

***NML Capital, Ltd. v. Republic of Argentina: An
Alternative to the Inadequate Remedies under the
Foreign Sovereign Immunities Act***

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I. Introduction

In 2001, the Republic of Argentina defaulted on its bond obligations by failing to make payments to its bondholders.¹ The default prompted more than a decade of conflict between

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¹ See *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012).

Argentina and a small group of creditors, which has yet to be resolved.² The creditors, largely consisting of hedge funds that refused to accept restructured bonds,³ have pursued Argentina in arbitration,⁴ in U.S. courts,⁵ and to the far-off shores of Ghana.⁶ Argentine officials have emphasized that it will continue to pay what it views as legitimate obligations, but “will not pay one dollar toward the vulture funds.”⁷ Paul Singer, founder of Elliot Associates L.P. (Elliot), the hedge fund leading the holdouts, also took an acrimonious tone in a letter to investors, writing: “[T]he inexhaustible disregard for the rule of law by the political class has

² See Drew Benson, *Bond Vigilantes' Ghana Ambush Proves Default Hex Unbroken*, BLOOMBERG (Oct. 4, 2012, 5:07 PM), <http://www.bloomberg.com/news/2012-10-04/bond-vigilantes-ghana-trap-shows-default-hex-argentina-credit.html>.

³ See Robin Wigglesworth & Jude Webber, *Ruling Raises Fear of Argentina Default*, FINANCIAL TIMES (Nov. 22, 2012, 5:42PM), <http://www.ft.com/intl/cms/s/0/6298aad8-3478-11e2-8986-00144feabdc0.html#axzz2LCOdIt00> (noting that the named plaintiff in much of the litigation, NML Capital Ltd., is a subsidiary of the aggressive hedge fund, Elliot Management, which has made a business out of suing countries on defaulted debt obligations).

⁴ See generally *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) (decision pending) (holding that the International Centre for Settlement of Investment Disputes has jurisdiction to rule on sovereign debt disputes regarding Argentina's restructuring negotiations despite the forum selection clause contained in the bonds issued by Argentina).

⁵ Jonathan Stempel & Hilary Burke, *U.S. Court Ends Claims on Argentina Funds at N.Y. Fed.*, SECURITIES LAWS, THOMSON REUTERS (Mar. 28, 2012), http://newsandinsight.thomsonreuters.com/Securities/News/2012/03_-_March/U_S_court_ends_claims_on_Argentina_funds_at_N_Y_Fed/ (explaining that various hedge funds have pursued Argentina in connection with its 2001 default for over a decade, including twelve separate cases in Southern District of New York).

⁶ See Benson, *supra* note 2 (documenting Elliot Management's action in Ghana, resulting in an injunction against the ARA Libertad, an Argentine naval frigate, and requiring that it stay in Ghana to satisfy Argentina's obligations to its creditors).

⁷ *Argentina to Blast 'Vulture Funds' at the G20 Ministerial Meeting in Mexico*, MERCOPRESS: SOUTH ATLANTIC NEWS AGENCY (Nov. 4, 2012), <http://en.mercopress.com/2012/11/04/argentina-to-blast-vulture-funds-at-the-g20-ministerial-meeting-in-mexico> (internal quotations omitted) (quoting Argentine Economy Minister Hernán Lorenzino). The term “vulture funds” refers to hedge funds that buy distressed sovereign debt at nominal prices with a view towards seeking judicial remedies that will allow the fund to collect the face value of the bond, resulting in a massive profit for the hedge fund. Minister Lorenzino has also referred to the rulings of the U.S. courts as “legal colonialism,” and Argentina has suggested it will not honor such decisions. See *Argentina Vows to Keep Fighting U.S. Court Ruling on Debt*, REUTERS (Nov. 22, 2013, 3:13 PM), <http://www.reuters.com/article/2012/11/22/usa-bonds-argentina-reaction-idUSE6E8EM01E20121122>.

cost [Argentina] . . . and it will continue to stand in the way of an Argentine economic recovery.”⁸ At its most remarkable, the dispute resulted in Elliot winning a judgment in Ghana.⁹ In satisfaction of the judgment, Elliot levied on the ARA Libertad, an Argentine triple-mast frigate, preventing the ship and crew from leaving a Ghanaian port.¹⁰ Although not as headline grabbing, a more significant victory for the holdouts came when the United States District Court for the Southern District of New York granted an Injunction prohibiting Argentina from paying holders of its restructured bonds unless it also, and at the same time, paid the accelerated principal and interest owed to the holdout bondholders.¹¹ The United States Court of Appeals for the Second Circuit upheld the Injunction while rejecting an argument put forth by Argentina, and the United States as amici curiae, that the Injunction violated the Foreign Sovereign Immunities Act’s (FSIA) prohibition on attachment and execution on sovereign property located outside the United States.¹² The decision has implications for the future of sovereign debt restructuring, which is an essential tool for sovereigns who have defaulted and seek to reenter the credit market.¹³

This Note will be divided into three sections: First, there will be a summary of Argentina’s default, the negotiation for issuance

⁸ Linette Lopez, *Hedge Funder Paul Singer Went Ballistic on Argentina in his Q4 Investor Letter*, BUSINESS INSIDER (Jan. 30, 2013, 1:13 PM), <http://www.businessinsider.com/elliott-management-q4-investor-letter-2013-1>.

⁹ See Benson, *supra* note 2.

¹⁰ See *id.* However, an international maritime tribunal subsequently overruled the Ghanaian court, allowing the FAA Libertad to return to Argentina. See Liz Ford, *Maritime Tribunal Orders Ghana to Set Argentina’s Libertad Frigate Free*, THE GUARDIAN (Dec. 17, 2012), <http://www.guardian.co.uk/global-development/2012/dec/17/maritime-tribunal-ghana-argentina-libertad>.

¹¹ See generally Order, *NML Capital, Ltd. v. Republic of Argentina*, 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012) (Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG)) [hereinafter Order Clarifying Scope of Injunction] (holding that Argentina has breached its obligations to the holders of the original bonds under an Equal Treatment Clause, which prevents the debtor from subordinating or otherwise treating unequally similarly positioned creditors, by continuing to pay the exchange bondholders without also paying the holdouts).

¹² See *NML Capital, Ltd.*, 699 F.3d at 262.

¹³ See Felix Salmon, *Argentina’s Stunning Pari Passu Loss*, REUTERS (Oct. 27, 2012), <http://blogs.reuters.com/felix-salmon/2012/10/27/argentinas-stunning-pari-passu-loss/>.

of Exchange Bonds to the vast majority of the default bondholders, and a brief history of the decade long dispute between Argentina and the small group of holdouts; second, a general discussion of the FSIA, the arguments presented to the Second Circuit in favor of vacating the Injunction against Argentina as a violation of the FSIA, and an analysis of the Second Circuit's rejection of Argentina's arguments; finally, a discussion of issues raised by the Second Circuit's interpretation, implications of the case for the future of sovereign debt litigation, and a proposal for facilitating restructuring where litigation has reached an impasse.

II. Argentina's Default, Debt Swap, and Holdout Litigation

a. Renegotiation of Argentina's Obligations and Subsequent Conflict with Holdouts

Argentina first began issuing the debt securities at the center of the suit between NML Capital (NML), a subsidiary of Elliot, and Argentina in 1994.¹⁴ Argentina defaulted on its obligations to bondholders in 2001.¹⁵ The default, and the subsequent economic emergency that engulfed the Republic, prompted the Argentine President to declare a "temporary moratorium" on all payments due under the bonds.¹⁶ The moratorium has been renewed every year since.¹⁷ No payments have been made to holders of the original bonds.¹⁸ In 2005 and 2010, Argentina entered negotiations with the original bondholders in an attempt to restructure its obligations by issuing new bonds, with the ultimate goal of righting its fiscal ship and freeing itself from the burden of the default.¹⁹

The 2005 offer gave all bondholders the opportunity to exchange their defaulted bonds for new debt securities (exchange bonds).²⁰ The restructured debt was worth approximately twenty-

¹⁴ See *NML Capital, Ltd.*, 699 F.3d at 251.

¹⁵ See *id.*

¹⁶ See *id.* (internal quotations omitted).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.* at 252; see also Salmon, *supra* note 13.

²⁰ See *NML Capital, Ltd.*, 699 F.3d at 252.

five to twenty-nine cents on every dollar owed under the original bonds.²¹ In exchange, the bondholders agreed to vacate their rights under the original bonds and adopt the terms of the exchange bonds.²² Seventy-six percent of the outstanding securities were tendered for the new bonds in the initial exchange.²³ In 2010, bondholders again were offered an exchange, on similar terms as the previous exchange, raising participation to ninety-one percent of the foreign debt.²⁴ To induce maximum participation in the exchange, Argentina threatened that the bonds “not tendered may remain in default indefinitely.”²⁵ Argentina made good on its promise to avoid payment on the defaulted bonds by passing the Lock Law in 2005.²⁶ The Lock Law made it illegal for the Argentine government to enter settlement negotiations or make any payments to anyone who chose not to participate in the exchanges.²⁷ The bondholders were faced with the choice between taking the exchange bonds, ensuring partial return on principal, or retaining the original bonds, which Argentina made clear it had no intention of honoring.²⁸ Initially, the exchange paid off for the bondholders who accepted; “Argentina has made all payments due on the debt it restructured in 2005 and 2010,” while refusing to pay anything to the holdout creditors.²⁹

Bondholders, who opted out of the restructuring, at least those willing to stomach protracted litigation, did retain a consolation prize of sorts. The holdouts were free to pursue full performance of the Republic’s obligations under the original bonds.³⁰ The majority of the holdouts, specifically the hedge funds specializing

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ *See id.* at 253.

²⁵ *See id.* at 252 (internal quotations omitted) (quoting the 2005 prospectus).

²⁶ *See NML Capital, Ltd.*, 699 F.3d at 252; *see also* Law No. 26017, Feb. 9, 2005, 30590 B.O. 1, art. 2-4 (Arg.) [hereinafter Lock Law].

²⁷ *See NML Capital, Ltd.*, 699 F.3d at 252 (noting that Argentina temporarily revoked the Lock Law in order to allow the 2010 restructuring offer); *see also* Lock Law, *supra* note 26, art. 2-4.

²⁸ *See NML Capital, Ltd.*, 699 F.3d at 252-53.

²⁹ *See id.* at 253.

³⁰ *See id.* at 252-54.

in distress-asset investing, purchased the bonds on secondary markets contemporaneous with or subsequent to the default.³¹ As a result of Argentina's impending financial distress, investors were able to purchase the bonds at well below face value.³² Investors, such as Elliot, who engage in the practice of buying sovereign debt on the cheap once the issuer is in or approaching default, and then suing to enforce the obligations at full value, are known as "distressed asset investors," but are often referred to despairingly as "vulture funds."³³ Since NML's purchase of the defaulted bonds, it pursued various avenues to gain complete performance of Argentina's obligations under those securities.³⁴ Although Elliot and NML have won various judgments against Argentina on breach of contract and other equitable claims, the Republic refuses to honor those judgments and "the FSIA has largely prevented [the holdouts] from attaching the Republic's foreign assets to satisfy those judgments."³⁵

b. The District Court's Injunction

While the FSIA renders traditional means of satisfying a judgment for monetary damages against a sovereign useless, NML seized on the court's frustration with Argentina in winning an unusually broad, but nonetheless creative, equitable remedy. The Southern District of New York ordered Argentina to specifically perform its obligations under the original bonds.³⁶ The obligations

³¹ See *id.* (noting that some distressed asset investors, also known as vulture funds, purchased the bonds as recently as 2010).

