12-105-cv(L)

12-109-cv(CON), 12-111-cv(CON), 12-157-cv(CON), 12-158-cv(CON), 12-163-cv(CON), 12-164-cv(CON), 12-170-cv(CON), 12-176-cv(CON), 12-185-cv(CON), 12-189-cv(CON), 12-214-cv(CON), 12-909-cv(CON), 12-914-cv(CON), 12-916-cv(CON), 12-919-cv(CON), 12-920-cv(CON), 12-923-cv(CON), 12-924-cv(CON), 12-926-cv(CON), 12-939-cv(CON), 12-943-cv(CON), 12-951-cv(CON), 12-968-cv(CON), 12-971-cv(CON)

FOR THE SECOND CIRCUIT

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE REPUBLIC OF ARGENTINA'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

STUART F. DELERY,
Principal Deputy Assistant Attorney General

MARK B. STERN,
SHARON SWINGLE,
Attorneys, Appellate Staff Civil Division, Department of Justice

CHRISTOPHER J. MEADE,
Acting General Counsel, Department of the Treasury

HAROLD HONGJU KOH,
Legal Adviser, Department of State

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for the United States of America as Amicus Curiae
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2716

JOHN D. CLOPPER,
JEANNETTE A. VARGAS,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys, Of Counsel

OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AQUERRETA, MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA ELSA LAVORATO, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

—v.—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

THE BANK OF NEW YORK MELLON, as Indenture Trustee,
EXCHANGE BONDHOLDER GROUP,
ICE CANYON LLC, FINTECH ADVISORY INC.,

Non-Party Appellants,

EURO BONDHOLDERS,

Intervenor.

TABLE OF CONTENTS

PAGE

Interest of the United States 1

ARGUMENT 1

POINT I—THE PANEL'S INTERPRETATION OF THE *PARI PASSU* CLAUSE IS INCORRECT AND ADVERSE TO THE UNITED STATES' POLICY INTERESTS 1

POINT II—THE INJUNCTION CONTRAVENES THE FSIA AND MAY HARM U.S. FOREIGN RELATIONS 6

Case: 12-105 Document: 653 Page: 4 12/28/2012 804548 15

PAGE

TABLE OF AUTHORITIES

Cases:

Af-Cap Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007) 7

Af-Cap Inc. v. Republic of Congo, 383 F.3d 361 (5th Cir. 2004) 7

Af-Cap Inc. v. Republic of Congo, 462 F.3d 417 n.8 (5th Cir. 2006) 8

Allied Bank v. Banco Credito Agricola, 757 F.2d 516 (2d Cir. 1985) 5

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). 6

Grupo Mexicano v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). 2

Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984) 6, 7

S&S Mach. Co. v. Masinexportimport, 706 F.2d 411 (2d Cir. 1983) 6, 7

Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226 (2d Cir. 1995) 7

Walker Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229 (5th Cir. 2004) 7

Whiteman v. Dorotheum GmbH & Co., 431 F.3d 57 (2d Cir. 2005) 8

PAGE

Statutes:

28 U.S.C. §§ 1609-1611 5

Rules:

Fed. R. App. P. 35(a) 1

Other Authorities:

Financial Markets Law Comm. (Bank of England), *Pari Passu Clauses: Analysis of the Role, Use and Meaning of Pari Passu Clauses in Sovereign Debt Obligations as a Matter of English Law* (2005) 2

Allen & Overy Global Law Intelligence Unit, *The Pari Passu Clause and the Argentine Case* (Dec. 27, 2012)..2

Roubini, *From Argentina to Greece: Crisis in the Global Architecture of Orderly Sovereign Debt Restructurings*, Roubini Global Econ. (Nov. 28, 2012)...2, 4

Lubben, *Possible Ripples from the Argentine Bond Litigation*, N.Y. Times Dealbook (Dec. 13, 2012) 3

Schumacher et al., *Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010* 3

Zettlemeyer et al., *The Greek Debt Exchange: An Autopsy*, Sept. 2010 draft 4

PAGE

Das et al., *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts*, IMF Working Paper WP/12/203 (Aug. 2012) 4

Interest of the United States

The panel in this case adopted a novel interpretation of a standard *pari passu* clause found in many sovereign debt instruments, in a manner that runs counter to longstanding U.S. efforts to promote orderly restructuring of sovereign debt. The panel further affirmed injunctive relief that constrains a sovereign state's disposition of assets that are not subject to execution under the Foreign Sovereign Immunities Act ("FSIA"). By unduly restricting the immunity afforded to foreign state property, the decision not only contradicts this Court's precedent, but could adversely affect U.S. foreign relations and threaten U.S. government assets. While the United States does not condone Argentina's actions in the international financial arena, Argentina's petition for rehearing en banc presents a "question of exceptional importance," and rehearing is needed to secure the "uniformity of the court's decisions." Fed. R. App. P. 35(a). Accordingly, the petition should be granted.

