic again defaulted on its sovereign debt, leading to the collapse of London's Barings Brothers bank, an underwriter for the Republic's bond issuances and the Republic's primary creditor. In 1956, the Republic threatened to default on its sovereign debt. The resulting debt restructuring negotiations between the Republic and various creditors led to the creation of the Paris Club, an informal group of official sector creditors from many of the world's largest economies including the United States, France, Germany, Canada, and Australia among others. After borrowing extensively in the 1970s, the Republic again faced the prospect of default in 1982, along with several other Latin American countries, leading to restructuring with foreign and multilateral lenders. More recently, the Republic defaulted on approximately $81 billion of sovereign debt in 2001, to date the largest sovereign default in history.

11. Indeed, the Republic's past history with defaults and debt restructuring is so extensive that the Second Circuit in *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2007), took explicit notice of the Republic's "numerous" defaults and what it termed the Republic's "diplomacy of default". *Id.* at 466 n2.

12. Third, not only does the Republic's past history with defaults demonstrate the Republic's willingness to forego payment on its debt, the Republic's own laws make it likely that the country will refuse to pay the holdout creditors. In particular the Lock Law (Argentine Law 26,017) prohibits the Republic from reopening the swap process (Article 2) and entering into a settlement with the holdout creditors (Article 3). The Lock Law thus prohibits the Republic from engaging in any settlement with the holdout creditors. While the Republic has suspended the Lock Law in the past, the public pronouncements of the Republic's President and members of her cabinet with respect to the holdout creditors make this an unlikely prospect.

13. The strong statements on the part of the Republic's President and members of her cabinet coupled with the Republic's history of defaults make it likely that any

[1] See Brief of Plaintiffs In Response to the Remand From the Court of Appeals in NML Capital, Ltd. v. The Republic of Argentina dated November 13, 2012 at p. 1-2.

requirement imposed on the Republic to pay the holdout creditors will result in the Republic simply refusing to make payment to the holdout creditors. This court's February 2012 injunction provides that "[w]henever the Republic pays any amount due under the terms of the [Exchange] bonds," it must "concurrently or in advance" pay NML Capital and the other holdout creditors a "Ratable Payment". The court's injunction takes two separate obligations (the obligation to pay the Exchange bondholders and the obligation to pay NML Capital and the other holdout creditors) and makes satisfaction of one obligation (payment to NML Capital and the other holdouts) a precondition to satisfy the other obligation (payment to the Exchange bondholders). Consequently, the injunction forces the Republic to pay both the holdout creditors and the Exchange bondholders or to pay neither of them. The February 2012 injunction also prohibits "all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds" from "aiding and abetting" any effort to make payments to the Exchange Bonds without also making a "Ratable Payment" to NML Capital. NML Capital has currently proposed orders to the court modifying the February 2012 injunction, among other things, to make clear that the aiding and abetting provision of the injunction applies to the Bank of New York Mellon, Cede & Co. and The Bank of New York Depositary (Nominees) Limited, clearing corporations and systems, depositaries, settlement agents, trustee paying agents, transfer agents, and attorneys and other agents among others.[2]

14. If the Republic adheres to its position of not paying the holdout creditors and also complies with this court's February 2012 injunction, the Republic must stop payment to the Exchange bondholders. Even if the Republic were to transfer money to the Bank of New York Mellon and other intermediaries earmarked for the Exchange bondholders, the February 2012 injunction would prohibit these intermediaries from transferring the money onto the Exchange bondholders without also paying NML Capital. Instead of being rewarded for their sacrifice in 2005 and 2010 in taking a large "haircut" in value when they turned their bonds in for the Exchange bonds, the Exchange bondholders now face a materially increased risk of non-payment because of the February 2012 injunction and the Second Circuit's *NML Capital* opinion related to the injunction. As this court indicated on November 9, 2012, other means exist to enforce an obligation to bondholders.[3] The February 2012 injunction is different from more traditional means of enforcement in that it imposes a material increase in the risk of non-payment on another class of bondholders, the Exchange bondholders, as the means to obtain payment for another class of bondholders, NML Capital and the other holdouts.

