NO. ______

In the
# Supreme Court of the United States

REPUBLIC OF ARGENTINA,

*Petitioner*,

v.

NML CAPITAL LTD., et al.,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Following a severe economic and social crisis in 2001, Argentina defaulted on approximately $80 billion in external debt. Because there is no sovereign bankruptcy regime, Argentina followed established international practice by voluntarily restructuring its debt. Ultimately, Argentina restructured 92% of its debt by trading defaulted bonds for new "exchange" bonds with different terms. Respondents are primarily "vulture funds" that exploit the absence of a sovereign bankruptcy regime and seek windfall profits by buying distressed debt at steep discounts, holding out from restructuring, and then suing to enforce the debt's original terms.

Under the Foreign Sovereign Immunities Act ("FSIA"), foreign state property is immune from "attachment arrest and execution" unless, among other things, it is located in the United States and used for commercial activity. 28 U.S.C. §§ 1609–1611. Accordingly, if Respondents obtained a money judgment based on their defaulted Argentine debt, the FSIA would prevent enforcement against Argentina's immune assets, including its reserves. The Second Circuit below nonetheless affirmed injunctions that coerce Argentina into paying Respondents with immune assets. Based on an outlier and deeply flawed interpretation of a *pari passu* clause that appears in virtually all sovereign bonds, the injunctions mandate that Argentina must pay Respondents in full, including principal and interest—and as a practical matter payment must come from Argentina's reserves—or else it must go into default on $24 billion of restructured debt, imposing grave losses on third-party bondholders, credit markets, and Argentine citizens.

The questions presented are:

1. Whether this Court should certify to the New York Court of Appeals this question: Whether a foreign sovereign is in breach of a *pari passu* clause when it makes periodic interest payments on performing debt without also paying on its defaulted debt.

2. Whether a district court can enter an injunction coercing a foreign sovereign into paying money damages, without regard to whether payment would be made with assets that the FSIA makes immune from "attachment arrest and execution," 28 U.S.C. §§ 1609–1611.

## PARTIES TO THE PROCEEDING

The Republic of Argentina is Petitioner and was defendant-appellant below. NML Capital, Ltd., Aurelius Capital Master, Ltd., 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 Vazquez, Norma Haydee Gines, Marta Azucena Vazquez, and Olifant Fund, Ltd. were plaintiffs-appellees below. The Bank of New York Mellon, as Indenture Trustee, Exchange Bondholder Group, and Fintech Advisory Inc., were styled as Non–Party Appellants below. Euro Bondholders and Ice Canyon LLC were Intervenors. Unless otherwise noted, “Respondents” herein refers only to plaintiffs-appellees.

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## PETITION FOR WRIT OF CERTIORARI

The decisions below warrant this Court's intervention as they are deeply offensive to Argentina's sovereignty, flout the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611, and have upended expectations in the sovereign debt markets. The Second Circuit affirmed injunctions that effectively reach into Argentina's borders, coercing it into violating its sovereign debt policies and commandeering billions of dollars of core sovereign assets—Argentina's reserves—to pay the vulture fund NML Capital Ltd. ("NML") and other holdout creditors. Unless Argentina pays all principal plus accrued interest to NML, Argentina must stop fully servicing its ongoing obligations to bondholders who accepted new "exchange" bonds as part of Argentina's restructuring. That is, Argentina must reward NML with a massive litigation windfall or face a court-ordered default, which could trigger a renewed economic catastrophe with severe consequences for millions of ordinary Argentine citizens.

These unprecedented injunctions stem from two important legal errors. First, the lower courts interpreted a boilerplate *pari passu* clause—which appears in virtually all foreign sovereign debt instruments—as a promise not to restructure. Under this incorrect interpretation, Argentina must pay all of its external debt at the same time or default on its restructured debt. And although exchange bondholders are entitled only to a periodic interest payment that was reduced in restructuring, because of an acceleration clause (another standard feature of sovereign debt), holdouts are due all principal and accrued interest without any haircut. The lower courts' counterintuitive interpretation of boilerplate language allows any holdout to veto a restructuring unless it is paid in full, upsets settled market expectations, impedes sovereign restructurings, and threatens New York's status as a law and forum of choice for international sovereign debt issuances.

Second, the lower courts enforced this newly-created obligation with effectively extraterritorial injunctions that trample Argentina's sovereignty and conflict with the FSIA's comprehensive immunity scheme. Under the FSIA, a foreign state's property is only subject to "attachment arrest and execution" if, among other things, that property is located and used for commercial activity in the United States. 28 U.S.C. §§ 1609–1611. The injunctions circumvent this express limitation on judicial authority by coercing Argentina into paying Respondents with immune assets located outside the United States: Argentina's reserves. The injunctions also conflict with traditional principles of equity. Indeed, the lower courts found that Argentina's FSIA immunities meant that there was no adequate remedy at law, thereby supporting injunctions that coerce payment with the very assets the FSIA declares immune. The injunctions thus achieve through indirection a result the FSIA directly prohibits. They upend Congress' carefully-crafted regime, contravene basic principles of equity, and cause the precise international tensions Congress intended for the FSIA to prevent.

The errors below are enormously consequential. The offense to Argentina's sovereignty is manifest, and the consequences go well beyond Argentina. First, the rulings upset the settled expectations of the financial community, threaten the stability of the international credit markets, and impede the restructuring of sovereign debt—a necessary aspect of the global financial system. Second, the rulings overstep the FSIA's limitations and, predictably, spark international tension. Indeed, the United States filed briefs as *amicus curiae* below emphasizing that these are issues of "vital public policy and legal importance to the United States." App. 113. Courts may have an impulse to ensure a remedy for every right, but the FSIA expressly limits their authority to remedy judgments against foreign sovereigns, placing certain assets—especially those located overseas—beyond the reach of judicial enforcement. The FSIA represents the political branches' considered balancing of the interests of litigants and foreign sovereigns, and it plainly contemplates that some money debts will remain unsatisfied. It is not an invitation to creative judicial maneuvering to achieve by indirection what the statute forbids directly.

The decisions below are final, and the need for this Court's intervention is imperative. The Court should certify the *pari passu* question to New York's highest court, resolve the FSIA question, or both.

## OPINIONS BELOW

The court of appeals issued two opinions below. The first (App. 29) ("*NML I*") is reported at 699 F.3d 246. The second (App. 1) ("*NML II*") is reported at 727 F.3d 230. The district court's orders (App. 70–165) are unreported.

## JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on August 23, 2013. Argentina timely filed a petition for rehearing and rehearing en banc, which was denied on November 19, 2013.

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the FSIA, 28 U.S.C. §§ 1602–1611 are reprinted at App. 208–20.

## STATEMENT OF THE CASE

### A. The Foreign Sovereign Immunities Act.

The FSIA provides the exclusive and comprehensive scheme for obtaining and enforcing a judgment against a foreign sovereign. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989); *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006); 28 U.S.C. § 1602. The scheme is two-fold. First, a foreign state is immune from jurisdiction unless an express statutory exception applies, such as when the sovereign has consented to jurisdiction. 28 U.S.C. §§ 1604–1605(a).

Second, even when a foreign sovereign is subject to jurisdiction, the FSIA strictly constrains courts' remedial authority. A foreign state's property in the United States "shall be immune from attachment arrest and execution except as provided" in 28 U.S.C. §§ 1610 and 1611. 28 U.S.C. § 1609. Section 1610 provides that a foreign state's property may be attached or executed upon if it is located in and used for a commercial activity in the United States *and* the sovereign has waived its enforcement immunity or another exception applies. § 1610(a)(1). Section

1611 further protects uniquely sovereign assets: military and central bank property. § 1611(b). Foreign state property in the United States that is not used for commercial activity is thus immune, as is foreign state property abroad: "The FSIA did not purport to authorize execution against a foreign state's property … wherever that property is located around the world." *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007).

The FSIA's robust enforcement immunity reflects a "deliberate policy choice on the part of Congress." App. 189 (U.S. Br.); *see also* Br. of United States as *Amicus Curiae* 8–9, *Republic of Argentina v. NML Capital*, *Ltd.*, No. 12-842 (Dec. 4, 2013) ("U.S. Discovery Br."). When it enacted the FSIA, Congress codified the "restrictive theory" of immunity from *jurisdiction* that had largely supplanted the traditional rule of absolute immunity. *See Republic of Austria v. Altmann*, 541 U.S. 677, 678–91 (2004). But "enforcement [of] *judgments* against foreign state property remain[ed] a somewhat controversial subject in international law." H.R. Rep. No. 94-1487, 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626 ("House Report") (emphasis added); *accord* Restatement (Third) of the Foreign Relations Law of the United States § 460 note 1 (1987). "Enforcement against State property constitutes a greater interference with a State's freedom to manage its own affairs and to pursue its public purposes" than entry of a judgment. Hazel Fox & Philippa Webb, *Law of State Immunity* 481 (3d ed. 2013) ("State Immunity"). Judicial seizure of a foreign state's property may "be regarded as 'an affront to [the sovereign's] dignity and may … affect our relations with it.'" *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36 (1945)). Coercive measures against a foreign state's reserves, in particular, "could cause significant foreign relations problems." House Report 31.

The political branches thus struck a delicate balance between the rights of creditors and the dignity of foreign sovereigns. Congress proceeded cautiously, "remedy[ing], *in part*, the … predicament of a plaintiff who has obtained a judgment against a foreign state." House Report 8 (emphasis added); *see also id*. 27 ("*partially* lowering" the preexisting rule of absolute immunity) (emphasis added). But Congress left foreign states' absolute enforcement immunity otherwise intact. *De Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984).

**B. The Argentine Crisis.**

In 2001, Argentina suffered the worst economic and social crisis in its modern history, causing poverty and unemployment to reach unprecedented levels. Unable to pay its debt and provide basic government services, Argentina declared a payment moratorium on more than $80 billion of its public external debt. App. 33. The default included bonds governed by a 1994 Fiscal Agency Agreement, known as "FAA Bonds." *Id*.

In the wake of default, millions of Argentines suffered grave harms. The cumulative fall in economic output was almost twice that experienced by the United States during the Great Depression. "The living standards of over one-half of the

Argentine people fell below the poverty line, and over a third could not afford basic food…. Adults were rioting and breaking into supermarkets, regularly, in search of food." Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 Int'l Lawyer 1189, 1196 (2009).

There is no bankruptcy regime for sovereign nations. Instead, a sovereign in crisis must engage in a voluntary restructuring of its debt. *See* App. 172–74 (U.S. Br.); Br. of France as *Amicus Curiae* 13-15, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-1494 (July 26, 2013) ("France Br."). Voluntary restructuring enables a distressed sovereign to devise solutions that are broadly acceptable to the markets, prioritize payments to international financial institutions ("IFIs") like the International Monetary Fund ("IMF") and the World Bank, and "move expeditiously past a balance of payment crisis." App. 173 (U.S. Br.). This, in turn, minimizes "ripple effects" across the global economy. *Id.*

Consistent with this approach, Argentina made voluntary exchange offers in 2005 and 2010. App. 33–37. Ultimately, 92% of the non-performing bonds were traded for new "exchange" bonds with modified terms, such as reduced principal, lower interest rates, and/or longer maturities. App. 37. In both offers, Argentina treated all FAA Bonds equally by offering all holders identical terms. In connection with the 2005 Exchange Offer, Argentina enacted a so-called Lock Law, ensuring that bondholders who held out would not be treated better than bondholders who accepted the exchange. App. 34–35.

Argentina has consistently made timely payments on its exchange bonds.

### C. NML and Its Suit for Specific Performance of the *Pari Passu* Clause.

NML is a Cayman Islands-based vulture fund. Vulture funds "exploi[t] the voluntary nature of international debt relief schemes by acquiring defaulted sovereign debt at deeply discounted prices and then seeking repayment of the full value of the debt through litigation, seizure of assets or political pressure." Press Release, Office of the High Comm'r for Human Rights, *'Vulture Funds'—UN Expert on Foreign Debt Welcomes Landmark Law to Address Profiteering* (Apr. 20, 2010), http://bit.ly/1ca5ZsW. Vulture funds' defection "deter[s] participation" in restructurings, and their "subsequent litigation threatens to derail any restructuring ultimately agreed upon." Christopher C. Wheeler & Amir Attaran, *Declawing the Vulture Funds*, 39 Stan. J. Int'l L. 253, 254 (2003). Vulture funds' profits often "com[e] at the expense of already impoverished nations and, in some cases, 'highly indebted poor countries.'" *Id*. 262–63; *see also* Gordon Brown, Speech at the United Nations General Assembly Special Session on Children (May 10, 2002), http://bit.ly/1hqEboQ (describing such litigation as "morally outrageous").

In the FAA Bonds, Argentina selected New York law and consented to jurisdiction in the Southern District of New York. App. 3. The bonds include an acceleration clause that, upon invocation, made all principal plus accrued interest due immediately to Respondents. App. 40–41 n.7; *see also* Mitu Gulati &

Robert E. Scott, *The 3½ Minute Transaction: Boilerplate and the Limits of Contract Design* 26–27 (2013) (acceleration clauses are standard in sovereign bonds). Respondents claim more than $1.33 billion, a subset of the over $15 billion in principal and accrued interest on outstanding non-performing bonds. *See* Republic of Argentina Annual Report (Form 18-K) (Sept. 30, 2011) (JA 2602) ($11.2 billion outstanding as of December 2010, which totals over $15 billion today with additional interest).

As a holder of FAA Bonds, NML was entitled to seek a money judgment against Argentina. But in a transparent effort to evade the FSIA's strict limitations on courts' judgment enforcement powers, NML sued and demanded specific performance. Am. Compl. ¶¶ 1–2 *NML Capital, Ltd. v. Republic* of Argentina, No. 08-6978, (S.D.N.Y. Oct. 17, 2011) (Doc. 344) ("Am. Compl."). Of course, an order for specific performance of a sovereign debt contract is more attractive than a money judgment *only* if it forces the sovereign to pay with property the FSIA renders immune. NML has candidly described such relief as an "enhanced judgment enforcement mechanism." (Letter from K. Reed, counsel of NML Capital, Ltd., to Hon. Thomas P. Greisa 3 (Jan. 14, 2004) (JA 210).)

NML demanded that Argentina perform the FAA's *pari passu* clause. It states:

> [The FAA Bonds] will constitute … direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves.

> The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness." App. 198.[1]

This is "a boilerplate provision." App. 170 (U.S. Br). *Pari passu* clauses appear in virtually all modern sovereign bonds, often with language that is materially identical to that here. Mark Weidemaier, et al. *Origin Myths, Contracts, and the Hunt for* Pari Passu, 38 Law & Soc. Inquiry 72, 84, 101–02 (2013) ("*Origin Myths*").

The first sentence of the clause prohibits Argentina from discriminating "among" the FAA Bonds "themselves" and "is not at issue." NML Resp. Br. 8 in *NML I* (Doc. 307) ("*NML I* Resp. Br."). Financial markets have most commonly understood the second sentence "to protect a lender against the risk of legal subordination in favor of another creditor," such as by creating unsecured debt ranking senior in legal right of payment. App. 177 (U.S. Br.). And markets have overwhelmingly agreed on what it does *not* mean: "a borrower does not violate the *pari passu* clause by electing as a matter of practice to pay certain indebtedness in preference to the obligations outstanding under the agreement in which this clause appears." App. 177–78 (U.S. Br.).

NML nonetheless argued that the second sentence promised that "Argentina may not make a

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[1] In this context, "External Indebtedness" means debt in currency other than Argentine pesos. App. 32.

payment to a holder of External Indebtedness without a ratable payment being made at the same time to [NML]." Am. Compl. ¶ 48. Although Argentina pays the exchange bondholders periodic interest payments that were reduced in restructuring, NML argued that, because of acceleration, Argentina must pay holdouts the entire balance of principal plus accrued interest. App. 120. Otherwise, Argentina must stop fully servicing its exchange bond debt and go into a court-ordered default.

NML dismissed the prospects of a default, asserting that Argentina could afford to pay all its bondholders by spending its reserves. *E.g.*, *NML I* Resp. Br. 1. But Argentina's reserves are immune under the FSIA. *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 196 (2d Cir. 2011); 28 U.S.C. § 1611(b)(1). Moreover, the claims of all holdouts exceeds $15 billion; the exchange bondholders' principal amount totals $24 billion; and Argentina's reserves, which must also be used for purposes other than debt service, are approximately $28 billion. Taos Turner, *Argentina's Currency Reserves Rise by $24 Million*, Wall St. J., Feb. 13, 2014.

**D. The Decisions Below.**

1. The district court granted partial summary judgment to NML. App. 70. It thereafter entered permanent injunctions requiring Argentina to make a "Ratable Payment." App. 88. The court held that Argentina breached the *pari passu* clause by "ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to

satisfy its payment obligations currently due under NML's Bonds." App. 88–89. The orders define "Ratable Payment" to mean that Argentina must pay NML the same percentage of "the total amount currently due" to it (*i.e.*, 100% of the entire amount of principal plus accrued interest) that Argentina pays of the total amount currently due to the exchange bondholders (*i.e.*, 100% of the periodic interest payment). App. 91.

The district court found "no adequate remedy at law" because Argentina would not pay a money judgment—in other words, because Argentina asserted its immunities under the FSIA. App. 89. The court held that the equities favored a "Ratable Payment" injunction because Argentina "has the financial wherewithal" to pay both NML and the exchange bondholders—notwithstanding that Argentina has that "wherewithal," if at all, only by using immune assets. App. 90.

The orders also threaten third-party financial institutions with contempt. App. 92–93. Consistent with ordinary practice, Argentina does not pay exchange bondholders directly. Isasa Decl. ¶ 4 (JA 2288). Argentina makes a lump sum payment in Argentina from its treasury to an Argentine office of the exchange bondholders' trustee. App. 7. Their trustee routes payments internationally through other institutions (the "registered owners" and the "clearing system"), before the funds are transferred to the bondholders or their nominees. *Id.* These third-party institutions face contempt for fulfilling their duties to the exchange bondholders if Argentina does not also make a "Ratable Payment" to NML. App. 92–93.

Following NML's lead, other holdout creditors obtained materially identical injunctions. *See* App. 94–116. With NML, they are Respondents here.

2. Argentina appealed. The United States joined as *amicus curiae*, arguing that the case "raise[d] two issues of vital public policy and legal importance to the United States that extend beyond the particular facts of this case." App. 169–70. First, the district court's interpretation of the "boilerplate" *pari passu* clause "deviate[d] from decades of settled market expectations" and was "contrary to United States economic policy." App. 170. The district court's ruling could "undermine the decades of effort the United States has expended to encourage a system of cooperative resolution of sovereign debt crises." *Id.* The United States also warned that private creditors could block sovereigns from making debt payments to IFIs, notwithstanding the "established custom" that IFIs ordinarily get paid back first. App. 186. Second, the injunctions' "breathtaking assertion of extraterritorial jurisdiction" was inconsistent with the FSIA and "could have adverse effects on … foreign relations." App. 188.

On October 26, 2012, the Second Circuit substantially affirmed. First, it held that Argentina breached the *pari passu* clause. It found the clause's meaning "neither well settled nor uniformly acted upon," and stated that the "real dispute is over what constitutes subordination" under the clause. App. 49. The panel held that the clause "protect[s] bondholders from more than just formal subordination"; it "prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA Bonds." App. 49–50. The panel found "that Argentina effectively has ranked its payment obligations to the plaintiffs below those of the exchange bondholders" because Argentina was paying the exchange bonds but not the FAA Bonds, Argentina's SEC filings stated that it had "no intention of resuming payment," and the Lock Law "preclud[ed] its officials from paying defaulted bondholders and barr[ed] its courts from recognizing plaintiffs' judgments." App. 51–52. The panel also held in the alternative that, even if the clause only prohibited formal subordination, the Lock Law breached that promise. App. 52.

Second, the panel held that the injunctions did not conflict with the FSIA. The panel recognized that courts are "barred from granting, 'by injunction, relief which they may not provide by attachment.'" App. 58 (quoting *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983)). But it held that the injunctions "are not barred by § 1609" because they "do not attach, arrest, or execute upon any property." *Id.* "Each of these three terms refers to a court's seizure and control over specific property." App. 57. According to the panel, the injunctions "affect Argentina's property only incidentally" and "can be complied with without the court's ever exercising dominion over sovereign property." App. 58.

The panel remanded for the district court to clarify the "ratable payment" formula and the impact on third-party financial institutions. App. 31, 63.

Argentina filed a petition for rehearing, which was denied. App. 66. Argentina also filed an interlocutory petition for certiorari, which was denied. 134 S. Ct. 201 (2013).

3. On remand, the district court issued final permanent injunctions, clarifying the payment formula dictating to Argentina that, when it makes the next interest payment on the exchange bonds, it "will be required to pay plaintiffs approximately $1.33 billion." App. 129; *see also* App. 138–65. The court exempted "intermediary banks," *see* N.Y. U.C.C. Art. 4-A-503, but confirmed that the exchange bondholders' trustee and other institutions in the international clearing and payment system could face contempt if Argentina does not comply. App. 122.

Argentina appealed again, arguing, among other things, that the panel should certify a *pari passu* question to the New York Court of Appeals.

4. On August 23, 2013, the Second Circuit affirmed the final injunctions without certifying the *pari passu* question. App. 1.[2] The panel reaffirmed its earlier holdings that Argentina breached the *pari passu* clause and that the injunctions "do not attach, arrest, or execute upon any property" in violation of the FSIA, as they "allow Argentina to pay its FAA debts with whatever resources it likes." App. 10–11.

Argentina and its *amici* "warn[ed] that rather than submitting to restructuring," bondholders in

[2] On January 10, 2013, the Second Circuit summarily denied a motion by the Exchange Bondholder Group to certify a *pari passu* question. Order 1 (Doc. 777).

future sovereign crises "will hold out for the possibility of full recovery on their bonds at a later time, in turn causing second- and third-order effects detrimental to the global economy and especially to developing countries." App. 25. The panel downplayed all that, describing this as "an exceptional [case] with little apparent bearing on transactions that can be expected in the future." *Id.* "We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA." App. 25–26; *see also* App. 12 ("Argentina has gone considerably farther by passing legislation, the Lock Law, specifically barring payments to FAA bondholders."). The panel noted that "newer bonds almost universally include collective action clauses ('CACs') which permit a super-majority of bondholders to impose a restructuring on potential holdouts." App. 26. And the panel "d[id] not believe the outcome of this case threatens to steer bond issuers away from the New York marketplace." App. 27. "[I]n view of the nature of the issues presented," however, the panel stayed the injunctions pending resolution of this petition for certiorari. App. 6.

5. On September 11, 2013, Argentina suspended the Lock Law indefinitely, App. 204, once again allowing the holdouts to accept an exchange offer under the same terms that holders of 92% of the non-performing bonds accepted.

Argentina's petition for rehearing and rehearing en banc was denied on November 19, 2013. App. 68.

## REASONS FOR GRANTING CERTIORARI

The now-final injunctions here are enormously consequential for Argentina and the global financial system and warrant this Court's intervention.

1. This Court should grant certiorari and certify the *pari passu* question to the New York Court of Appeals. The "ratable payments" injunctions below rest on an outlier interpretation of the ubiquitous *pari passu* clause, which appears in hundreds of billions of dollars of sovereign bonds. That interpretation is deeply flawed, disrupts settled market expectations, and threatens New York's role as a world center of sovereign finance. Certification would allow New York's highest court to undo the damage caused below and could lead to vacatur of the harmful injunctions here without the need for this Court to address the FSIA question.

2. The Court should also grant certiorari to review—and reverse—the Second Circuit's misguided holding that the FSIA can be evaded by injunction, even if it is not inclined to certify the *pari passu* question. Congress carefully crafted a two-part immunity scheme, ensuring that certain foreign sovereign property—including central bank property and property located abroad—would be immune from judicial enforcement even when the sovereign consents to jurisdiction in U.S. courts. *See* 28 U.S.C. §§ 1609, 1610(a)(1), 1611(b)1. The injunctions below trample this scheme and traditional principles of equity by coercing payment of a money debt with assets the FSIA declares immune—and coercing Argentina into violating its policies—thereby causing

the very offense to sovereign dignity that Congress sought to prevent.

3. This case is extraordinarily important to Argentina, other sovereigns, the capital markets, and U.S. foreign relations. *See* App. 169–70 (U.S. Br.) (rulings below raise issues of "vital public policy and legal importance … beyond the particular facts of this case"). The injunctions coerce Argentina into paying holdout creditors using core sovereign assets—Argentina's reserves—located outside the United States. Amplifying the offense, the injunctions derive their coercive power from the threat that, if Argentina does not pay Respondents, it will be pushed into default, exposing exchange bondholders and millions of Argentine citizens to grave harm.

More broadly, the United States, the IMF, France, and others have warned that the "ratable payments" injunctions threaten the international financial system. Orderly and voluntary restructuring of sovereign debt crises is critical to maintaining stability in a financially-interconnected world without a sovereign bankruptcy regime. The possibility of obtaining "ratable payments" injunctions creates a powerful incentive for creditors to hold out and seek windfall profits by threatening to block payments on restructured debt. This makes voluntary restructuring "substantially more difficult, if not impossible," and threatens to delay a process where swift action is essential to prevent crises from spreading. App. 182 (U.S. Br.).

## I. This Court Should Certify The *Pari Passu* Question To The New York Court Of Appeals, Which Could Obviate The FSIA Question.

This Court should grant certiorari and certify the *pari passu* question to the New York Court of Appeals. Certification is appropriate when "determinative questions of New York law are involved in a case … for which no controlling precedent of the Court of Appeals exists." NY Comp. Codes R. & Regs. tit. 22 § 500.27(a). Certification fosters "cooperative judicial federalism" by enabling a state's highest court to answer questions that impact the state's important interests. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

Certification here has the twin virtues of potentially obviating the FSIA issue and providing New York's highest court an opportunity to correct an important misinterpretation of New York law. First, the state's certification statute is satisfied because no New York court has ever interpreted a *pari passu* clause in a sovereign debt contract, *see* Philip R. Wood, Pari Passu *Clauses—What Do They Mean?*, Butterworths J. Int'l Banking & Fin. L. 371, 374 (2003), and the question is determinative. If the court holds that the *pari passu* clause only prohibits legal subordination, then injunctions requiring Argentina to make "ratable payments" would be unfounded and inequitable, particularly in light of the Lock Law repeal. Certification could therefore obviate the need for this Court to reach the FSIA question. As *Cline v. Oklahoma Coalition for Reproductive Justice*, 133 S. Ct. 2887 (2013), recently demonstrated, certification is particularly valuable where, as here, resolution of an antecedent state-law question could permit the Court to avoid an important federal question that would otherwise demand review.

Second, the *pari passu* question is extraordinarily important to New York. New York courts strive to "maintai[n] and foste[r]" the state's "undisputed status as the preeminent commercial and financial nerve center of the Nation and the world." *Ehrlich-Bober & Co. v. Univ. of Hous.*, 49 N.Y.2d 574, 581 (1980). "New York has a strong interest in maintaining its preeminent financial position and in protecting the justifiable expectation of the parties who choose New York law." *Banco Nacional De Mexico, SA. v. Societe Generale*, 34 A.D.3d 124, 130 (N.Y. App. Div. 2006); *see also* Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373, 401 (2000) ("Contract law has been [a] fertile area for certification in New York.").

The decisions below "disrup[t] settled expectations concerning the scope and effect of boilerplate language contained in many sovereign debt instruments." App. 182 (U.S. Br.). *Pari passu* clauses appear in hundreds of billions of dollars of debt subject to New York law, often with language that is materially identical to that found here. *See Origin Myths* 84, 101–02; France Br. 8. The lower courts read this boilerplate language to include a promise against restructuring: Argentina cannot "pa[y] on other bonds without paying on the FAA Bonds." App. 50. Whatever disagreement there may be about the precise meaning of a *pari passu* clause, markets have overwhelmingly agreed that this is wrong. App. 177–78 (U.S. Br.). "[A] borrower does not violate the *pari passu* clause by electing as a matter of practice to pay certain indebtedness in preference to the obligations outstanding under the agreement in which this clause appears." App. 177–78 (U.S. Br.); *see* U.N. Centre on Transnational Corporations, Advisory Studies, No. 4, Series B, *International Debt Restructuring: Substantive Issues and Techniques* 29 (1989) (*Pari passu* clauses "do not, of course, obligate the borrower to repay all of its debt at the same time."); *see also* Br. of Clearing House as *Amicus Curiae* 4–5 (Doc. 237) (describing the contrary reading as a "dramatic and disruptive departure" from market understanding).[3]

Markets have most commonly understood the clause "to protect a lender against the risk of legal subordination in favor of another creditor." App. 177 (U.S. Br.). The panel rejected this interpretation because it would leave the differences between the sentences in the clause "substantially without force

[3] *Pari passu* clauses have been common for decades, but "ratable payments" relief was never entered before NML's affiliate, Elliott Associates, persuaded a Belgian court to adopt such relief on an *ex parte* basis. App. 179–80 (U.S. Br.). "Most commentators concluded that the Belgian court had misconstrued the *pari passu* clause in a way that would cause problems in the sovereign debt markets," and Belgium's Parliament effectively overruled the decision. App. 180 (U.S. Br.). United Kingdom courts have refused to issue "ratable payments" injunctions. *See Kensington Int'l Ltd. v. Republic of the Congo*, 2002 No. 1088, [2003] EWHC 2331 (Comm) (Commercial Ct. Apr. 16, 2003) (U.K.).

or effect." App. 49. Not so. The first sentence prohibits discrimination "among" the FAA Bonds "themselves." *Accord NML I* Resp. Br. 8. The second is different, because it promises that Argentina will not legally subordinate FAA Bonds to *other* debt (its "unsecured and unsubordinated External Indebtedness").