ARGUMENT

POINT I—THE PANEL'S INTERPRETATION OF THE *PARI PASSU* CLAUSE IS INCORRECT AND ADVERSE TO THE UNITED STATES' POLICY INTERESTS

The panel held Argentina had violated the *pari passu* clause in its bonds and agreement by subordination of non-exchanged bonds through conduct resulting in selective repayment of creditors. That construction contradicts the settled market understanding of *pari passu* clauses and could undermine

longstanding U.S. efforts to promote orderly resolutions of sovereign debt crises.

The settled understanding of *pari passu* clauses is that selective repayment does *not* violate the clause, even if it is the result of sovereign policy. This view has been expressed not only by the United States, but by academics, governmental bodies, and market participants—not merely the sources the panel characterized as "arguably biased" (slip op. 17). *See, e.g.*, Financial Markets Law Comm. (Bank of England), *Pari Passu Clauses: Analysis of the Role, Use and Meaning of Pari Passu Clauses in Sovereign Debt Obligations as a Matter of English Law* (2005) ("FMLC Study"); Brief of *Amicus Curiae* Clearing House Ass'n at 4-5. Moreover, the United States' view is reinforced by historical experience, as *pari passu* clauses in sovereign debt instruments were not impediments to restructurings in the 1980s and 1990s.[1]

The reaction to the panel's decision has confirmed that it was contrary to settled understanding. *See* Allen & Overy Global Law Intelligence Unit, *The Pari Passu Clause and the Argentine Case* (Dec. 27, 2012); Roubini, *From Argentina to Greece: Crisis in the Global Architecture of Orderly Sovereign Debt Restructurings*, Roubini Global Econ. (Nov. 28, 2012);

---

[1] In general, an insolvent debtor "may prefer one creditor to another, in discharging his debts." *Grupo Mexicano v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 321 (1999). There is no reason to believe that the *pari passu* clause here was intended to alter that rule.

Lubben, *Possible Ripples from the Argentine Bond Litigation*, N.Y. Times Dealbook (Dec. 13, 2012).

The panel believed that the first sentence of the *pari passu* clause prohibits "the issuance of other superior debt" and the second prohibits "the giving of priority to other payment obligations." Slip op. 18-19. The better reading, however, is that the two sentences separately address changes in rank *within* a particular bond issuance and changes in rank *across* all external indebtedness, not a debtor's obligations as issuer and as payor, *see* FMLC Study at 4, as the panel believed. Thus, the first sentence bars changes in legal rank in bonds "among themselves" and the second sentence—which requires only that payment "*obligations*" (as opposed to the payments themselves) rank equally—prohibits changes in legal rank among all "External Indebtedness." *See id.*

The panel's reasoning that preferential payment can breach a *pari passu* clause threatens core U.S. policy regarding international debt restructuring. The effect could extend well beyond Argentina: creditor litigation has increased significantly in the past decade, adversely affecting even low-income countries such as Liberia and Zambia. *See* Schumacher et al., *Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010* (http://dx.doi.org/10.2139/ssrn.2189997). As the government explained in its prior *amicus* brief, voluntary sovereign debt restructuring will become far more difficult if holdout creditors can use novel interpretations of boilerplate bond provisions to interfere with the performance of a restructuring plan accepted by most creditors, and to greatly

tilt incentives away from voluntary debt exchanges and negotiated restructuring in the first place.

A sovereign's potential resistance to paying non-exchanged debt is a critical tool in its efforts to negotiate broad creditor support for restructuring. This leverage will be lost if creditors believe that a holdout strategy will eventually result in substantial or full payment. If enough creditors adopt this strategy, foreign sovereign debt restructuring will become impossible. While holdouts retain the right to assert legal claims in court and enforce resultant judgments in appropriate circumstances and in a manner consistent with the FSIA, the creation of new rights and new vehicles for enforcement alters and destabilizes the landscape of sovereign debt restructuring.

The panel suggested that the prevalence since 2005 of collective action clauses in bonds governed by New York law will eliminate any threat to orderly sovereign debt restructuring. Slip op. 27. But most bonds issued under New York law before 2005 lack collective action clauses, and the United States expects many to be in the market for the foreseeable future. Moreover, as demonstrated in the recent Greek debt exchange, holdouts can block amendment of bond issues despite collective action clauses. *See* Zettlemeyer et al., *The Greek Debt Exchange: An Autopsy*, Sept. 2010 draft (http://ssrn.com/abstract=2144932); Das et al., *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts*, IMF Working Paper WP/12/203 (Aug. 2012) at 43-45; Roubini, *supra*, at 5.