³² See *id.* at 251.

³³ See *id.*

³⁴ See *NML Capital, Ltd.*, 699 F.3d at 252.

³⁵ *Id.* at 253-54 n.5; see, e.g., *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 197 (2d Cir. 2011) (vacating plaintiffs' attachment of Argentine Central Bank reserves); *Aurelius Capital Partner, LP v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009) (rejecting plaintiffs' attempt to intercept assets that would be acquired by the Argentine social security system); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 472 (2d Cir. 2007) (affirming that plaintiffs may not attach Argentine Central Bank reserves to satisfy obligations owed to it). *But see* *NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254, 260 (2d Cir. 2012) (affirming attachment of Argentine assets); *EM Ltd. v. Republic of Argentina*, 389 Fed.Appx. 38, 43 (2d Cir. 2010) (affirming attachment of Argentine assets held in trust in the United States).

³⁶ See generally *Order Clarifying Scope of Injunction*, *supra* note 11, at 2-6 (fashioning an equitable remedy that would prevent Argentina from paying the

owed to holdouts under the original bonds are worth approximately \$1.33 billion.³⁷ Judge Griesa granted NML partial summary judgment in December 2011 on its claims under the bonds' "Equal Treatment Provision."³⁸ In February 2012, the district court granted NML equitable relief in the form of an Injunction providing "whenever the Republic pays any amount due under the terms of the [exchange] bonds," it must pay the holdouts the amount they are owed under the original bonds.³⁹

NML's argument focused on the Equal Treatment Provision in the original bond contracts.⁴⁰ The provision constituted a promise from Argentina to the bondholders:

The Securities will constitute . . . direct, unconditional, unsecured and subordinated 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.⁴¹

Argentina violated the Equal Treatment Provision by lowering the rank of holdout creditors' rights in two ways: (1) "when [the Republic] made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under NML's Bonds" and (2) when the Republic enacted the Lock Law.⁴²

A major hurdle to meaningful redress still existed. As seen in previous cases, where the holdouts managed to win a judgment only to be stymied in collection attempts, the real challenge in sovereign default litigation is fashioning a meaningful enforcement mechanism to compel payment without violating the principles of sovereign immunity.⁴³ Foreseeing that Argentina had

restructured bondholders without also paying the holdout litigants).

³⁷ See *NML Capital, Ltd.*, 699 F.3d at 251.

³⁸ See *id.* at 254.

³⁹ Order Clarifying Scope of Injunction, *supra* note 11, at 3-4.

⁴⁰ See Order, *NML Capital, Ltd. v. Republic of Argentina*, 2011 WL 9522565 (S.D.N.Y. Dec. 7, 2011) (Nos. 08 Civ. 06978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG)).

⁴¹ See *id.* at 1-2 (emphasis in original).

⁴² See *id.*

⁴³ See, e.g., *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652

no intention of voluntarily complying with its order, the district court mandated that copies of the Injunction be distributed to “all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds.”⁴⁴ The order explicitly extended the scope of the Injunction to all agents of Argentina, which could be liable for “aiding and abetting” the Republic in violating the Injunction by processing payments to exchange bondholders while continuing to avoid obligations under the original bonds held by the holdouts.⁴⁵ While the court could not enforce the Injunction against Argentina’s assets or any of its officials due to the Republic’s sovereign immunity, the court could enforce the provisions of the Injunction against banks, and other firms involved in the payment process, that would transfer funds from Argentina’s reserves to exchange bondholders.⁴⁶ The remedy is geared towards circumventing the restrictions the FSIA places on collection efforts against sovereign assets.⁴⁷ The hope being that firms involved in the payment process will refuse to process any payments due under the restructured bonds for fear of violating the Injunction.

The Injunction left Argentina with few viable options. It could violate the Injunction by continuing to pay only the restructured debt, and risk subjecting the third parties involved in the payment process to contempt sanctions.⁴⁸ Alternatively, if Argentina has a change of heart and decides to cooperate with the court, it has two choices. Argentina can avoid making any payments to the holdouts and simultaneously default on the exchange bonds,

F.3d 172, 197 (2d Cir. 2011) (vacating plaintiffs’ attachment of Argentine Central Bank reserves); *Aurelius Capital Partner, LP v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009) (rejecting plaintiffs’ attempt to intercept assets that would be acquired by the Argentine social security system).

⁴⁴ Order at 4, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. Feb. 23, 2012) (Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG)) [hereinafter *Injunction*], available at <http://blogs.reuters.com/felix-salmon/files/2012/04/2012-02-23-Equal-Treatment-Remedy-Order.pdf>.

⁴⁵ See *id.* at 5.

⁴⁶ See *NML Capital, Ltd.*, 699 F.3d at 255.

⁴⁷ 28 U.S.C. § 1609 (2012).

⁴⁸ See *NML Capital, Ltd.*, 699 F.3d at 262-63.

inflaming its financial hardship.⁴⁹ Argentina could also comply with the Injunction, and avoid another default, by paying obligations due under the restructured debt and pay the holdout bondholders.⁵⁰ There is little doubt the latter option is the one Judge Griesa had in mind.

In justifying the dramatic remedy, Judge Griesa relied on the irreparable harm that would otherwise befall the holdout creditors in absence of an equitable remedy.⁵¹ Without Judge Griesa's use of the court's equitable powers, it was feared that "NML would never be restored to the position it was promised that it would hold relative to other creditors in the event of default."⁵² The district court pointed to two pivotal factors in finding that the equities balanced in NML's favor: (1) the Republic's "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" the Equal Treatment Provision; and (2) "[i]n the absence of the equitable relief . . . the Republic will continue to violate [Equal Treatment Provision] with impunity."⁵³ The district court gave little credence to arguments that the broad scope of the Injunction infringed upon Argentina's sovereign immunity and instead focused on Argentina's role as a commercial entity, reasoning that just as "any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations."⁵⁴ Argentina appealed Judge Griesa's order and the Injunction to the Second Circuit.⁵⁵

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See* Injunction, *supra* note 44, at 2.

⁵² *See id.* While that line of thinking undoubtedly finds a solid foundation in contract law, it could be argued that the court's reasoning carries much less power within the context of this case given that many of the bonds were purchased after the default had already occurred. *See NML Capital, Ltd.*, 699 F.3d at 251 (noting that a large portion of the bonds held by the holdouts were acquired after the default had occurred).

⁵³ *See* Injunction, *supra* note 44, at 2.

⁵⁴ *See id.* at 3.

⁵⁵ *See NML Capital, Ltd.*, 699 F.3d at 246.

c. The Second Circuit's Opinion and the Trial Court's Decision on Remand

The United States Court of Appeals for the Second Circuit upheld the district court's Injunction against Argentina and its agents, but remanded the case for further clarification of the scope of the Injunction as it applies to third parties involved in the payment process who may be held liable for aiding and abetting Argentina's violation of the Injunction.⁵⁶ The opinion, and the arguments of all interested parties, focused primarily on the district court's interpretation of the Equal Treatment Provision in the original bond contract.⁵⁷ The Second Circuit interpreted the provision to "bar[] Argentina from discriminating against [NML's] bonds in favor of bonds issued in connection with the restructurings."⁵⁸ Argentina argued that the *pari passu* clause was mere boiler plate language that only provided protection from legal or formal subordination, which it defined as giving formal priority to claims of the exchange bondholders over the claims of the holdouts.⁵⁹ The court disagreed. It held that when reading the two sentences of the Equal Protection Provision together it was clear the protections guaranteed extended beyond what Argentina had dubbed "formal subordination."⁶⁰ The first sentence, containing the *pari passu* clause, "prohibits Argentina . . . from formally subordinating the bonds by issuing a superior debt."⁶¹ The second sentence, however, contains a promise that Argentina will not pay any other bond obligations without also making payments on the original bonds.⁶² Taken together, the two sentences constituted a promise from Argentina to bondholders not only to refrain from formally subordinating the bonds, but also to refrain from taking any other action, such as paying one class of bonds over another, that would in fact subject the bondholders to a

⁵⁶ See *id.* at 264-65.

⁵⁷ See *id.* at 251-52.

⁵⁸ *Id.* at 250.

⁵⁹ Brief of Defendant-Appellant the Republic of Argentina at 32-34, *NML Capital, Ltd.*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)) [hereinafter Arg. Brief].

⁶⁰ See *NML Capital, Ltd.*, 699 F.3d at 258-59.

⁶¹ *Id.* at 259.

⁶² *Id.*

lesser status.⁶³

The Second Circuit had no problem finding support for the district court's proposition that Argentina continually and brazenly violated the provision by ranking the Republic's "payment obligations to [NML] below those of the exchange bondholder."⁶⁴ Three actions by the Republic formed the basis for the breach.⁶⁵ First, Argentina refused to make payments on the original bonds for six years, while "simultaneously timely servicing the Exchange

⁶³ *Id.* For further discussion of *pari passu* clauses, their history, and their significance within the context of sovereign debt contracts, see Rodrigo Olivares-Caminal, *The Pari Passu Interpretation in the Elliot Case: A Brilliant Strategy but an Awful (Mid-Long Term) Outcome?*, 40 HOFSTRA L. REV. 39, 45-49 (2011-2012) (arguing that the interpretation of the *pari passu* clause in *Elliot* was an error because the clauses have long been understood to apply only to the specific class of debt securities and that its usefulness is limited because there is no bankruptcy regime to legally rank obligations of a defaulted debtor); see also Robert A. Cohen, "*Sometimes a Cigar is Just a Cigar*": *The Simple Story of Pari Passu*, 40 HOFSTRA L. REV. 11, 12 (2011-2012) ("The debaters generally fall into two camps: (1) those who oppose the equal treatment of creditors and as a result ignore or distort the terms of the contract, and (2) those who believe that the starting place for interpreting contractual provisions is the language of the contract and the covenants providing for equal treatment offer creditors important protections."); 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 L. & BUS. REV. AM. 745, 747-48 (2009) ("Post-Argentina's potential litigation could be based on an actual breach of the *pari passu* clause. If this is the case, if there was an actual breach of the *pari passu* clause, a new wave of litigation can be triggered."); Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869, 871 (2004) ("For several decades, lenders and borrowers in the international capital markets have, by their behavior, demonstrated a collective understanding of the import of the clause Inevitably, there was a risk that the oracular nature of the clause would tempt someone to speculate about alternative meanings. That risk has recently materialized, with potentially serious consequences for both lenders and borrowers."); William W. Bratton, *Pari Passu and a Distressed Sovereign's Rational Choices*, 53 EMORY L.J. 823, 826 (2004) ("This Article addresses the gap [in discussion that the broad reading of *pari passu* could benefit sovereign bondholders], situating the clause in the economic context of sovereign debt relationships."); Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72 (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633439 ("Focusing on . . . the *pari passu* clause, this article explores two possible aspects of these myths. First, it demonstrates that the myths are inaccurate as to both the clause's origin and the role of lawyers in contract drafting. Second, the myths often are unflattering, inaccurately portraying lawyers as engaged in little more than rote copying.")

⁶⁴ See *NML Capital, Ltd.*, 699 F.3d at 259-60.