The panel held in the alternative that Argentina breached the "legal subordination" interpretation by "enact[ing] the Lock Law," which barred Argentine "officials from paying defaulted bondholders and barr[ed] its courts from recognizing plaintiffs' judgments," when no Argentine law would bar enforcement of the exchange bonds after a default. App. 52. Even if this were correct, breaching a "legal subordination" promise would provide no basis for injunctions requiring "ratable payments." In any event, Argentina has suspended the Lock Law, so even if it once somehow supported the injunctions, it clearly no longer does. App. 204.

The New York Court of Appeals should have the final word on whether the *pari passu* clause prohibits a sovereign from continuing to service performing debt without servicing defaulted debt. If New York courts want New York law to upset settled expectations, impede restructurings, and endanger New York's status as the law of choice for sovereign debt, that is their prerogative. But they should not have those consequences thrust upon them.

## II. This Court Should Grant Certiorari To Review The FSIA Question.

This Court should also grant certiorari to review—and reverse—the extraordinary remedy affirmed below, which flouts the FSIA and causes exactly the international friction the FSIA is designed to prevent. In the FSIA, Congress cautiously balanced comity and international relations concerns against the interests of litigants, making it easier to obtain jurisdiction over a foreign sovereign but preserving much of foreign sovereigns' traditional immunity from enforcement measures. The panel below upset that basic balance and affirmed injunctions that indirectly achieve what the FSIA directly forbids: They coerce a foreign sovereign into satisfying a money debt with immune assets.

1. Under the FSIA, even when a foreign sovereign consents to jurisdiction it is not treated like an ordinary litigant for enforcement purposes. A foreign state's property is immune from "attachment arrest and execution" unless, among other things, it is located and used for commercial activity in the United States. 28 U.S.C. §§ 1609–1611. All other foreign sovereign property—particularly property abroad—is immune. *See id.*; *Autotech*, 499 F.3d at 750; *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1131–32 (9th Cir. 2010).

This scheme is the product of a careful compromise by the political branches. Congress chose to remedy "in part"—not in full—"the … predicament of a plaintiff who has obtained a judgment against a foreign state," giving *some* measure of relief against *some* foreign sovereign property located in the United States. House Report 8. As the Fifth, Seventh, Ninth, and D.C. Circuits have recognized, some judgments against a foreign sovereign will be unenforceable, a result Congress "fully intended" when it "create[d] rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments." *Peterson*, 627 F.3d at 1128; *see also FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011); *Autotech*, 499 F.3d at 750; *Conn. Bank of Comm. v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002).

The Second Circuit upended this careful balance by affirming injunctions that are designed to circumvent Congress' remedial scheme and to provide relief where Congress fully intended U.S. courts would provide none. Indeed, an order for specific performance of a debt contract is an "enhanced judgment enforcement mechanism" only to the extent it coerces the sovereign into satisfying the debt with assets that the FSIA declares immune from enforcement of a money judgment.

Remarkably, Respondents and the courts below eliminated any pretense by identifying the immune assets that the injunctions target: Argentina's "'foreign currency reserves.'" Br. in Opp. 9, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-1494 (Aug. 28, 2013) ("Br. in Opp."); *see NML I* Resp. Br. 1 (Argentina's reserves include "ample resources to pay"); *NML II* Joint Resp. Br. 4 (Doc. 821) (Argentina holds "more than $40 billion in accessible reserves"). Those reserves are doubly immune under the FSIA, as they are central bank property—core sovereign assets—and they are located abroad. *Banco Central*, 652 F.3d at 172. Orders coercing a sovereign into paying a debt with assets the FSIA declares immune plainly violate Congress' judgment that those assets should be immune in the first place. *E.g.,* House Report 31 (enforcement against reserves "could cause significant foreign relations problems").

2. The lower courts' analysis of the injunction factors similarly contravenes the judgment of the political branches and violates bedrock principles of equity. Injunctions are traditionally unavailable "to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation," because a money judgment is an adequate remedy at law. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210–11 (2002); *see also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999). But the panel held that Respondents "have no adequate remedy at law because the Republic has made clear its intention to defy any money judgment issued by this Court." App. 12; *see also* App. 56 ("Argentina will simply refuse to pay any judgments"). The panel thus used Argentina's invocation of its FSIA immunities as the avowed basis for entering an injunction designed to circumvent those immunities.

This reasoning is wholly incompatible with the FSIA. Immunity conferred by Congress upon property cannot render monetary relief "inadequate" and thereby justify an injunction that compels payment with immune property. The *whole point* of the FSIA's two-part immunity scheme is that a foreign sovereign may "refuse to pay" immune assets to satisfy a money judgment, even when the sovereign is subject to a court's jurisdiction. *See* 28

U.S.C. §§ 1610(a)(1), 1611(b). That is the basic structure of the FSIA, not a defect that justifies an injunctive remedy.

Even worse, the injunctions give rise to extraterritoriality concerns. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). This Court has cautioned against injunctions with extraterritorial effects that may "interfer[e] with the sovereignty of another nation." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952); *see Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 78 (3d Cir. 1994) (reversing injunctions because they "thrust the district court into the internal affairs of the Republic"). These injunctions bind Argentina itself, extending extraterritorially to constrain Argentina's use of core sovereign assets located outside the United States. Argentina must either use its reserves to pay Respondents, or it must not use its reserves or other immune assets to make an unrelated payment to the exchange bondholders' trustee.

3. Numerous circuits, including the Second Circuit, have recognized that a court cannot circumvent the FSIA by merely labeling an order an "injunction" when the effect is "attachment, arrest, or execution" of immune property. *See* App. 58 ("[C]ourts are … barred from granting 'by injunction, relief which they may not provide by attachment.'" (quoting *S&S Mach.*, 706 F.2d at 418); *see also Janvey v. Libyan Inv. Auth.*, 478 F. App'x 233, 236 (5th Cir. 2012) (per curiam) (prohibiting an injunction that is "functionally equivalent to an attachment"); *Phoenix Consulting Inc. v. Republic of*

*Angola*, 172 F.3d 920 (D.C. Cir. 1998) (table) (prohibiting an injunction that is "in effect a pre-judgment attachment").

The panel rendered this principle toothless, however, by holding that the injunctions do not even implicate the FSIA because they do not "exercis[e] dominion over sovereign property"; Argentina supposedly could "pay its FAA debts with whatever resources it likes." App. 58; App. 11. This cramped reading of the FSIA must not stand.

First, the panel's rule that § 1609 only prevents a court from taking "dominion" over immune property makes no sense in light of the FSIA's structure and purpose. From a foreign sovereign's perspective, it is immaterial whether a U.S. court coerces it into transferring immune assets to the court so that the court can transfer them to plaintiffs, or if the court skips a step and coerces the sovereign into handing the same assets directly to plaintiffs. Both orders are equally offensive as they equally constrain the sovereign's use of its property. *Cf.* State Immunity 31 ("The application by one State of forcible measures of constraint against the conduct or property of another State is an unfriendly act generally prohibited by international law ….").

Second, an order coercing a foreign sovereign to satisfy a money debt "with whatever resources it likes"—without regard to whether the assets used to satisfy the debt are immune under the FSIA—itself conflicts with the FSIA's immunity scheme, which is property-specific. "The only way the court can decide whether it is proper" to issue a remedial order "is if it knows which property is targeted." *Autotech*, 499

F.3d at 750. A court "cannot give a party a blank check when a foreign sovereign is involved." *Id.*; *see also Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011) (the FSIA "cloaks the foreign sovereign's property with a presumption of immunity" which "inheres in the property itself").[4] To the extent Respondents and the lower courts identified any property for Argentina to use to pay Respondents, they pointed only to immune reserves. The fact that the injunctions constrain Argentina's use of such core sovereign assets located abroad is a sure signal that the injunctions violate Argentina's sovereign immunity.

This Court has long rejected similar efforts to evade state sovereign immunity. For example, after the Civil War, Louisiana issued bonds that included covenants promising that it would pay creditors with a particular earmarked account funded by particular taxes. *Louisiana v. Jumel*, 107 U.S. 711, 713–15 (1883). Louisiana later defaulted, stopped collecting the tax and filling the account, and offered investors a bond exchange. *Id.* at 715–16. Some refused and sued in federal court. To evade Louisiana's sovereign immunity, the holdouts "purposely avoided" seeking

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[4] This Court recently granted certiorari in *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842, in which the same lower courts committed a similar error: They entered (and affirmed) an order permitting extraterritorial discovery into Argentine assets without regard to whether those assets were immune under the FSIA. *See* U.S. Discovery Br. 6–7, 9 (courts may not "exercise … judicial power over Argentina as any other party"; discovery orders must be tailored to "respec[t] the general rule of immunity Congress established in Section 1609").

a money judgment and instead demanded that state officials specifically perform the covenants, which would effectively satisfy the debt. *Id.* at 721–22. This Court squarely rejected the effort. *Id.* A state is thus immune from a suit that "will operate so as to compel [it] specifically to perform its contracts." *In re State of New York*, 256 U.S. 490, 500–01 (1921). This anti-circumvention rule should apply *a fortiori* here, where an effectively extraterritorial injunction runs against a foreign sovereign—not merely a state's residual sovereignty—to evade enforcement immunity codified in statute.

4. Even the Second Circuit recognized that it could not directly command Argentina to pay Respondents. But it held that it could achieve the same result indirectly by giving Argentina a choice: pay Respondents or suffer a calamity. *See* App. 58. The "choice" between satisfying a monetary obligation to Respondents and defaulting on $24 billion of exchange bond debt—threatening draconian consequences for the Argentine people—is no choice at all, let alone something a district court can impose on a foreign sovereign. It is a "weapo[n] of coercion." *Nat'l Federation of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2603 (2012) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 586 (1937)).

This weapon significantly exacerbates the FSIA problem because it puts Argentina in the unsustainable position of either paying Respondents or having countless third parties suffer grave harm. The exchange bondholders would suffer immense losses, and a new default would threaten a renewed financial crisis in Argentina. Moreover, because a district court ordinarily cannot punish foreign officials for their official acts, *see* State Immunity 564–65, to coerce Argentina, the court thrust yet more third parties into harm's way. The injunctions expressly threaten with contempt the exchange bondholders' trustee and other financial institutions that receive interest payments and route them to exchange bondholders. The threat to third parties is a "deliberate design choice, made in light of the fact that the injunction[s] cannot reach [their] primary target, to induce third parties to pressure Argentina to comply." W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation* 7, Yale J. on Reg., UNC Legal Studies Research, Working Paper No. 2330914, http://bit.ly/1h01Isc (forthcoming 2014). Because of this panoply of threats, the injunctions "have the practical effect" of forcing Argentina to use immune assets to satisfy a money debt to Respondents—in direct contravention of Congress' choice to make those assets immune. *See* App. 191 (U.S. Br.).

The injunctions thus engender precisely the friction the FSIA is designed to prevent. No sovereign nation would stand idly by while a foreign court takes its citizens and other third parties hostage in order to commandeer the public fisc. The fact that the panel below viewed this "option" as avoiding the FSIA problem simply underscores how badly it misinterpreted the FSIA.

## III. This Case Is Extraordinarily Important to Argentina, Foreign Relations, Other Sovereigns, and the Capital Markets.

### A. The Decisions Below Ignore Argentina's Sovereign Interests and Threaten Foreign Relations.

As Congress recognized in enacting the FSIA, the judiciary threatens international comity and foreign relations when it coerces a foreign sovereign into paying money damages with assets located abroad. First, the FSIA's enforcement immunities are robust precisely because the mere act of seizing foreign sovereign property "may be regarded as an affront," *Pimentel*, 553 U.S. at 866 (quotation marks omitted). "Questions of foreign-sovereign immunity are sensitive, and lower-court mistakes about the availability of immunity can have foreign-policy implications." *Rubin*, 637 F.3d at 791; *see* App. 194–95 (U.S. Br.); *see also Peterson*, 627 F.3d at 1128 ("courts should proceed carefully in enforcement actions against foreign states…."). Second, a court order reaching into a foreign sovereign's own borders to govern the sovereign's own conduct requires a "breathtaking assertion of extraterritorial jurisdiction" that "could have adverse effects on [U.S.] foreign relations and pose reciprocal concerns with respect to U.S. government assets." App. 188 (U.S. Br.). Third, it "could cause significant foreign relations problems" for a court to enter coercive measures reaching a country's reserves. House Report 31. A country's discretion over the use of its reserves "is seen as an element in the exercise of sovereign authority," and court orders limiting that discretion may have "political consequences to the friendly relations of the forum State." State Immunity 481.

The injunctions here cause all three problems and are "particularly likely to raise foreign relations tensions." App. 195 (U.S. Br.); App. 188 (U.S. Br.) (the orders' "extraordinary intrusiveness … could have adverse effects on [U.S.] foreign relations"). They are designed to coerce Argentina into turning over billions of dollars of assets located abroad, in violation of Argentina's own sovereign policies. "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc." *Alden v. Maine*, 527 U.S. 706, 750 (1999). Here, full payment of the holdouts would cut Argentina's reserves approximately in half, an unimaginable result for any nation. *Cf. Banco Central*, 652 F.3d at 192 (describing critical functions of Argentina's central bank). Compliance through payment is thus offensive and destabilizing.

### B. The Decisions Below Threaten Countless Third Parties With Harm and Will Impede Future Restructurings.

1. Compliance through non-payment would be even worse, as countless third parties would be harmed if Argentina defaulted on $24 billion of exchange bond debt. The exchange bondholders, who made the best of a difficult situation, would face massive losses. A default also could trigger a

renewed financial crisis, directly compromising the health and welfare of millions of ordinary Argentine citizens. No U.S. court has entered injunctions of this kind before.

2. The decisions below are more broadly important because they undermine the voluntary "system of cooperative resolution of sovereign debt crises." App. 170 (U.S. Br.). This is critical because there is no bankruptcy procedure for sovereign nations. App. 174–75 (U.S. Br.). Voluntary restructuring "will become substantially more difficult" under the regime endorsed below. App. 182 (U.S. Br.). Creditors are less likely to accept the haircut that is part and parcel of a restructuring if they are "guaranteed to receive the full amount of their outstanding loan obligation" after the restructuring succeeds and payments resume. App. 183 (U.S. Br.). *See also* G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law. 635, 638 (2001) (this "is a nightmarish situation").

The IMF has similarly warned that the decisions below "risk undermining the sovereign debt restructuring process." IMF, Sovereign Debt Restructuring — Recent Developments and Implications for the Fund's Legal and Policy Framework 31 (Apr. 26, 2013) ("IMF Report"). France, currently the secretary of the Paris Club, has echoed that the decisions "will have a chilling effect on … voluntary and negotiated debt restructurings." France Br. 14; *see also* Joe Leahy, *Brazil warns on Argentina debt ruling*, Fin. Times, Nov. 29, 2012 ("Brazil's central bank governo[r] has warned that [this case] sets a negative precedent that could hurt sovereign debt negotiations elsewhere.").

The rulings below also could "impede the repayment of loans extended … to sovereigns experiencing unserviceable debt burdens" by IFIs and sovereign lenders, including the Paris Club. App. 185 (U.S. Br.); *see* France Br. 15–17. A typical *pari passu* clause applies to "*all* its other present and future unsecured and unsubordinated External Indebtedness" without regard to whether that other creditor is a private party, another country, or an IFI. FAA ¶ 1(c) (App. 197) (emphasis added); *see also* App. 185–86 (U.S. Br.). The Second Circuit stated that it did not decide "whether policies favoring preferential payments to [IFIs] like the IMF would breach *pari passu* clauses" because Respondents had not raised such an argument. App. 53. But Respondents' reticence does not change the implications of their legal position. There is no material distinction for *pari passu* or FSIA purposes between payment to exchange bondholders and payment to an IFI. *See* App. 185–87 (U.S. Br.).

3. The Second Circuit was wrong to downplay these systemic concerns. *Pari passu* clauses are found in virtually all sovereign bonds, often with materially identical language to that found here. App. 183 (U.S. Br.); *Origin Myths* 101–02. And it has been "common practice" for sovereigns to restructure some but not all public debt. App. 178 (U.S. Br.). The decisions below thus have sweeping ramifications.

The advent of collective action clauses in recent bonds also does not "effectively eliminate the possibility of 'holdout' litigation." App. 61. CACs allow a supermajority of creditors to bind holdouts, but they were very rare before 2005. Tens of billions of dollars of older New York-law bonds without CACs remain outstanding. Choi Decl. ¶ 26 (Nov. 16, 2012) (SPE-1133). Moreover, "whereas CACs can be helpful, they do not—at least in the variety that is most common in sovereign debt contracts today—eliminate holdouts in sovereign debt restructuring so as to make the *pari passu* remedy unimportant." Brookings Inst., Comm. on Int'l Econ. Policy & Reform, *Revisiting Sovereign Bankruptcy* 18 (Oct. 2013) ("Brookings Report"); *accord* App. 170 (U.S. Br.); *see also* IMF Report 31. By creating massive incentives to hold out, the decisions below make it harder to obtain the needed supermajority in the first place, delaying restructuring and potentially altering the terms. *See* Br. of Prof. Krueger as *Amicus Curiae* 11–16 (Doc. 700). Furthermore, "creditors can and do target small series trading at a deep discount, where they can buy a blocking position with relative ease, hold out, and threaten to sue." Brookings Report 18. For example, notwithstanding the use of CACs, "more than half of all foreign-law bonds in the Greek debt restructuring failed to get the needed votes to amend the terms." *Id.*; *see also* IMF Report 28; France Br. 19.

The systemic harm is not quelled by the panel's emphasis on Argentina's allegedly "extraordinary behavior." App. 26. The panel's interpretation of the *pari passu* clause and its holding that reserves can be reached by injunction will embolden vultures worldwide and create powerful incentives for others to hold out. The Second Circuit affirmed "ratable payments" injunctions and explained that the *pari passu* clause "prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the [old] bonds." App. 50. The panel further described the "ratable payments" injunctions as "d[oing] no more than hold[ing] Argentina to its contractual obligation of equal treatment." App. 12; *see also* App. 55 (they "requir[e] that [Argentina] specifically perform its obligations under the FAA"). The panel emphasized the existence of the Lock Law as an example of Argentina's supposedly "extraordinary behavior," App. 26, but even the panel did not posit the "ratable payment" injunctions as a remedy for the existence of the Lock Law; in the court's view, they remedied a breach of the "payor" interpretation adopted by the district court. In any event, the Lock Law is now gone. Crucially, the panel also held that the FSIA did not protect sovereigns from injunctions that coerce it into using reserves located outside the United States to satisfy a money debt. The one-two punch of the holdings below creates serious comity and international relations problems, threatens a court-ordered default, and impedes future restructurings.

* * *

The need for this Court's review is imperative, and the time for review is now. Respondents primarily opposed Argentina's earlier petition for certiorari on the grounds it was interlocutory. Br. in Opp. 1; *id*. at 17. The injunctions are now final.

Respondents also argued that Argentina's refusal to voluntarily pay any judgments on holdout debt would render a grant a "gross misallocation of this Court's scarce resources." *Id.* at 30. This rhetoric again ignores that the FSIA expressly permits a foreign sovereign to consent to the jurisdiction of U.S. courts while still protecting much of its property—particularly its reserves—from enforcement measures.

In reacting to the district court's injunctions, Argentina thus has not behaved like a contumacious litigant—it acted like a sovereign, displaying exactly the affront that Congress intended for the FSIA to prevent. Any sovereign would protest if a foreign court issued an extraterritorial order threatening its creditors and citizens and coercing it into turning over billions of dollars from its immune reserves. Overstepping its proper role, an Article III court has thrust upon the political branches a foreign relations problem that the FSIA should have forestalled. The fact that injunctions designed to circumvent the FSIA are causing the very harms that Congress intended to prevent is no surprise. It is also a sure signal that the orders below are wrong and warrant this Court's review.

**CONCLUSION**

For the reasons set forth above, this Court should grant the petition, certify the *pari passu* question to the New York Court of Appeals, and review as needed the FSIA question after return from the Court of Appeals; or it should simply grant the FSIA question.

Respectfully submitted,

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February 18, 2014

# APPENDIX

# APPENDIX

## TABLE OF APPENDICES

Appendix E

*Appendix A*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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Nos. 12-105(L)
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12-170, 12-176, 12-185, 12-189, 12-214, 12-909,
12-914, 12-916, 12-919, 12-920, 12-923, 12-924,
12-926, 12-939, 12-943, 12-951, 12-968, 12-971,
12-4694, 12-4829, 12-4865*

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NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., 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 VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

*Plaintiffs-Appellees*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant-Appellant*,

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* Appeals numbered 12-105, 12-109, 12-111, 12-157, 12-158, 12-163, 12-164, 12-170, 12-176, 12-185, 12-189, and 12-214 were dismissed as of October 26, 2012. Appeals numbered 12-909, 12-914, 12-916, 12-919, 12-920, 12-923, 12-924, 12-926, 12-939, 12-943, 12-951, 12-968, 12-971, 12-4829 are decided by this opinion. Appeals numbered 12-4694 and 12-4865 are dismissed by this opinion.

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

*Non-Party Appellants*,

EURO BONDHOLDERS, ICE CANYON LLC,

*Intervenors.*

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August Term, 2012
Argued: February 27, 2013
Decided: August 23, 2013
Before: POOLER, B.D. PARKER and RAGGI, *Circuit Judges.*

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**OPINION**

Defendant-Appellant the Republic of Argentina, Non-Party Appellants, and Intervenors appeal from amended orders issued by the United States District Court for the Southern District of New York (Griesa, *J.*). The amendments explain certain aspects of those orders which were designed to remedy Argentina's breach of a promise to pay bondholders after a 2001 default on its sovereign debt. We hold that the district court did not abuse its discretion in issuing the orders.

AFFIRMED.

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BARRINGTON D. PARKER, *Circuit Judge*:

This is a contract case in which the Republic of Argentina refuses to pay certain holders of sovereign bonds issued under a 1994 Fiscal Agency Agreement (hereinafter, the "FAA" and the "FAA Bonds"). In order to enhance the marketability of the bonds, Argentina made a series of promises to the purchasers. Argentina promised periodic interest payments. Argentina promised that the bonds would be governed by New York law. Argentina promised that, in the event of default, unpaid interest and principal would become due in full. Argentina promised that any disputes concerning the bonds could be adjudicated in the courts of New York. Argentina promised that each bond would be transferrable and payable to the transferee, regardless of whether it was a university endowment, a so-called "vulture fund," or a widow or an orphan. Finally, Argentina promised to treat the FAA Bonds at least equally with its other external indebtedness. As we have held, by defaulting on the Bonds, enacting legislation specifically forbidding future payment on them, and continuing to pay interest on subsequently issued debt, Argentina breached its promise of equal treatment. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (*NML I*).

Specifically, in October 2012, we affirmed injunctions issued by the district court intended to remedy Argentina's breach of the equal treatment obligation in the FAA. *See id.* Our opinion chronicled pertinent aspects of Argentina's fiscal history and the factual background of this case, *see id.* at 251-57, familiarity with which is assumed.[1] Those

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[1] For a more comprehensive narrative of Argentina's long history of defaulting on its debts, see Judge José Cabranes's opinion in *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007).

injunctions, fashioned by the Hon. Thomas P. Griesa, directed that whenever Argentina pays on the bonds or other obligations that it issued in 2005 or 2010 exchange offers (the "Exchange Bonds"), the Republic must also make a "ratable payment" to plaintiffs who hold defaulted FAA Bonds. We remanded, however, for the district court to clarify the injunctions' payment formula and effects on third parties and intermediary banks, and retained jurisdiction pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994).

On November 21, 2012, the district court issued amended injunctions with the clarifications we requested,[2] as well as an opinion explaining them, which are challenged on this appeal by Argentina as well as by non-party appellants and intervenors. *See NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012) (*NML II*). Recognizing the unusual nature of this litigation and the importance to Argentina of the issues presented, following oral argument, we invited Argentina to propose to the appellees an alternative payment formula and schedule for the outstanding bonds to which it was prepared to commit. Instead, the proposal submitted by

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[2] *See NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012); *Aurelius Capital Master, Ltd. & ACP Master, Ltd. v. Republic of Argentina*, No. 09 Civ. 8757 (TPG), Dkt. No. 312 (S.D.N.Y. Nov. 26, 2012); *Olifant Fund, Ltd. v. Republic of Argentina*, No. 10 Civ. 9587, Dkt. No. 40 (S.D.N.Y. Nov. 26, 2012); *Varela v. Republic of Argentina*, No. 10 Civ. 5338, Dkt. No. 64 (S.D.N.Y. Nov. 26, 2012). We refer to these collectively as the "amended injunctions."

Argentina ignored the outstanding bonds and proposed an entirely new set of substitute bonds.[3] In sum, no productive proposals have been forthcoming. To the contrary, notwithstanding its commitment to resolving disputes involving the FAA in New York courts under New York law, at the February 27, 2013 oral argument, counsel for Argentina told the panel that it "would not voluntarily obey" the district court's injunctions, even if those injunctions were upheld by this Court. Moreover, Argentina's officials have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree.[4] It is within this context that we review the amended injunctions for abuse of discretion and, finding none, we affirm.[5]

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[3] *See* Dkt. No. 935 (Argentina's Proposal of March 29, 2013); *see also* Dkt. No. 950 (Appellees' April 22, 2013 Response to Argentina's Proposal).

[4] Argentine President Cristina Fernández de Kirchner is quoted as announcing that Argentina will pay on the Exchange Bonds "but not one dollar to the 'vulture funds,'" referring to FAA Bondholders such as plaintiff NML Capital, Ltd. Argentina to Blast 'Vulture Funds' at the G20 Ministerial Meeting in Mexico, MercoPress, Nov. 4, 2012, Supp. App. 391. The Republic's Economy Minister Hernan Lorenzino is quoted as echoing that "Argentina isn't going to change its position of not paying vulture funds . . . . We will continue to follow that policy despite any ruling that could come out of any jurisdiction, in this case New York." Ken Parks & Charles Roth, Argentina Grapples with Credit-Rating Challenges, Wall St. J., Oct. 31, 2012, Supp. App. 395. In a speech apparently posted to a presidential website, President Kirchner criticized the "justice system" overseen by this Court, stating that it "evidently is unaware of its own legislation." Supp. App. 553.

[5] *See City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 142 (2d Cir. 2011). A district court abuses its discretion

However, in view of the nature of the issues presented, we will stay enforcement of the injunctions pending resolution of a timely petition to the Supreme Court for a writ of *certiorari*.[6]

In its opinion, the district court first explained that its "ratable payment" requirement meant that whenever Argentina pays a percentage of what is due on the Exchange Bonds, it must pay plaintiffs the same percentage of what is then due on the FAA Bonds. *Id.* at *2. Under the express terms of the FAA, as negotiated and agreed to by Argentina, the amount currently due on the FAA Bonds, as a consequence of its default, is the outstanding principal and accrued interest. *See id.*; *NML I* at 254 n.7; *see also* Appellant Argentina 2012 Br. at 26 ("[T]he contractually agreed upon remedy [for default] is acceleration of principal, an action already taken by these plaintiffs."). Thus, as the district court explained, if Argentina pays Exchange Bondholders 100% of what has come due on their bonds at a given time, it must also pay plaintiffs 100% of the roughly $1.33 billion of principal and accrued interest that they are currently due. *See NML II* at *3.

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when it bases a ruling "on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks omitted).

[6] 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.

Second, the district court explained how its injunctions would prevent third parties from assisting Argentina in evading the injunctions. Though the amended (and original) injunctions directly bind only Argentina, the district court correctly explained that, through the automatic operation of Federal Rule of Civil Procedure 65(d), they also bind Argentina's "agents" and "other persons who are in active concert or participation" with Argentina. *See id.* at *4; Fed. R. Civ. P. 65(d)(2). Those bound under the operation of Rule 65(d) would include certain entities involved in the system through which Argentina pays Exchange Bondholders. As the district court stated:

> Argentina transfers funds to the Bank of New York Mellon ("BNY"), which is the indenture trustee in a Trust Indenture of 2005. Presumably there is a similar indenture for the 2010 exchange offer. BNY then forwards the funds to the "registered owner" of the Exchange Bonds. There are two registered owners for the 2005 and 2010 Exchange Bonds. One is Cede & Co. and the other is the Bank of New York Depositary ("BNY Depositary"). Cede and BNY Depositary transfer the funds to a "clearing system" such as the Depository Trust Company ("DTC"). The funds are then deposited into financial institutions, apparently banks, which then transfer the funds to their customers who are the beneficial interest holders of the bonds.

*NML II* at *5. Of these, the amended injunctions cover Argentina, the indenture trustee(s), the registered owners, and the clearing systems. *See id.* The amended injunctions explicitly exempt intermediary banks, which enjoy protection under Article 4A of New York's Uniform Commercial Code (U.C.C.), and financial institutions receiving funds from the DTC. *See id.*

In accordance with our October 2012 opinion, the litigation then returned to our Court. Argentina has challenged certain aspects of the amended injunctions, and appeals have also followed from other entities: a group of Exchange Bondholders, styling themselves as the Exchange Bondholder Group ("EBG"); the Bank of New York Mellon ("BNY"), indenture trustee to Exchange Bondholders; and Fintech Advisory Inc., a holder of Exchange Bonds. We further received briefing (but no notices of appeal) from two intervenors: a group of bondholders calling themselves the Euro Bondholders, and ICE Canyon LLC, a holder of GDP-linked securities issued by Argentina.

APPELLATE STANDING

Neither BNY, EBG, Fintech, Euro Bondholders, nor ICE Canyon intervened below, but each seeks to participate here as a non-party. As a general rule, only parties may appeal, but we have recognized non-party appellate standing in two situations: where the non-party is bound by the judgment and where the non-party has an interest plausibly affected by the judgment. *See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 77-78 (2d Cir. 2006).