15. Objective market evidence corroborates the material increase in the likelihood of non-payment for the Exchange bonds after the Second Circuit's *NML Capital* opinion. The Republic's Global 8.75% 2017 US dollar denominated bonds, one of the Exchange bonds, dropped in price from $100.053 on October 25, 2012, the day before the Second Circuit's decision, to $90.157 on October 26, 2012—for a drop of 9.9%. By November

---

[2] See Proposed Order Amending the February 23, 2012 Order filed on November 13, 2012 (Exhibits A, B, C, and D).

[3] See Transcript of Proceedings before Judge Griesa in NML Capital Ltd. v. The Republic of Argentina dated November 9, 2012 at p. 18.

2, 2012, one week after the Second Circuit's *NML Capital* opinion, the price had dropped to $76.483, for a drop from October 25, 2012 of 23.6% (data source: Bloomberg). Similarly, the spread on the Global 8.75% 2017 US dollar denominated bonds compared with the yield on generic US Government 10-year bonds as measured on October 25, 2012 increased by 304 basis points as of October 26, 2012 and by 779 basis points as of November 2, 2012 (data source: Bloomberg).[4]

16. Consistent with the dramatic drop in Exchange bond prices and corresponding increases in yield spreads, Bloomberg reported on November 16, 2012 that "[t]he cost to insure Argentine debt against default rose 132 basis points to 2,656 basis points yesterday, according to data compiled by Bloomberg. The credit-default swaps imply a 84.8 percent probability Argentina will default in five years, based on the assumption investors will recover 25 percent of the par value of the bond."[5]

17. Credit rating agencies also recognized the significantly increased risk of default for the Exchange bonds following the Second Circuit's *NML Capital* opinion. Explicitly citing the Second Circuit's *NML Capital* opinion, Standard & Poor's cut its sovereign rating of the Republic from B to B-, moving the Republic further into junk bond territory, and also assigned a negative outlook on the country. S&P reported that: "'The negative outlook indicates at least a one-in-three chance of a downgrade over the next 12 months'".[6] Fitch's similarly placed the Republic's Long-term foreign currency Issuer Default Rating of "B", Short-term Issuer Default Rating of "B" and the international bonds issued under New York Law on a negative ratings watch in response to the Second Circuit's *NML Capital* ruling.

18. In sum, several market metrics for the Exchange bonds indicate a significantly increased risk of default following the Second Circuit's *NML Capital* opinion. The risk of default has increased so much that Bloomberg reported on November 16, 2012 that the yields for the Republic's euro-denominated bonds now exceeds the yields for similar-maturity Greek bonds.[7] Indeed, even Elliot, the parent of NML Capital, is making a bet on default. A recent news article indicates that Elliot acquired approximately $100

---

[4] I did not examine the price and spreads for all of the Exchange bonds as they likely reacted similarly to the Second Circuit's *NML Capital* opinion. As a robustness check, I examined the prices and spreads for the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue), another Exchange bond. The price for the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue) dropped from $80.428 on October 25, 2012 to $72.125 on October 26, 2012—for a drop of 10.324%. By November 2, 2012, one week after the Second Circuit's *NML Capital* opinion, the price of the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue) had dropped to $61.278, for a drop from October 25, 2012 of 23.8% (data source: Bloomberg). The spread on the Republic's Discount Bonds 8.28% 2033 USD (2005 Issue) as measured on October 25, 2012 increased by 150 basis points as of October 26, 2012 and by 374 basis points as of November 2, 2012 (data source: Bloomberg).

[5] Drew Benson, Greek Insolvency Overwhelmed by Argentina's Default Risk, Bloomberg, November 16, 2012.

[6] Ken Parks, S&P Cuts Argentina Ratings on Debt Payment, Economics Risks, WSJ.com, October 30, 2012.