The Court also erroneously suggested that its opinion would be of limited reach because it was applicable only to bonds governed by New York law. Most bonds issued by emerging-market countries are governed by New York or English law, *see* Das et al., *supra*, at 41, making the decision highly significant to the worldwide bond market. In addition, the decision could harm U.S. interests in promoting issuers' use of New York law and preserving New York as a global financial jurisdiction. *See Allied Bank v. Banco Credito Agricola*, 757 F.2d 516, 521 (2d Cir. 1985) ("The United States has an interest in maintaining New York's status as one of the foremost commercial centers in the world."). The decision could encourage issuers to issue debt in non-U.S. currencies in order to avoid the U.S. payments system, causing a detrimental effect on the systemic role of the U.S. dollar.

Finally, the panel's construction was unnecessary for its legal conclusion. Had the panel stopped at its determination that "even under Argentina's interpretation of the [*pari passu* clause] as preventing only 'legal subordination' . . . , the Republic breached the Provision" through enactment of legislation such as the Lock Law, slip. op. 20, a measure that seems largely unique to Argentina, the far-reaching consequences of the ruling could have been avoided—and could to this extent be easily corrected upon panel rehearing or en banc review.[2]

---

[2] While the United States has taken no position on whether the unique Lock Law itself violates the

POINT II—THE INJUNCTION CONTRAVENES THE FSIA AND MAY HARM U.S. FOREIGN RELATIONS

The panel further erred in affirming the extraordinary injunctive relief entered by the district court. That relief contravenes the FSIA, which sets out the exclusive means of obtaining jurisdiction over a foreign state and enforcing judgments against it in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). Even when a court has jurisdiction to enter a judgment against a foreign state, injunctive relief can be enforced only if consistent with the FSIA provisions governing immunity from attachment, execution, or arrest, 28 U.S.C. §§ 1609-1611. *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983). Here, although the district court has properly exercised jurisdiction over Argentina, the injunction affirmed by the panel constrains Argentina's use and disposition of sovereign property that is immune from execution. That result improperly circumvents the careful limits on execution established by Congress. *See Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984).

This ruling conflicts with *S&S*, 706 F.2d at 418, which held that courts may not grant, "by injunction, relief which they may not provide by attachment" under the FSIA. The panel reasoned that the injunction did not implicate § 1609 because it did not "transfer . . . dominion or control over sovereign prop-

---

pari passu clause, it appears that such a ruling would not harm sovereign debt restructuring generally.

erty to the court." Slip op. 25. But that formalistic interpretation would permit courts to "eviscerate [the FSIA's] protections merely by denominating their restraints as injunctions against the . . . use of property rather than as attachments of that property." *S&S*, 706 F.2d at 418. "[T]he principle behind the prohibition against attachments should apply broadly," *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1230 (2d Cir. 1996), particularly as Congress enacted the FSIA against a background practice in which sovereign property was absolutely immune, *Letelier*, 748 F.2d at 799. When judicial action constrains a foreign state's use of its property, § 1609's protections apply. *See Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007) (garnishment action); *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004) (same); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004) (same).

That Argentina's dominion over its property was constrained is demonstrated by the panel's own logic. The Court stated that Argentina could comply with the injunction by paying "all amounts owed to its exchange bondholders" and all to the holdouts, or by making partial payments to both, slip op. 25; but in each case Argentina would be compelled to use sovereign funds in a particular way. Similarly, if Argentina decides not to pay the holdouts, it is constrained in its use of funds with which it would pay the exchange bondholders. Either way, Argentina is compelled to do something in particular with its immune property.

Finally, U.S. foreign relations may be harmed by a holding constraining a foreign state's use of its prop-

erty outside the United States, particularly such property inside the foreign state's territory. As explained more fully in the government's prior *amicus* brief, such an order could have adverse consequences for the treatment of U.S. property under principles of reciprocity. The laws of many foreign nations do not permit a court to enter an injunction against a foreign state; those foreign states may expect the United States to extend them the same consideration. Although the United States' position regarding foreign policy implications of particular exercises of jurisdiction should be accorded deference by the courts, *see, e.g.*, *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 69-74 (2d Cir. 2005); *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 428 n.8 (5th Cir. 2006), especially with respect to the extraordinary equitable relief of an injunction against a foreign sovereign, the panel here did not even address the government's position.

Dated: New York, New York
December 28, 2012

Respectfully submitted,

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for the United States as Amicus Curiae.

JOHN D. CLOPPER,
JEANNETTE A. VARGAS,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys, Of Counsel.

STUART F. DELERY,
Principal Deputy Assistant Attorney General,
MARK B. STERN,
SHARON SWINGLE,
Attorneys, Appellate Staff
Civil Division, Department of Justice

CHRISTOPHER J. MEADE,
Acting General Counsel, Department of the Treasury

HAROLD HONGJU KOH,
Legal Adviser, Department of State