The amended injunctions provide that BNY, as a participant in the payment process of the Exchange Bonds, "shall be bound by the terms of this ORDER as provided by [Federal Rule of Civil Procedure] 65(d)(2)." 2012 WL 5895784, at *2. Accordingly, BNY has standing to appeal. *See NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 175 n.1 (2d Cir. 2011) (holding that non-party Banco Central de la República Argentina had standing to challenge attachment and execution order). In contrast, EBG, Fintech, Euro Bondholders, and ICE Canyon are not bound by the amended injunctions. They are creditors, and, as such, their interests are not plausibly affected by the injunctions because a creditor's interest in getting paid is not cognizably affected by an order for a debtor to pay a different creditor. *Cf. Dish Network Corp. v. DBSD N. Am., Inc.*, 634 F.3d 79, 90 (2d Cir. 2010); *Evanston Ins. Co. v. Fred A. Tucker & Co., Inc.*, 872 F.2d 278, 280 (9th Cir. 1989). If Argentina defaults on its obligations to them, they retain their rights to sue. And, as discussed below, their interests are not cognizably affected in any other way. Consequently, EBG, Fintech, Euro Bondholders, and ICE Canyon have no appellate standing, and the appeals from EBG and Fintech are hereby dismissed. (Euro Bondholders and ICE Canyon did not file appeals of their own.)

At the same time, their arguments are not lost because they requested that, in the event they were not deemed appellants, the court consider their arguments as coming from *amici curiae*. Because Argentina contends in its own appeal that the amended injunctions should be vacated because, among other reasons, they are inequitable to Exchange Bondholders, we will consider the arguments of EBG, Fintech, Euro Bondholders, and ICE Canyon as arguments from *amici curiae* in support of Argentina. *See* Fed. R. App. P. 29(a).[7]

## DISCUSSION

Argentina advances a litany of reasons as to why the amended injunctions unjustly injure itself, the Exchange Bondholders, participants in the Exchange Bond payment system, and the public. None of the alleged injuries leads us to find an abuse of the district court's discretion.

### I. Alleged Injuries to Argentina

Argentina argues that the amended injunctions unjustly injure it in two ways. First, Argentina argues that the amended injunctions violate the Foreign Sovereign Immunities Act ("FSIA") by forcing Argentina to use resources that the statute protects. As discussed in our October opinion, the original injunctions—and now the amended injunctions—do not violate the FSIA because "[t]hey do not attach, arrest, or execute upon any property" as proscribed by the statute.[8] *NML I* at 262-63.

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[7] Judge Pooler disagrees with the majority decision to dismiss the appeals of EBG, Fintech, Euro Bondholders, and ICE Canyon. However, as the arguments of the dismissed appellants are treated as made by *amici*, and as the status of the non-appellants matters little to the outcome here, Judge Pooler has agreed to note her disagreement for the record in this footnote, rather than dissent.

[8] As we noted,

> [a]n "attachment" is the "seizing of a person's property to secure a judgment or to be sold in

Rather, the injunctions allow Argentina to pay its FAA debts with whatever resources it likes. Absent further guidance from the Supreme Court, we remain convinced that the amended injunctions are consistent with the FSIA.

Second, Argentina argues that the injunctions' ratable payment remedy is inequitable because it calls for plaintiffs to receive their full principal and all accrued interest when Exchange Bondholders receive even a single installment of interest on their bonds. However, the undisputed reason that plaintiffs are entitled immediately to 100% of the principal and interest on their debt is that the FAA guarantees acceleration of principal and interest in the event of default. *See NML I* at 254 n.7; *NML II* at *4. As the district court concluded, the amount currently owed to plaintiffs by Argentina as a result of its persistent defaults is the accelerated principal plus interest. We believe that it is equitable for one creditor to receive what it bargained for, and is

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> satisfaction of a judgment." Black's Law Dictionary 123 (9th ed.2009); *see also* 6 Am. Jur. 2d Attachment and Garnishment § 1. An arrest is "[a] seizure or forcible restraint." Black's Law Dictionary 124 (9th ed. 2009). "Execution" is "an act of dominion over specific property by an authorized officer of the court . . . which results in the creation of a legal right to subject the debtor's interest in the property to the satisfaction of the debt of his or her judgment creditor." 30 Am. Jur. 2d Executions § 177; *see also* Black's Law Dictionary (9th ed. 2009) ("Judicial enforcement of a money judgment, usu. by seizing and selling the judgment debtor's property.").

*NML I* at 262 n.13.

therefore entitled to, even if other creditors, when receiving what they bargained for, do not receive the same thing. The reason is obvious: the first creditor is differently situated from other creditors in terms of what is currently due to it under its contract. *See Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 344 (2d Cir. 2005). Because the district court's decision does no more than hold Argentina to its contractual obligation of equal treatment, we see no abuse of discretion.

Argentina adds that the amended injunctions are invalid because a district court may not issue an injunctive "remedy [that] was historically unavailable from a court of equity." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). However, English chancery courts traditionally had power to issue injunctions and order specific performance when no effective remedy was available at law. *See* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2944 (2d ed. 1994). As we explained in our October 2012 opinion, the plaintiffs have no adequate remedy at law because the Republic has made clear its intention to defy any money judgment issued by this Court. *See NML I* at 261-62. Moreover, Argentina has gone considerably farther by passing legislation, the Lock Law, specifically barring payments to FAA bondholders. And it is unremarkable that a court empowered to afford equitable relief may also direct the timing of that relief. Here, that timing requires that it occur before or when Argentina next pays the Exchange Bondholders.

## II. Alleged Injuries to Exchange Bondholders

Invoking the proposition that equitable relief is inappropriate where it would cause unreasonable hardship or loss to third persons, *see Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2d Cir. 1993), Argentina, EBG, and Fintech argue that the amended injunctions are inequitable to Exchange Bondholders.[9] But this case presents no conflict with that proposition. EBG argues, notwithstanding our affirmance of the district court's finding that Argentina has the financial wherewithal to pay all of its obligations, *see NML I* at 256, 263,

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[9] Intervenor ICE Canyon urges that the amended injunctions should not apply to euro-denominated GDP-linked securities that Argentina issued in its 2005 and 2010 exchanges. The gist of ICE Canyon's argument is that the amended injunctions require payment to plaintiffs whenever Argentina pays on the Exchange *Bonds*, not when it pays on GDP-linked securities which yield revenue only if the Republic's GDP grows. By their terms, however, the amended (and original) injunctions require payment to plaintiffs whenever Argentina pays on "Exchange Bonds," defined as including both bonds *and "other obligations"* issued in the exchange offers. 2012 WL 5895784, at *2 (emphasis added). The inclusion of other obligations like GDP-linked securities is unsurprising, given that the FAA required that the FAA Bonds be treated at least equally with all "obligations (other than the [FAA Bonds]) for borrowed money or evidenced by securities, debentures, notes or other similar instruments denominated or payable, or which at the option of the holder thereof may be payable, in a currency other than the lawful currency of the Republic. . . ." J.A. 171. The euro-denominated GDP-linked securities fit this description because they are "obligations . . . evidenced by securities . . . denominated . . . in a currency other than the lawful currency of the Republic." Accordingly, we see no need to clarify the amended injunctions, and we consider the term Exchange Bonds to include the euro-denominated GDP-linked securities.

that the amended injunctions will harm Exchange Bondholders because Argentina "has declared publicly that it has no intention of ever paying holdout bondholders like NML" and, as a result, neither plaintiffs nor Exchange Bondholders will be paid if the amended injunctions stand. Appellant EBG Br. 2.

This type of harm—harm threatened to third parties by a party subject to an injunction who avows not to obey it—does not make an otherwise lawful injunction "inequitable." We are unwilling to permit Argentina's threats to punish third parties to dictate the availability or terms of relief under Rule 65. *See Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301, 1302 (1992) (Stevens, *J.*, in chambers). Argentina's contention that the amended injunctions are unfair to Exchange Bondholders is all the less persuasive because, before accepting the exchange offers, they were expressly warned by Argentina in the accompanying prospectus that there could be "no assurance" that litigation over the FAA Bonds would not "interfere with payments" under the Exchange Bonds. J.A. 466. Under these circumstances, we conclude that the amended injunctions have no inequitable effect on Exchange Bondholders and find no abuse of discretion.[10]

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[10] The remaining arguments pertaining to Exchange Bondholder interests are similarly without merit. Exchange Bondholders have suffered no denial of procedural due process because there is no right to process for non-parties in their position. *See Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 42 (1st Cir. 2009) ("Impact and legal rights are not the same thing. A decision in a contract dispute or antitrust case can have drastic effects on

## III. Alleged Injuries to Participants in the Exchange Bond Payment System

Argentina, BNY, Euro Bondholders, and ICE Canyon raise additional issues concerning the amended injunctions and their effects on the international financial system through which Argentina pays Exchange Bondholders. The arguments include that (1) the district court lacks personal jurisdiction over payment system participants and therefore cannot bind them with the amended injunctions, (2) the amended injunctions cannot apply extraterritorially, (3) payment system participants are improperly bound because they were denied due process, and (4) the amended injunctions' application to financial system participants would violate the U.C.C.'s protections for intermediary

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suppliers, stockholders, employees and customers of the company that loses the case; no one thinks the Constitution requires all of them to be parties."). EBG's substantive due process and Takings Clause arguments fail because the amended injunctions do not deprive Exchange Bondholders of any property. And lastly, nonparties—even those whose enjoyment of contractual rights may be affected by a judicial decision—are not necessary parties for Rule 19 joinder if they can protect their rights in subsequent litigation. *See MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 386 (2d Cir. 2006). Here, Exchange Bondholders will be affected if, after we affirm the amended injunctions, Argentina decides to default on the Exchange Bonds, but Exchange Bondholders would then be able to sue over that default. Accordingly, we find no abuse of discretion in the amended injunctions with respect to the Exchange Bondholders' rights.

banks. None of these arguments, numerous as they are, has merit.[11]

First, BNY and Euro Bondholders argue that the district court erred by purporting to enjoin payment system participants over which it lacks personal jurisdiction. But the district court has issued injunctions against no one except Argentina. Every injunction issued by a district court automatically forbids others—who are not directly enjoined but who act "in active concert or participation" with an enjoined party—from assisting in a violation of the injunction. *See* Fed. R. Civ. P. 65(d). In any event, the Supreme Court has expressed its expectation that, when questions arise as to who is bound by an injunction though operation of Rule 65, district courts will not "withhold a clarification in the light of a concrete situation." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 15 (1945). The doors of the district court obviously remain open for such applications.

The amended injunctions simply provide notice to payment system participants that they could become liable through Rule 65 if they assist Argentina in violating the district court's orders. Since the amended injunctions do not directly enjoin payment system participants, it is irrelevant whether

[11] We also note that some payment system participants, ostensibly concerned about being sued for obeying the injunctions, apparently enjoy the protection of exculpatory clauses in their contracts. *See e.g.*, Trust Indenture of June 2, 2005, § 5.2(xvi), Supp. App. 662 ("[BNY] will not be liable to any person if prevented or delayed in performing any of its obligations . . . by reason of any present or future law applicable to it, by any governmental or regulatory authority or by any circumstance beyond its control . . . .").

the district court has personal jurisdiction over them. And of course, "[t]here will be no adjudication of liability against a [non-party] without affording it a full opportunity at a hearing, after adequate notice, to present evidence." *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168, 180 (1973). In such a hearing, before any finding of liability or sanction against a non-party, questions of personal jurisdiction may be properly raised. But, at this point, they are premature. Similarly, payment system participants have not been deprived of due process because, if and when they are summoned to answer for assisting in a violation of the district court's injunctions, they will be entitled to notice and the right to be heard. *See id.* at 181.

Euro Bondholders and ICE Canyon next argue that the amended injunctions are improper or at a minimum violate comity where they extraterritorially enjoin payment systems that deliver funds to Exchange Bondholders. But a "federal court sitting as a court of equity having personal jurisdiction over a party [here, Argentina] has power to enjoin him from committing acts elsewhere." *Bano v. Union Carbide*, 361 F.3d 696, 716 (2d Cir. 2004) (internal quotation marks omitted). And federal courts can enjoin conduct that "has or is intended to have a substantial effect within the United States." *United States v. Davis*, 767 F.2d 1025, 1036 (2d Cir. 1985).

The district court put forward sufficient reasons for binding Argentina's conduct, regardless of whether that conduct occurs here or abroad. *See NML II* at *4 (noting that if Argentina is able to pay

Exchange Bondholders while avoiding its obligations to plaintiffs, "the Injunctions will be entirely for naught"); *see also* Oral Arg. Tr. Nov. 9, 2012, 16:16-18, Supp. App. 461 ("[T]he Republic has done everything possible to prevent those judgments that have been entered [against it] from being enforced."). And the district court has articulated good reasons that the amended injunctions must reach the process by which Argentina pays Exchange Bondholders. *See NML II* at *4 (noting that, to prevent Argentina from avoiding its obligations to plaintiffs, "it is necessary that the *process* for making payments on the Exchange Bonds be covered"); *id.* at *5 (explaining that "if Argentina attempts to make payments . . . contrary to law," then "third parties should properly be held responsible for making sure that their actions are not steps to carry out a law violation"). The amended injunctions do not directly enjoin any foreign entities other than Argentina. By naming certain foreign payment system participants (such as Clearstream Banking S.A., Euroclear Bank S.A./N.V., and Bank of New York (Luxembourg) S.A), the district court was, again, simply recognizing the automatic operation of Rule 65.

If ICE Canyon and the Euro Bondholders are correct in stating that the payment process for their securities takes place entirely outside the United States, then the district court misstated that, with the possible exception of Argentina's initial transfer of funds to BNY, the Exchange Bond payment "process, without question takes place in the United States." *NML II* at *5 n.2. But this possible misstatement is of no moment because, again, the amended injunctions enjoin no one but Argentina, a party that has voluntarily submitted to the jurisdiction of the district court. If others in active concert or participation with Argentina are outside the jurisdiction or reach of the district court, they may assert as much if and when they are summoned to that court for having assisted Argentina in violating United States law.

Argentina and Fintech further argue that the amended injunctions violate Article 4A of the U.C.C., which was enacted to provide a comprehensive framework that defines the rights and obligations arising from wire transfers. *See Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 118 (2d Cir. 2010). Two sections of that article are at issue: § 502, concerning creditor process, and § 503, requiring "proper cause" before a party to a fund transfer (but not an intermediary bank) may be enjoined.

Section 502(1) defines creditor process as a "levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account." Within the context of electronic funds transfers ("EFTs"), § 502 requires that creditor process must be served on the bank of the EFT beneficiary who owes a debt to the creditor. N.Y. U.C.C. § 4-A-502(4). The Republic argues that the district court impermissibly skirts § 502's bar to creditor process except against a beneficiary's bank because the amended injunctions purport to affect multiple banks and other financial institutions in active concert and participation with Argentina.

Section 502 is not controlling because the amended injunctions do not constitute, or give rise to, "creditor process," essentially defined in the statute as a levy or attachment. The cases cited by Argentina are inapposite because they deal with attachments, and as we have seen, none has occurred here. *See Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 70 (2d Cir. 2009); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124 (2d Cir. 2009).

Section 503, however, does apply. It provides that only "[f]or proper cause" may a court

> restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an [EFT] originator's bank from executing the payment order of the originator, or (iii) the [EFT] beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

N.Y. U.C.C. § 4-A-503. This section "is designed to prevent interruption of a funds transfer after it has been set in motion," and "[i]n particular, intermediary banks are protected" from injunctions that would disrupt an EFT. *Id.* § 4-A-503 cmt.

Argentina argues that plaintiffs purport to have cause for an injunction only with respect to Argentina, and therefore any transfers not involving Argentina cannot be enjoined. But as discussed above, the district court explained why it had good cause to issue injunctions that cover Argentina as well as the Exchange Bond payment system. *See NML II* at *4-5. Moreover, taking into account § 503's ban on injunctions against intermediary banks, the district court expressly excluded intermediary banks from the scope of the amended injunctions. Nonetheless, Fintech argues that BNY, BNY's paying agents, and DTC all act as intermediary banks and are all bound by the amended injunctions. We need not determine now what entities may or may not act as intermediary banks in an EFT that violates the amended injunctions. Whether or not an institution has assisted Argentina in a payment transaction solely in the capacity of an intermediary bank will be a question for future proceedings.

We note, however, that the record does not support Fintech's assertions. BNY does not route funds transfers originated by Argentina to Exchange Bondholders. Rather, BNY accepts funds as a beneficiary of Argentina's EFT and then initiates new EFTs as directed by its indenture. *See* Supp. App. 529, 535, 537, 628-759; *see also* Appellant Argentina Br. 35 ("[BNY] initiates its *separate* funds transfer to distribute payment . . . .") (emphasis in original). It is noteworthy that neither Argentina nor BNY argue that BNY is an intermediary bank.

Similarly, the clearing systems such as DTC and Euroclear appear from the record and from their own representations to be other than intermediary banks. DTC does not route wire transfers but accepts funds that it then allocates "only to the [participant banks and brokerage houses] who have deposited the respective securities with DTC." Supp. App. 1289-90.

Euroclear receives "payments from paying agents" and then "credits such amounts to its account holders." *Amicus* Euroclear Br. 3. These are not the functions of an intermediary bank under § 503. *See In re Contichem LPG*, No. 99 Civ. 10493, 1999 WL 977364, at *2 n.2 (S.D.N.Y. Oct. 27, 1999) (McKenna, J.), *aff'd sub nom. ContiChem LPG v. Parsons Shipping Co., Ltd.*, 229 F.3d 426 (2d Cir. 2000) (explaining that a bank was "not an intermediary bank for purposes of U.C.C. § 4-A-503 because it did not transfer by wire, or attempt to transfer by wire, the funds in question, but simply, as a receiving bank, credited them to [its customer]").

IV. Alleged Injuries to the Public Interest

In our October opinion, we considered the dire predictions from Argentina that enforcing the commitments it made in the FAA would have cataclysmic repercussions in the capital markets and the global economy, and we explained why we disagreed. *See NML I* at 263. On this appeal, Argentina essentially recycles those arguments. We are mindful of the fact that courts of equity should pay particular regard to the public consequences of any injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). However, what the consequences predicted by Argentina have in common is that they are speculative, hyperbolic, and almost entirely of the Republic's own making. None of the arguments demonstrates an abuse of the district court's discretion.

The district court found that Argentina now "has the financial wherewithal to meet its commitment of providing equal treatment to [plaintiffs] and

[Exchange Bondholders].” 2012 WL 5895784, at *1. However, Argentina and the Euro Bondholders warn that Argentina may not be able to pay or that paying will cause problems in the Argentine economy, which could affect the global economy. But as we observed in our last opinion, other than this speculation, “Argentina makes no real argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court’s finding to the contrary was clearly erroneous.” *NML I* at 263. Moreover, and perhaps more critically, Argentina failed to present the district court with any record evidence to support its assertions.

Argentina and *amici* next assert that, by forcing financial institutions and clearing systems to scour all of their transactions for payments to Exchange Bondholders, the amended injunctions will delay many unrelated payments to third parties. But the financial institutions in question are already called on to navigate U.S. laws forbidding participation in various international transactions. *See, e.g.*, 31 C.F.R. § 560.206 (forbidding trade by U.S. persons, including financial institutions, with Iran); 31 C.F.R. § 560.208 (forbidding dealings between foreign persons engaged in trade with Iran and U.S. persons); *United States v. HSBC Bank USA, N.A.*, No. 12 Crim. 763, 2013 WL 3306161, at *8 (E.D.N.Y. July 1, 2013) (approving settlement of criminal charges against bank for violations of U.S. law that allowed money laundering by drug traffickers); U.S. Dep’t of Treasury, Settlement Agreement, MUL-488066, *available at* http://www.treasury.gov/resource-center/sanctions/of ac-enforcement/documents/08182010.pdf (settling allegations that a foreign bank violated U.S. prohibitions on payments to Cuba, Iran, Burma, and Sudan).[12] Indeed, the record in this case appears to belie those concerns and suggests that payment system participants know when Exchange Bond payments are to arrive, because each is identified by a unique code assigned to a particular Exchange Bond. *See* Supp. App. 1290. In this context, we view Argentina's concerns as speculative. In any event, a district court always retains the power to adjust the terms of an injunction as unforseen problems or complexities involving entities such as the clearing systems present themselves. *See United States v. Diapulse Corp. of Am.*, 514 F.2d 1097, 1098 (2d Cir. 1975).

Also unpersuasive is Argentina's warning that we should vacate the injunctions because future plaintiffs may "move against multilateral and official sector entities" like the IMF. Appellant Argentina Br. 47. As we have observed, this case presents no claim that payments to the IMF would violate the FAA. *NML I* at 260. A court addressing such a claim in the future will have to decide whether to entertain it or whether to agree with the appellees that subordination of "obligations to commercial unsecured creditors beneath obligations to

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[12] We have never been presented with the question whether U.S. sanctions legally apply to non-U.S. persons or institutions, and we do not answer that question today. We merely note that both foreign and domestic financial institutions are already required to police their own transactions in order to avoid violations of potentially applicable United States laws and regulations.

multilateral institutions like the IMF would *not* violate the Equal Treatment Provision for the simple reason that commercial creditors never were nor could be on equal footing with the multilateral organizations." *Id.* Speculation that a future plaintiff might attempt recovery affecting the IMF simply provides no reason to withhold relief here.

Next, Argentina and various *amici* assert that the amended injunctions will imperil future sovereign debt restructurings. They argue essentially that success by holdout creditors in this case will encourage other bondholders to refuse future exchange offers from other sovereigns. They warn that rather than submitting to restructuring, bondholders will hold out for the possibility of full recovery on their bonds at a later time, in turn causing second- and third-order effects detrimental to the global economy and especially to developing countries. *See generally Amicus* Anne Krueger Br. 11-16.

But this case is an exceptional one with little apparent bearing on transactions that can be expected in the future. Our decision here does not control the interpretation of all *pari passu* clauses or the obligations of other sovereign debtors under *pari passu* clauses in other debt instruments. As we explicitly stated in our last opinion, we have not held that a sovereign debtor breaches its *pari passu* clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor's rights. *See NML I* at 264 n.16. We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA. *Id.*

We further observed that cases like this one are unlikely to occur in the future because Argentina has been a uniquely recalcitrant debtor[13] and because newer bonds almost universally include collective action clauses ("CACs") which permit a super-majority of bondholders to impose a restructuring on potential holdouts. *See NML I* at 264. Argentina and *amici* respond that, even with CACs, enough bondholders may nonetheless be motivated to refuse restructurings and hold out for full payment—or that holdouts could buy up enough bonds of a single series to defeat restructuring of that series. But a restructuring failure on one series would still allow restructuring of the remainder of a sovereign's debt. And, as one *amicus* notes, "if transaction costs and other procedural inefficiencies are sufficient to block a super-majority of creditors from voting in favor of a proposed restructuring, the proposed restructuring is likely to fail under any circumstances." *Amicus* Kenneth W. Dam Br. 14 n.5.

Ultimately, though, our role is not to craft a resolution that will solve all the problems that might

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[13] *See also* Robin Wigglesworth & Jude Webber, An Unforgiven Debt, Fin. Times, Nov. 28, 2012 (characterizing Argentina as an "outlier in the history of sovereign restructurings"); Hung Q. Tran, The Role of Markets in Sovereign Debt Crisis Detection, Prevention and Resolution, Remarks at Bank of International Settlements Seminar, Sovereign Risk: A World Without Risk-Free Assets?, Jan. 8, 2013 ("Argentina . . . remain[s] a unique example of a sovereign debtor pursuing a unilateral and coercive approach to debt restructuring . . . .").

arise in hypothetical future litigation involving other bonds and other nations. The particular language of the FAA's *pari passu* clause dictated a certain result in this case, but going forward, sovereigns and lenders are free to devise various mechanisms to avoid holdout litigation if that is what they wish to do. They may also draft different *pari passu* clauses that support the goal of avoiding holdout creditors. If, in the future, parties intend to bar preferential payment, they may adopt language like that included in the FAA. If they mean only that subsequently issued securities may not explicitly declare subordination of the earlier bonds, they are free to say so. But none of this establishes why the plaintiffs should be barred from vindicating their rights under the FAA.

For the same reason, we do not believe the outcome of this case threatens to steer bond issuers away from the New York marketplace. On the contrary, our decision affirms a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to those terms. We believe that the interest—one widely shared in the financial community—in maintaining New York's status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts. *See Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

## CONCLUSION

For the foregoing reasons, we AFFIRM the district court's orders as amended.[14] The appeals from Exchange Bondholder Group, No. 12-4694, and from Fintech Advisory Inc., No. 12-4865, are hereby dismissed. Enforcement of the amended injunctions shall be stayed pending the resolution by the Supreme Court of a timely petition for a writ of *certiorari*.

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[14] The orders affirmed here are listed in footnote 2 of this opinion.

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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Nos. 12-105(L)
12-109, 12-111, 12-157, 12-158, 12-163, 12-164,
12-170, 12-176, 12-185, 12-189, 12-214, 12-909,
12-914, 12-916, 12-919, 12-920, 12-923, 12-924,
12-926, 12-939, 12-943, 12-951, 12-968, 12-971

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NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., 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 VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

*Plaintiffs-Appellees*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant-Appellant*.

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August Term, 2011
Argued: July 23, 2012
Decided: October 26, 2012
Before: POOLER, B.D. PARKER and RAGGI,
*Circuit Judges.*

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## OPINION

Plaintiffs appeal from permanent injunctions entered by the United States District Court for the Southern District of New York (Griesa, *J.*) designed to remedy Argentina's breach of its promise to pay bondholders after a 2001 default on its sovereign debt. We hold that Argentina breached its promise and, accordingly, affirm the underlying judgments of the district court. Further, we find no abuse of discretion in the injunctive relief fashioned by the district court. However, given the need for clarity as to how the injunctions are to function, the case is remanded to the district court for such proceedings as are necessary to address this matter.

AFFIRMED in part and REMANDED in part.

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BARRINGTON D. PARKER, *Circuit Judge*:

The Republic of Argentina appeals from permanent injunctions entered by the United States District Court for the Southern District of New York (Griesa, *J.*) designed to remedy Argentina's failure to pay bondholders after a default in 2001 on its sovereign debt. The district court granted plaintiffs summary judgment and enjoined Argentina from making payments on debt issued pursuant to its 2005 and 2010 restructurings without making comparable payments on the defaulted debt. We hold that an equal treatment provision in the bonds bars Argentina from discriminating against plaintiffs' bonds in favor of bonds issued in connection with the restructurings and that Argentina violated that provision by ranking its payment obligations on the defaulted debt below its obligations to the holders of its restructured debt. Accordingly, we affirm the judgment of the district court; we find no abuse of discretion in the injunctive relief fashioned by the district court, and we conclude that the injunctions do not violate the Foreign Sovereign Immunities Act ("FSIA"). However, the record is unclear as to how the injunctions' payment formula is intended to function and how the injunctions apply to third parties such as intermediary banks. Accordingly, the judgment is affirmed except that the case is remanded to the district court for such proceedings as are necessary to clarify these two issues. *See United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994).

## BACKGROUND

### Overview

In 1994, Argentina began issuing debt securities pursuant to a Fiscal Agency Agreement ("FAA Bonds"). A number of individual plaintiffs-appellees bought FAA Bonds starting around December 1998. The remaining plaintiffs-appellees, hedge funds and other distressed asset investors, purchased FAA Bonds on the secondary market at various times and as recently as June 2010.[1] The coupon rates on the FAA Bonds ranged from 9.75% to 15.5%, and the dates of maturity ranged from April 2005 to September 2031.

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[1] These plaintiffs include NML Capital, Ltd. ("NML"); Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Opportunities Fund II, LLC, and Blue Angel Capital I LLC (collectively, "Aurelius et al."); and Olifant Fund, Ltd. ("Olifant").

The FAA contains provisions purporting to protect purchasers of the FAA Bonds from subordination. The key provision, Paragraph 1(c) of the FAA, which we refer to as the "*Pari Passu* Clause," provides that:

> [t]he Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* without any preference among themselves. *The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness* . . . .

J.A. at 157 (emphasis added) ("External Indebtedness" is limited to obligations payable in non-Argentine currency. J.A. at 171.).[2] We refer to

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[2] The practical significance of an equal ranking obligation is readily apparent in the event of the bankruptcy or insolvency of a corporate debtor. Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 Emory L.J. 869, 873 (2004). In a corporate bankruptcy, holders of senior obligations have a priority claim over the debtor's assets. *Id.* In the case of sovereign borrowers, however, the impact of the clause is less clear because creditors cannot force them into bankruptcy-like proceedings, and no comparable asset distribution plan applies. Thus, in the event of a debt crisis, sovereigns wishing to honor some portion of their defaulted debt must negotiate with individual creditors or groups of creditors to effectuate restructurings. Typically, these proceedings leave in their wake so-called "holdout" creditors who refuse to restructure, opting instead to seek judgments against the sovereign. *See generally* William W. Bratton, *Pari Passu and a*

the second sentence of the *Pari Passu* Clause as the "Equal Treatment Provision." Following the 2001 default on the FAA Bonds, Argentina offered holders of the FAA Bonds new exchange bonds in 2005 and 2010 (the "Exchange Bonds"). Argentina continued to make payments to holders of those Exchange Bonds while failing to make any payments to persons who still held the defaulted FAA Bonds.

After Argentina defaulted, its President in December 2001 declared a "temporary moratorium" on principal and interest payments on more than $80 billion of its public external debt including the FAA Bonds. Each year since then, Argentina has passed legislation renewing the moratorium and has made no principal or interest payments on the defaulted debt. Plaintiffs estimate that, collectively, their unpaid principal and prejudgment interest amounts to approximately $1.33 billion.

The plaintiffs allege that Argentina's conduct violated the *Pari Passu* Clause by both subordinating their FAA Bonds to the Exchange Bonds and lowering the ranking of their FAA Bonds below the Exchange Bonds. The primary issues on appeal are whether Argentina violated the *Pari Passu* Clause, and if so, whether the remedy the district court ordered was appropriate.