[7] See Drew Benson, Greek Insolvency Overwhelmed by Argentina's Default Risk, Bloomberg, November 16, 2012 ("Argentina's bond yields are eclipsing those of Greece for the first time since the European nation's debt restructuring in March, as speculation increases the South American country will opt to default rather than settle with its so-called holdout creditors.").

million of credit default swaps that pay off only if Argentina defaults on its obligations to the Exchange bondholders.[8]

Irreversible Negative Impacts of a Non-Payment by the Republic

19. Non-payment of principal and interest will have immediate and irreversible negative effects on the Exchange bondholders. At a minimum, the Exchange bondholders will not receive the principal and interest due to them, imposing financial hardship on many of the Exchange bondholders that require the payment to meet their own debt and other obligations. Non-payment will also result in a likely large decline in the price of the Exchange bonds and a reduction in the liquidity of the secondary market for the Exchange bonds, making it difficult if not impossible for Exchange bondholders to exit their positions through sales to other investors. As discussed above, the mere prospect of non-payment or default after the Second Circuit's *NML Capital* opinion has resulted in large decreases in Exchange bond prices. Once investor confidence in The Republic is diminished by an actual incident of non-payment or default, it may take a significant amount time for that confidence to be restored—leading the market for the Exchange bonds to remain depressed even if the Republic were to resume payments on the Exchange bonds. Many of the Exchange bondholders themselves are investment entities required to mark to market the value of their Exchange bonds, thereby affecting the net asset value of these investment entities to outside investors. The reduction in the net asset value, in turn, may cause the investment entities to lose some of these outside investors.

20. Non-payment will also result in uncertainties for investors in the Exchange bonds, complicating valuation of the bonds as well as accounting treatment for the bonds. Many investors insure the value of their bonds against the risk of default through credit default swaps. Non-payment or default may trigger these credit default swaps, causing a ripple effect as the negative effect of non-payment or default are passed on to the counterparties of the credit default swaps. Some of these counterparties in turn may themselves have purchased credit default swaps which then may get triggered, leading to a further transfer of the effects of non-payment or default to yet another round of counterparties. Once various credit default swaps are triggered across numerous market participants, even if the Republic were to resume payments to the Exchange bondholders, unwinding the payments under the credit default swaps across multiple market participants will be difficult if not impossible (for example if a counterparty in the chain goes insolvent due to the triggering of a credit default swap). The complex, often non-transparent inter-linkages across different financial institutions through credit default swaps played a large role in the uncertainties about the exact exposures of individual financial institutions to

[8] See Vulture Fund Goes for Broke: It Bet US $100 Million on a New Default, ambito.com, November 15, 2012 ("It seems the Elliot vulture fund acquired approximately US$100 million of these CDS, as well as some short term agreements. They are taking it all. And they've stacked the deck because they have the best information about what is happening in the legal arena.").

mortgage-backed securities and related instruments during the recent financial crisis, resulting in a loss of investor confidence that exacerbated the crisis.[9]

21. The negative impacts of default in one country can have significant negative systemic consequences on countries and investors worldwide. Countries and financial institutions today are highly interlinked. The negative effect of a non-payment or default on sovereign debt obligations on the Republic's economy will have spillover effects on the economies of countries that trade with and otherwise do business in the Republic. Global financial institutions often take on significant quantities of sovereign debt onto their balance sheets. The default on the part of one sovereign may then weaken the balance sheet of these financial institutions and require the financial institutions to increase their liquid capital reserves, leading the institutions to withdraw liquid assets held in other financial institutions. This in turn will spread the impact of the default and resulting liquidity problems to these other financial institutions. Investors fearful that a financial institution faces insolvency due to its sovereign debt exposure may lose confidence in the financial institution and seek to withdraw their money from the institution, further weakening the institution and leading the financial institution to withdraw even more liquid assets from other financial institutions, widening the negative impact of the default. Banks may also not know the exposure of other banks to the bad sovereign debt, leading banks to become cautious about lending each other money, leading to drastic reductions in interbank lending and liquidity. Constricting liquidity may then cause financial institutions to lend less money to the private sector generally, causing a contraction of business in all areas of the world where the financial institutions make loans, pushing countries into recession and raising the risk of default by other sovereigns.