⁶⁵ See *id.*

Bonds.”⁶⁶ Second, in filings with the Securities and Exchange Commission (SEC), Argentina admitted to classifying the original bonds in a separate category from its other debt, including the exchange bonds, and made clear that it had no intention of paying obligations under the original bonds.⁶⁷ Finally, Argentina’s legislature enacted the Lock Law, which made it illegal for public officials to pay the holdout bondholders and also prohibited Argentine courts from recognizing any judgments in favor of the holdouts.⁶⁸

Having found Argentina in breach of the original bond contract, the Second Circuit directed its focus to the Injunction granted by the district court.⁶⁹ Again siding with Judge Griesa, the court found that the broad equitable remedy was necessary to ensure specific performance because a traditional judgment of acceleration and monetary damages would be ineffective.⁷⁰ In the court’s view, the unprecedented remedy was warranted “[i]n light of Argentina’s continual disregard for the rights of its . . . creditors and the judgments of our courts to whose jurisdiction it has submitted.”⁷¹ Argentina argued that public policy compels the court to dispense with the Injunction because it will “plunge the Republic into a new financial and economic crisis.”⁷² Argentina had “sufficient funds, including over \$40 billion in foreign currency reserves, to pay” the obligations owed to holdouts and made no relevant argument that paying the holdouts would impair the Republic’s capacity to service other obligations.⁷³ Argentina

⁶⁶ See *id.* at 260.

⁶⁷ See *id.* Argentina tried to justify its position by saying that it was “not in a legal . . . position to pay.” *Id.* (quoting Argentina’s 18-K filing) (internal quotation marks omitted).

⁶⁸ See *id.* (“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.”). The court also notes that, given the prohibitions of the Lock Law, even under the Republic’s more narrow interpretation of the *pari passu* clause, requiring formal or legal subordination for breach, Argentina has breached the original bond contract. See *id.*

⁶⁹ See *id.* at 262.

⁷⁰ See *NML Capital, Ltd.*, 699 F.3d at 262.

⁷¹ See *id.*

⁷² See Arg. Brief, *supra* note 59, at 61; see also *NML Capital, Ltd.*, 699 F.3d at 263.

⁷³ See *NML Capital, Ltd.*, 699 F.3d at 263.

also argued, with the assistance of the United States as *amici curiae*, that the precedent set by the district court's decision would threaten the sovereign debt restructuring system.⁷⁴ The United States argued that the decision would have the effect of allowing "a single creditor to thwart the implementation of an internationally supported restructuring plan."⁷⁵ The Second Circuit made clear that the ball remains in the sovereign's court, noting the sovereign, rather than any creditor, will be the one to decide whether to address its debt obligations in a way that "violates a *pari passu* clause."⁷⁶ Moreover, according to the court, it is unlikely that other sovereigns will be faced with a situation akin to Argentina.⁷⁷ The belief that Argentina has created for itself a particularly precarious situation, one unlikely to be duplicated, rests great faith in the power of collective action clauses, "which [the court believes] effectively eliminate the possibility of 'holdout' litigation."⁷⁸ Collective action clauses bind all bondholders to a restructuring deal if a certain proportion, generally a super majority, of the outstanding bonds are voted in

⁷⁴ See *id.*

⁷⁵ See Brief for the United States of America as *Amicus Curiae* in Support of Reversal at 5, *NML Capital, Ltd.*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)) [hereinafter U.S. Amicus Brief].

⁷⁶ See *NML Capital, Ltd.*, 699 F.3d at 264.

⁷⁷ See *id.*

⁷⁸ See *id.* But see Anna Gelpern, *Sovereign Restructuring After NML v. Argentina: CACs Don't Make Pari Passu Go Away*, CREDIT SLIPS (May 3, 2012, 10:38 AM), <http://www.creditslips.org/creditslips/2012/05/sovereign-restructuring-after-nml-v-argentina-cacs-dont-make-pari-passu-go-away.html> (observing that the argument that collective action clauses will effectively end holdout litigation fails for two reasons: (1) sovereign debt is not always issued in a form that lends itself to collective action clauses; and (2) an aggregation feature, "which allows majority amendment across multiple bond series," are not standard in all bonds). For further discussion on collective action clauses and their impact on sovereign debt restructuring, see generally Ana Gelpern & Mitu Gulati, *Sovereign Snake Oil* (Am. Univ., WCL Research Paper No. 2011-05, Dec. 30, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1732650 (examining the use of collective action clauses as an ill-fitting and ineffective solution to the sovereign debt crisis engulfing Europe); see also Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses* (UNC Legal Studies Research Paper No. 2172302, Nov. 7, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2172302 (noting that collective action clauses have been a marginal part of sovereign bond contracts for centuries, falling in and out of fashion, so it is difficult to explain why they have now "become integral to the proper management of public debt crises").

favor.⁷⁹ The court notes that such clauses “have been included in 99% of the aggregate value of New York-law bonds since January 2005, including Argentina’s 2005 and 2010 Exchange Bonds.”⁸⁰

The court did take issue with the scope of the Injunction as it applies to third parties and intermediaries.⁸¹ The court remanded the case to the district court in order to “precisely determine the third parties to which the Injunctions will apply.”⁸² The Federal Rules of Civil Procedure allow injunctions to be enforced against the named parties as well as those “in active concert or participation with” the named party.⁸³ On remand, the Southern District of New York was charged with determining precisely which third parties could be deemed “in active concert or participation with” Argentina if the Republic decided to subvert the Injunction by continuing to pay the restructured debt while disregarding the rights of the holdouts.⁸⁴

The district court made clear that “if Argentina is able to make the payments on the Exchange Bonds without making the payments to [the holdouts], the District Court and the Court of Appeals’ rulings and the Injunctions will be entirely for naught.”⁸⁵ To avoid that untenable outcome, the district court ensured all parties involved in the payment process under the exchange bonds would be held accountable to the court should they elect to play any role in violating the Injunction.⁸⁶ To that end, Judge Griesa

⁷⁹ Weidemaier & Gulati, *supra* note 78, at 2-5 (“To fix the problem [of holdouts threatening sovereign debt restructuring], some observers claimed, bonds should adopt new terms, called Collective Action Clauses (CACs), that allowed for collectively binding restructuring decisions.”).

⁸⁰ See *NML Capital, Ltd.*, 699 F.3d at 264.

⁸¹ See *id.* at 264-65.

⁸² See *id.* at 264.

⁸³ FED. R. CIV. P. 65(d)(2)(C).

⁸⁴ See Order Clarifying Scope of Injunction, *supra* note 11, at 5. The Southern District of New York issued an Amended Injunction. For purposes of this Note any distinctions between the two injunctions are not relevant. The Injunctions are concurrent in scope, both in terms of prohibitions and applicability to third parties. Compare Injunction, *supra* note 44, at 5, with Order, *NML Capital, Ltd. v. Republic of Argentina*, 5 (S.D.N.Y. Nov. 21, 2012). For the sake of simplicity, the Injunctions will be collectively referred to as “the Injunction.”

⁸⁵ *Id.*

⁸⁶ See *id.* There are several parties and payments that are exempt from the Injunction, specifically “intermediary banks” as defined under Article 4A of the

interpreted the Injunction in the broadest terms possible, including in its terms the Bank of New York Mellon, Bank of New York Depository, Cede & Co., the indenture trustee, and the clearing system that processes the payment.⁸⁷ The list of third parties covers the payments system from the time the funds leave the Argentine Treasury to the time they arrive in the hands of the exchange bondholders, and every step in-between.⁸⁸

d. Writ of Certiorari

On January 7, 2013, Argentina filed a writ of certiorari⁸⁹ in response to the Second Circuit's first decision, which upheld the district court's order entitling NML to ratable payments and dispensed with Argentina's argument that the order violates the FSIA. The crux of Argentina's argument to the Supreme Court is that the Second Circuit erred in holding that "the FSIA places no limitation on a United States court's authority to order blanket post-judgment execution discovery on the assets of a foreign state used for any activity anywhere in the world."⁹⁰ The United States Supreme Court rejected Argentina's writ.⁹¹ Argentina may yet have its case heard before the Supreme Court. As of this writing Argentina has yet to appeal the Second Circuit's subsequent opinion, which will be discussed below, regarding Judge Griesa's decision determining the scope of the Injunction as it pertains to third parties.⁹² Argentina will have a right file another writ of certiorari once the Second Circuit rules on the petition for en banc review.⁹³

Universal Commercial Code and payments made by Argentina to international organizations such as the International Monetary Fund. *See id.* at 11; *NML Capital, Ltd.*, 699 F.3d at 261.

⁸⁷ *See* Order Clarifying Scope of Injunction, *supra* note 11, at 9-10.

⁸⁸ *See id.* at 8-12.

⁸⁹ Petition for Writ of Certiorari at 1, *NML Capital, Ltd.* (2013) (No. 12-842), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/Final-Petition.pdf>.

⁹⁰ *See id.* at 14.

⁹¹ Greg Stohr, *Argentina Rejected by U.S. Court in Bond Payment Appeal*, BLOOMBERG (Oct. 7, 2013, 6:09 PM), <http://www.bloomberg.com/news/2013-10-07/argentina-rejected-by-u-s-court-in-bond-payment-appeal.html>.

⁹² *See infra* notes 94-100 and accompanying text.

⁹³ Anna Gelpern, *Argentina Gets No SCOTUS Review—Yet (Yawn)*, CREDIT SLIPS (Oct. 7, 2013, 10:05 AM), <http://www.creditslips.org/creditslips/2013/10/argentina-gets->

e. Return to the Second Circuit

After the district court issued its opinion clarifying the scope of the Injunction, Argentina appealed, once again, to the Second Circuit.⁹⁴ The Second Circuit affirmed the scope of the Injunction, noting that it applies directly only to Argentina.⁹⁵ The Injunction only affects third parties to the extent any third party attempts to assist Argentina in processing payments to exchange bondholders in violation of the Injunction.⁹⁶ Again, Argentina and its supporters failed to persuade the court that the remedy ordered by the district court violated the FSIA.⁹⁷ The court dispensed with the argument, holding, “the original [I]njunctions—and now the amended [I]njunctions—do not violate the FSIA because ‘[t]hey do not attach, arrest, or execute upon any property’ as proscribed in the statute.”⁹⁸ There was some modicum of good news for Argentina. The court did impose a stay on the Injunction pending further appeals.⁹⁹ Due to the stay, Argentina can continue to pay the exchange bondholders while failing to make payments to NML and the other holdout creditors, which, in absence of the stay, would be a violation of the Injunction.¹⁰⁰

III. Foreign Sovereign Immunity Act of 1973 and Argentine Debt Litigation

The Republic continues to claim the Injunction violates the prohibitions of the FSIA.¹⁰¹ The Second Circuit dispensed with Argentina’s arguments under the FSIA, on two occasions, without much difficulty.¹⁰² Moreover, the court gave little credence, let

no-scotus-review-yet-yawn.html.

⁹⁴ See *NML Capital, Ltd. v. Republic of Argentina*, 2013 WL 4487563, at *2 (2d Cir. Aug. 23, 2013) [hereinafter *NML Capital III*].

⁹⁵ See *id.* at 11.

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *id.* at 4 (quoting *NML Capital, Ltd.*, 699 F.3d at 262-63).

⁹⁹ See *id.* at 11.

¹⁰⁰ See Mark Weidemaier, *More on an Argentine Debt Swap (and Why It Doesn't Matter Whether the 'No Workaround' Injunction is Stayed)*, CREDIT SLIPS (Aug. 27, 2013, 2:02 PM) [hereinafter *Argentine Debt Swap*], <http://www.creditslips.org/creditslips/2013/08/more-thoughts-an-argentine-debt-swap.html>.