Argentina's Restructurings

In 2005, Argentina initiated an exchange offer in which it allowed FAA bondholders to exchange their defaulted bonds for new unsecured and

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*Distressed Sovereign's Rational Choices*, 53 Emory L.J. 823, 828-33 (2004).

unsubordinated external debt at a rate of 25 to 29 cents on the dollar. In exchange for the new debt, participants agreed to forgo various rights and remedies previously available under the FAA. To induce creditors to accept the exchange offer, Argentina stated in the prospectus under "Risks of Not Participating in [the] Exchange Offer" the following:

> *Existing defaulted bonds eligible for exchange that are not tendered may remain in default indefinitely*. As of June 30, 2004, Argentina was in default on approximately U.S. $102.6 billion of its public indebtedness . . . . *The Government has announced that it has no intention of resuming payment on any bonds eligible to participate in [the] exchange offer . . . that are not tendered or otherwise restructured as part of such transaction*. Consequently, if you elect not to tender your bonds in an exchange offer there can be no assurance that you will receive any future payments in respect of your bonds.

2005 Prospectus, J.A. at 465 (second emphasis added).

That same year, in order to exert additional pressure on bondholders to accept the exchange offer, the Argentine legislature passed Law 26,017 (the "Lock Law") declaring that:

> Article 2 – The national Executive Power may not, with respect to the bonds . . . , reopen the swap process established in the [2005 exchange offer].

> Article 3 – *The national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to the bonds* . . . .
>
> Article 4 – The national Executive Power must . . . remove the bonds . . . from listing on all domestic and foreign securities markets and exchanges.

2005 Lock Law, J.A. at 436 (emphasis added). The 2005 exchange offer closed in June 2005 with a 76% participation rate, representing a par value of $62.3 billion. Plaintiffs did not participate.

In 2010, Argentina initiated a second exchange offer with a payment scheme substantially identical to the 2005 offer. To overcome the Lock Law's prohibition against reopening the exchange, Argentina temporarily suspended the Lock Law (the "Lock Law Suspension").[3] Like the 2005 prospectus, the 2010 exchange offer prospectus also warned of

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[3] The Lock Law Suspension, Law 26,547, explained that

> [t]he holders of government bonds that were eligible for the [2005] swap . . . who wish to participate in the [2010] restructuring . . . will have to waive all of the rights that pertain to them by virtue of the [FAA Bonds], including those rights that may have been recognized by any judicial or administrative judgment, . . . and waive and discharge the Republic of Argentina of any judicial . . . action, initiated or that may be initiated in the future, with regard to the [FAA Bonds] . . . . It is prohibited to offer the holders of government bonds who may have initiated judicial . . . action, more favorable treatment than what is offered to those who have not done so.

Lock Law Suspension, J.A. at 440.

"Risks of Not Participating in the [2010 restructuring]":

> *Eligible Securities that are in default and that are not tendered may remain in default indefinitely and, if you elect to litigate, Argentina intends to oppose such attempts to collect on its defaulted debt.*
>
> Eligible Securities in default that are not exchanged pursuant to the Invitation may remain in default indefinitely. In light of its financial and legal constraints, *Argentina does not expect to resume payments on any Eligible Securities in default that remain outstanding following the expiration of the Invitation*. Argentina has opposed vigorously, and intends to continue to oppose, attempts by holders who did not participate in its prior exchange offers to collect on its defaulted debt through . . . litigation . . . and other legal proceedings against Argentina. Argentina remains subject to significant legal constraints regarding its defaulted debt. . . .
>
> Consequently, if you elect not to tender your Eligible Securities in default pursuant to the Invitation *there can be no assurance that you will receive any future payments or be able to collect through litigation in respect of your Eligible Securities in default.*

2010 Prospectus, J.A. at 980 (second and third emphases added). As with the 2005 exchange offer, plaintiffs did not participate in the 2010 restructuring. After the two exchange offers, Argentina had restructured over 91% of the foreign debt on which it had defaulted in 2001.

An important new feature of the Exchange Bonds was that they included "collective action" clauses. These clauses permit Argentina to amend the terms of the bonds and to bind dissenting bondholders if a sufficient number of bondholders (66 2/3% to 75% of the aggregate principal amount of a given series) agree.[4] With the inclusion of collective action clauses, the type of "holdout" litigation at issue here is not likely to reoccur.

Argentina has made all payments due on the debt it restructured in 2005 and 2010. Under the indentures for the 2005 and 2010 Exchange Bonds, Argentina makes principal and interest payments to a trustee in Argentina that in turn makes an electronic funds transfer ("EFT") to U.S.-registered exchange bondholders. The EFTs are made from the trustee's non-U.S. bank to the registered holder's U.S. bank, often routed through one or more intermediary banks.

Proceedings Below

Plaintiffs sued Argentina on the defaulted FAA Bonds at various points from 2009 to 2011, alleging breach of contract and seeking injunctive relief, including specific performance of the Equal

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[4] *See* 2010 Prospectus at 122, J.A. at 1054 (providing that certain "modification[s] to the terms and conditions of [the Exchange Bonds] . . . may generally be made, and future compliance therewith may be waived, with the consent of Argentina and the holders of not less than 75% in aggregate principal amount or notional amount . . . of the [Exchange Bonds] at the time outstanding.").

Treatment Provision.[5] The FAA is governed by New York law and further provides for jurisdiction in "any state or federal court in The City of New York." J.A. at 184. However, Argentina's courts have held that the Lock Law and the moratoria on payments prevent them from recognizing New York judgments regarding the FAA Bonds. In SEC filings, Argentina has stated that it has classified unexchanged FAA Bonds as a category separate from its regular debt and that, since 2005, it has "not [been] in a legal . . . position to pay" that category. Republic of Arg., Annual Report (Form 18-K) ("18-K"), at 2, 11 (Sept. 30, 2011).

In December 2011, the district court granted plaintiffs partial summary judgment (the "Declaratory Orders").[6] The court observed that the

[5] In separate litigation on different bonds, plaintiffs hold judgments against Argentina that, as we have seen, its courts have refused to honor, and the FSIA has largely prevented plaintiffs from attaching the Republic's foreign assets to satisfy those judgments. *See, e.g.*, *EM Ltd. v. Republic of Arg.*, 473 F.3d 463, 472 (2d Cir. 2007) (affirming vacatur of attachment of central bank reserves); *NML Capital, Ltd. v. Banco Central de la República Arg.*, 652 F.3d 172, 197 (2d Cir. 2011) (vacating attachment of same reserves); *Aurelius Capital Partners, LP v. Republic of Arg.*, 584 F.3d 120, 131 (2d Cir. 2009) (rejecting attempt to restrain assets to be acquired by Argentine social security system); *but see NML Capital Ltd. v. Republic of Arg.*, 680 F.3d 254, 260 (2d Cir. 2012) (affirming attachment and restraining orders); *EM Ltd. v. Republic of Arg.*, 389 F. App'x 38, 43 (2d Cir. 2010) (affirming post-judgment restraint and pre-judgment attachment orders on certain assets of Argentina held in trust in the United States).

[6] The remainder of the procedural history discussed below, while referencing "plaintiffs," describes the district court's rulings with respect to NML Capital. The court subsequently

Republic violates the Equal Treatment Provision "whenever it lowers the rank of its payment obligations under [plaintiffs'] Bonds below that of any other present or future unsecured and unsubordinated External Indebtedness." The district court then held that Argentina "lowered the rank" of plaintiffs' bonds in two ways: (1) "when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under [plaintiffs'] Bonds" and (2) "when it enacted [the Lock Law] and [the Lock Law Suspension]." Special App. at 13-14. As the court explained:

> it's hard for me to believe that there is not a violation of the [Equal Treatment Provision] accomplished by the congressional legislation in '05 and '10, simply saying that the Republic will not honor these judgments. It is difficult to imagine anything would reduce the rank, reduce the equal status or simply wipe out the equal status of these bonds under the [Equal Treatment Provision] [more than the Lock Law and the Lock Law Suspension]. . . . [The Equal Treatment Provision] can't be interpreted to allow the Argentine government to simply declare that these judgments will not be paid, and that's what they have done.

J.A. at 2124.

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entered essentially identical judgments with respect to all other plaintiffs.

In January 2012, the district court issued a temporary restraining order enjoining Argentina

> from altering or amending the processes or specific transfer mechanisms (including the use of specific firms) by which it makes payments due to holders of bonds or other securities issued pursuant to its 2005 and 2010 exchange offers, including without limitation by using agents, financial intermediaries and financial vehicles other than those used at the time of this Order.

Special App. at 26.

The District Court's Injunctions

In February 2012, the district court granted injunctive relief, ordering Argentina to specifically perform its obligations under the Equal Treatment Provision (the "Injunctions"). *Id.* at 38. The Injunctions provide that "whenever the Republic pays any amount due under the terms of the [exchange] bonds," it must "concurrently or in advance" pay plaintiffs the same fraction of the amount due to them (the "Ratable Payment").[7] We

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[7] Under the Injunctions' terms, calculating the Ratable Payment requires first determining a "Payment Percentage," a fraction calculated by dividing "the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds." Special App. at 39. The Payment Percentage is in turn multiplied by "the total amount currently due to [plaintiffs]," including pre-judgment interest. *Id.* Because Argentina has defaulted on all of plaintiffs' bonds, the "amount currently due" on the FAA Bonds is the amount due under the FAA's Acceleration Clause—the entire principal amount of the

are unable to discern from the record precisely how this formula is intended to operate. It could be read to mean that if, for example, Argentina owed the holders of restructured debt $100,000 in interest and paid 100% of that amount then it would be required to pay the plaintiffs 100% of the accelerated principal and all accrued interest. Or it could be read to mean that, if such a $100,000 payment to the exchange bondholders represented 1% of the principal and interest outstanding on the restructured debt, then Argentina must pay plaintiffs 1% of the amount owed to them. We cannot tell precisely what result the district court intended. On remand the district court will have the opportunity to clarify precisely how it intends this injunction to operate.

Anticipating that Argentina would refuse to comply with the Injunctions and in order to facilitate payment, the district court ordered that copies of the Injunctions be provided to "all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds." These could include Argentina's agent-banks located in New York that hold money in trust for the exchange bondholders and process payments to them under the terms of those bonds. Under Rule 65(d)(2), parties, their "officers, agents, servants, employees, and attorneys," as well as "other persons who are in active concert or participation with" them, are bound by injunctions. Furthermore, the Injunctions expressly prohibit Argentina's agents from

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bonds—plus pre-judgment interest which, according to plaintiffs, totals approximately $1.33 billion.

> aiding and abetting any violation of this ORDER, including any further violation by [Argentina] of its obligations under [the Equal Treatment Provision], such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a ratable payment to [plaintiffs].

Special App. at 40.

To give effect to this provision, the Injunctions prevent Argentina from "altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds" without approval of the court (the "Preliminary Injunction"). Special App. at 40. Finally, the Injunctions require Argentina to certify to the court, concurrently or in advance of making a payment on the Exchange Bonds, that it has satisfied its obligations under the Injunctions.

In justifying the remedy ordered, the court reasoned that

> [a]bsent equitable relief, [plaintiffs] would suffer irreparable harm because the Republic's payment obligations to [plaintiffs] would remain debased of their contractually-guaranteed status, and [plaintiffs] would never be restored to the position [they were] promised that [they] would hold relative to other creditors in the event of default.

*Id.* at 37. Further, there was no adequate remedy at law "because the Republic has made clear—indeed, it has codified in [the Lock Law] and [the Lock Law

Suspension]—its intention to defy any money judgment issued by this Court." *Id.*

The court further reasoned that the balance of the equities tipped in plaintiffs' favor because of (1) Argentina's "unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Plaintiffs, in direct violation of" the Equal Treatment Provision and (2) Argentina's ability to "violate [that Provision] with impunity" in the absence of injunctive relief. *Id.* at 37-38. The district court also stated that "if there was any belief that the Republic would honestly pay its obligations, there wouldn't be any need for these kinds of paragraphs" in the Injunctions. J.A. at 2319. The court noted that the Injunctions "require[] of [Argentina] only that which it promised Plaintiffs and similarly situated creditors to induce those creditors to purchase [Argentina's] bonds." The court further observed that Argentina now "has the financial wherewithal to meet its commitment of providing equal treatment to [plaintiffs] and [to the exchange bondholders]." Special App. at 37-38. As to the exchange bondholders, the Injunctions do not "jeopardiz[e] [their] rights" because "all that the Republic has to do" is "honor its legal obligations." J.A. at 2339. Finally,

> [t]he public interest of enforcing contracts and upholding the rule of law will be served by the issuance of th[ese] [Injunctions], particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must

> rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

Special App. at 38.[8]

Argentina's Appeal from the Injunctions

In March 2012, Argentina timely appealed from the Injunctions and the Declaratory Orders. We have jurisdiction over the Injunctions under 28 U.S.C. § 1292(a)(1). The Declaratory Orders are also properly before us because they are "inextricably intertwined" with the Injunctions. *Lamar Adver. of Penn, LLC v. Town of Orchard Park, N.Y.*, 356 F.3d 365, 371 (2d Cir. 2004).[9]

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[8] The court also rejected Argentina's argument that, because plaintiffs had full knowledge of the purported basis of their *Pari Passu* Clause claims as early as 2004, and yet waited until the 2010 exchange offer was completed to bring those claims, those claims were barred by the equitable defense of laches. The district court found "no merit" to the defense because any delay by plaintiffs in advancing their claim for equitable relief was due to the fact that they "were trying to do other things" to obtain payment on their bonds. J.A. at 2125, 2321; *see also id.* at 2339 ("The effort under the pari passu clause comes late. But it is absolutely true[,] and this court knows the facts and history painfully well, . . . that the plaintiffs have tried in many ways to enforce their rights. They are now attempting to make use of a very important provision in the [FAA]. . . . They are entitled to do so.").

[9] In January 2012, after the district court issued the Declaratory Orders but before it entered the Injunctions, Argentina filed notices of appeal from the Orders "[o]ut of an excess of caution and to rebut any possible future argument that it did not preserve all appellate rights with respect to the

Argentina advances a host of reasons as to why the district court erred. First, the Republic argues that it has not violated the Equal Treatment Provision because it has not given the exchange bondholders a legally enforceable preference over the FAA Bonds in the event of default on the Exchange Bonds—even if it has favored the exchange bondholders by honoring their payment rights while violating plaintiffs'. Argentina contends that plaintiffs' bonds have always remained "direct, unconditional, unsecured and unsubordinated obligations of the Republic" with the same legal "rank" as any other debt—which is all the Equal Treatment Provision requires. Appellant's Br. 45-48. In any event, even if the Provision had been violated, Argentina argues the contractually agreed upon remedy is acceleration, which has already occurred.

Second, Argentina argues that the Injunctions violate the FSIA by ordering the Republic to pay plaintiffs with immune property located outside the United States. *Id.* at 26-27 (citing *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir.

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Declaratory Orders." Appellant's Opp'n to Appellees' Mot. To Dismiss Prior Appeals at 5. Those appeals were subsequently consolidated with the ones over which we have jurisdiction. Therefore, there are two sets of appeals before this Court that Argentina concedes are "overlapping" and "clogging the dockets." *Id.* at 7. Because Argentina's second set of appeals have successfully reached this Court, Plaintiffs' motion to dismiss the first set of appeals is therefore granted. *See* Appellees' Mot. to Dismiss the Premature Appeals. The clerk of the court is directed to dismiss appeal nos. 12-105, 12-109, 12-111, 12-157, 12-158, 12-163, 12-164, 12-170, 12-176, 12-185, 12-189, and 12-214.

1983) (holding district courts "may not grant, by injunction, relief which they may not provide by attachment").

Third, the Republic contends that the assets the Injunctions restrain are not property of the Republic, but are held in trust for exchange bondholders, and therefore, under New York law, may not be reached by creditors. Moreover, the Injunctions, which by their terms apply to "indirect facilitators" of payments on the Exchange Bonds, Special App. at 39, violate the U.C.C., which prohibits injunctive relief against "intermediary banks" responsible for processing fund transfers. U.C.C. § 4-A-503 cmt. Since subjecting exchange bondholder money to process in U.S. courts is improper, Argentina argues, the court erroneously restricted it from utilizing other methods to service its debt.

Fourth, because the only harm plaintiffs suffer is monetary, Argentina argues that the district court incorrectly concluded that such harm was irreparable.

Fifth, Argentina argues that the hardship to exchange bondholders and to the Republic stemming from the Injunctions far outweighs the purported prejudice to "holdouts," who bought their debt at or near default with full knowledge of the limitations on their ability to collect. The Injunctions "will thrust the Republic into another economic crisis and undermin[e] the consensual [sovereign debt] restructuring process the United States has been at pains to foster for the past several decades." *Id.*

Sixth and finally, Argentina argues that plaintiffs' claims are barred by laches.

We review a district court's decision to grant equitable relief for abuse of discretion. *See Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66, 76 (2d Cir. 2004); *Leasco Corp. v. Taussig*, 473 F.2d 777, 786 (2d Cir. 1972); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010). We review *de novo* a district court's grant of partial summary judgment. *See Juliano v. Health Maint. Org. of N.J., Inc.*, 221 F.3d 279, 286 (2d Cir. 2000).

## DISCUSSION

### I.

We first address Argentina's argument that the district court erred in its interpretation of the Equal Treatment Provision. The district court held that Argentina violated the Provision when it made payments currently due under the Exchange Bonds while persisting in its refusal to satisfy its payment obligations to plaintiffs and when it enacted the Lock Law and the Lock Law Suspension.

"In New York, a bond is a contract. . . ." *Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33, 39 n.4 (2d Cir. 2009). Thus, the parties' dispute over the meaning of the Equal Treatment Provision presents a "simple question of contract interpretation." *EM Ltd. v. Republic of Argentina*, 382 F.3d 291, 292 (2d Cir. 2004) (interpreting Acceleration Clause in FAA). Argentina argues that the *Pari Passu* Clause is a boilerplate provision that, in the sovereign context, "has been universally understood for over 50 years . . . to provide protection from *legal subordination* or other discriminatory *legal ranking* by preventing the creation of *legal priorities* by the sovereign in favor of creditors holding particular classes of debt." Appellant's Br. 32, 34 (emphasis added); *accord* Clearing House Amicus Br. 2, 10.

We are unpersuaded that the clause has this well settled meaning. Argentina's selective recitation of context-specific quotations from arguably biased commentators and institutions notwithstanding, the preferred construction of *pari passu* clauses in the sovereign debt context is far from "general, uniform and unvarying," *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010) (quotation marks omitted). Argentina's primary authorities and Argentina itself appear to concede as much. *See* Appellant's Reply Br. 21 n.9 ("*[N]o one knows* what the clause really means" (emphasis in Appellant's Reply Br.)); Lee C. Buchheit, *The Pari Passu Clause Sub Specie Aeternitatis*, 10 Int'l Fin. L. Rev. 11, 11 (1991) ("[N]o one seems quite sure what the clause really means, at least in the context of a loan to a sovereign borrower."); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law 635, 646 (2001) ("[I]n the sovereign context there is at least disagreement about the meaning of the clause."); Stephen Choi & G. Mitu Gulati, *Contract As Statute*, 104 Mich. L. Rev. 1129, 1134 (2006) ("The leading commentators on sovereign contracts acknowledged that there exists ambiguity as to the meaning of this clause."); Philip R. Wood, *Project Finance, Subordinated Debt and State Loans* 165 (1995) ("In the state context, the meaning of the clause is uncertain because there is no hierarchy of payments which is legally enforced under a bankruptcy regime."). In short, the record reveals that Argentina's interpretation of the *Pari Passu* Clause is neither well settled nor uniformly acted upon.

Once we dispense with Argentina's customary usage argument, it becomes clear that the real dispute is over what constitutes subordination under the *Pari Passu* Clause. Argentina contends the clause refers only to legal subordination and that none occurred here because "any claims that may arise from the Republic's restructured debt have no priority in any court of law over claims arising out of the Republic's unrestructured debt." Appellant's Br. 47. Plaintiffs, on the other hand, argue that there was "de facto" subordination because Argentina reduced the rank of plaintiffs' bonds to a permanent non-performing status by passing legislation barring payments on them while continuing to pay on the restructured debt and by repeatedly asserting that it has no intention of making payments on plaintiffs' bonds.

We disagree with Argentina because its interpretation fails to give effect to the differences between the two sentences of the *Pari Passu* Clause. *See Singh v. Atakhanian*, 818 N.Y.S.2d 524, 526 (N.Y. App. Div. 2d Dep't 2006) ("A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect." (internal quotation marks and citation omitted)).

Instead, we conclude that in pairing the two sentences of its *Pari Passu* Clause, the FAA manifested an intention to protect bondholders from more than just formal subordination. *See Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13

N.Y.3d 398, 404 (2009). The first sentence ("[t]he Securities will constitute . . . direct, unconditional, unsecured, and unsobrdinated obligations . . . .") prohibits Argentina, as bond *issuer*, from formally subordinating the bonds by issuing superior debt. The second sentence ("[t]he payment obligations . . . shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.") prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA Bonds. Thus, the two sentences of the *Pari Passu* Clause protect against different forms of discrimination: the issuance of other superior debt (first sentence) and the giving of priority to other payment obligations (second sentence).[10]

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[10] Argentina, along with the Clearing House, argues that the FAA's "repurchase" provision, authorizing the Republic to "at any time purchase Securities at any price in the open market or otherwise," is inconsistent with "NML's 'ratable' interpretation." FAA § 9(c), J.A. at 169; Appellant's Br. 39. Leaving aside that that is not NML's "interpretation," we find the repurchase provision wholly consistent with the Equal Treatment Provision: Were Argentina to make such a repurchase, it would not be fulfilling its "payment obligations" on the Securities, Securities that by the FAA's own terms are not "redeemable prior to maturity." FAA § 9(a), J.A. at 167. Rather, it would be purchasing them, potentially at a discount or premium reflecting the market's expectations of the Republic's likelihood of fulfilling those obligations, in an arms-length transaction with a willing seller. Such repurchases would not breach Argentina's promise, under the Equal Treatment Provision, not to discriminate against outstanding bondholders in meeting its payment obligations to them. To conclude otherwise would be to hold that the 2005 and 2010 exchange offers themselves

This specific constraint on Argentina as payor makes good sense in the context of sovereign debt: When sovereigns default they do not enter bankruptcy proceedings where the legal rank of debt determines the order in which creditors will be paid. Instead, sovereigns can choose for themselves the order in which creditors will be paid. In this context, the Equal Treatment Provision prevents Argentina as payor from discriminating against the FAA Bonds in favor of other unsubordinated, foreign bonds.

The record amply supports a finding that Argentina effectively has ranked its payment

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violated the Equal Treatment Provision, a position not even plaintiffs have taken.

Argentina and the Clearing House also argue that "NML's interpretation of the pari passu clause as requiring 'ratable' payments to creditors would render meaningless other standard loan contract clauses" such as "sharing clauses" which "do actually address the issue of payment to one creditor before another." Appellant's Br. 37-38. Leaving aside that NML does not "interpret . . . the pari passu clause as requiring 'ratable' payments"—it proposed ratable payments as a *remedy* for Argentina's breach of the Provision—this argument fails. A "sharing clause" (which does not even appear in the FAA) is an agreement made among *lenders* to divide payments that a debtor makes (or that are obtained by other means, such as offsets); it is not a promise made by the *borrower*. *See* Clearing House Amicus Br. 12 (citing Lee C. Buchheit, *How to Negotiate Eurocurrency Loan Agreements* 76-81 (2d ed. 2004)). Thus, a sharing clause, unlike the Equal Treatment Provision, could not ensure against the *debtor*'s discrimination in favor of other, non-sharing creditors. The fact that sharing clauses "contain complex payover provisions which are necessary to reallocate among creditors disproportionate payments," *id.* at 13, is not surprising given that they serve as a coordinating mechanism among a number of lenders.

obligations to the plaintiffs below those of the exchange bondholders. After declaring a moratorium on its outstanding debt in 2001, Argentina made no payments for six years on plaintiffs' bonds while simultaneously timely servicing the Exchange Bonds. Argentina has renewed that moratorium in its budget laws each year since then. It declared in the prospectuses associated with the exchange offers that it has no intention of resuming payments on the FAA Bonds. 2005 Prospectus, J.A. at 465; 2010 Prospectus, J.A. at 980. It stated in SEC filings that it had "classified the [FAA Bonds] as a separate category from its regular debt" and is "not in a legal . . . position to pay" them. 18-K at 2, 11. Its legislature enacted the Lock Law, which has been given full effect in its courts, precluding its officials from paying defaulted bondholders and barring its courts from recognizing plaintiffs' judgments. By contrast, were Argentina to default on the Exchange Bonds, and were those bondholders to obtain New York judgments against Argentina, there would be no barrier to the Republic's courts recognizing those judgments. Thus, even under Argentina's interpretation of the Equal Treatment Provision as preventing only "legal subordination" of the FAA Bonds to others, the Republic breached the Provision. *See* Appellant's Br. 35 (stating that "'the clause must mean that, for example, there is no statutory or constitutional or other rule of law . . . subordinating the debt to other debt'").

In short, the combination of Argentina's executive declarations and legislative enactments have ensured that plaintiffs' beneficial interests do *not* remain direct, unconditional, unsecured and unsubordinated obligations of the Republic and that any claims that may arise from the Republic's restructured debt *do* have priority in Argentinian courts over claims arising out of the Republic's unstructured debt. Thus we have little difficulty concluding that Argentina breached the *Pari Passu* Clause of the FAA.

We are not called upon to decide whether policies favoring preferential payments to multilateral organizations like the IMF would breach *pari passu* clauses like the one at issue here. Indeed, plaintiffs have never used Argentina's preferential payments to the IMF as grounds for seeking ratable payments. Far from it; they contend that "a sovereign's *de jure* or *de facto* policy [of subordinating] obligations to commercial unsecured creditors beneath obligations to multilateral institutions like the IMF would *not* violate the Equal Treatment Provision for the simple reason that commercial creditors never were nor could be on equal footing with the multilateral organizations." Appellees' (NML et al.'s) Br. 40.

Moreover, plaintiffs' claims are not barred by laches. Argentina argues that, after it sought to resolve the meaning of the Equal Treatment Provision in December 2003 (and the court deemed the issue unripe for adjudication),[11] plaintiffs "sat

[11] In 2003, in separate Argentine bondholder litigation, Argentina moved to preclude plaintiffs from interfering with payments it anticipated making in connection with its contemplated debt restructuring and with its debt to creditors such as the IMF "based on [a] misconstruction of the *Pari Passu* Clause." J.A. at 237. The district court found the issue not ripe for review because the plaintiffs, including appellee NML as intervenor, were not at that time seeking any relief under the

silent as the Republic restructured over 91% of its defaulted debt and made regular biannual payments to holders of its restructured debt." Appellant's Br. 29. In the face of this "inexcusable delay," Argentina argues, "plaintiffs cannot now rely on 'equity' to interfere with payments to third parties who have obviously developed a reasonable expectation of that regular source of income." *Id.*

This contention has no merit. Under New York law, the equitable defense of laches requires: (1) conduct giving rise to the situation complained of, (2) delay in asserting a claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert the claim, and (4) injury or prejudice to the offending party as a consequence relief granted on the delayed claim. *See Denaro v Denaro*, 84 A.D.3d 1148, 1149-50 (N.Y. App. Div. 2d Dep't 2011); *see also Cohen v. Krantz*, 227 A.D.2d 581, 582 (N.Y. App. Div. 2d Dep't 1996) (citation omitted).

Argentina's laches argument fails because it had not yet violated the Equal Treatment Provision when it sought a declaration in 2003 that plaintiffs could not invoke the Provision to impede its restructuring efforts. It violated the Provision later by persisting in its policy of discriminatory treatment of plaintiffs, for example, by passing the Lock Law. In any event, we do not see how Argentina can claim prejudice by plaintiffs' purported delay. Argentina has known

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*Pari Passu* Clause and further agreed by joint stipulation to give Argentina thirty days' notice before seeking any such relief.

since 2004 that NML retained the option to pursue the claim. Moreover, because equitable relief was not granted until 2012, Argentina was able to hold its 2005 and 2010 exchange offers unimpeded.

II.

We turn now to Argentina's challenges to the Injunctions and their requirement that it specifically perform its obligations under the FAA. Specific performance may be ordered where no adequate monetary remedy is available and that relief is favored by the balance of equities, which may include the public interest. *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) (noting that "the balance of equities and consideration of the public interest [] are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent."); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).[12]

Once the district court determined that Argentina had breached the FAA and that injunctive relief was warranted, the court had considerable latitude in fashioning the relief. The performance required by a decree need not, for example, be

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[12] To be eligible for specific performance of a contractual provision, a party also needs to show that "(1) a valid contract exists between the parties, (2) the plaintiff has substantially performed its part of the contract, and (3) plaintiff and defendant are each able to continue performing their parts of the agreement." *Nemer Jeep-Eagle*, 992 F.2d at 433. There is no dispute that these factors are satisfied here.

identical with that promised in the contract. *Greenspahn v. Joseph E. Seagram & Sons, Inc.*, 186 F.2d 616, 620 (2d Cir. 1951). Where "the most desirable solution" is not possible, this Court may affirm an order of specific performance so long as it achieves a "fair result" under the "totality of the circumstances." *Leasco*, 473 F.2d at 786.

Argentina's first contention is that, even assuming it breached the *Pari Passu* Clause, plaintiffs are limited to the "contractually agreed upon remedy of acceleration." Appellant's Br. at 48. This argument is easily dispensed with. While paragraph 12 of the FAA specifies acceleration as one remedy available for a breach of the Equal Treatment Provision, the FAA does not contain a clause limiting the remedies available for a breach of the agreement. Nor does the FAA contain a provision precluding specific performance or injunctive relief. Under New York law the absence of the parties' express intention in the FAA to restrict the remedies available for breach of the agreement means that the full panoply of appropriate remedies remains available. *Vacold LLC v. Cerami*, 545 F.3d 114, 130 (2d Cir. 2008) (New York courts "recognize limitations on available remedies" "only when the contract contains a clause *specifically* setting forth the remedies available. . . .") (quotation marks omitted)).

