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), 12-4694-cv(CON), 12-4829-cv(CON), 12-4865-cv(CON)

United States Court of Appeals
For The Second Circuit

NML CAPITAL LTD., AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs-Appellees,

–v.–

THE REPUBLIC OF ARGENTINA

Defendant-Appellant.

(caption continued on inside cover)

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

BRIEF OF *AMICI CURIAE* ITALIAN HOLDERS OF ARGENTINE SOVEREIGN BONDS IN SUPPORT OF PLAINTIFFS-APPELLEES

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January 4, 2013

ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS 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 VASQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VASQUEZ, 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.

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INTEREST OF *AMICI CURIAE*

Amici curiae Italian holders of Argentine sovereign bonds ("Italian Bondholders" or "Bondholders") are approximately 54,000 Italian nationals holding over $1 billion in outstanding sovereign bonds issued, and repudiated, by Appellant the Republic of Argentina ("Argentina").[1] A majority of the Italian Bondholders are individuals who invested their personal savings in Argentine bonds; many are of retirement age; all invested prior to Argentina's historic 2001 default and confiscatory "Cram Down Law" or "Lock Law." The Bondholders did not accept Argentina's unilaterally-imposed, punitive debt restructuring offers in 2005 and 2010. In the more than a decade since the default, the Bondholders have collectively sought redress for Argentina's deprivation of their rights and violation of international treaty obligations. Their efforts to secure meaningful relief are ongoing.

It is widely recognized—including by this Court and the District Court, in this proceeding and others—that Argentina is engaged in a deliberate campaign to deprive its bondholders of any meaningful remedy. Argentina's efforts in this regard include its brazen refusal to pay lawful court judgments; its calculated

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party made any monetary contribution intended to fund the preparation or submission of the brief. *Amici curiae* the Italian Bondholders are coordinated, in this proceeding and others, by their designated agent, the Italian organization Task Force Argentina ("TFA"). On the Bondholders' behalf, TFA is bearing the costs for preparing and submitting this brief. *Amici* are prepared to submit a list identifying each individual Bondholder for the record should the Court require it.

removal of assets from jurisdictions, including the United States, where they otherwise would be subject to judicial process; and its engagement in "shell games" with the assets of purportedly separate State-owned entities. Indeed, as this Court recently noted, Argentina openly acknowledges in public regulatory filings that it "has opposed vigorously, and intends to continue to oppose, attempts by holders . . . to collect on its defaulted debt through . . . litigation . . . and other legal proceedings." (SPE-275 (quoting 2010 Exchange Offer Prospectus).)

Argentina's defiance of creditors, courts, and the rule of law extends beyond the United States to international proceedings. Since 2006, the Bondholders have pursued treaty-based claims against Argentina in an international arbitration before the World Bank's International Centre for Settlement of Investment Disputes ("ICSID").[2] The claims arise out of Argentina's breach—in connection with its default, debt restructuring, repudiation by law of its obligations to repay, and related sovereign measures—of obligations under a bilateral investment treaty between Argentina and Italy. The Bondholders opted to pursue the arbitration in part due to Argentina's refusal to abide by judgments rendered in U.S. courts.[3]

[2] *See generally Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5 ("*Abaclat*"), procedural history *available at* http://icsid.worldbank.org/ICSID/Index.jsp.

[3] To prevent the running of statutes of limitations for contract claims under the bond contracts, the Bondholders also filed, and stayed, three breach-of-contract cases at the U.S. District Court for the Southern District of New York ("SDNY"). Those cases are stayed pending the outcome of the ICSID arbitration.

In the more than six years since the Bondholders filed their claims at ICSID, Argentina has vigorously opposed, and persistently sought to obstruct, the arbitration. During a protracted jurisdictional phase, Argentina raised numerous arguments to the effect that the presiding tribunal purportedly lacked jurisdiction to hear the claims. In an August 2011 Decision on Jurisdiction and Admissibility, the majority of the tribunal rejected all of Argentina's arguments and held that it does, indeed, have jurisdiction to decide the claims on the merits.[4] Since then, Argentina has further sought to derail the arbitration, deny the Italian Bondholders justice, and even undermine the ICSID system through various measures at odds with governing procedures, standards, and treaty obligations. Notwithstanding Argentina's ongoing efforts, the ICSID case is now proceeding through a merits and damages phase scheduled to conclude by the end of 2013.