22. Once multiple financial institutions face liquidity problems (and may indeed become insolvent), investors lose confidence, and financial institutions constrict their lending to each other and to borrowers in the economy, the resulting economic downward spiral makes reversing the systemic impact of a sovereign default difficult if not impossible. Not only will sovereign default harm the specific bond issuance whose payments are suspended or reduced, sovereign default can thus have large negative consequences for the global economy.

Negative Impact on Ability of Sovereigns to Restructure

23. Given the large negative impact of non-payment or default, sovereigns and creditors benefit from consensual restructuring through exchange offers during times when the sovereigns are unable to meet all their financial obligations and otherwise might default. When creditors make loans to a sovereign, the expectation on the part of all parties is that the sovereign's economy will grow and the sovereign will make full payment to the creditors. But sovereigns, much like corporate issuers, can face financial distress. In such situations, reducing the debt burden for a sovereign may give the

[9] See Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure, 41 Conn. L. Rev. 1327, 1363 (2009) ("The central problem is that the CDS market creates daisy chains of counterparty liability, whereby one buyer relies on the solvency of its seller to cover the buyer's own CDS exposure to another buyer down the chain.").

sovereign time to change policies and turn around its economy, allowing eventually greater payments to the group of all creditors than if the sovereign simply defaulted. The United States government has recognized the value-increasing function of voluntary restructurings and pursues a policy in favor of the "orderly and consensual restructuring of sovereign debt" in situations where a sovereign is unable to meet all its financial obligations.[10]

24. Holdouts pose a very real risk to the process of value-increasing restructurings. Although an exchange offer may be beneficial to the group of all creditors, an individual creditor may profit more by demanding a disproportionately greater payment than the amount received by the rest of the creditors in a restructuring. Being paid more than a proportionate amount, however, is not sustainable. Once other investors realize that a holdout creditor stands to make more individually, other investors will also adopt a holdout strategy. And the higher price demanded by an increasing number of holdouts ultimately may cause a restructuring to fail, to the detriment of both the sovereign and all the outstanding creditors.

25. The Second Circuit in the *NML Capital* opinion cited the growing use of collective action clauses (CACs) as a solution to the holdout problem. Instead of relying on individual decisions on the part of bondholders in an exchange offer whether to tender their bonds in an exchange offer, the application of a collective action clause binds all bondholders of a specific bond issuance to a change in the payment terms of a bond so long as a defined percentage of the aggregate principal amount of the bonds, typically 75%, vote in favor of the restructuring. The growing use of CACs however, does not eliminate the threat of holdouts and in the case of many sovereigns may only minimally reduce the threat of holdouts for several reasons.

26. Collective action clauses rose in prevalence in New York law governed bonds after Mexico's adoption of a CAC in a sovereign bond issuance in 2003. Nonetheless, many bond issuances prior to 2003 with unanimity action clauses (UACs) are still outstanding today. In addition, not all countries immediately shifted to using a CAC after Mexico's adoption in 2003. For a study I co-authored with Mitu Gulati and Eric Posner in the Journal of Legal Analysis, we developed a dataset of sovereign bond issuances and their contract terms (the "Choi-Gulati-Posner dataset").[11] Of the 257 issuances in the Choi-Gulati-Posner dataset of New York law governed bonds that have a maturity date of 2013 or later (excluding bonds issued by the Republic), 192 or 74.7% had a CAC. Thus, 65 or 25.3% of New York law governed bond issuances with a maturity date of 2013 or later employ a UAC for changes to payment related terms. In aggregate, the 65 sovereign issuances with UACs still outstanding today represent a principal amount, measured at the time of offering, of $45.8 billion.[12] The ongoing presence of numerous bond