Moreover, it is clear to us that monetary damages are an ineffective remedy for the harm plaintiffs have suffered as a result of Argentina's breach. Argentina will simply refuse to pay any judgments. It has done so in this case by, in effect, closing the doors of its courts to judgment creditors. In light of Argentina's continual disregard for the rights of its FAA creditors and the judgments of our courts to whose jurisdiction it has submitted, its contention that bondholders are limited to acceleration is unpersuasive. Insofar as Argentina argues that a party's persistent efforts to frustrate the collection of money judgments cannot suffice to establish the inadequacy of a monetary relief, the law is to the contrary. *See Pashaian v. Eccelston Props., Ltd.*, 88 F.3d 77, 87 (2d Cir. 1996); Restatement (Second) of Contracts § 360 cmt. d ("Even if damages are adequate in other respects, they will be inadequate if they cannot be collected by judgment and execution."). In this context, the district court properly ordered specific performance.

Next, we conclude that because compliance with the Injunctions would not deprive Argentina of control over any of its property, they do not operate as attachments of foreign property prohibited by the FSIA. Section 1609 of the FSIA establishes that "the property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. § 1609. Each of these three terms refers to a court's seizure and control over specific property.[13]

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[13] An "attachment" is the "seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment." *Black's Law Dictionary* 123 (9th ed. 2009); *see also* 6 Am. Jur. 2d *Attachment and Garnishment* § 1. An arrest is "[a] seizure or forcible restraint." *Black's Law Dictionary* 124 (9th ed. 2009). "Execution" is "an act of dominion over specific property by an authorized officer of the court . . . which results in the creation of a legal right to subject the debtor's interest in the property to the satisfaction of the debt of his or her judgment creditor." 30

However, courts are also barred from granting "by injunction, relief which they may not provide by attachment." *S&S Machinery Co.*, 706 F.2d at 418; *see also Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229 (2d Cir. 1995).

The Injunctions at issue here are not barred by § 1609. They do not attach, arrest, or execute upon any property. They direct Argentina to comply with its contractual obligations not to alter the rank of its payment obligations. They affect Argentina's property only incidentally to the extent that the order prohibits Argentina from transferring money to some bondholders and not others. The Injunctions can be complied with without the court's ever exercising dominion over sovereign property. For example, Argentina can pay all amounts owed to its exchange bondholders provided it does the same for its defaulted bondholders. Or it can decide to make partial payments to its exchange bondholders as long as it pays a proportionate amount to holders of the defaulted bonds. Neither of these options would violate the Injunctions. The Injunctions do not require Argentina to pay any bondholder any amount of money; nor do they limit the other uses to which Argentina may put its fiscal reserves. In other words, the Injunctions do not transfer any dominion or control over sovereign property to the court.

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Am. Jur. 2d *Executions* § 177; *see also Black's Law Dictionary* (9th ed. 2009) ("Judicial enforcement of a money judgment, usu. by seizing and selling the judgment debtor's property.").

Accordingly, the district court's Injunctions do not violate § 1609.[14]

Nor does the FSIA create any other impediment to the injunctive relief ordered by the district court. Argentina voluntarily waived its immunity from the jurisdiction of the district court, and the FSIA imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign, at least where the district court's use of its equitable powers does not conflict with the separate execution immunities created by § 1609. A "federal court sitting as a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere." *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004) (internal quotation marks and citation omitted).

Turning to Argentina's argument that the balance of equities and the public interest tilt in its favor, we see no abuse of discretion in the district court's conclusion to the contrary. The FAA bondholders contend with good reasons that Argentina's disregard of its legal obligations exceeds any affront to its sovereign powers resulting from the Injunctions.[15]

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[14] For similar reasons, we see no merit to Argentina's argument that the Injunctions violate New York trust or attachment law on the theory that they "execute upon" funds that do not belong to Argentina. Appellant's Br. 53-54. Nothing in the Injunctions suggests that plaintiffs would "execute upon" any funds, much less those held in trust for the exchange bondholders.

[15] Argentina repeatedly expresses its frustration with plaintiffs for refusing to accept the exchange offers. *See*

Moreover, nothing in the record supports Argentina's blanket assertion that the Injunctions will "plunge the Republic into a new financial and economic crisis." Appellant's Br. 61. The district court found that the Republic had sufficient funds, including over $40 billion in foreign currency reserves, to pay plaintiffs the judgments they are due. *See* Special App. at 37-38 (concluding that Argentina "has the financial wherewithal to meet its commitment of providing equal treatment to [plaintiffs] and [the exchange bondholders]"). Aside from merely observing that these funds are dedicated to maintaining its currency, Argentina makes no real argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court's finding to the contrary was clearly erroneous.

Nor will the district's court's judgment have the practical effect of enabling "a single creditor to thwart the implementation of an internationally supported restructuring plan," as the United States contends. U.S. Amicus Br. 5. It is up to the sovereign—not any "single creditor"—whether it will repudiate that creditor's debt in a manner that

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Appellant's Br. 47 ("A holder of defaulted debt cannot *voluntarily* decline to participate in a restructuring and then afterward assert that the creditors who elected to settle their claims are a 'preferred class.'" (emphasis in original)). But plaintiffs were completely within their rights to reject the 25-cents-on-the-dollar exchange offers. And because the FAA does not contain a collective action clause, Argentina has no right to force them to accept a restructuring, even one approved by a super-majority.

violates a *pari passu* clause.[16] In any event, it is highly unlikely that in the future sovereigns will find themselves in Argentina's predicament. Collective action clauses—which effectively eliminate the possibility of "holdout" litigation—have been included in 99% of the aggregate value of New York-law bonds issued since January 2005, including Argentina's 2005 and 2010 Exchange Bonds. Only 5 of 211 issuances under New York law during that period did not include collective action clauses, and all of those issuances came from a single nation, Jamaica.[17] Moreover, none of the bonds issued by Greece, Portugal, or Spain—nations identified by Argentina

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[16] Further, to the extent the district court suggested that a breach would occur with *any* nonpayment that is coupled with payment on other debt, *see* Special App. at 13 (holding that Argentina breaches the Equal Treatment Provision "whenever it . . . fail[s] to pay the obligations currently due under [plaintiffs'] Bonds while at the same time making payments currently due *to holders of other unsecured and unsubordinated External Indebtedness*" (emphasis added)), we need not decide whether it was correct. Nor need we determine whether "legislative enactment" alone could result in a breach of the Equal Treatment Provision. *See id.* We simply affirm the district court's conclusion that Argentina's course of conduct here did.

[17] See Datalogic, Bloomberg, and other publicly available sources. Although these sources identified 221 issuances, data on the presence of collective action clauses was available only for 211 of those issuances (96% of the aggregate value of all issuances); the figures above are compared against those 211 issuances with sufficient data. *See also* Michael Bradley & Mitu Gulati, Collective Action Clauses for the Eurozone: An Empirical Analysis 11-12 (Oct. 24, 2011) (unpublished manuscript), available at http://ssrn.com/abstract=1948534.

as the next in line for restructuring—are governed by New York law.

However, we do have concerns about the Injunctions' application to banks acting as pure intermediaries in the process of sending money from Argentina to the holders of the Exchange Bonds. Under Article 4-A of the U.C.C., intermediary banks, which have no obligations to any party with whom they do not deal directly, are not subject to injunctions relating to payment orders. *See, e.g.*, N.Y. U.C.C. § 4-A-503 cmt. Any system that seeks to force intermediary banks to stop payments by a particular entity for a particular purpose imposes significant costs on intermediary banks and risks delays in payments unrelated to the targeted Exchange Bond payments. *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 6 1998). Plaintiffs claim that the Injunctions do not encompass intermediaries, but they fail to offer a satisfactory explanation for why intermediary banks would not be considered "indirect[] . . . facilitat[ors]" apparently covered by the Injunctions. Special App. at 39.

Our concerns about the Injunctions' application to third parties do not end here. Oral argument and, to an extent, the briefs revealed some confusion as to how the challenged order will apply to third parties generally. Consequently, we believe the district court should more precisely determine the third parties to which the Injunctions will apply before we can decide whether the Injunctions' application to them is reasonable. Accordingly, we remand the Injunctions to the district court under *United States v. Jacobson*, 15 F.3d at 22, for such further proceedings as are necessary to address the Injunctions' application to third parties including intermediary banks and to address the operation of their payment formula.

## CONCLUSION

For the reasons stated, the judgments of the district court (1) granting summary judgment to plaintiffs on their claims for breach of the Equal Treatment Provision and (2) ordering Argentina to make "Ratable Payments" to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt are affirmed. The case is remanded to the district court pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994) for such proceedings as are necessary to address the operation of the payment formula and the Injunctions' application to third parties and intermediary banks. Once the district court has conducted such proceedings the mandate should automatically return to this Court and to our panel for further consideration of the merits of the remedy without need for a new notice of appeal.

*Appendix B*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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Nos. 12-105, 12-109, 12-111, 12-157, 12-158, 12-163, 12-164, 12-170, 12-176, 12-185, 12-189, 12-214, 12-909, 12-914, 12-916, 12-919, 12-920, 12-923, 12-924, 12-926, 12-939, 12-943, 12-951, 12-968, 12-971

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NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., 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 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, FINTECH ADVISORY INC.,

*Non-Party Appellants*,

EURO BONDHOLDERS, ICE CANYON LLC,

*Intervenors.*

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Filed: February 28, 2013
Before: Rosemary S. Pooler,
Barrington D. Parker, Reena Raggi, *Circuit Judges*.

**ORDER**

Appellant, Republic of Argentina, having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

s/

Clerk of Court

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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Nos. 12-105(L)
12-109, 12-111, 12-157, 12-158, 12-163, 12-164, 12-170, 12-176, 12-185, 12-189, 12-214, 12-909, 12-914, 12-916, 12-919, 12-920, 12-923, 12-924, 12-926, 12-939, 12-943, 12-951, 12-968, 12-971

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NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., 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 VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

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THE REPUBLIC OF ARGENTINA,

*Defendant-Appellant*,

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

*Non-Party Appellants*,

EURO BONDHOLDERS, ICE CANYON LLC,

*Intervenors.*

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Filed: March 26, 2013

## ORDER

Appellant Republic of Argentina has filed a petition for rehearing en banc. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is DENIED.

For the Court:

Catherine O'Hagan Wolfe

s/________________________

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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12-926, 12-939, 12-943, 12-951, 12-968, 12-971,
12-4694, 12-4829, 12-4865

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NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., 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 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, FINTECH ADVISORY INC.,

*Non-Party Appellants*,

EURO BONDHOLDERS, ICE CANYON LLC,

*Intervenors.*

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Filed: November 19, 2013

**CORRECTED ORDER**

Appellant The Republic of Argentina filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

s/

*Appendix C*

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

Nos. 08-6978, 09-1707, 09-1708

NML CAPITAL, LTD.,
*Plaintiff*,
v.
REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: December 7, 2011

**ORDER**

Upon consideration of the motion by NML Capital, Ltd. ("NML") for partial summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure ("FRCP") and for injunctive relief and/or specific performance pursuant to FRCP 65(d) and the court's inherent equitable powers, the response of the Republic of Argentina (the "Republic") thereto, NML's reply, and all other arguments submitted to the court in the parties' papers and at the hearing held on September 28, 2011;

WHEREAS the uncontested facts establish that:

1. The Republic issued bonds pursuant to a 1994 Fiscal Agency Agreement ("FAA").

2. Paragraph 1(c) of the FAA provides, among other things, that:

> The Securities [i.e., the bonds] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement).

3. The bonds issued pursuant to the FAA contain the following clause, as quoted in *EM Ltd. v. The Republic of Argentina*, 720 F.Supp.2d 273, 278 (S.D.N.Y. 2010):

> The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan, The City of New York and the courts of the Republic of Argentina (the "Specified Courts") over any suit, action, or proceeding against it or its properties, assets or revenues with respect to the Securities of this Series or the Fiscal Agency Agreement (a "Related Proceeding") except with respect to any actions brought under the United States federal securities laws. The Republic has in the Fiscal Agency Agreement waived any objection to Related Proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related Proceedings have been brought

> in an inconvenient forum. The Republic agrees that a final nonappealable judgment in any such Related Proceeding (the "Related Judgment") shall be conclusive and binding upon it and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the "Other Courts"), by a suit upon such judgment.

4. NML owns bonds issued pursuant to the FAA ("NML's Bonds").

5. The Republic issued other bonds in its 2005 and 2010 Exchange Offers ("Exchange Bonds"), thereby creating new unsecured and unsubordinated External Indebtedness.

6. The Republic has satisfied the payment obligations that have come due to date under the Exchange Bonds.

7. The Republic has not paid principal or interest on NML's Bonds since December, 2001.

8. NML has brought the captioned actions to recover on the defaulted bonds, pursuant to its legal rights, and also pursuant to the express undertakings in the bonds.

9. On February 10, 2005, Argentina enacted Law 26,017, providing that the "national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to bonds" that were eligible to participate in the 2005 Exchange Offer.

10. On December 9, 2009, Argentina enacted Law 26,547, which, *inter alia*, suspended the effect of

Law 26,017 for a period of time during which the 2010 Exchange Offer was launched, closed, and consummated. Law 26,547 also provides that the "Republic of Argentina . . . is prohibited to offer holders of government bonds [including those issued pursuant to the FAA] who may have initiated judicial, administrative, arbitration or any other type of action [to enforce their rights], more favorable treatment than what is offered to those who have not done so."

WHEREAS NML claims that the Republic breached (and continues to breach) its contractual duty to rank its payment obligations under NML's Bonds at least equally with all its other present and future unsecured and unsubordinated External Indebtedness, NML seeks summary judgment on the Republic's liability for that breach, and NML seeks an injunction that would restore it to its bargained-for position among other creditors;

It is HEREBY ORDERED that:

1. The motion for partial summary judgment pursuant to Rule 56(a) is GRANTED.

2. It is DECLARED, ADJUDGED, and DECREED that the Republic is required under Paragraph 1(c) of the FAA at all times to rank its payment obligations pursuant to NML's Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness.

3. It is DECLARED, ADJUDGED, and DECREED that the Republic's payment obligations on the bonds include its payment obligations to bondholders who have brought actions to recover on

their defaulted bonds, and on judgments entered pursuant to judicial action brought by bondholders.

4. It is DECLARED, ADJUDGED, and DECREED that the Republic violates Paragraph 1(c) of the FAA whenever it lowers the rank of its payment obligations under NML's Bonds below that of any other present or future unsecured and unsubordinated External Indebtedness, including (and without limitation) by relegating NML's bonds to a non-paying class by failing to pay the obligations currently due under NML's Bonds while at the same time making payments currently due to holders of other unsecured and unsubordinated External Indebtedness or by legislative enactment.

5. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of NML's bonds in violation of Paragraph 1(c) of the FAA when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under NML's Bonds.

6. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of NML's bonds in violation of Paragraph 1(c) of the FAA when it enacted Law 26,017 and Law 26,547.

7. It is DECLARED, ADJUDGED, and DECREED that the aforesaid laws were in direct violation of the right of NML under the FAA and the bond agreements to bring a legal action in court to recover on the defaulted bonds.

8. The motion for injunctive relief and/or specific performance pursuant to FRCP 65(d) and the court's inherent equitable powers is DENIED at the present

time to permit further consideration by the court regarding the means of enforcement of the present ORDER.

SO ORDERED.

Dated: New York, New York
December 7, 2011

s/______________________
Thomas P. Griesa
U.S. District Judge

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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Nos. 09-8757, 09-10620, 10-1602, 10-3507,
10-3970, 10-4101, 10-4782, 10-8339

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AURELIUS CAPITAL MASTER, LTD.
and ACP MASTER, LTD.,

*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant*.

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AURELIUS OPPORTUNITIES FUND II, LLC
and AURELIUS CAPITAL MASTER, LTD.,

*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant*.

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AURELIUS CAPITAL MASTER, LTD. and AURELIUS
OPPORTUNITIES FUND II, LLC,

*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant*.

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BLUE ANGEL CAPITAL I LLC,
*Plaintiff*,
v.
THE REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: December 13, 2011

**ORDER**

Upon consideration of the motion by Plaintiffs Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Opportunities Fund II, LLC and Blue Angel Capital I LLC (collectively "Plaintiffs") for partial summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure ("FRCP"), the response of the Republic of Argentina (the "Republic") thereto, Plaintiffs' reply, and all other arguments submitted to the court in the parties' papers;

WHEREAS the uncontested facts establish that:

1. The Republic issued bonds pursuant to a 1994 Fiscal Agency Agreement ("FAA").

2. Paragraph 1(c) of the FAA provides, among other things, that:

> The Securities [i.e., the bonds] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all

> times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement).

3. The bonds issued pursuant to the FAA contain the following clause, as quoted in *EM Ltd. v. The Republic of Argentina*, 720 F.Supp.2d 273, 278 (S.D.N.Y. 2010):

> The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan, The City of New York and the courts of the Republic of Argentina (the "Specified Courts") over any suit, action, or proceeding against it or its properties, assets or revenues with respect to the Securities of this Series or the Fiscal Agency Agreement (a "Related Proceeding") except with respect to any actions brought under the United States federal securities laws. The Republic has in the Fiscal Agency Agreement waived any objection to Related Proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related Proceedings have been brought in an inconvenient forum. The Republic agrees that a final nonappealable judgment in any such Related Proceeding (the "Related Judgment") shall be conclusive and binding upon it and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may

be subject (the "Other Courts"), by a suit upon such judgment.

4. Plaintiffs own bonds issued pursuant to the FAA ("Plaintiffs' Bonds").

5. The Republic issued other bonds in its 2005 and 2010 Exchange Offers ("Exchange Bonds"), thereby creating new unsecured and unsubordinated External Indebtedness.

6. The Republic has satisfied the payment obligations that have come due to date under the Exchange Bonds.

7. The Republic has not paid principal or interest on Plaintiffs' Bonds since December, 2001.

8. Plaintiffs have brought the captioned actions to recover on the defaulted bonds, pursuant to their legal rights, and also pursuant to the express undertakings in the bonds.

9. On February 10, 2005, Argentina enacted Law 26,017, providing that the "national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to bonds" that were eligible to participate in the 2005 Exchange Offer.

10. On December 9, 2009, Argentina enacted Law 26,547, which, *inter alia,* suspended the effect of Law 26,017 for a period of time during which the 2010 Exchange Offer was launched, closed, and consummated. Law 26,547 also provides that the "Republic of Argentina . . . is prohibited to offer holders of government bonds [including those issued pursuant to the FAA] who may have initiated judicial, administrative, arbitration or any other type

of action [to enforce their rights], more favorable treatment than what is offered to those who have not done so."

WHEREAS Plaintiffs claim that the Republic breached (and continues to breach) its contractual duty to rank its payment obligations under Plaintiffs' Bonds at least equally with all its other present and future unsecured and unsubordinated External Indebtedness, and Plaintiffs seek summary judgment on the Republic's liability for that breach;

It is HEREBY ORDERED that:

1. The motion for partial summary judgment pursuant to Rule 56(a) is GRANTED.

2. It is DECLARED, ADJUDGED, and DECREED that the Republic is required under Paragraph 1(c) of the FAA at all times to rank its payment obligations pursuant to Plaintiffs' Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness.

3. It is DECLARED, ADJUDGED, and DECREED that the Republic's payment obligations on the bonds include its payment obligations to bondholders who have brought actions to recover on their defaulted bonds, and on judgments entered pursuant to judicial action brought by bondholders.

4. It is DECLARED, ADJUDGED, and DECREED that the Republic violates Paragraph 1(c) of the FAA whenever it lowers the rank of its payment obligations under Plaintiffs' Bonds below that of any other present or future unsecured and unsubordinated External Indebtedness, including

(and without limitation) by relegating Plaintiffs' bonds to a non-paying class by failing to pay the obligations currently due under Plaintiffs' Bonds while at the same time making payments currently due to holders of other unsecured and unsubordinated External Indebtedness or by legislative enactment.

5. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Plaintiffs' bonds in violation of Paragraph 1(c) of the FAA when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Plaintiffs' Bonds.

6. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Plaintiffs' bonds in violation of Paragraph 1(c) of the FAA when it enacted Law 26,017 and Law 26,547.

7. It is DECLARED, ADJUDGED, and DECREED that the aforesaid laws were in direct violation of the right of Plaintiffs under the FAA and the bond agreements to bring a legal action in court to recover on the defaulted bonds.

SO ORDERED.

Dated: New York, New York
December 13, 2011

s/______________________
Thomas P. Griesa
U.S. District Judge

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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No. 10-5338

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PABLO ALBERTO VARELA, *et al.*,
*Plaintiffs*,
v.
THE REPUBLIC OF ARGENTINA,
*Defendant*.

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Filed: December 13, 2011

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**ORDER**

Upon consideration of the motion by Plaintiffs for partial summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure ("FRCP") and for injunctive relief and/or specific performance pursuant to FRCP 65(d) and the court's inherent equitable powers, the response of the Republic of Argentina (the "Republic") thereto, Plaintiffs' reply, and all other arguments submitted to the court in the parties' papers and at the hearing held on September 28, 2011;

WHEREAS the uncontested facts establish that:

1. The Republic issued bonds pursuant to a 1994 Fiscal Agency Agreement ("FAA").

2. Paragraph 1(c) of the FAA provides, among other things, that:

> The Securities [i.e., the bonds] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement).

3. The bonds issued pursuant to the FAA contain the following clause, as quoted in *EM Ltd. v. The Republic of Argentina*, 720 F. Supp. 2d 273, 278 (S.D.N.Y. 2010):

> The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan, The City of New York and the courts of the Republic of Argentina (the "Specified Courts") over any suit, action, or proceeding against it or its properties, assets or revenues with respect to the Securities of this Series or the Fiscal Agency Agreement (a "Related Proceeding") except with respect to any actions brought under the United States federal securities laws. The Republic has in the Fiscal Agency Agreement waived any objection to Related Proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related Proceedings have been brought

> in an inconvenient forum. The Republic agrees that a final nonappealable judgment in any such Related Proceeding (the "Related Judgment") shall be conclusive and binding upon it and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the "Other Courts"), by a suit upon such judgment.

4. Plaintiffs own bonds issued pursuant to the FAA ("Plaintiffs' Bonds").

5. The Republic issued other bonds in its 2005 and 2010 Exchange Offers ("Exchange Bonds"), thereby creating new unsecured and unsubordinated External Indebtedness.

6. The Republic has satisfied the payment obligations that have come due to date under the Exchange Bonds.

7. The Republic has not paid principal or interest on Plaintiffs' Bonds since December, 2001.

8. Plaintiffs have brought the captioned action to recover on the defaulted bonds, pursuant to their legal rights, and also pursuant to the express undertakings in the bonds.

9. On February 10, 2005, Argentina enacted Law 26,017, providing that the "national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to bonds" that were eligible to participate in the 2005 Exchange Offer.

10. On December 9, 2009, Argentina enacted Law 26,547, which, *inter alia,* suspended the effect of

Law 26,017 for a period of time during which the 2010 Exchange Offer was launched, closed, and consummated. Law 26,547 also provides that the "Republic of Argentina . . . is prohibited to offer holders of government bonds [including those issued pursuant to the FAA] who may have initiated judicial, administrative, arbitration or any other type of action [to enforce their rights], more favorable treatment than what is offered to those who have not done so."

WHEREAS Plaintiffs claim that the Republic breached (and continues to breach) its contractual duty to rank its payment obligations under Plaintiffs' Bonds at least equally with all its other present and future unsecured and unsubordinated External Indebtedness; Plaintiffs seek summary judgment on the Republic's liability for that breach; and Plaintiffs seek an injunction that would restore them to their bargained-for position among other creditors.

It is HEREBY ORDERED that:

1. The motion for partial summary judgment pursuant to Rule 56(a) is GRANTED.

2. It is DECLARED, ADJUDGED, and DECREED that the Republic is required under Paragraph 1(c) of the FAA at all times to rank its payment obligations pursuant to Plaintiffs' Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness.

3. It is DECLARED, ADJUDGED, and DECREED that the Republic's payment obligations on the bonds include its payment obligations to bondholders who have brought actions to recover on

their defaulted bonds, and on judgments entered pursuant to judicial action brought by bondholders.

4. It is DECLARED, ADJUDGED, and DECREED that the Republic violates Paragraph 1(c) of the FAA whenever it lowers the rank of its payment obligations under Plaintiffs' Bonds below that of any other present or future unsecured and unsubordinated External Indebtedness, including (and without limitation) by relegating Plaintiffs' Bonds to a non-paying class by failing to pay the obligations currently due under Plaintiffs' Bonds while at the same time making payments currently due to holders of other unsecured and unsubordinated External Indebtedness or by legislative enactment.

5. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Plaintiffs' Bonds in violation of Paragraph 1(c) of the FAA when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Plaintiffs' Bonds.

6. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Plaintiffs' Bonds in violation of Paragraph 1(c) of the FAA when it enacted Law 26,017 and Law 26,547.

7. It is DECLARED, ADJUDGED, and DECREED that the aforesaid laws were in direct violation of the right of Plaintiffs under the FAA and the bond agreements to bring a legal action in court to recover on the defaulted bonds.

8. The motion for injunctive relief and/or specific performance pursuant to FRCP 65(d) and the court's

inherent equitable powers is DENIED at the present time to permit further consideration by the court regarding the means of enforcement of the present ORDER.

SO ORDERED.

Dated: New York, New York
December 13, 2011

s/___________________________
Thomas P. Griesa
United States District Judge

*Appendix D*

**UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK**

Nos. 08-6978, 09-1707, 09-1708

NML CAPITAL, LTD.,
*Plaintiff*,

v.

REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: February 23, 2012

**~~[PROPOSED]~~ ORDER**

WHEREAS, in an Order dated December 7, 2011, this Court found that, under Paragraph 1(c) of the 1994 Fiscal Agency Agreement ("FAA"), the Republic is "required . . . at all times to rank its payment obligations pursuant to NML's Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness."

WHEREAS, in its December 7, 2011 Order, this Court granted partial summary judgment to NML on its claim that the Republic repeatedly has breached, and continues to breach, its obligations under Paragraph 1(c) of the FAA by, among other things, "ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under NML's Bonds."

And WHEREAS NML Capital, Ltd. ("NML") has filed a renewed motion for equitable relief as a remedy for such violations pursuant to Rule 65(d) of the Federal Rules of Civil Procedure and the Court's inherent equitable powers.

Upon consideration of NML's renewed motion, the response of the Republic of Argentina (the "Republic") thereto, NML's reply, and all other arguments submitted to the Court in the parties' papers and at oral argument, it is HEREBY ORDERED that:

1. It is DECLARED, ADJUDGED, and DECREED that NML is irreparably harmed by and has no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

   a. Absent equitable relief, NML would suffer irreparable harm because the Republic's payment obligations to NML would remain debased of their contractually-guaranteed status, and NML would never be restored to the position it was promised that it would hold relative to other creditors in the event of default.

   b. There is no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear—indeed, it has codified in Law

26,017 and Law 26,547—its intention to defy any money judgment issued by this Court.

c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to NML. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting NML to harm. On the other hand, the Order requires of the Republic only that which it promised NML and similarly situated creditors to induce those creditors to purchase the Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both NML (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to NML, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

2. The Republic accordingly is permanently ORDERED to specifically perform its obligations to NML under Paragraph I (c) of the FAA as follows:

a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" (as defined below) to NML.

b. Such "Ratable Payment" that the Republic is ORDERED to make to NML shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to NML in respect of the bonds at issue in these cases (08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708), including pre-judgment interest (the "NML Bonds").

c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange

Bonds by the total amount then due under the terms of the Exchange Bonds.

d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to NML.

e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds (collectively, "Agents and Participants"), with a copy to counsel for NML. Such Agents and Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to NML.

f. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Agents and Participants, and to counsel for NML, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to NML.

3. NML shall be entitled to discovery to confirm the timing and amounts of the Republic's payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

4. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval of the Court;

5. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: Feb. 23, 2012

s/____________________
Thomas P. Griesa

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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No. 10-5338

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PABLO ALBERTO VARELA, *et al.*,
*Plaintiffs*,
v.
THE REPUBLIC OF ARGENTINA,
*Defendant*.

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Filed: February 23, 2012

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**~~[PROPOSED]~~ ORDER**

WHEREAS, in an Order dated December 13, 2011, this Court found that, under Paragraph 1(c) of the 1994 Fiscal Agency Agreement ("FAA"), the Republic is "required . . . at all times to rank its payment obligations pursuant to Plaintiffs' Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness."

WHEREAS, in its December 13, 2011 Order, this Court granted partial summary judgment to Plaintiffs on their claim that the Republic repeatedly has breached, and continues to breach, its obligations under Paragraph 1(c) of the FAA by, among other things, "ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Plaintiffs' Bonds."

And WHEREAS Plaintiffs have filed a renewed motion for equitable relief as a remedy for such violations pursuant to Rule 65(d) of the Federal Rules of Civil Procedure and the Court's inherent equitable powers.