¹⁰¹ See *NML Capital, Ltd.*, 699 F.3d at 257.

¹⁰² See *id.* at 262.

alone any semblance of deference, to the United States' arguments that the Injunction violated the FSIA and was contrary to foreign policy.¹⁰³ Reading the prohibitions in the FSIA against attachment, arrest, and execution of sovereign property outside the United States, the court found "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."¹⁰⁴ Additionally, the court rejected the policy arguments of Argentina and the United States that the remedy requested by NML and the other holdouts would harm the United States' relations with other sovereigns and would ruin Argentina's efforts at fiscal and economic rehabilitation, "plung[ing Argentina] into a new financial and economic crisis."¹⁰⁵

The idea that a sovereign state can be subject to suit by an individual is a relatively new one.¹⁰⁶ Chief Justice Marshall solidified the absolute theory of immunity in *Schooner Exchange v. McFadden*, holding that the "full and absolute territorial jurisdiction" is an "attribute of every sovereign," which prevents one sovereign from infringing the sovereignty of another by subjecting the former to the jurisdiction of the latter's courts.¹⁰⁷ By the mid-twentieth century the absolute theory of immunity was giving way to a new standard.¹⁰⁸ The State Department announced a new view of sovereign immunity—restrictive

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at 263 (internal quotations omitted).

¹⁰⁶ See, e.g., George K. Foster, *Collection from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 717 (2008) (noting that until the mid-twentieth century sovereign immunity was considered absolute).

¹⁰⁷ *Schooner Exchange v. McFadden*, 11 U.S. 116, 137 (1812); see also Foster, *supra* note 106, at 117 (explaining that the case involved an effort by U.S. citizens to seize a warship in possession of France in satisfaction of debts).

¹⁰⁸ See W. Mark. C. Weidemaier, *Sovereign Immunity and Sovereign Debt* 8-9 (UNC Legal Studies Research Paper No. 2180228, Nov. 24, 2012) [hereinafter *Sovereign Immunity and Sovereign Debt*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180228 ("Until around the middle of the twentieth century, the doctrine of absolute sovereign immunity posed a nearly insurmountable barrier to suit in English and US Courts.").

immunity—in the Tate Letter, issued in 1952.¹⁰⁹ The Tate Letter maintained absolute immunity where the State acts in its capacity as a sovereign, *jure imperii*, but restricted immunity where the State acts as a commercial entity, *juri gestionis*.¹¹⁰ With respect to jurisdiction, courts in the United States followed the Tate Letter's interpretation, in that private parties could bring suits against foreign states, but sovereigns retained “absolute immunity from attachment and execution, absent [the State's] consent.”¹¹¹

In 1976, Congress passed the FSIA, codifying the restrictive theory of sovereign immunity.¹¹² The Act was the culmination of longstanding debate concerning the competing interests in “avoiding judicial interference in foreign relations” and providing private citizens who have been harmed by foreign sovereigns an avenue for redress.¹¹³ After the passage of the FSIA, many countries followed suit by “abandon[ing] the absolute theory” and moving to “recognize some sort of commercial property and waiver exceptions.”¹¹⁴ For purposes of analyzing the *NML Capital* decisions, the FSIA has three relevant provisions: (1) extending jurisdiction to claims by private citizens against a foreign sovereign where the sovereign has waived immunity or engaged in commercial activity; (2) allowing execution of judgments, attachment, and arrest against sovereign property under certain narrowly prescribed circumstances; and (3) allowing broader execution rights where the sovereign has waived immunity from execution, attachment, and arrest.¹¹⁵

¹⁰⁹ See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlamn, Acting Att'y Gen. (May 19, 1952), reprinted in 26 DEP'T ST BULL. 984-85 (1952) [hereinafter Tate Letter]; see also Foster, *supra* note 106, at 717 (“[P]rivate parties were often without an effective avenue for pursuing claims when disputes arose [with a sovereign] . . . [M]any courts and commentators came to the conclusion that it was no longer tenable to confer absolute immunity on States, and began to advocate a ‘restrictive’ theory of immunity.”).

¹¹⁰ See Tate Letter, *supra* note 109; see also Foster, *supra* note 106, at 717-18.

¹¹¹ See Foster, *supra* note 106, at 718 (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

¹¹² See Foster, *supra* note 106, at 718; see also *Sovereign Immunity and Sovereign Debt*, *supra* note 108, at 13.

¹¹³ Note, *Too Sovereign to be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550, 550 (2010-11).

¹¹⁴ See Foster, *supra* note 106, at 718.

¹¹⁵ See *Sovereign Immunity and Sovereign Debt*, *supra* note 108, at 30-31.

The FSIA contains “[the] sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States.”¹¹⁶ Foreign states have “presumptive immunity” from suit under the FSIA, which may be rebutted where any of several enumerated exceptions are met.¹¹⁷ The first relevant exception to the presumption of immunity is a foreign state “shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity.”¹¹⁸ Today, when countries issue debt securities abroad, “they almost always include waivers of immunity from suit.”¹¹⁹ This was the case in *NML Capital* where “Argentina voluntarily waived its immunity from the jurisdiction of the district court.”¹²⁰ The FSIA also provides an exception to jurisdictional immunity where the foreign state engages in “commercial activity” in the United States or with a connection in the United States.¹²¹ The reasoning behind the commercial actor exception is as follows: “by descending to the level of a commercial actor, a foreign government divests itself of its sovereign status. In other words, when a foreign sovereign engages in commercial activity, that foreign sovereign is no longer acting in a sovereign capacity. The foreign sovereign sheds its sovereignty”¹²² The Supreme Court has held the issuance of foreign government bonds in the United States is a commercial activity sufficient to bring a claim under the bond contracts in U.S. courts.¹²³ Therefore, NML could

¹¹⁶ See H.R. REP NO. 94-1487, pt. 11, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 1976 WL 14078.

¹¹⁷ See Report of the Working Group of the ABA, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT’L L. 489, 506 (2002) [hereinafter ABA Report]; see also 28 U.S.C. § 1330(a). A “foreign state” is defined as an entity that “includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state.” 28 U.S.C. § 1603(a).

¹¹⁸ 28 U.S.C. § 1605(a)(1). The waiver can either be explicit or implicit, and cannot be withdrawn once granted. See *id.*

¹¹⁹ *Sovereign Immunity and Sovereign Debt*, *supra* note 108, at 3.

¹²⁰ *NML Capital, Ltd.*, 699 F.3d at 263.

¹²¹ 28 U.S.C. § 1605(a)(2).

¹²² Clinton L. Narver, *Putting the “Sovereign” Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT’L L. J. 163, 197 (2001); see also Foster, *supra* note 106, at 719.

¹²³ See *Argentina v. Weltover, Inc.*, 504 U.S. 607, 615 (1992).

have based jurisdiction under the commercial activity exception, even if Argentina had not waived its immunity.¹²⁴

The provisions allowing creditors to bring suit against sovereign debtors would be inconsequential, so long as U.S. court's remained powerless to impose meaningful remedies against the sovereign.¹²⁵ The FSIA provides a presumption of immunity from "attachment[,] arrest[,] and execution."¹²⁶ The presumption, however, is subject to numerous exceptions.¹²⁷ Section 1610(a)(2) provides an exception where property located within the United States "is or was used for the commercial activity upon which the claim is based."¹²⁸ Commercial activity is defined as "either a regular course of commercial conduct or a particular commercial transaction or act."¹²⁹ The commercial activity exception requires a "nexus between any commercial property against which a judgment may be executed, and the underlying claim upon which the judgment to be executed is based."¹³⁰ In *Weltover*, the U.S. Supreme Court held, "[W]hen a foreign government acts, not as a regulator of a market, but in a manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."¹³¹ The ultimate issue is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'"¹³² To the satisfaction of plaintiffs, the definition of commercial activity has been broadly defined, but there are still

¹²⁴ See *id.* at 615; see also 28 U.S.C. § 1605(a)(2).

¹²⁵ See *Sovereign Immunity and Sovereign Debt*, *supra* note 108, at 15 ("[T]he FSIA provided judgment-holders with limited rights to enforce a judgment against sovereign assets.").

¹²⁶ 28 U.S.C. § 1609.

¹²⁷ See *id.* at §§ 1610-11. "The execution immunity provisions of the Act, and particularly section 1610, are generally regarded as among the most confusing and ineffectual in the statute." ABA Report, *supra* note 117, at 581.

¹²⁸ 28 U.S.C. § 1610(a)(2).

¹²⁹ *Id.* at 1603(d).

¹³⁰ Jeremy Ostrander, Note, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments*, 22 BERKELEY J. INT'L L. 541, 557 (2004) (internal quotations omitted).

¹³¹ *Weltover*, 504 U.S. at 614.

¹³² *Id.* (internal emphasis omitted).

substantial barriers to recovery. Notably the assets subject to execution, arrest, or attachment must be located within the United States and must be “used for the commercial activity upon which the claim is based.”¹³³ The first requirement is a problem where the sovereign can simply move all assets out of the country where litigation is anticipated.¹³⁴ The latter is also a hurdle in sovereign debt litigation “[b]ecause the relevant commercial activity is borrowing money, and because sovereigns quickly spend the money they borrow, few assets will meet [the] definition.”¹³⁵ It will be difficult for any plaintiff to collect in sovereign debt litigation, unless the sovereign waives its immunity under section 1610(a)(1).¹³⁶ Unlike waivers of jurisdictional immunity, which have become universal since the enactment of the FSIA, waivers of immunity from execution, attachment, and arrest are relatively rare.¹³⁷

Given the difficulties plaintiffs encounter under the FSIA when trying to collect traditional monetary damages from sovereign debtors, it is not surprising that NML requested a novel equitable remedy.¹³⁸ What is remarkable is the district court’s willingness to adopt such an approach, and the Second Circuit’s eagerness to affirm on two occasions.¹³⁹ The Second Circuit relied on a plain reading of the FSIA in ultimately holding that “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.”¹⁴⁰ NML argued that the Injunctions do not constitute an arrest, attachment, or execution, and therefore did not violate Section 1609.¹⁴¹ The Second Circuit followed NML’s logic, finding all three terms

¹³³ See 28 U.S.C. § 1610(a)(2).

¹³⁴ See *Argentine Debt Swap*, *supra* note 100, at 18.

¹³⁵ *Id.*

¹³⁶ See *id.*; see also 28 U.S.C. § 1610(a)(2).

¹³⁷ See Weidemaier, *Sovereign Immunity and Sovereign Debt*, *supra* note 108, at 15-18.

¹³⁸ See Corrected Joint Response Brief of Plaintiffs-Appellees NML Capital, Ltd., Olifant Fund, Ltd., and Varela, et. al. at 58-64, *NML Capital, Ltd.*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105(L)) [hereinafter NML Response Brief].

¹³⁹ See *NML Capital, Ltd.*, 699 F.3d at 265; *NML Capital II*, *supra* note 94, at *1.

¹⁴⁰ *NML Capital, Ltd.*, 699 F.3d at 262.