[10] See Statement of Interest of the United States in the *Macrotecnic International Corp. v. Republic of Argentina* and *EM Ltd. V. Republic of Argentina* litigation dated January 12, 2004 at p. 2.
[11] See Stephen J. Choi, Mitu Gulati, and Eric Posner, The Evolution of Contractual Terms in Sovereign Bonds, forthcoming Journal of Legal Analysis. The dataset was originally developed in Stephen Choi and Mitu Gulati, Innovation in Boilerplate Contracts: The Case of Sovereign Bonds, 53 Emory L. J. 929 (2004).
[12] Note that Choi-Gulati-Posner dataset is not comprehensive of all New York law governed issuances. We attempted to make the dataset as comprehensive as possible, collecting bond information from Thompson

issuances with UACs today continues to make restructuring through exchange offers an important method for sovereigns to engage in debt workouts when the sovereigns encounter distress.

27. Second, even for sovereign bond issuances that incorporate a CAC, the ability to work out a debt restructuring through an exchange offer remains important. CACs work best when there are only a small number of large bondholders who are able to coordinate with one another in agreeing to a sovereign debt restructuring. Where there are different bond issuances and numerous bondholders of these issuances, even reaching the typical 75% threshold of aggregate principal of outstanding bonds to change payment terms found in most CACs can be difficult. Evidence exists that many foreign holders of the Republic's bonds were small, individual investors. After the Republic defaulted on its debt obligations in 2001, 180,000 Italian holders of defaulted Argentine debt pursued arbitration through ICSID through Task Force Argentina.[13] Where the bondholders are small and dispersed, individual bondholders will face a collective action problem in determining whether a restructuring offer is good for the group of bondholders. Each bondholder will individually bear the full cost of research while the benefit from taking an informed vote will accrue to the entire group of bondholders. Moreover, each individual bondholder may think that their vote is unlikely to be the pivotal vote in a CAC vote, leading them to act with rational apathy toward the vote.[14] Compounding the problems of collective action and rational apathy, bondholders, to the extent large in number, will also face significant costs in communicating and coordinating with one another. Even a value-increasing restructuring therefore may fail when bondholders are required to vote pursuant to a CAC.

28. Third, many sovereign bond issuances containing a CAC bind only the bondholders of a particular bond issuance. If a sovereign has multiple bond issuances, a vote under a CAC to restructure one bond issuance will bind only the bondholders of that particular issuance. Holdouts may focus their attention in purchasing the bonds of another bond issuance—seeking to obtain greater than 25% of the principal of the outstanding bonds—thereby blocking restructuring for that particular bond issuance under a CAC even as bondholders in other issuances agree to restructure. Of course, once other bondholders realize that a holdout in a particular issuance refuses to restructure, this will diminish the incentive of these other bondholders to vote in favor of a restructuring and take a haircut in value for their own bond issuances, undermining the restructuring efforts.

---

ONE Banker. Nonetheless, we may miss some New York law governed issuances and thus the $45.8 billion aggregate offering amount number likely understates the principal amount issued under bonds governed by UACs that are still outstanding today.

[13] See Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (dated August 4, 2011).

[14] Many have written on the problems of collective action and rational apathy in the context of shareholder voting in the corporate context. See, e.g., Stephen M. Bainbridge, Redirecting State Takeover Laws at Proxy Contests, 1992 Wis. L. Rev. 1071, 1079-80 (1992) ("[M]ost shareholders' holdings are too small to have any significant effect on the vote's outcome. Accordingly, shareholders can be expected to assign a relatively low value to the expected benefits of careful consideration. Shareholders are thus rationally apathetic. For the average shareholder, the necessary investment of time and effort in making informed voting decisions simply is not worthwhile.").