Upon consideration of Plaintiffs' renewed motion, the response of the Republic of Argentina (the "Republic") thereto, Plaintiffs' reply, and all other arguments submitted to the Court in the parties' papers and at oral argument, it is HEREBY ORDERED that:

1. It is DECLARED, ADJUDGED, and DECREED that Plaintiffs are irreparably harmed by and have no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

a. Absent equitable relief, Plaintiffs would suffer irreparable harm because the Republic's payment obligations to Plaintiffs would remain debased of their contractually-guaranteed status, and Plaintiffs would never be restored to the position they were promised that they would hold relative to other creditors in the event of default.

b. There is no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear indeed, it has codified in Law 26,017 and Law 26,547—its intention to defy any money judgment issued by this Court.

c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to Plaintiffs. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting Plaintiffs to harm. On the other hand, the Order requires of the Republic only that which it promised Plaintiffs and similarly situated creditors to induce those creditors to purchase the Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both Plaintiffs (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Plaintiffs, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

2. The Republic accordingly is permanently ORDERED to specifically perform its obligations to Plaintiffs under Paragraph 1(c) of the FAA as follows:

a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" (as defined below) to Plaintiffs.

b. Such "Ratable Payment" that the Republic is ORDERED to make to Plaintiffs shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to Plaintiff's in respect of the bonds at issue in this case, including pre-judgment interest (the "Plaintiffs' Bonds").

c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to Plaintiffs.

e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds (collectively. "Agents and Participants"), with a copy to counsel for Plaintiffs. Such Agents and Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to Plaintiffs.

f. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Agents and Participants, and to counsel for Plaintiffs, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to Plaintiffs.

3. Plaintiffs shall be entitled to discovery to confirm the timing and amounts of the Republic's payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

4. 'The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval of the Court;

5. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: Feb. 23, 2012

s/____________________
Thomas P. Griesa

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

Nos. 09-8757, 09-10620, 10-1602, 10-3507,
10-3970, 10-4101, 10-4782, 10-8339

AURELIUS CAPITAL MASTER, LTD.
and ACP MASTER, LTD.,

*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant*.

AURELIUS OPPORTUNITIES FUND II, LLC
and AURELIUS CAPITAL MASTER, LTD.,

*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant*.

AURELIUS CAPITAL MASTER, LTD. and AURELIUS
OPPORTUNITIES FUND II, LLC,

*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant*.

BLUE ANGEL CAPITAL I LLC,
*Plaintiff*,
v.
THE REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: February 23, 2012

**~~[PROPOSED]~~ ORDER**

WHEREAS, in an Order dated December 13, 2011, this Court found that, under Paragraph 1(c) of the 1994 Fiscal Agency Agreement ("FAA"), the Republic is "required . . . at all times to rank its payment obligations pursuant to Plaintiffs' Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness." WHEREAS, in its December 13, 2011 Order, this Court granted partial summary judgment to Plaintiffs Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Opportunities Fund II, LLC and Blue Angel Capital I LLC (collectively "Plaintiffs") on their claims that the Republic repeatedly has breached, and continues to breach, its obligations under paragraph 1(c) of the FAA by, among other things, "ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Plaintiffs' bonds."

And WHEREAS Plaintiffs have filed a motion for equitable relief as a remedy for such violations pursuant to Rule 65(d) of the Federal Rules of Civil Procedure and the Court's inherent equitable powers.

Upon consideration of Plaintiffs' motion, the response of the Republic of Argentina (the "Republic") thereto, Plaintiffs' reply, and all other arguments submitted to the Court in the parties' papers and at oral argument, it is HEREBY ORDERED that:

1. It is DECLARED, ADJUDGED, and DECREED that Plaintiffs are irreparably harmed by and have no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

(a) Absent equitable relief, Plaintiffs would suffer irreparable harm because the Republic's payment obligations to Plaintiffs would remain debased of their contractually-guaranteed status, and Plaintiffs would never be restored to the position they were promised that they would hold relative to other creditors in the event of default.

(b) There is no adequate remedy at law for the Republic's ongoing violations of Paragraph I(c) of the FAA because the Republic has made clear—indeed, it has codified in Law 26,017 and Law 26,547—its intention to defy any money judgment issued by this Court.

(c) The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the

Republic's repeated failures to make required payments to Plaintiffs. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting Plaintiffs to harm. On the other hand, the Order requires of the Republic only that which it promised Plaintiffs and similarly situated creditors to induce those creditors to purchase the Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both Plaintiffs (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Plaintiffs, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

(d) The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

2. The Republic accordingly is permanently ORDERED to specifically perform its obligations to Plaintiffs under Paragraph 1(c) of the FAA as follows:

(a) Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" (as defined below) to Plaintiffs.

(b) Such "Ratable Payment" that the Republic is ORDERED to make to Plaintiffs shall be an amount that is equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to Plaintiffs in respect of the bonds at issue in these cases (09 Civ. 8757, 09 Civ. 10620, 10 Civ. 1602, 10 Civ. 3507, 10 Civ. 3970, 10 Civ. 4101, 10 Civ. 4782, 10 Civ. 8339), including pre-judgment interest ("Plaintiffs' Bonds").

(c) Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

(d) The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to Plaintiffs.

(e) Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds (collectively, "Agents and Participants"), with a copy to counsel for Plaintiffs. Such Agents and Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a ratable payment to Plaintiffs.

(f) Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Agents and Participants, and to counsel for Plaintiffs, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to Plaintiffs.

3. Plaintiffs shall be entitled to discovery to confirm the timing and amounts of the Republic's

payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

4. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with this ORDER, including, without limitation, by altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without prior approval of the Court;

5. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: Feb. 23, 2012

s/______________________
Thomas P. Griesa
U.S. District Judge

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

No. 10-9587

OLIFANT FUND, LTD.,
*Plaintiff*,
v.
THE REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: February 23, 2012

**~~[PROPOSED]~~ ORDER**

Upon consideration of the motion by Olifant Fund, Ltd. ("Olifant") for partial summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure ("FRCP") and for injunctive relief and/or specific performance pursuant to FRCP 65(d) and the court's inherent equitable powers, the response of the Republic of Argentina (the "Republic") thereto, and all other arguments submitted to the court in the parties' papers and at the hearing on this matter;

WHEREAS the uncontested facts establish that:

1. The Republic issued bonds pursuant to a 1994 Fiscal Agency Agreement ("FAA").

2. Paragraph 1(c) of the FAA provides, among other things, that:

The Securities [i.e., the bonds] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement).

3. The bonds issued pursuant to the FAA contain the following clause, as quoted in *EM Ltd.* v. *The Republic of Argentina,* 720 F. Supp. 2d 273, 278 (S.D.N.Y. 2010): The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan, The City of New York and the courts of the Republic of Argentina (the "Specified Courts") over any suit, action, or proceeding against it or its properties, assets or revenues with respect to the Securities of this Series or the Fiscal Agency Agreement (a "Related Proceeding") except with respect to any actions brought under the United States federal securities laws. The Republic has in the Fiscal Agency Agreement waived any objection to Related Proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related Proceedings have been brought in an inconvenient forum. The Republic agrees that a final nonappealable judgment in any such Related Proceeding (the "Related Judgment") shall be conclusive and binding upon it and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the "Other Courts"), by a suit upon such judgment.

4. Olifant owns bonds pursuant to the FAA ("Olifant's Bonds").

5. The Republic issued other bonds in its 2005 and 2010 Exchange Offers "Exchange Bonds"), thereby creating new unsecured and unsubordinated External Indebtedness.

6. The Republic has satisfied the payment obligations that have come due to date under the Exchange Bonds.

7. The Republic has not paid principal or interest on Olifant's Bonds since December, 2001.

8. Olifant has brought the above-captioned action to recover on the defaulted bonds, pursuant to its legal rights, and also pursuant to the express undertakings in the bonds.

9. On February 10, 2005, Argentina enacted Law 26,017, providing that the "national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to bonds" that were eligible to participate in the 2005 Exchange Offer.

10. On December 9, 2009, Argentina enacted Law 26,547, which, *inter alia,* suspended the effect of Law 26,017 for a period of time during which the 2010 Exchange Offer was launched, closed, and consummated. Law 26,547 also provides that the "Republic of Argentina . . . is prohibited to offer holders of government bonds [including those issued pursuant to the FAA] who may have initiated judicial, administrative, arbitration or any other type of action [to enforce their rights], more favorable

treatment than what is offered to those who have not done so."

WHEREAS Olifant claims that the Republic breached (and continues to breach) its contractual duty to rank its payment obligations under Olifant's Bonds at least equally with all its other present and future unsecured and unsubordinated External Indebtedness, Olifant seeks summary judgment on the Republic's liability for that breach, and Olifant seeks an injunction that would restore it to its bargained-for position among other creditors;

It is HEREBY ORDERED that:

1. The motion for partial summary judgment pursuant to Rule 56(a) is GRANTED.

2. It is DECLARED, ADJUDGED, and DECREED that the Republic is required under Paragraph 1(c) of the FAA at all times to rank its payment obligations pursuant to Olifant's Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness.

3. It is DECLARED, ADJUDGED, and DECREED that the Republic's payment obligations on the bonds include its payment obligations to bondholders who have brought actions to recover on their defaulted bonds, and on judgments entered pursuant to judicial action brought by bondholders.

4. It is DECLARED, ADJUDGED, and DECREED that the Republic violates Paragraph 1(c) of the FAA whenever it lowers the rank of its payment obligations under Olifant's Bonds below that of any other present or future unsecured and

unsubordinated External Indebtedness, including (and without limitation) by relegating Olifant's Bonds to a non-paying class by failing to pay the obligations currently due under Olifant's Bonds while at the same time making payments currently due to holders of other unsecured and unsubordinated External Indebtedness or by legislative enactment.

5. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Olifant' s Bonds in violation of Paragraph 1(c) of the FAA when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Olifant's Bonds.

6. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Olifant' s Bonds in violation of Paragraph 1(c) of the FAA when it enacted Law 26,017 and Law 26,547.

7. It is DECLARED, ADJUDGED, and DECREED that the aforesaid laws were in direct violation of the right of Olifant under the FAA and the bond agreements to bring a legal action in court to recover on the defaulted bonds.

8. It is DECLARED, ADJUDGED, AND DECREED that Olifant is irreparably harmed by and has no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

a. Absent equitable relief, Olifant would suffer irreparable harm because the Republic's payment obligations to OLIFANT would remain debased of their contractually-guaranteed status, and Olifant would never be restored to the position it was promised that it would hold relative to other creditors in the event of default.

b. There is no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear-indeed, it has codified in Law 26,017 and Law 26,547-its intention to defy any money judgment issued by this Court.

c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to Olifant. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting Olifant to harm. On the other hand, the Order requires of the Republic only that which it promised Olifant and similarly situated creditors to induce those creditors to purchase the Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both Olifant (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Olifant, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

9. The Republic accordingly is permanently ORDERED to specifically perform its obligations to Olifant under Paragraph 1(c) of the FAA as follows:

a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" (as defined below) to Olifant.

b. Such "Ratable Payment" that the Republic is ORDERED to make to Olifant shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to Olifant in respect of the bonds at issue in this case (10 CV 9587), including pre-judgment interest (the "Olifant Bonds").

c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to Olifant.

e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds (collectively, "Agents and Participants"), with a copy to counsel for Olifant. Such Agents and Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to Olifant.

f. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Agents and Participants, and to counsel for Olifant, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to Olifant.

10. Olifant shall be entitled to discovery to confirm the timing and amounts of the Republic's payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

11. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval of the Court;

12. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: Feb. 23, 2012

s/
Thomas P. Griesa
U.S. District Judge

*Appendix E*

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

Nos. 08-6978, 09-1707, 09-1708

NML CAPITAL, LTD.,
*Plaintiff*,
v.
REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: November 21, 2012

**AMENDED FEBRUARY 23, 2012 ORDER**

WHEREAS, in an Order dated December 7, 2011, this Court found that, under Paragraph 1(c) of the 1994 Fiscal Agency Agreement ("FAA"), the Republic is "required . . . at all times to rank its payment obligations pursuant to NML's Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness."

WHEREAS, in its December 7, 2011 Order, this Court granted partial summary judgment to NML on its claim that the Republic repeatedly has breached, and continues to breach, its obligations under Paragraph 1(c) of the FAA by, among other things, "ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under NML's Bonds."

And WHEREAS NML Capital, Ltd. ("NML") has filed a renewed motion for equitable relief as a remedy for such violations pursuant to Rule 65(d) of the Federal Rules of Civil Procedure and the Court's inherent equitable powers.

Upon consideration of NML's renewed motion, the response of the Republic of Argentina (the "Republic") thereto, NML's reply, and all other arguments submitted to the Court in the parties' papers and at oral argument, it is HEREBY ORDERED that:

1. It is DECLARED, ADJUDGED, and DECREED that NML is irreparably harmed by and has no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

a. Absent equitable relief, NML would suffer irreparable harm because the Republic's payment obligations to NML would remain debased of their contractually-guaranteed status, and NML would never be restored to the position it was promised that it would hold relative to other creditors in the event of default.

b. There is no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear—indeed, it has codified in Law

26,017 and Law 26,547—its intention to defy any money judgment issued by this Court.

c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to NML. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting NML to harm. On the other hand, the Order requires of the Republic only that which it promised NML and similarly situated creditors to induce those creditors to purchase the Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both NML (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to NML, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

2. The Republic accordingly is permanently ORDERED to specifically perform its obligations to NML under Paragraph 1(c) of the FAA as follows:

a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" to NML (as defined below and as further defined in the Court's Opinion of November 21, 2012).

b. Such "Ratable Payment" that the Republic is ORDERED to make to NML shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to NML in respect of the bonds at issue in these cases (08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708), including pre-judgment interest (the "NML Bonds").

c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to NML.

e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all participants in the payment process of the Exchange Bonds ("Participants"). Such Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to NML.

f. "Participants" refer to those persons and entities who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds, including: (1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York); (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London)); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.

g. Nothing in this ORDER shall be construed to extend to the conduct or actions of a third party acting solely in its capacity as an "intermediary bank," under Article 4A of the U.C.C. and N.Y.C.L.S. U.C.C. § 4-A-104, implementing a funds transfer in connection with the Exchange Bonds.

h. Any non-party that has received proper notice of this ORDER, pursuant to Rule

65(d)(2), and that requires clarification as to its duties, if any, under this ORDR may make an application to this Court, with notice to the Republic and NML. Such clarification will be promptly provided.

i. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Participants, and to counsel for NML, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to NML.

3. NML shall be entitled to discovery to confirm the timing and amounts of the Republic's payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

4. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval by the Court;

5. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: New York, New York
November 21, 2012

s/

Thomas P. Griesa
U.S. District Judge

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

Nos. 08-6978, 09-1707, 09-1708

NML CAPITAL, LTD.,
*Plaintiff*,
v.
REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: November 21, 2012

## OPINION

On October 26, 2012, the Court of Appeals handed down an opinion affirming certain injunctions entered by the District Court. These injunctions were designed to remedy Argentina's breach of the *Pari Passu* Clause, including the "Equal Treatment Provision," contained in the contractual provisions of the Fiscal Agency Agreement Bonds ("FAA Bonds") at issue in this litigation. This breach resulted from the fact that Argentina had issued new debt pursuant to exchange offers in 2005 and 2010 ("Exchange Bonds"), and was making the payments required on this new debt, but had declared that it would make no payments to those still holding the FAA Bonds. It is of note that the Court of Appeals affirmed the finding of the District Court that, although there had originally been a default on the FAA Bonds because of a well-known financial crisis, currently Argentina is able to make the payments on both the FAA Bonds owned by plaintiffs and the Exchange Bonds.

An essential part of the ruling of the Court of Appeals was to affirm the injunctive relief fashioned by the District Court. It ruled that Argentina must make appropriate payments to plaintiffs on their FAA Bonds concurrent with or in advance of any payments to holders of the 2005 and 2010 Exchange Bonds. However, the Court of Appeals remanded, directing that the District Court clarify precisely how the payment formula, regarding payments to plaintiffs, is intended to operate. Also, the Court of Appeals directed a more precise determination as to how the injunctions would apply to third parties, including intermediary banks.

On remand, the court has not only received briefs from plaintiffs and Argentina, but has also received briefs and letters from exchange bondholders, parties responsible for handling the payment process to these bondholders, and the Federal Reserve Bank. The court has considered these materials without requiring formal interventions.

*Payment Formula*

The injunctions affirmed by the Court of Appeals are contained in an Order of the District Court dated February 23, 2012, which contains a number of injunction provisions and which is referred to by the Court of Appeals as the "Injunctions." Paragraph two of the Injunctions provides:

> The Republic accordingly is permanently ORDERED to specifically perform its

obligations to NML under Paragraph 1(c) of the FAA as follows:

a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" (as defined below) to NML.

b. Such "Ratable Payment" that the Republic is ORDERED to make to NML shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to NML in respect of the bonds at issue in these cases (08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708), including pre-judgment interest (the "NML Bonds").

c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

The Court of Appeals stated that it is unable to discern from the record precisely how this formula is intended to operate, and further stated:

> It could be read to mean that if, for example, Argentina owed the holders of restructured debt $100,000 in interest and paid 100% of that amount then it would be required to pay the plaintiffs 100% of the accelerated principal and all accrued interest. Or it could be read to mean that, if such a $100,000 payment to the exchange bondholders represented 1% of the principal and interest outstanding on the restructured debt, then Argentina must pay plaintiffs 1% of the amount owed to them. The following discussion is intended to provide the clarification requested by the Court of Appeals.

Although the provisions of the February 23, 2012 Injunctions regarding the "Ratable Payment" are phrased in a somewhat complicated manner, the actual meaning is quite straightforward. The obligation to plaintiffs under the February 23, 2012 Injunctions accrues whenever Argentina "pays any amount due" under the terms of the Exchange Bonds. The next time this will occur will be in December 2012, when Argentina is scheduled to make interest payments on the Exchange Bonds of about $3.14 billion: $42 million on December 2, $3 billion on December 15, and $100 million on December 31. When this occurs, Argentina will be required to make a "Ratable Payment" to plaintiffs. Assuming that Argentina pays 100% of what is then due on the Exchange Bonds, this is the "Payment Percentage" referred to in paragraph 2(b). Argentina would be required to pay 100% "multiplied by the *total amount currently due*" to plaintiffs. There is no question about what is "currently due" to plaintiffs. The amount that is currently due is the amount of the unpaid principal, the due date of which has been accelerated, and accrued interest.[1] The total of these amounts due to plaintiffs is approximately $1.33 billion. Thus, at some time in December 2012, when Argentina makes the interest payments on the Exchange Bonds, amounting to a total of about $3.14 billion, Argentina will be required to pay plaintiffs approximately $1.33 billion.

This is in accord with the first hypothetical situation posed in the Court of Appeals' opinion, describing the situation in which Argentina owes the holders of restructured debt $100,000 in interest and pays 100% of that amount, resulting in the requirement to pay plaintiffs 100% of the accelerated principal plus all accrued interest.

The second hypothetical situation posed by the Court of Appeals, resulting in Argentina paying plaintiffs 1% of the amount owed to them, is based on a misinterpretation of the relevant language of the Injunctions. The second hypothetical assumes a $100,000 payment to the Exchange bondholders, representing 1% of the total "principal and interest outstanding on the restructured debt," most of which is payable in the future. But the obligation of Argentina under the payment formula in the Injunctions arises when Argentina "*pays* any amount

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[1] Although judgments have been entered in other related cases, the cases before the court in this matter are ones where judgment has not been entered. *See* Transcript of Oral Argument at 26-27, *NML Capital v. The Republic of Argentina*, (February 23, 2012) (03 Civ. 8845).

due" to the exchange bondholders. In the present case, this would next occur when Argentina pays the interest due on the Exchange Bonds in December 2012. Also, the Payment Percentage is calculated on the basis of "the amount actually paid or which the Republic intends to pay," as a percentage of "the total amount then due." None of this relevant language refers to any calculation based upon the total amount of principal and interest outstanding on the restructured debt, including large amounts of principal and interest to be paid into the future.

To recapitulate, the Ratable Payment provisions in the Injunctions, as correctly interpreted and as intended by the court, would be currently applied as follows. In December 2012, there are interest payments of approximately $3.14 billion due on the Exchange Bonds. Presumably, Argentina intends to pay 100% of what is owed. There are currently debts owed to plaintiffs by Argentina of approximately $1.33 billion. It should be emphasized that these are debts *currently owed*, not debts spaced out over future periods of time. In order to comply with the terms of the Injunctions, Argentina must pay plaintiffs 100% of that $1.33 billion concurrently with or in advance of the payments on the Exchange Bonds.

This result is not only in accordance with the payment formula provisions of the Injunctions, it is consistent with the *Pari Passu* Clause and its Equal Treatment Provision. In saying this, the court recognizes that the debt now owed to the exchange bondholders is of a *different amount* and of a *different nature* from what is owed to plaintiffs. What is owed in December 2012 to exchange bondholders are interest payments, which are part of a series which will go on being paid until the maturity of the Exchange Bonds. The debt owed to plaintiffs is accelerated principal plus accrued interest. But it is obvious that a *Pari Passu* Clause does not require that the debts in question be in the same amount or of the same nature. What is required is that the obligations under the various debts are complied with to the same extent, rather than having the obligations on one debt honored and the obligations on the other debt repudiated, as has occurred in the present case.

Of course, what is being done here is not literally to carry out the *Pari Passu* Clause, as would be done in a normal commercial situation, but to provide a remedy for Argentina's violation of the Clause. *NML Capital v. The Republic of Argentina*, No. 12-105(L), at 19 n.10 (2d Cir. Oct. 26, 2012) (hereinafter "Opinion"). Yet, the remedy must bear some reasonable relation to the *Pari Passu* Clause in order to be a sensible remedy. One definition of pari passu in Black's Law Dictionary (8th ed. 2004) is "proportionally," obviously referring to the use of the same proportion in paying down two kinds of debts. This is clearly reflected in the Ratable Payment provisions in the Injunctions, as correctly interpreted. These provisions properly start with the fact that if 100% of what is *currently due* to the exchange bondholders *is paid*, then 100% of what is currently due to plaintiffs must also be paid. The payment to plaintiffs must surely relate to a debt actually due to them. And this leads to the problem which this court finds in the second hypothetical posed by the Court of Appeals. There is simply no debt owed to plaintiffs on terms providing for payments of 1% of some sum of money, spaced out over 100 installments of 1% each. The second hypothetical of the Court of Appeals would involve a radical departure from the payment formula in the Injunctions and from the Pari Passu Clause.

Again, there is no suggestion of interfering with what the exchange bondholders are due to be paid. The question raised by the Court of Appeals relates solely to how much plaintiffs are to be paid at the time exchange bondholders are paid. But the fact is that the amount owed to plaintiffs by Argentina is the accelerated principal plus accrued interest. Argentina owes this and owes it now. No one has suggested any basis in contract or in policy why Argentina deserves to have payment of the amount due to plaintiffs spread over some period of time.

Moreover, and this is most important, to apply the second hypothetical of the Court of Appeals and spread payment to plaintiffs over a period of time, would be a far cry from a proper remedy for the flagrant and intentional contract violations committed by Argentina.

Argentina and certain exchange bondholders argue that it is unjust for them to be receiving thirty cents on the dollar by virtue of the Exchange Bonds, while plaintiffs receive full payment pursuant to the court rulings. The Court of Appeals essentially answered this argument (Opinion at 26 n.15). However, some further discussion is in order.

In accepting the exchange offers of thirty cents on the dollar, the exchange bondholders bargained for certainty and the avoidance of the burden and risk of litigating their rights on the FAA Bonds. However, they knew full well that other owners of FAA Bonds were seeking to obtain *full payment* of the amounts due on such bonds through persisting in the litigation. Indeed, the exchange bondholders were able to watch year after year while plaintiffs in the litigation pursued methods of recovery against Argentina which were largely unsuccessful. However, decisions have now been handed down by the District Court and the Court of Appeals based on the *Pari Passu* Clause, which give promise of providing plaintiffs with full recovery of the amounts due to them on their FAA Bonds. This is hardly an injustice. The exchange bondholders made the choice not to pursue the route which plaintiffs have pursued. Moreover, 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.

*Third Parties*

It is the intention of the court to properly apply Rule 65(d) of the Federal Rules of Civil Procedure. This Rule provides that an injunction binds the parties, the parties' agents, and other persons who are in active concert or participation with the parties or their agents. It is further provided that an injunction binds these people only if they receive actual notice of the injunction.

The issue arises because of the need to ensure enforcement of the Injunctions' requirement that payments are to be made on the Exchange Bonds only if appropriate payments are made concurrently or in advance to plaintiffs. The Court of Appeals noted that the District Court was invoking Rule 65(d), "Anticipating that Argentina would refuse to comply with the Injunctions and in order to facilitate payment." It goes without saying that if Argentina is able to make the payments on the Exchange Bonds without making the payments to plaintiffs, the District Court and Court of Appeals' rulings and the Injunctions will be entirely for naught. To avoid this, it is necessary that the process for making payments on the Exchange Bonds be covered by the Injunctions, and that the parties participating in that process be so covered.

The February 23, 2012 Injunctions contain a provision prohibiting Argentina from taking any action to evade the directives of the Injunctions and further prohibiting Argentina from altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval of the court.

The process and the parties involved in making payments on the Exchange Bonds are as follows. Argentina transfers funds to the Bank of New York Mellon ("BNY"), which is the indenture trustee in a Trust Indenture of 2005.[2]

Presumably there is a similar indenture for the 2010 exchange offer. BNY then forwards the funds to

[2] There is apparently a dispute as to whether this payment takes place in Argentina or the United States. However, BNY is surely a United States entity. The rest of the process, without question takes place in the United States.

the “registered owner” of the Exchange Bonds. There are two registered owners for the 2005 and 2010 Exchange Bonds. One is Cede & Co. and the other is the Bank of New York Depositary (“BNY Depositary”). Cede and BNY Depositary transfer the funds to a “clearing system” such as the Depository Trust Company (“DTC”). The funds are then deposited into financial institutions, apparently banks, which then transfer the funds to their customers who are the beneficial interest holders of the bonds.

Plaintiffs assert that under Rule 65(d), the Injunctions should bind Argentina, the indenture trustee, the registered owners, and the clearing system, whoever they are. It is probably true that these parties are not all agents of Argentina, but they surely are “in active concert or participation” with Argentina in processing the payments from Argentina to the exchange bondholders.

There is a problem under Article 4A of the U.C.C. about including intermediary banks. But plaintiffs address this in seeking a carve-out in the Injunctions for such intermediary banks. Plaintiffs are also not requesting that the financial institutions receiving funds from the DTC be bound by the Injunctions.

It would appear that plaintiffs have requested that a reasonable set of parties be bound by the Injunctions, and this is in compliance with Rule 65(d).

BNY, and to some extent others on the above list, object to any application of Rule 65(d) to them. Particularly BNY strenuously asserts that it has duties as indenture trustee, and these duties should be the beginning and the end of its responsibilities.

These arguments miss the point. If Argentina complies with the rulings of the Court of Appeals, there will be no problem about funds destined for exchange bondholders being deposited with BNY and going up the chain until they arrive in the hands of such bondholders. But if Argentina attempts to make payments to the exchange bondholders, contrary to the ruling of the Court of Appeals and thus contrary to law, this would not involve the normal and proper situation dealt with by BNY under the indenture, and dealt with by others in the chain. Under these circumstances, these third parties should properly be held responsible for making sure that their actions are not steps to carry out a law violation, and they should avoid taking such steps.

## The Order

Since the Court of Appeals has essentially affirmed the February 23, 2012 Order containing the Injunctions, that Order will remain in effect, subject to the following qualifications. In paragraph 2a, there will be an appropriate reference to the definitions contained in the current opinion, which does not change the relevant wording but further defines it.

The court believes that plaintiffs properly recommend specific wording listing the parties bound by the Order under Rule 65(d). Accordingly, that listing will be included.

Dated: New York, New York
November 21, 2012

s/________________________

Thomas P. Griesa
U.S. District Judge

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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Nos. 09-8757, 09-10620, 10-1602, 10-3507, 10-3970, 10-4101, 10-4782, 10-8339

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AURELIUS CAPITAL MASTER, LTD. and ACP MASTER, LTD.,

*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant*.

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AURELIUS OPPORTUNITIES FUND II, LLC and AURELIUS CAPITAL MASTER, LTD.,

*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant*.

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AURELIUS CAPITAL MASTER, LTD. and AURELIUS OPPORTUNITIES FUND II, LLC,

*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant*.

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BLUE ANGEL CAPITAL I LLC,
*Plaintiff*,
v.
THE REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: November 26, 2012

**~~[PROPOSED]~~ AMENDED FEBRUARY 23, 2012 ORDER**

WHEREAS, in an Order dated December 13, 2011, this Court found that, under Paragraph 1(c) of the 1994 Fiscal Agency Agreement ("FAA"), the Republic is "required . . . at all times to rank its payment obligations pursuant to Plaintiff's Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness."

WHEREAS, in its December 13, 2011 Order, this Court granted partial summary judgment to Plaintiffs Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC and Blue Angel Capital I LLC (collectively "Plaintiffs") on its claim that the Republic repeatedly has breached, and continues to breach, its obligations under Paragraph 1(c) of the FAA by, among other things, "ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Plaintiffs' Bonds."

And WHEREAS Plaintiffs have filed a motion for equitable relief as a remedy for such violations pursuant to Rule 65(d) of the Federal Rules of Civil Procedure and the Court's inherent equitable powers.