¹⁴¹ NML Response Brief, *supra* note 138, at 60.

referred to “a court’s seizure and control over specific property.”¹⁴² The district court’s order does not seize or control any property of Argentina’s outside the United States, therefore the Injunction merely “direct[s] Argentina to comply with its contractual obligations not to alter the rank of its payments obligations.”¹⁴³ There is no seizure of Argentina’s property because it is firmly within Argentina’s capacity to comply with the injunction “without the court’s ever exercising dominion over sovereign property.”¹⁴⁴ For instance, Argentina is free to pay the amounts owed on the exchange bonds, so long as it also chooses to pay the holdouts.¹⁴⁵ Alternatively, the court reasoned, Argentina could make no payments on the exchange bonds or original bonds, and instead incur another default.¹⁴⁶ Under either option, the Injunction does not mandate “Argentina to use any particular asset, or set of assets, to come into compliance.”¹⁴⁷ Since the “Injunctions do not transfer any dominion or control over sovereign property to the court,” the Injunctions do not violate the prohibitions of Section 1609.¹⁴⁸

Argentina disagreed with NML’s arguments and the Second

¹⁴² *NML Capital, Ltd.*, 699 F.3d at 262 & n.13. “An attachment is the seizing of a person’s property to secure a judgment or to be sold in satisfaction of a judgment.” *Id.* (quoting BLACK’S LAW DICTIONARY 123 (9th ed. 2009)) (internal quotation marks omitted). “An arrest is seizure or forcible restraint.” *Id.* (quoting BLACK’S LAW DICTIONARY 124 (9th ed. 2009) (internal quotation marks omitted). “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.” *Id.* (quoting 30 AM. JUR. 2D. *Executions* § 177) (internal quotation marks omitted).

¹⁴³ *NML Capital, Ltd.*, 699 F.3d at 262; *see also* NML Response Brief, *supra* note 138, at 60 (“The hallmarks of any attachment or execution are the *seizure* by the court of *specific* interests in property of the debtor. Thus, courts have deemed an order to be an attachment only when it effects a seizure of specific property that deprives the owner of meaningful possessory interest in that property.”) (citing *United States v. Va Lerie*, 424 F.3d 694, 702 (8th Cir. 2005)).

¹⁴⁴ *NML Capital, Ltd.*, 699 F.3d at 262-63.

¹⁴⁵ *See id.* at 262-63.

¹⁴⁶ *See id.* at 263.

¹⁴⁷ NML Response Brief, *supra* note 138, at 62; *see also* *NML Capital, Ltd.*, 699 F.3d at 263 (“The Injunctions do not require Argentina to pay any bondholder any amount of money; nor do they limit other uses to which Argentina may put its fiscal reserves.”).

¹⁴⁸ *NML Capital, Ltd.*, 699 F.3d at 263.

Circuit's subsequent opinion, arguing the Injunction "interfere[s] with the Republic's use of its property located outside the United States, where it is indisputably immune from restraint by United States courts under [Section 1609 of] the FSIA."¹⁴⁹ Argentina relied on Second Circuit precedent, which held "courts are also barred from granting 'by injunction, relief which they may not provide by attachment.'"¹⁵⁰ Since the Injunction either prevented Argentina from paying a large amount of otherwise immune funds owed to the exchange bondholders, no matter where in the world those funds were located, or compelled the payment of funds to the holdouts in the event exchange bondholders were paid, it was in essence an attachment of some funds in violation of the FSIA.¹⁵¹ The choice between paying the holdouts and defaulting on the exchange bonds was, according to Argentina, a coercive mechanism that effected an "end-run around the FSIA," which was expressly prohibited by the holding in *S & S Machinery Co.*¹⁵² Ultimately, Argentina claimed it was irrelevant that the Injunction "[did] not literally attach or execute on Republic property," because the Injunction does in fact "require a turnover of property not in the United States, and therefore outside the scope of the court's enforcement powers."¹⁵³

The United States joined Argentina's arguments, adding a foreign policy gloss to the Republic's positions under the FSIA. Generally, the United States' support would have commanded some persuasive authority considering the implications of the case on foreign relations with the numerous nations that register bonds under New York law.¹⁵⁴ The United States has a foreign policy interest in assisting restructurings supported by the international

¹⁴⁹ Arg. Brief, *supra* note 59, at 50.

¹⁵⁰ *NML Capital, Ltd.*, 699 F.3d at 262 (quoting *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983)).

¹⁵¹ See Arg. Brief, *supra* note 59, at 52.

¹⁵² See *id.*

¹⁵³ See Reply Brief of Defendant-Appellant the Republic of Argentina at 5, *NML Capital, Ltd.*, 699 F.3d 246 (2d Cir. 2012) (12-105-cv(L)) [hereinafter Arg. Reply Brief].

¹⁵⁴ See U.S. Amicus Brief, *supra* note 75, at 29; see also Brief for the United States of America as *Amicus Curiae* in Support of the Republic of Argentina's Petition for Panel Hearing and Rehearing *En Banc* at 6-8, *NML Capital, Ltd.*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105) [hereinafter U.S. Brief for Rehearing].

community.¹⁵⁵ The United States argued Argentina's assets were in fact attached and, therefore, the constraints of the Injunction, as they applied to otherwise immune assets, violated Section 1609.¹⁵⁶ The Second Circuit dispensed with these arguments, noting, in a circular fashion, that the Injunction did not achieve the result of an attachment, arrest, or execution because it does not in fact "attach, arrest, or execute upon any property."¹⁵⁷

Although the Second Circuit's reasoning was not exhaustive, its conclusion was consistent with Section 1609. Under the plain terms of the statute, the Injunction is permissible.¹⁵⁸ The Injunction is not an "execution" because NML's rights were not first reduced to monetary value in the form of a judgment.¹⁵⁹ While Elliot and NML had previously won monetary judgments in other proceedings, no such judgment was entered by the District Court in the present case.¹⁶⁰ The Injunction is not an "attachment" or an "arrest" given that no specific property of the Republic was restrained.¹⁶¹ All funds belonging to Argentina could be disposed in any way the Republic saw fit, with the exception of paying the restructured debt without also paying the holdout creditors.¹⁶² The crux of Argentina's argument was that the Injunction had the effect of preventing funds designated for payment of the restructured debt to be used for that purpose, which constituted a de facto attachment, regardless of whether any specific funds within the treasury could be identified as those restrained.¹⁶³ The argument advanced by Argentina ignores the key fact that distinguishes the Injunction from an impermissible attachment or arrest. Under the Injunction, the Republic is free to spend every peso in its treasury so long as it does not make any payments on the restructured debt, which would have the effect of

¹⁵⁵ U.S. Amicus Brief, *supra* note 75, at 18-26.

¹⁵⁶ U.S. Brief for Rehearing, *supra* note 154, at 7.

¹⁵⁷ *NML Capital, Ltd.*, 699 F.3d at 262.

¹⁵⁸ *See id.*

¹⁵⁹ *See* 30 AM. JUR. 2D. *Executions* § 177.

¹⁶⁰ *See* Injunction, *supra* note 44, at 2-5; *see also* *NML Capital, Ltd.*, 699 F.3d at 255-58.

¹⁶¹ *See* BLACK'S LAW DICTIONARY 123-24 (9th ed. 2009).

¹⁶² *See* *NML Capital, Ltd.*, 699 F.3d at 262-63.

¹⁶³ Arg. Brief, *supra* note 59, at 50.

subordinating the original bonds.¹⁶⁴ Argentina could make massive expenditures, depleting all of its funds located in the treasury and elsewhere, on defense, domestic programs, and even on service of other debt, providing payment of that debt would not subordinate the holdout bonds.¹⁶⁵ Therefore, no specific asset or set of assets are restrained in a manner that would constitute an attachment or arrest.¹⁶⁶ Argentina's argument may have resonated with the Second Circuit had the Injunction required the Republic to set aside specific funds and prohibited the specified funds expenditure for any purpose other than payment of obligations under the defaulted bonds, but that was not the case.¹⁶⁷

IV. Implications for the Future of Sovereign Debt Restructuring and Litigation

A. No End in Sight: The Injunction will do Little to End the Stalemate Between Argentina and Elliot

Despite Elliot's victories in its latest bout with Argentina, a resolution to the dispute remains elusive. As noted above, the court has left Argentina with three choices: (1) pay its obligations under the exchange bonds, at which point the Injunction compels the Republic to also pay the full amount owed to the holdouts; (2) refuse to pay the holdouts and default on the obligations under the exchange bonds, causing new financial hardship; or (3) pay its obligations under the exchange bonds while continuing to disregard the obligations under the original bonds, inviting the ire of the court and potentially subjecting complicit third parties to contempt sanctions.¹⁶⁸ Argentina has made clear that, in light of political and economic circumstances, it will not pay the holdout creditors.¹⁶⁹ Speculation that Argentina will default on the exchange bonds to avoid making payments to holdouts has already begun.¹⁷⁰ Another default would be a great blow to Argentina's

¹⁶⁴ See *NML Capital, Ltd.*, 699 F.3d at 262-63.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See Felix Salmon, *Why Argentina Will Default in 2013*, REUTERS (Feb. 28, 2013), <http://blogs.reuters.com/felix-salmon/2013/02/28/argentina-will-default-in-2013/>.

¹⁷⁰ See *id.*

fiscal reform efforts and will raise new problems associated with additional restructuring.¹⁷¹ Ironically, a consequence of another default would be the potential for further holdout problems.¹⁷²

If Argentina defaults on its obligations under the exchange bonds, the effectiveness of the Injunction as an enforcement tool will be compromised.¹⁷³ NML, in seeking the Injunction, hoped the Republic would pay what is owed on the original bonds to avoid the threat of another default.¹⁷⁴ Argentina has shown, at least publicly, that it is undeterred by the prospect of another default.¹⁷⁵

Argentina's refusal to make payments on the original bonds in the face of the Injunction means the dispute could carry on indefinitely.¹⁷⁶ Elliot will continue to hound Argentina in court with no hope of gaining an effective remedy.¹⁷⁷ Sovereign immunity will shield Argentina from any meaningful enforcement of obligations under the defaulted bonds.¹⁷⁸ Holders of the restructured bonds will not be paid because Argentina will not be

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See* Mark Weidemaier, *Pari passu Realpolitik*, CREDIT SLIPS (Mar. 1, 2013, 11:25 AM) [hereinafter *Realpolitik*], <http://www.creditslips.org/creditslips/2013/03/pari-passu-realpolitik.html>; *see also* Anna Gelpern, *Sovereign Bankruptcy, Day One: Market Rallies*, CREDIT SLIPS (Mar. 1, 2013, 4:27 PM), <http://www.creditslips.org/creditslips/2013/03/sovereign-bankruptcy-day-one-market-rallies.html>.

¹⁷⁴ *See* Amended Injunction, *supra* note 11.

¹⁷⁵ *See* Hilary Burke, *Argentina Faces Very Different Debt Default if Loses Legal Fight*, REUTERS (May 13, 2013, 7:06 AM), <http://www.reuters.com/article/2013/05/13/us-argentina-debt-idUSBRE94C0AB20130513>.

¹⁷⁶ As of this writing there are reports that Elliot is negotiating a settlement with the holders of the exchange bonds. The proposed plan would involve the exchange bondholders making payments to the holdouts out of their receipts from Argentina. In exchange Elliot would drop all actions in pursuit of Argentina, allowing the Republic to continue paying the exchange bondholders. *See* Joseph Cotterill, *Look Ma, No Uniquely Recalcitrant Sovereign*, FT ALPHAVILLE (Nov. 1, 2013, 5:38 PM), <http://ftalphaville.ft.com/2013/11/01/1677502/look-ma-no-uniquely-recalcitrant-sovereign/>.

¹⁷⁷ *See* Nate Raymond, *Bondholders Lose Bid to Lift Stay in Argentina Litigation*, REUTERS (Nov. 1, 2013, 2:07 PM), <http://www.reuters.com/article/2013/11/01/us-usa-court-argentina-idUSBRE9A00PN20131101> (noting that Elliot has continued to pursue collection efforts against Argentina, even though the Injunction appears not have had the desired effect).