The Italian Bondholders have a compelling interest in this case due to their pending claims against Argentina in international and U.S. fora; Argentina's repudiation of its obligations and the Bondholders' rights in those proceedings; and the enforcement challenges that Argentina likely will impose in the event the Bondholders obtain an award or judgment in their favor. The Bondholders have a sizeable interest in holding Argentina accountable for the treaty and contractual

[4] *Abaclat*, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ("Decision on Jurisdiction"), *available at* http://italaw.com/cases/35. Pursuant to party agreement and a confidentiality order entered by the tribunal in the ICSID proceeding, the Decision on Jurisdiction is publicly available.

obligations *vis-à-vis* its bonds that Argentina willingly undertook, benefited greatly from, and unilaterally violated. The Bondholders also have a profound interest in the enforceability of U.S. court orders and judgments, and in eliminating Argentina's abuses of the U.S. judicial system, disregard for U.S. court monetary judgments, and defiance of international treaty regimes to evade its creditors. These interests are directly implicated by this proceeding.

STATEMENT OF THE CASE

I. ARGENTINA REMAINS COMMITTED TO ITS DECADE-LONG DEFIANCE OF CREDITORS AND COURTS

Argentina's ongoing refusal to pay bondholders in U.S. proceedings and its efforts to escape operation of the District Court's injunctive measures are only part of the broader narrative of Argentina's disregard of legal obligations and international norms.

In fact, Argentina's notorious defiance of creditors and courts in the last decade stands in stark contrast to the comprehensive measures that it initially undertook to induce investment in its sovereign bonds. During the 1990s, Argentina established a sovereign finance strategy focused on the placement of its bonds in foreign capital markets. Argentina adopted an extensive legal framework for its bond issuances, and made promises and representations to assure and entice investors in the bonds through laws, contracts, and treaties. Argentina targeted the

placement of the bonds with myriad investors, including specifically the Italian Bondholders and other retail investors.

Through the bond issuance process, Argentina cloaked itself in a garb of legitimacy by registering bond issuances with the United States Securities and Exchange Commission ("SEC") pursuant to U.S. securities laws; by providing assurances in bond forum selection clauses that bondholders would have recourse to judicial remedies; and by providing similar assurances under treaties ratified by the United States and other States, including Argentina and Italy. As this Court and the District Court repeatedly have found, Argentina has turned all such assurances into a "dead letter."

Argentina's default on more than $80 billion in sovereign debt in 2001 was the largest sovereign default in history. Argentina's unilateral imposition of two debt restructuring offers in 2005 and 2010 presented historically punitive terms, offering cents on the dollar (*see* SPE-273)—without any meaningful prior consultation with bondholders. To cement its repudiation of bond obligations—and, as this Court found, "to exert additional pressure on bondholders to accept the exchange offer" (*id.*)—Argentina enacted the "Cram Down Law" or "Lock Law." The Lock Law expressly prohibits Argentina "from conducting any type of in-

court, out-of-court or private settlement," precluding any recovery for bondholders outside of the exchange offer itself. (SPE-274 (quoting Law No. 26,017).)[5]

Thus, Argentina's repudiation of its debt obligations and foreign court judgments seeking to enforce those obligations is literally written into Argentine law—and Argentina has conducted itself accordingly. The District Court, all too familiar with Argentina's tactics, specifically noted when ordering the injunctive relief at issue that "if there was any belief that the Republic would honestly pay its obligations, there wouldn't be any need for these kind of [measures]." (SPE-280.) Indeed, "[t]here is no adequate remedy at law for the Republic's ongoing violations . . . because the Republic has made clear—indeed, it has codified . . . its intention to defy any money judgment issued by this Court." (SPE-1379-80.) This Court likewise found that "it is clear to us that monetary damages are an ineffective remedy" because "Argentina will simply refuse to pay any judgments" as part of its "continual disregard for the rights of its [] creditors and the judgments of our courts." (SPE-291.)