Upon consideration of Plaintiffs' motion, the response of the Republic of Argentina (the "Republic") thereto, Plaintiffs' reply, and all other arguments submitted to the Court in the parties' papers and at oral argument, it is HEREBY ORDERED that:

1. It is DECLARED, ADJUDGED, and DECREED that Plaintiffs are irreparably harmed by and have no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

   a. Absent equitable relief, Plaintiffs would suffer irreparable harm because the Republic's payment obligations to Plaintiffs would remain debased of their contractually-guaranteed status, and Plaintiffs would never be restored to the position they were promised that they would hold relative to other creditors in the event of default.

   b. There is no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear – indeed, it has codified in Law 26,017 and Law 26,547 – its intention to defy any money judgment issued by this Court.

c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to Plaintiffs. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting Plaintiffs to harm. On the other hand, the Order requires of the Republic only that which it promised Plaintiffs and similarly situated creditors to induce those creditors to purchase the Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both Plaintiffs (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Plaintiffs, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

2. The Republic accordingly is permanently ORDERED to specifically perform its obligations to Plaintiffs under Paragraph 1(c) of the FAA as follows:

a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" to Plaintiffs (as defined below and as further defined in the Court's Opinion of November 21, 2012 in the NML Capital, Ltd. v. The Republic of Argentina cases, Nos. 08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708).

b. Such "Ratable Payment" that the Republic is ORDERED to make to Plaintiffs shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to Plaintiffs in respect of the bonds at issue in these cases (09 Civ. 8757, 09 Civ. 10620, 10 Civ. 1602, 10 Civ. 3507, 10 Civ. 3970, 10 Civ. 4101, 10 Civ. 4782, 10 Civ. 8339), including pre-judgment interest (the "Plaintiffs' Bonds").

c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to Plaintiffs.

e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all participants in the payment process of the Exchange Bonds ("Participants"). Such Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to Plaintiffs.

f. "Participants" refer to those persons and entities who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds, including: (1)

the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York); (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London)); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.

g. Nothing in this ORDER shall be construed to extend to the conduct or actions of a third party acting solely in its capacity as an "intermediary bank," under Article 4A of the U.C.C. and N.Y.C.L.S. U.C.C. § 4-A-104, implementing a funds transfer in connection with the Exchange Bonds.

h. Any non-party that has received proper notice of this ORDER, pursuant to Rule 65(d)(2), and that requires clarification as to its duties, if any, under this ORDER may make an application to this Court, with notice to the Republic and Plaintiffs. Such clarification will be promptly provided.

i. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Participants, and to counsel for Plaintiffs, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to Plaintiffs.

3. Plaintiffs shall be entitled to discovery to confirm the timing and amounts of the Republic's payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

4. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval by the Court;

5. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it

as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: New York, New York
November 21, 2012

s/________________________
Thomas P. Griesa
U.S. District Judge

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

No. 10-5338

PABLO ALBERTO VARELA, *et al.*,
*Plaintiffs*,

v.

THE REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: November 26, 2012

**~~[PROPOSED]~~ AMENDED FEBRUARY 23, 2012 ORDER**

WHEREAS, in an Order dated December 13, 2011, this Court found that, under Paragraph 1(c) of the 1994 Fiscal Agency Agreement ("FAA"), the Republic is "required . . . at all times to rank its payment obligations pursuant to Plaintiffs' Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness."

WHEREAS, in its December 13, 2011 Order, this Court granted partial summary judgment to Plaintiffs on their claim that the Republic repeatedly has breached, and continues to breach, its obligations under Paragraph 1(c) of the FAA by, among other things, "ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Plaintiffs' Bonds."

And WHEREAS Plaintiffs have filed a motion for equitable relief as a remedy for such violations pursuant to Rule 65(d) of the Federal Rules of Civil Procedure and the Court's inherent equitable powers.

Upon consideration of Plaintiffs' motion, the response of the Republic of Argentina (the "Republic") thereto, Plaintiffs' reply, and all other arguments submitted to the Court in the parties' papers and at oral argument, it is HEREBY ORDERED that:

1. It is DECLARED, ADJUDGED, and DECREED that Plaintiffs are irreparably harmed by and have no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

a. Absent equitable relief, Plaintiffs would suffer irreparable harm because the Republic's payment obligations to Plaintiffs would remain debased of their contractually-guaranteed status, and Plaintiffs would never be restored to the position they were promised that they would hold relative to other creditors in the event of default.

b. There is no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear – indeed, it has codified in Law

26,017 and Law 26,547 – its intention to defy any money judgment issued by this Court.

c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to Plaintiffs. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting Plaintiffs to harm. On the other hand, the Order requires of the Republic only that which it promised Plaintiffs and similarly situated creditors to induce those creditors to purchase the Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both Plaintiffs (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Plaintiffs, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

2. The Republic accordingly is permanently ORDERED to specifically perform its obligations to Plaintiffs under Paragraph 1(c) of the FAA as follows:

a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" to Plaintiffs (as defined below and as further defined in the Court's Opinion of November 21, 2012 in the *NML Capital, Ltd. v. The Republic of Argentina* cases, Nos. 08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708).

b. Such "Ratable Payment" that the Republic is ORDERED to make to Plaintiffs shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to Plaintiffs in respect of the bonds at issue in these cases (09 Civ. 8757, 09 Civ. 10620, 10 Civ. 1602, 10 Civ. 3507, 10 Civ. 3970, 10 Civ. 4101, 10 Civ.

4782, 10 Civ. 8339), including pre-judgment interest (the "Plaintiffs' Bonds").

c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to Plaintiffs.

e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all participants in the payment process of the Exchange Bonds ("Participants"). Such Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to Plaintiffs.

f. "Participants" refer to those persons and entities who act in active concert or participation with the Republic, to assist the

Republic in fulfilling its payment obligations under the Exchange Bonds, including: (1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York); (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London)); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.

g. Nothing in this ORDER shall be construed to extend to the conduct or actions of a third party acting solely in its capacity as an "intermediary bank," under Article 4A of the U.C.C. and N.Y.C.L.S. U.C.C. § 4-A-104, implementing a funds transfer in connection with the Exchange Bonds.

h. Any non-party that has received proper notice of this ORDER, pursuant to Rule 65(d)(2), and that requires clarification as to its duties, if any, under this ORDER may make an application to this Court, with notice to the Republic and Plaintiffs. Such clarification will be promptly provided.

i. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Participants, and to counsel for Plaintiffs, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to Plaintiffs.

3. Plaintiffs shall be entitled to discovery to confirm the timing and amounts of the Republic's payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

4. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval by the Court;

5. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: New York, New York
Nov. 21, 2012

s/
Thomas P. Griesa
U.S. District Judge

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

No. 10-9587

OLIFANT FUND, LTD.,
*Plaintiff*,
v.
THE REPUBLIC OF ARGENTINA,
*Defendant*.

Filed: November 26, 2012

**~~[PROPOSED]~~ AMENDED**
**FEBRUARY 23, 2012 ORDER**

Upon consideration of the motion by Olifant Fund, Ltd. ("Olifant") for partial summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure ("FRCP") and for injunctive relief and/or specific performance pursuant to FRCP 65(d) and the court's inherent equitable powers, the response of the Republic of Argentina (the "Republic") thereto, and all other arguments submitted to the court in the parties' papers and at the hearing on this matter;

WHEREAS the uncontested facts establish that:

1. The Republic issued bonds pursuant to a 1994 Fiscal Agency Agreement ("FAA").

2. Paragraph 1(c) of the FAA provides, among other things, that:

> The Securities [i.e., the bonds] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement).

3. The bonds issued pursuant to the FAA contain the following clause, as quoted in *EM Ltd. v. The Republic of Argentina*, 720 F. Supp. 2d 273, 278 (S.D.N.Y. 2010):

> The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan, The City of New York and the courts of the Republic of Argentina (the "Specified Courts") over any suit, action, or proceeding against it or its properties, assets or revenues with respect to the Securities of this Series or the Fiscal Agency Agreement (a "Related Proceeding") except with respect to any actions brought under the United States federal securities laws. The Republic has in the Fiscal Agency Agreement waived any objection to Related Proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related Proceedings have been brought

> in an inconvenient forum. The Republic agrees that a final nonappealable judgment in any such Related Proceeding (the "Related Judgment") shall be conclusive and binding upon it and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the "Other Courts"), by a suit upon such judgment.

4. Olifant owns bonds pursuant to the FAA ("Olifant's Bonds").

5. The Republic issued other bonds in its 2005 and 2010 Exchange Offers ("Exchange Bonds"), thereby creating new unsecured and unsubordinated External Indebtedness.

6. The Republic has satisfied the payment obligations that have come due to date under the Exchange Bonds.

7. The Republic has not paid principal or interest on Olifant's Bonds since December, 2001.

8. Olifant has brought the above-captioned action to recover on the defaulted bonds, pursuant to its legal rights, and also pursuant to the express undertakings in the bonds.

9. On February 10, 2005, Argentina enacted Law 26,017, providing that the "national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to bonds" that were eligible to participate in the 2005 Exchange Offer.

10. On December 9, 2009, Argentina enacted Law 26,547, which, inter alia, suspended the effect of

Law 26,017 for a period of time during which the 2010 Exchange Offer was launched, closed, and consummated. Law 26,547 also provides that the "Republic of Argentina . . . is prohibited to offer holders of government bonds [including those issued pursuant to the FAA] who may have initiated judicial, administrative, arbitration or any other type of action [to enforce their rights], more favorable treatment than what is offered to those who have not done so."

WHEREAS Olifant claims that the Republic breached (and continues to breach) its contractual duty to rank its payment obligations under Olifant's Bonds at least equally with all its other present and future unsecured and unsubordinated External Indebtedness, Olifant seeks summary judgment on the Republic's liability for that breach, and Olifant seeks an injunction that would restore it to its bargained-for position among other creditors;

It is HEREBY ORDERED that:

1. The motion for partial summary judgment pursuant to Rule 56(a) is GRANTED.

2. It is DECLARED, ADJUDGED, and DECREED that the Republic is required under Paragraph 1(c) of the FAA at all times to rank its payment obligations pursuant to Olifant's Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness.

3. It is DECLARED, ADJUDGED, and DECREED that the Republic's payment obligations on the bonds include its payment obligations to bondholders who have brought actions to recover on

their defaulted bonds, and on judgments entered pursuant to judicial action brought by bondholders.

4. It is DECLARED, ADJUDGED, and DECREED that the Republic violates Paragraph 1(c) of the FAA whenever it lowers the rank of its payment obligations under Olifant's Bonds below that of any other present or future unsecured and unsubordinated External Indebtedness, including (and without limitation) by relegating Olifant's Bonds to a non-paying class by failing to pay the obligations currently due under Olifant's Bonds while at the same time making payments currently due to holders of other unsecured and unsubordinated External Indebtedness or by legislative enactment.

5. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Olifant' s Bonds in violation of Paragraph 1(c) of the FAA when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Olifant's Bonds.

6. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Olifant's Bonds in violation of Paragraph 1(c) of the FAA when it enacted Law 26,017 and Law 26,547.

7. It is DECLARED, ADJUDGED, and DECREED that the aforesaid laws were in direct violation of the right of Olifant under the FAA and the bond agreements to bring a legal action in court to recover on the defaulted bonds.

8. It is DECLARED, ADJUDGED, and DECREED that Olifant is irreparably harmed by and has no adequate remedy at law for the Republic's

ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

a. Absent equitable relief, Olifant would suffer irreparable harm because the Republic's payment obligations to Olifant would remain debased of their contractually-guaranteed status, and Olifant would never be restored to the position it was promised that it would hold relative to other creditors in the event of default.

b. There is no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear–indeed, it has codified in Law 26,017 and Law 26,547–its intention to defy any money judgment issued by this Court.

c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to Olifant. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting Olifant to harm. On the other hand, the Order requires of the Republic only that which it promised Olifant and similarly situated creditors to induce those creditors to purchase the Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both Olifant (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Olifant, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

9. The Republic accordingly is permanently ORDERED to specifically perform its obligations to Olifant under Paragraph 1(c) of the FAA as follows:

a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" to Olifant (as defined below and as further defined in the Court's Opinion of November 21, 2012 in the *NML Capital, Ltd. v. The Republic of Argentina* cases, Nos. 08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708).

b. Such "Ratable Payment" that the Republic is ORDERED to make to Olifant shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to Olifant in respect of the bonds at issue in this case (10 Civ. 9587), including pre-judgment interest (the "Olifant Bonds").

c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to Olifant.

e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all participants in the payment process of the Exchange Bonds ("Participants"). Such Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to Olifant.

f. "Participants" refer to those persons and entities who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds, including: (1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York); (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London)); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.

g. Nothing in this ORDER shall be construed to extend to the conduct or actions of a third party acting solely in its capacity as an "intermediary bank," under Article 4A of the U.C.C. and N.Y.C.L.S. U.C.C. § 4-A-104, implementing a funds transfer in connection with the Exchange Bonds.

h. Any non-party that has received proper notice of this ORDER, pursuant to Rule 65(d)(2), and that requires clarification as to its duties, if any, under this ORDER may make an application to this Court, with notice to the Republic and Olifant. Such clarification will be promptly provided.

i. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Participants, and to counsel for Olifant, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to Olifant.

10. Olifant shall be entitled to discovery to confirm the timing and amounts of the Republic's payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

11. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval by the Court;

12. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: New York, New York
November 21, 2012

s/

Thomas P. Griesa
U.S. District Judge

*Appendix F*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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Nos. 12-105(L)
12-109, 12-111, 12-157, 12-158, 12-163, 12-164,
12-170, 12-176, 12-185, 12-189, 12-214, 12-909,
12-914, 12-916, 12-919, 12-920, 12-923, 12-924,
12-926, 12-939, 12-943, 12-951, 12-968, 12-971

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NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., 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 VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

*Plaintiffs-Appellees*,

v.

THE REPUBLIC OF ARGENTINA,

*Defendant-Appellant*.

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On Appeal from the United States District Court for the Southern District of New York

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Filed April 4, 2012

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## BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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Interest of the United States

Pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States respectfully submits this brief as amicus curiae supporting reversal of orders entered by the United States District Court for the Southern District of New York (Griesa, *J.*), on December 7 and December 13, 2011 (the "December Orders") (SPA 10-25), and February 23, 2012 (the "February 23 Orders") (SPA 28-54) (collectively, the "Orders").

This litigation involves efforts by so-called "holdout creditors" to collect on defaulted bonds from the Republic of Argentina ("Argentina"). In 2001, the Argentine government announced a moratorium on its repayment of approximately $80 billion in public foreign debt. *See NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172, 175 (2d Cir. 2011). Since 2001, Argentina has not made any payments on the defaulted bonds. *Id.* Instead, Argentina restructured approximately 92 percent of its debt by launching global exchange offers in 2005 and 2010, pursuant to which creditors holding the defaulted bonds could exchange them for new securities with modified terms. *Id.* at 176 & n.4. Plaintiffs-appellees did not accept the exchange offers and instead sought recourse from the courts.

In the December Orders, the district court adopted a broad and novel interpretation of the standard *pari passu* provision found in many sovereign debt instruments. The district court concluded that Argentina breaches the *pari passu* provision whenever it makes payments to those bondholders who accepted the exchange offers without fsimultaneously paying the full amount of principal and interest owed to plaintiffs-appellees. (SPA 13).

The February 23 Orders in turn require that Argentina pay the full amount due to plaintiffs-appellees whenever Argentina makes a payment under the terms of the exchange bonds. (*See, e.g.*, SPA 33). The court further prohibited third parties from assisting Argentina in servicing payments on the exchange bonds without ensuring that full payment to plaintiffs-appellees are also made. (*See, e.g.*, SPA 34). Finally, the court prohibited Argentina from altering the process by which Argentina makes payments on the exchange bonds without obtaining approval from the court. (*See, e.g.*, SPA 34-35).

In supporting reversal of the Orders, the United States does not condone or excuse a foreign state's failure to comply with the judgment of a U.S. court imposing liability on the state. The United States consistently has maintained, and continues strongly to maintain, that Argentina immediately should normalize relations with all of its creditors, both public and private.

In addition to Argentina's unwillingness to resolve remaining issues with all of its bondholders, the United States has several concerns regarding

Argentina's failure to honor its international obligations. We encourage Argentina to continue to work with the International Monetary Fund ("IMF") and to participate in IMF surveillance as required under its Articles of Agreement, to improve its statistical reporting, clear its arrears to the United States and other Paris Club members, and honor final awards of arbitration panels convened under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"). Argentina's failure to honor its obligations or to engage with international institutions remains a concern, given that Argentina is a member of the G-20, the IMF, the World Bank, and other international fora, and is a middle-income country with great potential to generate prosperity for its citizens. It is for these reasons that the United States has opposed lending to Argentina through multilateral development banks such as the World Bank and the Inter-American Development Bank. In addition, on March 26, 2012, President Obama suspended Argentina's eligibility under the Generalized System of Preferences program because of Argentina's failure to pay two longstanding ICSID arbitral awards in favor of U.S. companies.

Notwithstanding these concerns regarding Argentina's continued failure to abide by its obligations, and our strong insistence that it do so promptly, the United States respectfully submits this brief because these consolidated appeals raise two issues of vital public policy and legal importance to the United States that extend beyond the particular facts of this case.[*]

First, the district court's interpretation of the *pari passu* clause, a boilerplate provision contained in a number of sovereign debt instruments, in a manner that deviates from decades of settled market expectations is contrary to United States economic policy. Notwithstanding recent developments in sovereign debt contracts that promote collective action by creditors, the district court's interpretation of the *pari passu* provision could enable a single creditor to thwart the implementation of an internationally supported restructuring plan, and thereby undermine the decades of effort the United States has expended to encourage a system of cooperative resolution of sovereign debt crises. Allowing creditors recourse to such an enforcement mechanism would have adverse consequences on the prospects for voluntary sovereign debt restructuring, on the stability of international financial markets, and on the repayment of loans extended by international financial institutions ("IFIs"). Accordingly, the United States opposes the adoption of the district court's ratable payment interpretation of the *pari passu* clause as contrary to United States policy interests.

Second, the United States has a significant interest in ensuring that courts correctly construe the laws relating to foreign sovereign immunity,

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[*] In 2004, the United States filed a Statement of Interest in related litigation addressing the proper interpretation of the *pari passu* clause and the permissible scope of relief against a foreign sovereign. (*See* A-1760–A-1785).

including immunity from enforcement of judgments against the property of foreign states. The issues raised in this appeal regarding the appropriate scope of an injunction issued against a foreign sovereign could affect all foreign sovereigns in U.S. courts, and have a significant, detrimental impact on our foreign relations, as well as on the reciprocal treatment of the United States and its extensive property holdings.

# ARGUMENT

## POINT I

## THIS COURT SHOULD REJECT THE DISTRICT COURT'S INTERPRETATION OF THE *PARI PASSU* CLAUSE IN SOVEREIGN DEBT INSTRUMENTS*

### A. The United States Has Long Promoted Consensual, Orderly Sovereign Debt Restructuring Efforts Within a Framework of Contractual Certainty

Recognizing the serious difficulties that sovereign solvency crises present for both sovereign

* In addition to holding that the *pari passu* clause was violated when Argentina made payments to the holders of exchange bonds without also satisfying its payment obligations under the bonds held by the appellees (SPA-32 at ¶ 5), the district court found that the *pari passu* clause was violated by the enactment of Argentina's Lock Law (SPA-32 at ¶¶ 6-7). The parties here dispute the proper characterization of the Lock Laws. Argentina argues that the Lock Law does not legally subordinate debt, but merely requires legislative approval to authorize new settlements with bondholders. Brief of Defendant-Appellant the Republic of Argentina ("Arg. Br.") at 45. Plaintiffs-appellees contend, in contrast, that the Lock Law is a legislative enactment that prohibits payments with respect to their bonds and accords a higher legal preference to the exchange bonds. (A-2122). The United States does not have particular expertise on the application of Argentine law in the context of its 2005 and 2010 debt restructuring. Moreover, legal mechanisms to effectuate a default or a restructuring of debt are likely to vary from country to country, and may not exist in all cases. Accordingly, the United States takes no position as to whether the district court correctly concluded that the enactment of the Lock Law constituted a breach of the *pari passu* clause.

borrowers and the international financial system, the United States has adopted, as a cornerstone of its foreign economic policy, the position that emerging markets should embrace strong macroeconomic policies that will produce economic growth, allow them to fully satisfy their external debt obligations, and strengthen the international financial system. In those rare cases where a sovereign cannot meet its external obligations, however, the policy of the United States is that the orderly and consensual restructuring of sovereign debt, in conjunction with needed macroeconomic adjustments, is the most appropriate response. This policy promotes international economic and financial stability by allowing a debtor nation to move expeditiously past a balance of payment crisis, while at the same time minimizing potentially devastating "ripple effects" that sovereign defaults could otherwise have on the global economy.

In response to the sovereign debt crises of the 1980s, the United States urged sovereign debtors to adopt economic policy reforms in conjunction with increased lending from the IFIs. In a subsequent initiative known as the Brady Plan, the United States explicitly recognized the role restructuring must play in resolving sovereign debt crises. The Brady Plan encouraged commercial banks to find alternatives to new lending in dealing with the sovereign debt problem, and called for debt and debt service reduction by banks. This policy was codified in the International Debt Management Act, 22 U.S.C. § 5324.

Over the past decade, the United States has recognized that the shift of the emerging market creditor base from commercial banks to bondholders has increased uncertainty surrounding the sovereign debt restructuring process and complicated decision-making for private creditors, the public sector, and sovereign debtors alike. Accordingly, the United States has been engaged in a concerted effort to promote greater orderliness and predictability in the restructuring process. The United States has advocated the incorporation of a package of new clauses into sovereign debt contracts that would provide for a more orderly restructuring process and facilitate countries' efforts to restructure their debt in order to reach more rapidly sustainable debt positions.

For example, the United States has encouraged the inclusion of collective action clauses in sovereign debt contracts, which would permit a super-majority of bondholders to amend a debt instrument even when a minority creditor refuses to agree to the amendment. The United States considers the progress made in this initiative a demonstration that sovereign debt restructuring can be achieved within the existing framework of contractual relations and consensual negotiation.

Despite these actions to promote voluntary restructuring as the solution to sovereign debt crises, the growth of the secondary market for sovereign debt means that creditors have a wide range of financial interests. The disparate nature of creditor interests complicates the orderly resolution of sovereign debt crises, which depends on the voluntary actions of individual debtholders and the affected sovereign state in developing jointly negotiated solutions to balance of payment crises.

In this context, ensuring the certainty and predictability of sovereign contractual relations becomes essential. Indeed, U.S. sovereign debt policy implicitly recognizes the critical role of the contract in resolving a debt crisis. Restructuring negotiations must take place within a framework where creditors can seek recourse to the courts to enforce contractual obligations. Moreover, creditors must be assured that the terms of any new debt instruments issued pursuant to a restructuring plan will be legally enforceable. It would, however, harm the process that has evolved to address sovereign debt problems if creditors, in negotiating with debtors, also retained the option to litigate to obtain incorrect interpretations of standard terms than are not supported by commercial market practice. Because it is the United States' policy that neither party should be allowed to alter through litigation the terms of a sovereign debt instrument, it is vital that such terms be interpreted according to settled market understanding.

Settled market understanding most clearly reflects the *ex ante* understanding of the parties at the time they entered their contractual relationship. In contrast, altering settled market understanding of existing debt instruments renders contractual relations less certain. International markets are adversely affected by uncertainty regarding provisions in sovereign debt instruments, particularly where, as here, it injects further unpredictability and disorder into the already complex problems posed by sovereign defaults. Such a lack of certainty could also discourage international lending to distressed sovereigns.

B. The District Court's Interpretation of the *Pari Passu* Clause Disrupts Settled Expectations, and Is Incorrect as a Matter of Law and Adverse to the United States' Policy Interests

The district court's construction of the *pari passu* clause in the December Orders is both contrary to the settled understanding of this standard contractual provision and at odds with the established framework for resolving sovereign payment crises through consensual restructuring of debt.

1. The Ratable Payment Interpretation of the *Pari Passu* Clause Is Incorrect and Creates Uncertainty in Sovereign Contractual Relationships

As an initial matter, by failing to analyze, let alone defer to, the market understanding of boilerplate language in a commercial instrument, the district court's decision was contrary to New York law, which governs the interpretation of the loan documents at issue. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) ("[T]he creation of enduring uncertainties as to the meaning of boilerplate provisions would decrease the value of all debenture issues and greatly impair the efficient working of capital markets."); *In re Southeast Banking Corp.*, 93 N.Y.2d 178, 183-84 (1999) (noting importance of settled marking understanding in construing terms of indenture instruments). Moreover, because *pari passu* clauses substantially similar to those at issue here have been common in sovereign debt instruments since the 1970s, adoption of the district court's novel interpretation is likely to disrupt financial markets for a considerable period.

a. Longstanding Market Practice Supports a Narrow Reading of the *Pari Passu* Clause

The United States accepts the established market understanding of *pari passu* clauses in sovereign debt instruments. "The international financial markets have long understood the [*pari passu*] clause to protect a lender against the risk of legal subordination in favor of another creditor . . . ." Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 Emory L.J. 869, 870 (2004); *see also id.* at 872 n.3; Rodrigo Olivares-Caminal, *Understanding the Pari Passu Clause in Sovereign Debt Instruments: A Complex Quest*, 43 Int'l Law. 1217, 1227 (Fall 2009) [hereinafter, "*Understanding the Pari Passu Clause*"]; Philip R. Wood, *Pari Passu Clauses—What Do They Mean?*, 18 Butterworths J. of Int'l Banking and Financial L. 371, 372 (2003).

It is clear that the market does not understand the *de facto* actions or policies of a sovereign regarding payment of its debt obligations to affect the "rank" of debt within the meaning of the *pari passu* clause. To the contrary, market understanding has consistently reflected that a "borrower does not violate [the *pari passu*] clause by electing as a matter of practice to pay certain indebtedness in preference to the obligations outstanding under the agreement in which this clause appears." Lee C. Bucheit & Ralph Reisner, *The Effect of the Sovereign Debt Restructuring Process on Inter-Creditor Relationships*, 1988 U. Ill. L. Rev. 493, 497 (1988). The customary inclusion of *pari passu* provisions in sovereign debt instruments throughout the 1980s and 1990s was never viewed as a barrier to the resolution of sovereign defaults on foreign loans through the negotiation of consensual rescheduling and restructuring agreements. In fact, it was common practice throughout this period for sovereigns to exclude some debt from restructuring—such as debt owed to trade creditors or multilateral lending institutions—while restructuring other public debt. *See* Buchheit & Pam, *supra*, at 883.*

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* This was consistent with historical sovereign lending practice. In his treatise, former Yale law professor Edwin Borchard described how the principle of equal treatment of sovereign debt was understood in the early twentieth century, before the term "*pari passu*" had entered the sovereign debt lexicon:

> The principle of equality . . . does not signify uniformity of treatment. . . . While the private law of bankruptcy is governed by the principle of equality of claims in the distribution of the debtor's assets, differential treatment of the holders of foreign government bonds in case of default is the ordinary rule. The reason therein lies in the semipolitical nature of government loans and in the great variety of forms and purposes for which such loans are issued.

Edwin Borchard, 1 *State Insolvency and Foreign Bondholders* 337-38 (1951). Professor Borchard went on to note the variety of ways in which discrimination among classes of state obligations

b. The Ratable Payment Interpretation of the *Pari Passu* Clause Deviates From This Settled Market Understanding

Notwithstanding this settled commercial understanding, in September 2000, a Belgian court in an *ex parte* proceeding relied upon the *pari passu* clause to enjoin payments by Peru through Euroclear to the holders of bonds issued under a restructuring agreement. *See Elliot Assocs., L.P. v. Banco de la Nacion*, General Docket No. 2000/QR/92 (Court of Appeals of Brussels, 8th Chamber, Sept. 26, 2000). The Belgian Court of Appeals held, without citation to any authority, that "the various creditors benefit from a *pari passu* clause that in effect provides that the debt be repaid *pro rata* among all creditors." *Id.* at 3. The Peruvian government was ultimately forced to pay substantially all of the holdout creditor's debt to avoid defaulting on its Brady Bonds. *See Understanding the Pari Passu Clause*, *supra*, at 1225.

The Belgian court's construction of the *pari passu* clause deviated from well-established market practice and was viewed with almost universal consternation by international financial markets. *See, e.g.*, Mark Weidemaier, Robert Scott & G. Mitu Gulati, *Origin Myths, Contracts and the Hunt for*

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had been tolerated in the past. For example, creditors tolerated preferences in favor of certain other creditors in order for the state to maintain its basic functions (*e.g.,* salaries for public employees) and to conduct trade (*e.g.,* preferred payment of short-term trade credits over longer term external loan contracts). *Id.*

*Pari Passu*, UNC Legal Studies Research Paper No. 1633439, at 5 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633439 ("The decision sent shockwaves through the sovereign debt world . . . ."); Rodrigo Olivares-Caminal, *To Rank Pari Passu or Not to Rank Pari Passu: That is the Question in Sovereign Bonds After the Latest Episode of the Argentine Saga*, 15 Law and Business Review of the Americas 745, 746 (2009) [hereinafter "*To Rank Pari Passu*"]; Michael H. Bradley, James D. Cox & Mitu Gulati, *The Market Reaction to Legal Shocks and Their Antidotes: Lessons from the Sovereign Debt Market*, 39 J. Legal Studies 289, 303 (2010) ("[T]he [Belgian] court's decision came as a shock to the market and was clearly unanticipated.").

Most commentators concluded that the Belgian court had misconstrued the *pari passu* clause in a way that would cause problems in the sovereign debt markets. *See, e.g.*, Financial Markets Law Committee, *Pari Passu Clauses: Analysis of the Role, Use and Meaning of Pari Passu Clauses in Sovereign Debt Obligations as a Matter of English Law*, at 9-22 (2005) (A-1823–A-1849) (noting that the Belgian court's interpretation would be unworkable and contrary to market practice); *To Rank Pari Passu*, *supra*, at 746; Weidemaier, Scott & Gulati, *supra*, at 2; Buchheit & Pam, *supra*, at 917; G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law. 635, 640 (2001).