¹⁷⁸ *See NML Capital, Ltd.*, 699 F.3d at 262-63; *see also* 28 U.S.C. § 1609.

able to find any financial institution, securities firm, or payment processor willing to aid and abet its violation of the Injunction.¹⁷⁹ Ultimately, Argentina will be prevented from bringing order to its fiscal house.¹⁸⁰

The status quo of ceaseless conflict cannot be appealing to any of the interested parties. As discussed below, the current stalemate calls into question whether changes to the FSIA and the sovereign immunity principles, at least as they apply to sovereign debt litigation, are needed to facilitate sovereign restructuring where the courts are faced with unyielding, well resourced creditors and recalcitrant debtors.¹⁸¹

B. How Far will the Ripples Travel?

The district court's Injunction, and the opinions of the Second Circuit upholding it, made waves across the sovereign debt world, but in the immediate aftermath it remains to be seen whether the case will ripple to other restructuring efforts. It is generally accepted that the Injunction was a creative use of the courts equitable powers, one which has no precedent in modern sovereign debt litigation.¹⁸² The applicability of the Injunction to future restructuring efforts is a more contested issue.¹⁸³ If the Injunction were limited to the circumstances seen in *NML Capital*, the case would not have much impact on the wider universe of sovereign debt litigation.¹⁸⁴ The Second Circuit urged such a reading in both of its opinions.¹⁸⁵ The court emphasized the

¹⁷⁹ The Injunction should be more effective in deterring third parties from aiding Argentina in thwarting the Injunction, especially considering they do not have the benefit of sovereign immunity to shield them from contempt.

¹⁸⁰ See Hilary Burke, *supra* note 175 (examining some of the fallout from continued litigation and the possibility of another default).

¹⁸¹ See *supra* Section III.C.

¹⁸² See Felix Salmon, *Elliott vs Argentina: It's Not Over Yet*, REUTERS (Aug. 23, 2013), <http://blogs.reuters.com/felix-salmon/2013/08/23/elliott-vs-argentina-its-not-over-yet/>; see also Mark Weidemaier, *Argentina Loses . . . Big*, REUTERS (Aug. 23, 2013, 10:36 AM), <http://www.creditslips.org/creditslips/2013/08/argentina-loses-big.html>.

¹⁸³ Compare *NML Capital, Ltd.*, 699 F.3d at 264; with Anna Gelpern, *supra* note 78, and Mark Weidemaier, *Argentina's (Not So) Unusual Pari Passu Clause*, CREDIT SLIPS (Nov. 5, 2012, 7:00 AM), <http://www.creditslips.org/creditslips/2012/11/argentinas-not-so-unusual-pari-passu-clause.html>.

¹⁸⁴ See *NML Capital, Ltd.* 699 F.3d at 264-65.

¹⁸⁵ See *id.*

special circumstances of the Argentine default influenced the interpretation of the Equal Payment Provision, which in turn justified the unusual exercise of the court's equitable powers.¹⁸⁶ Two factors lead the courts to believe that the ongoing dispute between Argentina and Elliot presents a unique case.¹⁸⁷ First, while many sovereign debt contracts contain *pari passu* clauses, Argentina's contract contains the added provision that no creditor shall be subject to subordination, which the court presumed is not included in other sovereign debt contracts.¹⁸⁸ The court hinted that the second sentence of the Equal Protection Provision weighed heavily in its interpretation.¹⁸⁹ In absence of the second sentence, the court suggested a different outcome was possible.¹⁹⁰ Second, the court repeatedly noted the great lengths Argentina went to stiff the holdouts.¹⁹¹ Dubbing Argentina a "uniquely recalcitrant" debtor, the court cited Argentina's continuing payment on the exchange bonds, multiple statements claiming it would never pay the holdouts, regardless of what U.S. courts ordered, and codification of the Republic's public stance through the Lock Law.¹⁹² The court's implicit suggestion being that a debtor who was less brazen in its refusal to meet contractual obligations and less vocal about its general disregard for the orders of U.S. courts might not warrant the same treatment as Argentina.¹⁹³

There is reason to be skeptical of the court's claims regarding the unique nature of the Argentine default.¹⁹⁴ First, there is doubt whether any significant distinction exists between the Argentine Equal Treatment Provision and the *pari passu* clauses in countless other bonds.¹⁹⁵ Further, where a *pari passu* clause is included in a

¹⁸⁶ *See id.*

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See NML Capital, Ltd.* 699 F.3d at 264-65.

¹⁹¹ *See id.*

¹⁹² *See NML Capital II, supra* note 94, at * 23 ("We further observed that cases like this one are unlikely to occur in the future because Argentina has been a uniquely recalcitrant debtor and because newer bonds almost universally include collective action clauses.").

¹⁹³ *See id.*

¹⁹⁴ *See* Anna Gelpert, *supra* note 78; *see also* Mark Weidemaier, *supra* note 183.

¹⁹⁵ *See* Mark Weidemaier, Robert Scott, and Mitu Gulati, *Origin Myths, Contracts,*

bond contract, payments to some bond holders and not others will constitute subordination in violation of the contract, regardless of any other factors that may cause the court to view the debtor with more or less empathy.¹⁹⁶ While a court may be less likely to exercise its equitable powers where disregard for bondholders' rights is less egregious, there is no reason to believe, under the Second Circuit's interpretation, that breach will not be found where the debtor refuses to make ratable payments to all bondholders.¹⁹⁷

In the immediate aftermath of the Second Circuit's decisions, market participants have provided some evidence that *NML Capital* will have a substantial impact on the issuance, restructuring, and litigation of sovereign debt.¹⁹⁸ The International Monetary Fund¹⁹⁹ and the Republic of France²⁰⁰ thought the opinions sufficiently implicated their interest so as to warrant the filing of amicus briefs urging the Supreme Court of the United States to accept Argentina's writ of certiorari.²⁰¹ The Republic of Columbia,²⁰² the United Mexican states,²⁰³ and the Republic of

and the *Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72 (2013); see also Mark Weidemaier, *supra* note 183.

¹⁹⁶ *NML Capital Ltd.*, 699 F.3d at 261-63.

¹⁹⁷ See *id.*

¹⁹⁸ See *infra* notes 199-207.

¹⁹⁹ Sandrine Rastello & Katia Porzecanski, *IMF's Legarde Drops Proposal to Back Argentina in Debt Case*, THE WASHINGTON POST (July 24, 2013, 5:44 PM), <http://washpost.bloomberg.com/Story?docId=1376-MQF5BD1A74E901-4TO2NBG2P3TS69LA3P5RV5I0EF>.

²⁰⁰ See generally Brief for the Republic of France as *Amicus Curiae* in Support of the Republic of Argentina's Petition for a Writ of Certiorari at 1-6, *Argentina v. NML Capital, Ltd.* (2013) (No. 12-1494), 2013 WL 3930517, at * 1-6 [hereinafter French Amicus Brief] (arguing in support of Argentina's position that the Southern District of New York's Injunction violated principles of sovereign immunity and the FSIA).

²⁰¹ See Rastello & Porzecanski, *supra* note 199. The IMF announced its intention to file an amicus curiae brief in support of Argentina's petition. The IMF later retracted its statement, noting that it would not longer file its brief. Reports cited pressure from the United States as a major factor informing the IMF's decision. The pressure from the United States is somewhat strange when considering that the United States filed its own briefs in the United States Court of Appeals for the Second Circuit in support of Argentina. See *id.*

²⁰² Republic of Columbia, Prospectus S-9 (Dec. 20, 2011).

²⁰³ United Mexican States, Prospectus, Supplemental Risk Factor Disclosure (Jan. 7, 2013).

Paraguay²⁰⁴ listed the ongoing litigation as a risk factor in documents filed with the SEC in connection with their own forthcoming debt offerings.²⁰⁵ The actions of the countries and organization noted above, coupled with the previously strong support Argentina received from the United States, sustain a view that the *NML Capital* decisions will not be limited to their facts, but instead represent a new weapon for creditors.²⁰⁶ However, the most persuasive factor evidencing the impact of the case on future litigation is the suit brought against Grenada in the wake of the Second Circuit's rulings seeking to enforce rights under defaulted bonds.²⁰⁷ The plaintiff-creditor in that case asserts the same arguments sanctioned by the Southern District of New York in *NML Capital*.²⁰⁸ Irrespective of the Second Circuit's limiting admonishments; it appears there will be no shortage of creditors lining up to seize upon the previously dormant *pari passu* clauses in their defaulted bonds.²⁰⁹

*C. The Court Needs a Stronger Stick to Compel Resolutions
in Sovereign Debt Litigation*

Argentina's obstinance in the face of financial hardship and

²⁰⁴ Republic of Paraguay, Offering Circular 17 (Jan. 17, 2013).

²⁰⁵ All three documents explained the risk factor associated with the Argentine litigation as follows:

In ongoing litigation in the federal courts in New York captioned *NML Capital v. Republic of Argentina*, the U.S. Court of Appeals for the Second Circuit ruled that the ranking clause in bonds issued by Argentina prevents Argentina from making payments in respect of the bonds unless it makes pro rata payments on defaulted debt that ranks *pari passu* with the performing bonds. . . . [A] final decision that requires ratable payments could potentially hinder or impede future sovereign debt restructurings and distressed debt management.

Republic of Columbia, Prospectus S-9 (Dec. 20, 2011); United Mexican States, Prospectus, Supplemental Risk Factor Disclosure (Jan. 7, 2013); Republic of Paraguay, Offering Circular 17 (Jan. 17, 2013).

²⁰⁶ See French Amicus Brief, *supra* note 200, at 1-6; see also Republic of Columbia, Prospectus S-9 (Dec. 20, 2011); United Mexican States, Prospectus, Supplemental Risk Factor Disclosure (Jan. 7, 2013); Republic of Paraguay, Offering Circular 17 (Jan. 17, 2013).

²⁰⁷ See *Exp.-Imp. Bank of Republic of China v. Grenada*, No. 13-1450 (S.D.N.Y. Aug. 19, 2013).

²⁰⁸ See *id.*

²⁰⁹ See, e.g., *id.*

adverse court decisions brings the efficacy of the district court's Injunction into a harsh light.²¹⁰ The Injunction is a coercive remedy, one with the express design of forcing the State's hand.²¹¹ Courts are generally hesitant to issue such remedies against sovereign entities, realizing that while they are not expressly forbidden under the FSIA,²¹² a use of the court's equitable powers impacts traditional notions of sovereignty.²¹³ If Argentina, without flinching, is willing to flaunt the Injunction by taking the exact course of action the court sought to discourage, the legitimacy of U.S. courts as a forum for adjudicating disputes with sovereign debtors has been harmed.²¹⁴

The Second Circuit breathed new life into the *pari passu* clause, invigorating other bondholders who may try their hand at coercing payment by invoking the equitable powers of the court.²¹⁵ However, if entrenched sovereigns are willing to suffer self-inflicted pain, Argentina has provided a blueprint for eluding creditors indefinitely. A status quo could emerge, whereby well funded creditors are more eager than ever to sue to collect on sovereign debt, but just as unlikely to succeed in that endeavor.²¹⁶ Perpetual litigation with holdout creditors will frustrate sovereign debt restructuring to the detriment of the stakeholders who do not have the resources to orchestrate a global collection effort and are not fortunate enough to be shrouded in sovereign immunity.²¹⁷

²¹⁰ See Felix Salmon, *Elliot vs Argentina: Enter the Crazy*, REUTERS (Aug. 27, 2013), <http://blogs.reuters.com/felix-salmon/2013/08/27/elliott-vs-argentina-enter-the-crazy/>.