Argentina has pursued a similar course in international proceedings—including at ICSID, under the auspices of the World Bank, where Argentina has refused to abide by arbitral awards rendered against it in other cases arising out of its 2001 economic crisis. In 2012, the U.S. Government responded to Argentina's

[5] Argentina temporarily suspended operation of the Lock Law to allow for its equally unfavorable second exchange offer in 2010. (SPE-274.)

recalcitrance by suspending certain trade benefits. In a Proclamation initiating the suspension, President Obama found that "it is appropriate to suspend Argentina's designation as a [trade preference] beneficiary developing country because it has not acted in good faith in enforcing arbitral awards in favor of United States citizens."[6] Argentina likewise has not satisfied arbitral awards rendered in favor of non-U.S. investors. In the words of leading U.S. arbitrator and former President of the International Court of Justice, Judge Stephen Schwebel, Argentina's obstinate refusal to pay ICSID awards in accordance with its treaty obligations constitutes a "challenge to the viability of the ICSID system."[7]

Regrettably, Argentina has made clear through the years that it will not meet its contractual, judicial, or treaty obligations unless compelled to do so—at great, lasting prejudice to bondholders and to the U.S. and international legal and financial systems. This longstanding refusal is particularly condemnable in light of the finding of the District Court, affirmed by this Court, that Argentina possesses the funds to pay bondholders what they are owed. (SPE-293.)

[6] President of the United States, Proclamation No. 8788, 77 Fed. Reg. 18,899, Mar. 29, 2012.

[7] Alison Ross, *Argentina poses "Serious Threat" to ICSID Arbitration*, Latin Lawyer, Nov. 24, 2009. Pending judgments against Argentina in other jurisdictions also include nearly 500 final money judgments rendered by German courts.

II. ARGENTINA HAS GONE TO GREAT LENGTHS TO IMPEDE THE ITALIAN BONDHOLDERS' EFFORTS TO PROTECT THEIR RIGHTS AND RECOVER THEIR INVESTMENTS

Confronted with Argentina's historic default and punitive debt restructuring, the Italian Bondholders rejected Argentina's 2005 and 2010 exchange offers—as, this Court has confirmed, they were "completely within their rights" to do. (SPE-293 n.15.) Instead, the Bondholders organized to pursue their treaty and contract rights through arbitration and litigation. In large part as a result of Argentina's calculated strategy to delay and impede progress, those efforts are unnecessarily protracted and ongoing.

A. Treaty Claims In International Arbitration

In September 2006, the Bondholders initiated arbitration proceedings at ICSID pursuant to (i) the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), a multilateral treaty formulated by the Executive Directors of the World Bank and currently ratified by 147 States (including Argentina and the United States);[8] and (ii) a bilateral investment treaty between Argentina and Italy ("Argentina-Italy BIT").[9]

The Bondholders' treaty claims arise from Argentina's breach of various obligations under the Argentina-Italy BIT in connection with Argentina's default,

[8] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

[9] Agreement on the Promotion and Protection of Investments, Republic of Italy-Argentine Republic, May 22, 1990 (entered into force Oct. 14, 1993).

debt restructuring, Cram Down Law, and related sovereign measures. Argentina's breached treaty obligations include the obligation not to expropriate the investments of Italian nationals without payment of prompt, adequate, and effective compensation; to accord fair and equitable treatment; and to accord treatment no less favorable than that accorded Argentine national investors.[10]

The ICSID arbitration involves thousands of individual claimants pursuing claims on a collective basis. Argentina has vigorously opposed the case and, incredibly, sought to portray *itself* as the victim in the arbitration, arguing that the Bondholders' pursuit of treaty claims through collective action is purportedly illegitimate and in violation of Argentina's due process rights.

Among other arguments raised during the jurisdictional phase, Argentina asserted as a defense that the forum selection clauses in the bond contracts, designating the SDNY and other national courts for resolution of contract claims, precluded the tribunal's exercise of jurisdiction over the treaty claims. That is, Argentina argued that the ICSID case should be dismissed and the Bondholders required to pursue litigation in designated national courts—the very same courts where, pursuant to the terms of the Cram Down Law, Argentina refuses to abide by

[10] When the claims were filed, the Italian Bondholders numbered approximately 180,000, representing $4.4 billion in holdings—at the time, roughly twenty percent of the total principal amount of defaulted bonds not tendered into Argentina's 2005 exchange offer. Further to Argentina's dilatory tactics and the reopening of its exchange offer in 2010, which required as a precondition that tendering bondholders abandon any claims against Argentina, thousands of bondholders have since withdrawn from the case.

any judgment whatsoever. Argentina made no mention of its longstanding evasion of national court judgments when urging the ICSID tribunal to dismiss the treaty case in favor of such proceedings.