The Belgian government itself effectively overruled the *Elliot* decision in November 2004, by enacting legislation that precludes holdout creditors from obtaining orders blocking payments through Euroclear in future cases. *See* Belgium Law 4765 [C-2004/03482]; Bradley, Cox & Gulati, *supra*, at 9, 15 & n.33.*

The one court to examine the *pari passu* clause in depth since the *Elliot* decision was issued expressed skepticism regarding its conclusion. In *Kensington Int'l Ltd. v. Republic of the Congo*, 2002 No. 1088, [2003] EWHC 2331 (Comm) (Commercial Ct. Apr. 16, 2003), the court denied an application for an injunction requiring Congo to make *pro rata* payments to its creditors. The court ultimately based

* Although two other lower level courts have issued orders requiring a sovereign to make *pro rata* payments to holders of defaulted sovereign debt instruments, neither court engaged in any substantive consideration of the *pari passu* clause, and both orders were later vacated. A Belgian court enjoined Euroclear from making payments to holders of debt instruments issued by the Republic of Nicaragua, but this decision merely adhered to the precedent set by the *Elliot* decision. *Republic of Nicaragua v. LNC Investments and Euroclear Bank S.A.*, Docket No. 240/03 (Brussels Commercial Ct. Sept. 11, 2003). This decision was reversed on appeal on grounds unrelated to the interpretation of the *pari passu* clause. In another case, a district court in California denied a judgment creditor's motion for specific performance of the *pari passu* clause. Despite denying that motion, the court nonetheless enjoined the Democratic Republic of Congo from making payments on any debts unless proportionate payments were made to the plaintiff in that case. Order dated May 21, 2001, *Red Mountain Finance, Inc. v. Democratic Republic of Congo*, No. CV-00-0164 R (C.D. Cal.) (A-1369–A-1372). The district court's order contained no reasoning and so it is unclear on what basis the court entered the injunction. In any event, the injunction was vacated after the parties arrived at a settlement while the case was on appeal. (A-2216–A-2225).

its decision upon, *inter alia*, the excessive and intrusive nature of the injunction that was sought. *Id.* at ¶¶ 93-94. The court nonetheless observed that it gave "little weight" to the *Elliot* decision, which "was made upon an *ex parte* application," *id.* at ¶ 63, and which was contrary to language in the Encyclopaedia of Banking Law stating that the *pari passu* clause is not violated "merely because one creditor is, in fact, paid before another," *id.* at ¶ 67.

Like the *Elliot* decision, the district court's decision here failed to analyze market practices or commercial understanding of the *pari passu* clause, much less consider how its interpretation of the *pari passu* clause might affect the financial markets. Because the district court's interpretation of the *pari passu* clause disrupts settled expectations concerning the scope and effect of boilerplate language contained in many sovereign debt instruments, it is contrary to U.S. policy interests. *See* Gulati & Klee, *supra*, at 649-50.

2. The Ratable Payment Interpretation of the *Pari Passu* Clause Would Disrupt the Orderly Resolution of Sovereign Debt Crises

The district court's broad interpretation of the *pari passu* clause also imperils the United States' efforts to promote voluntary debt restructuring, along with macroeconomic reform and support as necessary from the IFIs, as the most effective way to resolve sovereign balance of payment crises while minimizing economic damage. Voluntary sovereign debt restructuring will become substantially more difficult, if not impossible, if holdout creditors are allowed to use novel interpretations of boilerplate bond provisions to interfere with the performance of a restructuring plan accepted by most creditors and to dramatically tilt the incentives away from consensual, negotiated restructuring in the first place.

Reinterpreting standard *pari passu* clauses after decades of settled market practice could change the balance of interests that, to date, has induced the majority of creditors and debtors to recognize a mutuality of interest in finding jointly negotiated solutions to balance of payment crises. The ratable payment interpretation of the *pari passu* clause presents a classic collective action problem: no creditor will be willing to accept the reductions in debt necessary for a consensual restructuring plan if creditors are contractually guaranteed to receive the full amount of their outstanding loan obligation at some point in the future, when the sovereign inevitably makes payment on other external indebtedness. Moreover, if, as happened in *Elliot*, creditors can interfere with payments by sovereign debtors to those creditors who have already accepted a reduction in the sovereign's debt obligation, this will reduce the incentives of such creditors to agree to a restructuring.

At the same time, the knowledge that creditors might be able to rely upon the *pari passu* clause to leverage greater recoveries from sovereign debtors would encourage more creditors to pursue holdout litigation strategies. *See Understanding the Pari Passu Clause*, *supra*, at 1219. The threat of increased litigation by holdout creditors relying upon the *pari* *passu* clause to target the implementation of a debt restructuring plan undermines the orderly consensual restructuring process the United States has been at pains to foster for the past several decades.

Indeed, a broad construction of the *pari passu* clause could ultimately involve the federal courts in rendering determinations concerning payments on Argentina's debts of all kinds and in many countries, including in Argentina itself. This may force the district court to assume the role of a sovereign bankruptcy court, issuing stays on all outflow of Argentina's assets and supervising the timing and amount of payments made by Argentina to its creditors.

Finally, the ratable payment interpretation could have the cascading effect of turning short-term and limited balance of payment problems into full-fledged sovereign defaults. It was partly for this reason that the Financial Markets Law Committee ("FMLC"), an independent committee of private sector English lawyers sponsored by the Bank of England, rejected the ratable payment construction of the *pari passu* clause as unworkable and contrary to market practice. FMLC, *supra*, at 13-15. The FMLC observed that, following the ratable payment theory to its natural conclusion could have dramatic consequences: Because the ratable payment construction of the *pari passu* clause prohibits the creation of preferences among creditors, as soon as a sovereign became unable to pay all of its external indebtedness, even temporarily, the sovereign's only options would be to default on all of its outstanding obligations or violate the *pari passu* clause by prioritizing payments. *Id.* at 14. The *pari passu* clause should not be read to have such drastic implications.

3. The Ratable Payment Interpretation of the *Pari Passu* Clause Could Prevent Sovereign Debtors From Servicing Debts to International Financial Institutions

The ratable payment interpretation of the *pari passu* clause adopted by the district court could also impede the repayment of loans extended by IFIs to sovereigns experiencing unserviceable debt burdens. Although the district court's holding that Argentina breached the *pari passu* clause by its terms is limited to Argentina's payments to holders of exchange bonds, the logical implication of its decision is that any selective payment of external indebtedness by a sovereign debtor, including to IFIs, constitutes a violation of the *pari passu* clause.

The United States relies upon the IFIs to play a critical role in resolving sovereign debt crises. The IFIs were established by the international community to advance shared public policy interests in promoting global economic growth and stability. For example, the IMF—with U.S. urging—played a central role in the international financial community's efforts to tackle the Latin debt crises of the 1980s, to promote the transition of Eastern European and former Soviet Union economies to market-based systems, and to address the Asian financial crisis in the second half of the 1990s.

Most recently, the IMF has worked with private bondholders and European leaders to restructure

Greece's sovereign debt, thereby preventing a disorderly Greek default. The IMF has provided critical support for economic reform programs in Greece, Ireland, and Portugal in partnership with Europe, actions that have helped limit the damage from the European financial crisis to the United States and to economies around the world.

The IFIs—with the encouragement of the United States and other members—provide financial support to reforming countries at times when private capital is unavailable. Continued financial support for nations facing balance of payment difficulties and undertaking needed reforms is vital to maintaining the stability of the international financial system. *See, e.g.*, International Monetary Fund, Policy on Lending into Arrears to Private Creditors, available at http://www.imf.org/external/pubs/ft/privcred/(1999).

The IFIs would be hampered in their ability to serve this function were they no longer able to expect timely and complete payments from their borrowers. *See* John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter*, 33 Va. J. of Int'l Law 591, 603-04 (1993). Therefore, as a matter of established custom, sovereign debtors routinely service debts owed to IFIs—even though those debtors may lack the resources to pay their other obligations. This custom is well understood by the international financial community. *See, e.g.*, Matthew H. Hurlock, *New Approaches to Economic Development: The World Bank, the EBRD, and the Negative Pledge Clause*, 35 Harv. Int'l L. J. 345, 365-

66 (1994); Testimony of Deputy Assistant Secretary Mark Sobel Before the House Oversight Committee on TARP, Financial Services, and Bailouts of Public and Private Programs (Dec. 16, 2011), available at http://www.hft review.com/pg/newsfeeds/hftreview/item/30378/writte n-testimony-of-deputy-assistant-secretary-marksobel -before-the-house-oversight-and-governmentreform-subcommittee-on-tarp-financial-services-andbailouts-of-public-and-private-programs-what-the-eurocrisis-means-for-taxpayers-and-the-us-economy ("The Fund is regarded as the world's preferred creditor, meaning that the IMF's member countries acknowledge and agree that it gets repaid first."); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, div. I, Pub. L. No. 112-74, § 7071(b), 125 Stat. 786.1254 (2011) (directing the Secretary of the Treasury to "instruct the United States Executive Director of the [IMF] to seek to ensure that any loan will be repaid to the IMF before other private creditors"). Any interpretation of the *pari passu* clause that would potentially prevent states from continuing to service their IFI debt during, or as they emerge from, financial crisis is contrary to U.S. interests.

## POINT II

## THE DISTRICT COURT'S ORDERS ARE IMPERMISSIBLY BROAD

The district court exceeded the permissible scope of its jurisdiction when it directed a sovereign state to marshal assets that are immune from the court's exercise of its execution powers under the Foreign Sovereign Immunities Act of 1976 ("FSIA") restrained the sovereign's use of such immune property, and commanded the sovereign to refrain from altering its processes for servicing its debt obligations to third parties not before the court. In the context of the FSIA, such an injunction constitutes a "breathtaking assertion of extraterritorial jurisdiction," *Autotech Technologies LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007), and, as discussed in further detail below, is inconsistent with directly relevant Second Circuit precedent. Furthermore, the extraordinary intrusiveness of the Orders could have adverse effects on our foreign relations and pose reciprocal concerns with respect to U.S. government assets.

A. The Orders Contravene the Purpose and Structure of the FSIA

The injunctive relief ordered by the district court must be considered against the backdrop of the statutory scheme established in the FSIA. The FSIA sets out the "sole, comprehensive scheme" for obtaining and enforcing a judgment against a foreign state in a civil case in the U.S. courts. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989); Foreign Sovereign Immunities Act of 1976, House Report No. 94-1487, 5 U.S.C.A.A.N. 6604, 6610 (Sept. 9, 1976) [hereinafter H.R. 94-1487] (the FSIA "prescribes . . . [the] circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment"). Under the FSIA, a foreign state is immune from jurisdiction except as immunity is removed by statute, 28 U.S.C. § 1604, and foreign state-owned property is "immune from attachment arrest and execution except as provided in" 28 U.S.C. §§ 1610 and 1611, 28 U.S.C. § 1609. Accordingly, the FSIA does not provide for plenary enforcement of the orders of U.S. courts, but instead cabins courts' enforcement authority to those mechanisms set forth in the statute. *Id.* §§ 1609-1611.

The FSIA's presumption of enforcement immunity contains exceptions for foreign state property located "in the United States" that is "used for a commercial activity in the United States" and that meets one of seven other requirements, 28 U.S.C. § 1610(a). Sovereign property located outside of the United States plainly falls outside the court's enforcement authority. *See, e.g.*, *Walters v. Industrial and Comm. Bank of China, Ltd.*, 651 F.3d 280, 288-89 (2d Cir. 2011) (noting that "special protection [is] afforded to the property of a foreign sovereign" under the FSIA because the judicial seizure of sovereign property is viewed as a greater affront to sovereignty than the exercise of jurisdiction over a state by itself); *Walters v. People's Republic of China*, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009) (citing cases). "The FSIA did not purport to authorize execution against a foreign state's property . . . wherever that property is located around the world." *Autotech*, 499 F.3d at 750.

The FSIA's carefully circumscribed limits on the judiciary's exercise of jurisdiction over sovereigns and foreign state property reflect a deliberate policy choice on the part of Congress. As Congress recognized at the time it enacted the FSIA, "enforcement [of] judgments against foreign state property remains a somewhat controversial subject in international law." H.R. 94-1487, 5 U.S.C.A.A.N. at 6626. The judicial seizure of the property of a foreign state may well "be regarded as 'an affront to its dignity and may . . . affect our relations with it.' " *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008). Accordingly, the provisions of the FSIA allowing execution against foreign state property impose limits on the extraterritorial exercise of jurisdiction by U.S. courts. *See, e.g.*, *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1088-89 (9th Cir. 2007).

According to Argentina, "the Republic makes its payments on the restructured debt *outside the United States* when it transfers the necessary funds to a trustee." Arg. Br. at 50. If plaintiffs were to reduce their claims to money judgment, they would be prevented from seeking to attach the funds utilized to pay the exchange bonds under the FSIA's strictures on enforcement of judgments, as the funds at issue are located outside the United States. Presumably in an effort to avoid these restrictions, plaintiffs-appellees chose instead to move for equitable relief that purports to constrain Argentina's use of such property.

A court may issue an injunction against a sovereign only if it is "clearly appropriate." H.R. 94-1487, 5 U.S.C.A.A.N. at 6621. An injunction restraining a sovereign's use of property that the FSIA expressly provides is immune from execution is inconsistent with the structure of the FSIA and thus not "clearly appropriate."

Although the injunctions at issue here do not formally effectuate a transfer of property interests, the February 23 Orders have the practical effect of requiring Argentina to transfer funds amounting to the balance of principal and interest owed to plaintiffs-appellees on the next occasion that it makes a payment on the exchange bonds. Courts are not permitted to achieve by injunction what they are prohibited from doing in the exercise of their limited execution authority under the FSIA. *See S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983).

In *S&S Machinery Co.*, this Court considered the propriety of an injunction that restrained the use of assets that were immune from attachment under the FSIA. The Court squarely rejected the notion that a district court's jurisdiction over a foreign state permitted it to restrain the use of sovereign property that was not itself subject to the court's jurisdiction:

> [S]uch [an injunction] could only have resulted in the disingenuous flouting of the FSIA ban on prejudgment attachment of assets belonging to a 'foreign state'. . . . The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property. We hold that courts in this context may not grant, by injunction, relief which they may not provide by attachment.

*Id.* at 418; *see also Weston Compagnie de Finance et D'Investissement, S.A. v. Republic del Ecuador*, 823

F. Supp. 1106, 1115-16 (S.D.N.Y. 1993) (denying injunction that directed sovereign to return funds that had passed through New York but were now located abroad).

Courts have repeatedly resisted creditors' attempts to evade the restrictions on enforcement set forth in the FSIA, even if creditors frame the collection method as an exercise of jurisdiction over the sovereign, rather than the sovereign's property. For example, in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010), the Ninth Circuit rejected a creditor's argument that the court's exercise of *in personam* jurisdiction over a sovereign provided it with authority to enter an order requiring the sovereign to assign foreign state assets located outside the United States, and hence immune from execution under the FSIA, to the creditor. *Id.* at 1130-32 ("The FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property."); *see also Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian*, 218 Cal. App. 3d 1058, 1094, 1099-100 (Cal. Ct. App. 1990) (rejecting argument that assignment order applying to assets worldwide would be "a valid exercise of the court's personal jurisdiction" over state instrumentality, because such an order would "ignore a longstanding immunity under international law and under the FSIA," and give the creditor what he could not achieve "through ordinary creditors' remedies, namely, execution upon foreign property"); *cf. Walters*, 651 F.3d at 288-89 ("[T]he FSIA's provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently.").

To the extent that plaintiffs-appellees rely upon section 1606 as the basis for the district court's authority to enter the injunctions, this argument is unavailing. Section 1606 establishes that, with respect to a claim for which a state is not entitled to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Yet section 1606 concerns "the scope of *liability*, [not] the scope of *execution*. Although [a state] may be found liable in the same manner as any other private defendant, the options for executing a judgment remain limited." *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011) (rejecting argument that section 1606 provides authority to subject sovereign to broad discovery orders in aid of execution of judgment). Accordingly, section 1606 does not expand upon the enforcement remedies that are available against a sovereign defendant. *See Mangattu v. M/V Ibn Hayyan*, 35 F.3d 205, 209 (5th Cir. 1994). Nor is it even clear that a U.S. court would have the authority to issue such a broad injunction—which also purports to bind nonparties in Argentina—against a private party.

In sum, parties cannot avoid the limitations deliberately imposed by Congress on judicial execution authority and expand the scope of remedies available to them in an action against a sovereign simply by refraining from asking the court to reduce their claims to judgment. There is no indication in the statutory text or history that Congress intended for litigants to be able to sidestep sections 1609-1611 by seeking an injunction that restrains the sovereign's use of immune assets until a judgment is satisfied, rather than an order of execution against those same assets.

B. The Orders Are Harmful to the United States' Foreign Relations

In addition to being contrary to the purpose and structure of the FSIA, the February 23 Orders could cause heightened tensions in our foreign relations. The United States' views regarding the foreign policy implications of particular exercises of a court's jurisdiction under the FSIA are accorded deference by the courts. *See, e.g.*, *Af-Cap*, 462 F.3d at 428 n.8; *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 69-74 (2d Cir. 2005).

As an initial matter, the same foreign relations concerns that animate the FSIA's restrictions on execution of judgments with respect to sovereign property located abroad exist whether the order is denominated an order of attachment or an injunction restricting the use of sovereign funds. Although there is a widespread acceptance in modern international law that foreign states' immunity from adjudication may be restricted, "immunity from enforcement jurisdiction remains largely absolute," and "a foreign State continues largely immune from forcible measures of execution against its person or property." H. Fox, "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States," in M. Evans, ed., *International Law*, 364, 366, 371 (2003).

Moreover, the laws of many foreign nations do not even permit a court to enter an injunction against a foreign state, and the foreign state may expect the United States to extend to it the same respect and courtesy. It is important to recognize in this regard the strongly held view of many foreign states that they are not subject to coercive orders of U.S. courts. *See* Fox, *supra*, at 371 ("Nor may an injunction or order for specific performance be directed by a national court against a foreign State on pain of penalty if not obeyed."). The potential for affront is particularly heightened where, as here, the U.S. court purports to control the foreign state's conduct within its own borders. The breadth of the injunctions at issue here, which not only purport to exercise jurisdiction over foreign state property, but also have the effect of dictating to a sovereign state the implementation of its sovereign debt policy within its own territory, is particularly likely to raise foreign relations tensions.

The February 23 Orders are also problematic in their application to third parties. An order by a U.S. court directing third parties' actions with respect to foreign property could lead to friction in our foreign relations by imposing obligations on foreign persons or entities with possession of foreign state assets. Such third parties might have inconsistent obligations with regard to those assets as a matter of domestic law or by contract.

Finally, an order by a U.S. court authorizing execution against foreign state property could have adverse consequences for the treatment of the United States and its property abroad under principles of reciprocity. As the D.C. Circuit recognized in *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), because "some foreign states base their sovereign immunity decisions on reciprocity," a U.S. court's decision to exercise jurisdiction over a foreign state can "subject the United States to suits abroad" in like circumstances. The district court's Orders restraining the use of foreign state property and purporting to direct the conduct of a sovereign state could encourage foreign courts to issue like orders against the United States and its property abroad.

## CONCLUSION

For the foregoing reasons, the Orders should be reversed.

Dated: New York, New York
April 4, 2012

Respectfully submitted,

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GEORGE W. MADISON,
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*Legal Adviser, Department of State*

*Appendix G*

**Excerpts from**
**Fiscal Agency Agreement between the Republic of Argentina and Bankers Trust Company, Fiscal Agent**

Dated as of October 19, 1994
[Filed in the 2d Cir. Mar. 21, 2012]

* * *

THE REPUBLIC OF ARGENTINA

FISCAL AGENCY AGREEMENT dates as of October 19, 1994, between The Republic of Argentina (the "Rebublic") and Bankers Trust Company, a New York banking corporation, as fiscal agent.

* * *

(c) The Securities will constitute (except as provided in Section 11 below) direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank <u>pari passu</u> and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement).

* * *

For purposes of this Agreement:

"External Indebtedness" means obligations (other than the Securities) for borrowed money or evidenced by securities, debentures, notes or other similar instruments denominated or payable, or which at the option of the holder thereof may be payable, in a currency other than the lawful currency of the Republic provided that no Domestic Foreign Currency Indebtedness, as defined below, shall constitute External Indebtedness.

* * *

12. *Default: Acceleration of Maturity*. If any of the following events ("Events of Default") with respect to the Securities of any series occurs and is continuing:

(a) Non-Payment: the Republic fails to pay any principal of any of the Securities of such Series when due and payable or fails to pay any interest on any of the Securities of such Series when due and payable and such failure continues for a period of 30 days; or * * *

(d) Moratorium: a moratorium on the payment of principal of, or interest on, the Public External Indebtedness of the Republic shall be declared by the Republic or; * * *

than the holders of not less than 25 percent in aggregate principal amount of the Securities of such Series by notice in writing to the Republic at the specified office of the Fiscal Agent shall declare the principal amount of all the Securities of such Series to be due and payable immediately, and, in the case of (a) and (d) above, each holder of Securities of such Series may be such notice in writing declare the principal amount of Securities of such Series held by it to be due and payable immediately, and upon any such declaration the same shall become and shall be immediately due and payable upon the date that such written notice is received by the Republic unless prior to such date all Events of Default in respect of all the Securities of such Series shall have been cured; provided that in the case of (b), (d) and (e) above, such event is materially prejudicial to the interests of the holders of the Securities of such Series, and provided further, that if, at any time after the principal of the Securities of such Series shall have been so declared due and payable, and before any sale of property under any judgment or decree for the payment of the monies due shall have been obtained or entered as hereinafter provided, the Republic shall pay or shall deposit with the Fiscal Agent a sum sufficient to pay all matured amounts of interest and principal upon all the Securities which shall have become due and otherwise than solely by declaration (with interest on overdue amounts of interest, to the extent permitted by law, and on such principal of each of the Securities at the rate of interest applicable thereto, to the date of such payment or deposit; and the expenses of the Fiscal Agent, and reasonable compensation to the Fiscal Agent, its agents, legal advisers, and any and all defaults under the Securities of such Series, other than the non-payment of principal on the Securities of such Series which shall have become due solely by declaration, shall have been remedied, then, and in every such case, the holders of 75 percent in aggregate principal amount of the Securities of such Series then outstanding, after a meeting of holders of Securities held in accordance with the procedures described in Section 16 below, by written notice to the Republic at the specified office of the Fiscal Agent, may on behalf of the holders of all of the Securities of such Series waive all defaults and rescind and annul such declaration and its consequences: but no such waiver or rescission and annulment shall extend to or shall affect any subsequent default, or shall impair any right consequent thereon.

* * *

22. *Consent to Service: Jurisdiction.* The Republic hereby appoints Banco de la Nación Argentina, at its office located at 299 Park Avenue, New York, New York 10171, and, if such person is not maintained by the Republic of its agent for such purpose, the Republic will appoint CT Corporation System to act as its agent for such purpose) as its authorized agent (the "Authorized Agent") upon whom process may be served in any action arising out of or based on the Securities or this Agreement by the holder of any Security which may be instituted in any state or federal court in The City of New York, and expressly accepts the jurisdiction of any such court in respect of such action. Such appointment shall be irrevocable until all amounts in respect of the principal of and any interest due and to become due on or in respect of all the Securities have been provided to the Fiscal Agent pursuant to the terms hereof, except that, if for any reason, such Authorized Agent ceases to be able to act as Authorized Agent or to have an address in the Borough of Manhattan, The City of New York, the Republic will appoint another person in the Borough of Manhattan, The City of New York, selected in its discretion, as such Authorized Agent. Prior to the date of issuance of any Securities hereunder, the Republic shall obtain the consent of Banco de la Nación Argentina to its

appointment as such Authorized Agent, a copy of which acceptance it shall provide to the Fiscal Agent. The Republic shall take any and all action, including the filing of any and all documents and instruments, that may be necessary to continue such appointment or appointments in full force and effect as aforesaid. Upon receipt of such service of process, the Authorized Agent shall advise the Subministry of Finance promptly by telecopier at 011-54-1-349-6080. Service of process upon the Authorized Agent at the address indicated above, as such address may be changed within the Borough of Manhattan, The City of New York by notice given by the Authorized Agent to each party hereto, shall be deemed, in every respect, effective service of process upon the Republic. The Republic hereby irrevocably and unconditionally waives, to the fullest extent permitted by law, any objection which it may now or hereafter have to the laying of venue of the aforesaid action arising out of or in connection with this Agreement brought in any such court has been brought in an inconvenient forum. Neither such appointment nor such acceptance of jurisdiction shall be interpreted to include actions brought under the United States federal securities laws. This appointment and acceptance of jurisdiction is intended to be effective upon execution of this agreement without any further act by the Republic before any such court and introduction of a true copy of this Agreement into evidence shall be conclusive and final evidence of such waiver.

Notwithstanding the foregoing, any action arising out of or based on the Securities may be instituted by the holder of any Security in any competent court in the Republic of Argentina.

The Republic hereby irrevocably waives and agrees not to plead any immunity from the jurisdiction of any such court to which it might otherwise be entitled in any action arising out of or based on the Securities or this Agreement by the holder of any Security.

23. *Governing Law and Counterparts*. This Agreement shall be governed by, and interpreted in accordance with, the laws of the State of New York. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

* * *

IN WITNESS WHEREOF, the parties hereto have executed this Fiscal Agency Agreement as of the date first above written.

THE REPUBLIC OF ARGENTINA

By: /s/ Noemi LaGreca
Name: Noemi LaGreca
Title: Financial Representative of Argentina in the United States

BANKERS TRUST COMPANY

By: /s/ Wanda Camacho
Name: Wanda Camacho
Title: Assistant Secretary

**GOVERNMENT DEBT**
**Law No. 26,886**

[Certified Translation;
Filed in the 2d Cir. Oct. 25, 2013]

Restructuring process of government-issued debt.
Enacted: September 11, 2013
Promulgated: September 20, 2013

The Senate and Chamber of Representatives of Argentina, Meeting in Congress, etc. sign into

Law:

ARTICLE 1 - The Federal Executive Branch is authorized, through the Ministry of Economy and Public Finance, to carry out all acts necessary for the conclusion of the restructuring process of government-issued debt eligible for the swap provided by Decree No. 1,735 dated December 9, 2004, and supplementary regulations, that were not submitted to the same nor to the swap provided by Decree No. 563 dated April26, 2010, as provided by Article 65 of the Law of Financial Administration and Oversight Systems of the Federal Government No. 24,156 and modifications thereof, for the purpose of adjusting debt service to the payment possibilities of the National state in the medium and long term.

ARTICLE 2 - The financial terms and conditions to be offered are prohibited from being more favorable than those offered to creditors in the debt restructuring provided by Decree No. 563/10.

ARTICLE 3 - Government-issued debt issued as a consequence of the provisions of this law, the provisions of Articles 7 and 10 of Law No. 23,928 and modifications thereof, as applicable, shall be exempted.

ARTICLE 4 - Holders of government-issued debt that are eligible for the swap provided under Decree No. 1,735/04 and supplementary regulations who wish to participate in any restructuring operation carried out within the framework of the provisions of this law, shall waive all rights under the referenced government-issued debt, including rights recognized by any court or administrative ruling, arbitral award or decision of any authority, and release the Argentine Republic from any court, administrative or arbitral action or any other type of action that has been filed or may be filed in the future in relation to the referenced government-issued debt or the obligations of the Argentine Republic that may arise therefrom, including any action for the purpose of receiving services related to capital or interest from the referenced government-issued debt.

It is forbidden to offer to holders of government-issued debt who have filed court, administrative or arbitral actions or actions of any other type treatment more favorable than that given to those who have not done so.

ARTICLE 5 - The Ministry of Economy and Public Finance will inform the Federal Congress of the results of the provisions of this law on a quarterly basis.

ARTICLE 6 - Government-issued debt eligible pursuant to the provisions of Decree No. 1,735/04 deposited for any reason due to an order from courts of any instance, authority or jurisdiction, whose holders did not observe the provisions of the swap provided by the aforementioned decree or the provisions of Decree No. 563/10, or who did not expressly state in the respective legal proceedings their wish not to abide by the same, shall be automatically replaced by "2038 Par Value Step-Up Bonds of the Argentine Republic," under the conditions established for assignment, liquidation, and issuance of such bonds by Decree No. 1, 73 5/04 and supplementary regulations.

The Ministry of Economy and Public Finance is authorized to issue any supplementary rules necessary to implement the replacement provided in this article.

ARTICLE 7 - Articles 2, 3, and 4 of Law No. 26,017 are suspended until the Federal Congress declares the termination of the restructuring process for the government-issued debt under the referenced law.

ARTICLE 8 - This law will enter into effect on the day of its publication in the Official Bulletin.

ARTICLE 9 - Be it notified to the Federal Executive Branch.

ISSUED IN THE HALL OF SESSIONS OF THE ARGENTINE CONGRESS, IN BUENOS AIRES, ON THE ELEVENTH DAY OF THE MONTH OF SEPTEMBER IN THE YEAR TWO THOUSAND THIRTEEN.

-REGISTERED UNDER NUMBER 26,886-

AMADO BOUDOU. - JULIAN A. DOMINGUEZ. -
Gervasio Bazzano. - Juan H. Estrada.

Geotext Translations, Inc.

STATE OF NEW YORK )
) ss
)
COUNTY OF NEW YORK )

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English of the attached Law No. 26,886, enacted on September 11, 2013.

s/
Ken Hetzel, Project Manager
Geotext Translations, Inc.

Sworn to and subscribed before me this 24th day of October, 2013.

s/Lynda Green

Lynda Green
Notary Public-State of New York
No. 01GR6205401
Qualified in New York County
My Commission Expires May 11, 2017

* * *

*Appendix H*

**28 U.S.C. § 1602**
**Findings and declaration of purpose**

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

**28 U.S.C. § 1603**
**Definitions**

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of

whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

**28 U.S.C. § 1604**
**Immunity of a foreign state from jurisdiction**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

**28 U.S.C. § 1605(a)**
**General exceptions to the jurisdictional immunity of a foreign state**

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if

(A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

*   *   *

**28 U.S.C. § 1606**
**Extent of liability**

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

## 28 U.S.C. § 1609
## Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

## 28 U.S.C. § 1610
## Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which

has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver

the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in Certain Actions.—

(1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a

separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United states sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.—Nothing in this subsection shall be construed to

supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

**28 U.S.C. § 1611**
**Certain types of property immune from execution**

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.