²¹¹ See generally Injunction, *supra* note 44, 2-5 (requiring Argentina to pay the holdout creditors when it pays the holders of its restructured debt, which is the only way to avoid another default).

²¹² See 28 U.S.C. § 1609.

²¹³ See W. Mark C. Weidemaier & Anna Gelper, *Injunctions in Sovereign Debt Litigation*, YALE J. ON REG. (forthcoming 2014) (manuscript at 2), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330914 ("On the other hand, the idea of one government commanding another seems to strike at the heart of sovereign equality.").

²¹⁴ See generally *id.* ("[J]udges do not want to look feckless and seldom will issue injunctions unless they believe the sovereign will feel significant pressure to comply.").

²¹⁵ See *Exp.-Imp. Bank of Republic of China v. Grenada*, No. 13-1450 (S.D.N.Y. Aug. 19, 2013).

²¹⁶ See *supra* notes 194-206 and accompanying text.

²¹⁷ See Benedict Mander, *Funds Offer Way to Avert Default by Argentina*,

As noted by Professors Mark Weidemaier and Anna Gelpern, the real bite of the Injunction harms third parties, which are least at fault for the current quagmire.²¹⁸ Notably, the third parties prohibited from aiding or abetting Argentina's violation of the Injunction are the only entities subject to contempt sanctions.²¹⁹ Taking into consideration Argentina's enduring refusal to make any payments to the holdouts, the equitable remedy as fashioned by the district court offers no realistic avenue to repayment when facing an entrenched debtor.²²⁰ The regime established in the wake of *NML Capital* is costly for all parties involved and lacking in equity toward interested bystanders.

It would be more efficient to refuse to issue similar injunctions in future cases, giving creditors a clear sign that collection attempts will be stymied. A consistent refusal to exercise equitable powers would provide incentive for debtors to consent to restructuring when offered, no matter how deep the discount.²²¹ Sovereign debt restructuring would be a much simpler process, but at what cost. Serial defaulters, such as Argentina, would have even less incentive to honor obligations and work with

FINANCIAL TIMES (Oct. 24, 2013, 9:40 AM), <http://www.ft.com/intl/cms/s/0/2537ebf8-3c07-11e3-b85f-00144feab7de.html#axzz2kO2mjm4z> (“The acrimonious legal battle between a group of hedge funds and Argentina that could tip the country into default, and make future sovereign debt restructurings harder.”).

²¹⁸ See Weidemaier & Gelpern, *supra* note 213, at 7. The Professors note the deliberate choice of the court to turn its enforcement mechanisms toward the third parties:

To ensure that default is the only alternative, the injunction also highlights the risk of contempt sanctions for trustees, securities clearing houses, and payment systems operators around the world. The impact of the injunction on these parties is not an unfortunate byproduct of the remedy, nor merely a natural consequence of ordinary procedural rules against aiders and abettors. It is a deliberate design choice, made in light of the fact that the injunction cannot reach its primary target, to induce third parties to pressure Argentina to comply.

See id.

²¹⁹ Order Clarifying Scope of Injunction, *supra* note 11, at 10-12; *see also* Weidemaier & Gelpern, *supra* note 213, at 6-7.

²²⁰ See *supra* note 182-209 and accompanying text.

²²¹ See Elizabeth Broomfield, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUM. BUS. L. REV. 473, 518-22 (explaining that where contractual defenses and statutory caps on recovery are in place, sovereign debt litigation has decreased in response).

creditors in the event of default.²²²

Instead, courts must have a more powerful enforcement mechanism at their disposal, one which will create greater leverage to facilitate settlement. The mechanism must be capable of encouraging even the most well funded distressed asset investor and most recalcitrant debtor to negotiate regarding a settlement. Any solution, however, cannot coerce the sovereign to make payments of otherwise immune funds.²²³ The FSIA continues to stand as a formidable obstacle to the enforcement of traditional damages remedies.²²⁴ The court must work within the current framework of sovereign immunity, as codified in the FSIA, to find a functional solution to protracted sovereign debt litigation. If stubborn sovereigns are permitted to run rampant over the rule of law with little impediment, the creditors have no leverage with which to bargain.²²⁵ Although Elliot is by no means a saint,²²⁶ it does offend one's sense of equity to see a sovereign with Argentina's history—disrespecting court judgments in jurisdictions to which it has voluntarily submitted to jurisdiction, making statements harming any hope at negotiation, and passing legislation to avert any possibility of payments to holdouts—find solace within the fortress of the FSIA's immunity provisions.²²⁷

²²² See generally Richard D. Thomas, Comment, *Tipping the Scales in Chapter 11: How Distressed Debt Investors Decrease Debtor Leverage and the Efficacy of Business Reorganization*, 27 EMORY BANKR. DEV. J. 213, 215 (describing how the involvement of distressed asset investors in chapter 11 bankruptcies decreases the leverage of the debtor in negotiations with creditors).

²²³ See 28 U.S.C. § 1609.

²²⁴ See 228 U.S.C. § 1603 et seq.

²²⁵ See generally Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043, 1044 (2004) (“[T]he absence of a formal proceeding for evaluating the debtor's financial condition creates a risk of unreasonable restructuring terms.”).

²²⁶ See generally *id.* at 1045 (“[Holdout creditors] are also often subject to extensive criticism. Holdout creditors have been charged with delaying the restructuring process, thereby imposing unnecessary burdens on the citizens of the sovereign debtors. They have also been denounced for seeking payments for themselves at the expense of other creditors or at the risk of jeopardizing the restructuring.”). NML is in the business of buying defaulted bonds at nominal prices after the issuer has already defaulted with an eye towards protracted litigation and general harassment of the issuer, which it hopes will encourage the sovereign to pay it face value, at considerable profit, to resolve the whole matter. See *supra* notes 6-8 and accompanying text.

²²⁷ Bob Van Voris & Christie Smythe, *Argentina Says It Won't Voluntarily Comply*

The protections against execution and attachment under Section 1609 result in a “right without a remedy.”²²⁸ Fifty years before the FSIA was passed into law, Andrew Mellon, then Secretary of the Treasury, stated:

No nation, except by the pressure of public opinion and the necessities of its own credit, can be compelled to pay a debt to another nation. An insistence on a funding agreement in excess of the capacity of the nation to pay would justify it in refusing to make any settlement. None can do the impossible It follows that those who insist upon impossible terms are in the final analysis working for an entire repudiation of the debts.²²⁹

Secretary Mellon’s words have not lost their pertinence, despite the almost century that has passed.²³⁰ A creditor who has been aggrieved by a sovereign’s default will only receive payment where the sovereign voluntarily meets its obligations, which is unlikely given the perverse incentives the FSIA provides against cooperation.²³¹

Several amendments to the FSIA have been proposed, but none effectively addresses the issues posed by sovereign debt litigation. One reform that has been suggested is to reverse the current presumption under the FSIA so that “[r]ather than having an *exception* that denies immunity to property if [the assets are] in use for a commercial activity[,]” have “a *general rule* that makes property of sovereigns available to its creditors, subject to an exception that confers immunity on property in use for a sovereign

With Bond Ruling, BLOOMBERG (Feb. 28, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-02-27/argentina-seeks-relief-from-u-s-court-in-debt-fight.html>.

²²⁸ *Letelier v. Republic of Chile*, 784 F.2d 790, 798 (2d Cir. 1984).

²²⁹ Andrew Mellon, Statement by Secretary Mellon before the Ways and Means Committee concerning the Settlement of Indebtedness of Belgium, Czechoslovakia, Estonia, Italy, Latvia and Rumania (January 4, 1926), SECRETARY OF THE TREASURY REPORT ON THE FINANCES OF 1926, Exhibit 12, at 212, *reprinted in* SELECTED ARTICLES ON INTERALLIED DEBTS AND REVISIONS OF THE DEBT SETTLEMENTS 67, 77-78 (James Thayer Gerould & Laura Shearer Turnbull, eds., 1928).

²³⁰ *See generally Sovereign Immunity and Sovereign Debt*, *supra* 108, at 32 (“It is true that, before the statute, sovereign assets were absolutely immune from execution. As a practical matter, however, the statute did little to change this for post-FSIA bonds.”).

²³¹ *See id.* at 29 (“Given this dynamic it would make no sense to pay successful litigants voluntarily; doing so would encourage holdouts and potentially derail the restructuring.”).

activity.”²³² The reverse presumption would certainly help some classes of creditors, specifically judgment creditors who won tort claims.²³³ The amendment would do little for holdout creditors in sovereign debt litigation.²³⁴ Generally, the proceeds of the bond issue are spent quickly, so the holdout creditor is left to pursue other assets, which the sovereign will ensure are used for sovereign activity.²³⁵

Another alternative would be an international agreement, one which establishes a fund to “pay amounts due to creditors under awards or judgments against participating States.”²³⁶ Again, this alternative would be a viable option for tort and other judgment creditors, but would be ineffectual with regard to sovereign debt litigation. It is unlikely that states with sterling credit records would be willing to subsidize the defaults of other nations. Moreover, states with a history of default and the potential for future defaults—such as Argentina—would not adhere to an agreement that provided for payments to vulture funds.²³⁷ If such a system were to exist, many states would seek to exclude vulture funds from receiving payment out of the common fund, and therefore, the system would not resolve litigation of the type seen in *NML Capital*.²³⁸

No amendment to the FSIA will remedy the problem illuminated by *NML Capital* without gutting the heart of the statute and displacing traditional principles of sovereign immunity.²³⁹ Judge Griesa was on the right tract in using the court’s equitable powers to craft the Injunction. Problems ensued because the coercive aspects of the Injunction—contempt sanctions in the event of violation—could only be exercised

²³² Foster, *supra* note 106, at 720.

²³³ See 28 U.S.C. §§ 1609-1612.

²³⁴ See generally Weidemaier, *Sovereign Immunity and Sovereign Debt*, *supra* note 108, at 28 (“The statute does not guarantee creditors meaningful relief. The sovereign may not keep assets in the enforcing jurisdiction or may remove assets in anticipation of being sued. Judgment creditors thus tend to recover only if sovereigns willingly pay the judgment.”) (internal footnote omitted).

²³⁵ See *id.*

²³⁶ See Foster, *supra* note 106, at 727.

²³⁷ See *id.* at 667.

²³⁸ See *id.*

²³⁹ See 28 U.S.C. §§ 1609-1612

against third parties.²⁴⁰ Argentina needs third party cooperation to make payments on the exchange debt, which the Injunction precludes in absence of payments to the holdouts.²⁴¹ Argentina has shown, however, that it is willing to default on the exchange bonds if that means the Republic does not have to pay Elliot and friends.²⁴² The coercive element of the Injunction fails to compel the behavior sought.