After a jurisdictional phase lasting nearly five years, the tribunal ruled in a comprehensive Decision on Jurisdiction that it has jurisdiction to hear the claims. The tribunal considered and rejected all of Argentina's objections, including with respect to the forum selection clauses. *See*, *e.g.*, *Abaclat*, Decision on Jurisdiction, ¶¶ 696-712 (summarizing the tribunal's conclusions with respect to each jurisdictional objection); *id.* ¶ 499 (ruling that "the presence of forum selection clauses in the contractual bond documents is irrelevant for the assessment of the existence and/or validity of Argentina's consent to ICSID arbitration").[11] Following the Decision on Jurisdiction, Argentina has signaled its intent to continue to contest and prolong the case at every step of the process—at times, in defiance of the established procedures and governing legal standards under the ICSID Convention.[12]

[11] As noted above, the Decision is publicly available at http://italaw.com/cases/35.

[12] *See*, *e.g.*, PCA Secretary-General's Recommendation on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg dated September 15, 2011, *available at* http://italaw.com/cases/35 (rejecting Argentina's request to disqualify a majority of the tribunal and holding that it did not meet any applicable standard, but instead reflected Argentina's subjective dissatisfaction with the tribunal's conclusions); Procedural Order No. 13 dated Sept. 27, 2012, *available at* http://www.tfargentina.it/icsid.php (citing Argentina for disclosing tens of thousands of pages of confidential materials to instigate unfounded and harassing criminal investigations against certain Italian Bondholders); TFA Press Release, "Argentina Repudiates Obligation to Pay ICSID Costs; Task Force Argentina Makes

Argentina's ongoing disregard for the Bondholders' rights, applicable treaty obligations, legal standards, and tribunal orders in the ICSID arbitration mirrors its disdainful repudiation of obligations and court orders in the United States. Notwithstanding Argentina's campaign to deny the Italian Bondholders justice, the Bondholders have persevered and the ICSID proceeding has advanced to the merits and damages phase. That phase is ongoing and scheduled to conclude in 2013.

B. Contract Claims And Regulatory Measures In The United States

The Italian Bondholders also have taken steps to preserve breach-of-contract claims from expiration under applicable statutes of limitations, per national laws governing the bond contracts. In the United States, the Bondholders filed three actions before the SDNY to preserve such claims—one action for bond contracts governed by New York and English law, one for contracts governed by German law, and one for contracts governed by Argentine law.[13] In all three cases, the

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Payment and the Case Advances," dated Oct. 24, 2012, *available at* http://www.tfargentina.it/icsid.php (stating that Argentina refused to pay its required one-half share of arbitration costs, compelling the Bondholders to make an additional payment to preclude any delay in the case).

[13] *See* Complaint, *Agritech S.R.L. v. Republic of Argentina*, No. 06 CV 15393 (S.D.N.Y. Dec. 22, 2006) ("*Agritech*"); Complaint, *A. Gandola & C. S.P.A., et al. v. Republic of Argentina*, No. 08 CV 9506 (S.D.N.Y. Nov. 5, 2008) ("*Gandola*"); Complaint, *Diocesi Patriarcato di Venezia v. Republic of Argentina*, No. 10 CV 1598 (S.D.N.Y. Feb. 25, 2010) ("*Diocesi*"). The Bondholders have opted out of all U.S. class actions against Argentina arising out of its 2001 default. The Bondholders also have taken steps outside of the United States to preserve claims under bond contracts governed by the laws of Argentina, Italy, Spain, and Switzerland.

Bondholders secured a stay pending the completion of the ICSID arbitration.[14] As the Bondholders explained in their motion papers, they were compelled to file the actions raising contract rights (not treaty claims) because Argentina had refused to enter into an agreement to toll the statutes of limitations pending the treaty arbitration.[15] The Bondholders intend to pursue these contract actions only to the extent they are not made whole at ICSID. The cases remain stayed.