29. Aggregation clauses that aggregate the vote across all of a sovereign's bond issuances and, upon a successful vote, bind all bondholders across these different issuances have the potential to reduce the holdout problem that may plague sovereigns with multiple bond issuances. Limits nonetheless exist on the ability of aggregation clauses to address the holdout problem for CACs. Most bond issuances under New York law today that use a CAC do not contain an aggregation clause. Of the 192 sovereign bond issuances under New York law with a maturity date of 2013 or later with a CAC in the Choi-Gulati-Posner dataset (excluding bonds issued by the Republic), only 7 (or 3.7%) had an aggregation clause. Moreover, the typical aggregation clause requires an affirmative vote in favor of a payment term modification on the part of 75% of the aggregate principal amount of debt securities across all the different issuances of debt securities as well as the affirmative vote of more than 66 2/3% of the aggregate principal amount of the debt securities in *each* particular issuance. As a result, even if a sovereign bond issuance includes an aggregation clause, a holdout can still defeat an aggregation provision by purchasing over 33 1/3% of the bonds of a specific bond issuance.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 16, 2012, in New York, New York.

STEPHEN CHOI

**Materials Relied Upon**

**News Articles**

Drew Benson, Greek Insolvency Overwhelmed by Argentina's Default Risk, Bloomberg, November 16, 2012.

Ken Parks, S&P Cuts Argentina Ratings on Debt Payment, Economics Risks, WSJ.com, October 30, 2012.

Reuters, Fitch Puts Argentina Ratings on Watch Negative, October 30, 2012.

Vulture Fund Goes for Broke: It Bet US $100 Million on a New Default, ambito.com, November 15, 2012.

**Court and Arbitration Materials**

Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (dated August 4, 2011).

*EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2007).

*NML Capital Ltd. v. The Republic of Argentina* (2nd Cir., October 26, 2012).

Order dated February 23, 2012 in *NML Capital Ltd. v. The Republic of Argentina* (S.D.N.Y).

Proposed Order Amending the February 23, 2012 Order filed on November 13, 2012 (Exhibits A, B, C, and D).

Statement of Interest of the United States in the *Macrotecnic International Corp. v. Republic of Argentina* and *EM Ltd. V. Republic of Argentina* litigation dated January 12, 2004.

**Data**

Bloomberg data on prices and yields for Argentina's Global 8.75% 2017 US dollar denominated bonds, Argentina's Discount Bonds 8.28% 2033 USD (2005 Issue), and generic U.S. government 10-year bonds.

Choi-Gulati-Posner NY-Law Governed Sovereign Bond dataset.

**Academic Articles**

Stephen M. Bainbridge, Redirecting State Takeover Laws at Proxy Contests, 1992 Wis. L. Rev. 1071 (1992).

Stephen J. Choi, Mitu Gulati, and Eric A. Posner, The Dynamics of Contract Evolution, forthcoming New York University Law Review.

Stephen J. Choi, Mitu Gulati, and Eric A. Posner, The Evolution of Contractual Terms in Sovereign Bonds, forthcoming Journal of Legal Analysis.

Stephen J. Choi, Mitu Gulati, and Eric A. Posner, Pricing Terms in Sovereign Debt Contracts: a Greek Case Study with Implications for the European Crisis Resolution Mechanism, 6 Capital Markets Law Journal 163 (2011).

Stephen J. Choi and Mitu Gulati, Contract as Statute, 104 Mich. L. Rev. 1129 (2006) (with Mitu Gulati) [cited in *NML Capital, Ltd. v. The Republic of Argentina* (2nd Cir., October 26, 2012)].

Stephen J. Choi and Mitu Gulati, Innovation in Boilerplate Contracts: The Case of Sovereign Bonds, 53 Emory L. J. 929 (2004).

Stephen J. Choi and Mitu Gulati, Why Lawyers Need to Take a Closer Look at Exit Consents, International Financial Law Review 15 (September 2003).

Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure, 41 Conn. L. Rev. 1327 (2009).

**Other**

Lock Law (Argentine Law 26,017).