Separate and apart from the U.S. actions, the Italian Bondholders also have informed U.S. regulatory authorities as to inaccurate and misleading representations by Argentina in its securities filings, including in connection with its 2010 exchange offer. In a series of letters to the Division of Corporation Finance at SEC, the Bondholders informed the SEC that Argentina's SEC filings had vastly understated the number of Italian Bondholders pursuing claims in the ICSID arbitration and the total value of their claim, among other misrepresentations and distortions.[16] The Italian Bondholders also informed Argentina directly of these inaccuracies, but Argentina took no steps to correct them, or even to respond to the Bondholders' concerns.

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[14] Stay Order, *Agritech* (Mar. 27, 2007); Stay Order, *Gandola* (Dec. 12, 2008); Stay Order, *Diocesi* (Feb. 17, 2011).

[15] *See* Memorandum of Law in Support of Plaintiffs' Motion to Stay, *Agritech* (Jan. 30, 2007); Memorandum of Law in Support of Plaintiffs' Motion to Stay, *Gandola* (Nov. 21, 2008); Memorandum of Law in Support of Plaintiffs' Motion to Stay, *Diocesi* (Mar. 18, 2010).

[16] The Italian Bondholders are prepared to provide copies of these letters for the record should the Court require it.

ARGUMENT

I. ARGENTINA'S EXTRAORDINARY MISCONDUCT AND CONTEMPT FOR THE RULE OF LAW JUSTIFY EXTRAORDINARY MEASURES

In its latest appellate brief, Argentina purports to "understand[] the Court's desire to resolve the lengthy litigation," and claims to be "prepared do what it can to end it." (Br. at 4.) However, Argentina's suggestion of a possible third, equally punitive exchange offer (*id.* at 4, 30) is hardly an acceptable solution—and reveals only Argentina's unwavering commitment to evading its contractual, judicial, and treaty obligations. Indeed, Argentina "has not acted capriciously" (*id.* at 54), as it says, but instead has acted in purposeful, calculated fashion for more than a decade to avoid answering for its debts and breaches.

This Court held in its partial affirmance of the District Court's injunction order that such relief is proper where no adequate monetary remedy is available, and where the relief "is favored by the balance of equities, which may include the public interest." (SPE-289-90 (citing *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 473 (2d Cir. 1980); *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 433 (2d Cir. 1993); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 32 (2008).) As noted above, both the District Court and Circuit Court have determined that Argentina's refusal to pay renders any monetary award an ineffective remedy. (SPE-280, SPE-291, SPE-1379-80.)

With respect to equitable considerations, Argentina's renewed invocation of matters of the public interest should be soundly rejected—as this Court already ruled during Argentina's initial appeal from the District Court's injunction order. (SPE-293.) Argentina's arguments with respect to "shock in the world of sovereign debt," the "standing of U.S. law and U.S. jurisdiction," and the importance of "the rule of law," (*e.g.*, *id.* at 18, 54) ring hollow in view of Argentina's own lasting damaging legacy to sovereign debt practice and defiance of the rule of law and legitimate U.S. court judgments at every turn.

Equitable considerations weigh decidedly in favor of the many bondholder plaintiffs who have been denied justice and the full value of their investments for more than a decade. While Argentina clings to purported concern for the standing of U.S. law and the U.S. financial system, the pernicious impact of Argentina's pervasive and ongoing fraud *vis-à-vis* its creditors and the U.S. financial and judicial systems should not be understated. Further, as the District Court noted, "it is hardly an injustice to have legal rulings which, at long last, mean that Argentina must pay the debts which it owes. After ten years of litigation this is a just result." (SPE-1367-68.)

Given Argentina's uniquely egregious conduct in this case and many other similar cases pending against it, the courts can and should fashion equitable relief appropriately tailored to these circumstances to hold Argentina accountable for its serial breaches. Argentina's efforts to evade such injunctive measures should be rejected.

CONCLUSION

For the foregoing reasons, Argentina's appeal from the District Court's injunction order should be denied.

Dated: January 4, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 3,449 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

January 4, 2013

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