In future cases the trial court should aim its equitable relief more squarely at the debtor. As Secretary Mellon noted, sovereigns cannot be forced to honor debt obligations; they must do so voluntarily.²⁴³ If only domestic pressures or the need to tap credit markets can induce a sovereign debtor to make debt payments, the remedy must apply pressure to one of those levers.²⁴⁴ Public opinion is generally in favor of the sovereign's efforts to thwart the collection attempts of the vulture funds.²⁴⁵ Such is the case in Argentina's dispute with Elliot, where Argentine President Cristina Fernández de Kirchner employed the conflict to rally domestic fervor.²⁴⁶ The pressure in many cases, therefore, must be placed on the debtor's ability to tap into credit markets, rather than the ability to satisfy debts already incurred.²⁴⁷

The trial court, in the most egregious cases, must be able to impair the debtor's ability to access credit markets.²⁴⁸ Rather than using the Injunction to impair Argentina's ability to continue to pay the exchange debt,²⁴⁹ the court should have granted an

²⁴⁰ See Order Clarifying the Scope of the Injunction, *supra* note 11, at 10-12.

²⁴¹ See Injunction, *supra* note 44, 2-5.

²⁴² See Salmon, *supra* note 169.

²⁴³ Mellon, *supra* note 229, at 212.

²⁴⁴ See *id.*

²⁴⁵ See, e.g., Heather Stewart & Uki Goñi, *Argentina Fears Default After American Court Ruling*, THE GUARDIAN ((Nov. 22, 2012, 2:43 PM), <http://www.theguardian.com/world/2012/nov/22/american-ruling-fears-default-argentina>).

²⁴⁶ See Stewart & Goñi, *supra* note 245 (quoting President Fernández: "We will not surrender money at the cost of hunger and exclusion of millions of Argentines We are not going to give in."). Economy Minister Hernán Lorenzino further stated, "These funds are vultures who seek to profit by betting on technical default We will continue defending Argentina's interests at every instances necessary and that includes going before the [U.S.] supreme court." *Id.*

²⁴⁷ See Mellon, *supra* note 229, at 212.

²⁴⁸ *Id.*

²⁴⁹ See Injunction, *supra* note 44, 2-5.

injunction against Argentina that would have prevented the Republic from issuing additional New York law debt securities. In cases, such as *NML Capital*, where the debtor has proved apt at disregarding its obligations under mutually agreed upon contracts with creditors and willing to disregard the judgments of courts to which the debtor voluntarily submitted to jurisdiction, a meaningful remedy is essential to ending the dispute. The court should refrain from granting such an injunction, unless the holdout creditors can carry the burden of showing that the equities weigh substantially in their favor, no less intrusive remedy will end the dispute, and that the sovereign debtor has gone to extraordinary lengths to prevent the creditors from exercising their rights under the debt securities.

An order would accompany each injunction. The order would require the debtor to submit to the court a restructuring plan, including a schedule and formula for making payments to the holdout creditors. If the creditor rejects the plan, the court shall require the debtor to submit subsequent plans so long as the court determines the holdout creditors are negotiating in good faith. A condition would be placed on each injunction providing that it will be lifted only once the holdout creditors and debtor agree to a restructuring plan or the court determines that the holdouts are not negotiating in good faith.

There is some evidence that this is the approach the Second Circuit intended, once it became clear that Argentina would rather default than voluntarily pay the holdouts.²⁵⁰ After a recent hearing, the court issued an order allowing Argentina to “submit in writing to the court the precise terms of any alternative payment formula and schedule to which it is prepared to commit.”²⁵¹

²⁵⁰ Order, *NML Capital, Ltd.*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105 (L)) [hereinafter Payment Terms Order], available at <http://blogs.reuters.com/felix-salmon/files/2013/02/BlawX1Q6MK6DIHO2.pdf> (“[I]t is hereby ordered that, on or before March 29, 2013, Argentina submit in writing to the court the precise terms of any alternative payment formula and schedule to which it is prepared to commit.”).

²⁵¹ *Id.* (“Argentina [is to] indicate: (1) how and when it proposes to make current those debt obligations on the original bonds that have gone unpaid over the last 11 years; (2) the rate at which it proposes to repay debt obligations on the original bonds going forward; and (3) what assurances, if any, it can provide that the official government action necessary to implement its propose will be taken, and the timetable for such action.”).

Argentina was not receptive to the court's olive branch.²⁵² Argentina did submit a plan to the court, but it offered substantially the same deal available under the 2005 and 2010 exchanges.²⁵³ As one could have predicted, NML declined the proposal.²⁵⁴ After victories before the district court and the Second Circuit, twice, Argentina could hardly have expected Elliot to accept a deal on the same terms available to it at the outset of the controversy.²⁵⁵

Regardless of its success in this case, the order shows that the court, recognizing the realities of the situation, desires to find a mutually agreeable resolution that will end this decade long quarrel.²⁵⁶ The court realizes the district court's Injunction will be undercut by another Argentine default.²⁵⁷ Instead of that unsustainable result, which harms the Second Circuit's credibility and leaves the holdout creditors back at square one, the court hoped to encourage Argentina to submit a plan that could be mutually agreed upon, given that the Republic would have input in its construction.²⁵⁸

While the idea floated by the Second Circuit faltered in the Argentine case, if each party were provided with the right mixture of sticks and carrots, similarly situated parties in future cases may be willing to engage in court monitored restructuring. For instance, if the sovereign debtor were enjoined from registering debt securities, once again gaining access to credit markets may

²⁵² See Response of Appellees to the Republic of Argentina's March 29 Proposal, *NML Capital, Ltd.*, 699 F.3d 246 (2d Cir. 2012) (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, 12-4694, 12-4829, 12-4865), 2013 WL 1790907.

²⁵³ See *id.*

²⁵⁴ See *id.*

²⁵⁵ See *id.*

²⁵⁶ See Payment Terms Order, *supra* note 250.

²⁵⁷ See Mark Weidemaier, *Pari passu Realpolitik*, CREDIT SLIPS (Mar. 1, 2013, 11:25 AM) [hereinafter *Realpolitik*], <http://www.creditslips.org/creditslips/2013/03/pari-passu-realpolitik.html>; see also Anna Gelpern, *Sovereign Bankruptcy, Day One: Market Rallies*, CREDIT SLIPS (Mar. 1, 2013, 4:27 PM), <http://www.creditslips.org/creditslips/2013/03/sovereign-bankruptcy-day-one-market-rallies.html>.

²⁵⁸ See *Realpolitik*, *supra* note 257 ("Given the court's limited enforcement power in the sovereign context, [this] kind of clash calls for a negotiated solution."); see also Gelpern, *supra* note 257.

provide the necessary incentive to spark negotiation, even in the most acrimonious of conflicts. By contrast, in cases that satisfy the strict requirements set forth above, the holdout creditors should be eager to end the perpetual stalemate and gain any repayment in excess of pennies on the dollar offered in the initial restructuring. Also, when dealing with most creditors the court will have traditional case management tools at its disposal to encourage agreement on a restructuring plan, which are not available when dealing with the sovereign debtor.²⁵⁹

Moreover, the proposed injunction would not carry the negative implications associated with holding the vast array of third parties subject to contempt sanctions for the debtor's violation of the Injunction.²⁶⁰ Instead of prohibiting third party financial service firms from aiding and abetting a violation of the injunction, the injunction would prevent the SEC from accepting or approving any prospectus, offering circular, or other document filed in connection with a debt offering. By applying the injunction to the SEC the court would avoid the enforcement problems that portend imposing an equitable remedy against a sovereign and would also quell concerns about the legitimacy of potentially subjecting third party payment systems participants to contempt sanctions.²⁶¹

Resistance to this plan is likely to stem from the concern that such a remedy will facilitate settlements above what is offered in initial restructuring efforts and, therefore, incentivize holdout litigation. Such concerns are not inconsequential. These arguments cut to the essence of the criticism of vulture funds.²⁶² For some, the idea of well funded investors purchasing securities at rock bottom prices, refusing to participate in restructuring, and then suing for a windfall judgment is the height of inequity.²⁶³ Any system that allows the vulture funds, which have comparatively less skin in the game, to swoop in and demand full

²⁵⁹ See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing trend encouraging judges to facilitate settlement and the tools used to achieve that goal).

²⁶⁰ See Order Clarifying the Scope of the Injunction, *supra* note 11.

²⁶¹ See Weidemaier & Gelper, *supra* note 213, at 6-7.

²⁶² See, e.g., Fisch & Gentile, *supra* note 225, 1087-90 (outlining some of the most common arguments against distressed asset investors).

²⁶³ See *id.* at 1045, 1089.

payment when investors less able to pursue the debtor in court are forced to settle for a large haircut in restructuring is inherently unfair.²⁶⁴ The concern is that the availability of the remedy suggested above will encourage holdout litigation, further frustrating the traditional restructuring process.²⁶⁵ For instance, the Argentine restructuring garnered ninety-one percent participation.²⁶⁶ The argument against a judicial remedy that rewards and encourages the dissenting nine percent is not without its merits.

The nature of distressed asset investing, however, should not be an impediment to resolving disputes of in the most thorny sovereign debt cases. The merits of vulture funds within the larger restructuring system present policy questions beyond the scope of this Note. It is sufficient to clarify here that the price and circumstances under which the bonds are purchased do not affect the rights asserted by the bondholder in subsequent litigation.²⁶⁷ The bondholder does not hold a lesser right under the contract because the rights were purchased during a time when the debtor was suffering financial stress.²⁶⁸ The bondholder, whether a pension fund or a vulture fund, has the right to petition the court for enforcement of rights under the contract.²⁶⁹ Furthermore, the fact that the vulture fund was able to purchase at a deep discount

²⁶⁴ *See id.*

²⁶⁵ *See id.* at 1089 (“[C]ritics argue that the potential for vulture funds to disrupt restructurings and to receive special payments not only discourages sovereign debtors from entering into the restructuring process but it also creates a collective action problem that dissuades other creditors from participating in the process.”).

²⁶⁶ *NML Capital, Ltd.*, 699 F.3d at 253.

²⁶⁷ *See generally* Jonathan Goren, Note, *State-to-State Debts: Sovereign Immunity and the “Vulture” Hunt*, 41 GEO. WASH. INT’L L. REV. 681, 700 (2010) (“While vulture fund litigation is not exceedingly common . . . when an investor has a legitimate claim, and the means and expertise to bring suit in the appropriate forum, they almost always win.”).

²⁶⁸ *See generally* Saloni Kantaria, *Looks Can be Deceiving: Holdout Litigation Under the Foreign Sovereign Immunities Act*, 10 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 26, 27-28 (2009) (overcoming the jurisdictional restrictions in the FSIA is one of the major hurdles in sovereign debt litigation, not establishing that the distressed asset investor has the right under the contract to bring suit).

²⁶⁹ *See, e.g.*, James M. Hays II, *The Sovereign Debt Dilemma*, 75 BROOK. L. REV. 905, 908 (explaining that without indenture trustee or other official with the power to “strip bondholders of their right to pursue individual legal remedies,” all bondholders are free to do so).

does not speak to the nature of the rights being purchased, but rather the value the market places on the securities.²⁷⁰ The discount in price is, in part, due to the increased risk of nonpayment that accompanies the debtor's financial distress.²⁷¹ In purchasing the bonds, the investor is taking a calculated risk that it will be able to gain full repayment of the contract while incurring reasonable costs.²⁷² The fact that distressed asset investors are willing to incur the greater risk of nonpayment inherent in buying the securities once the debtor is experiencing fiscal problems does not make their rights under the bond contract inferior to those that purchased in the initial offering and held until default.

The court will only exercise its discretion to implement the proposed injunction in the most drastic of cases, where there appears to be no end to the stalemate. Under such circumstances, the push towards settlement seems appropriate. The high burden to be satisfied by the creditor before gaining the remedy should neutralize much of the adverse impact on traditional restructuring that may be associated with this proposal. The high burden will also ensure that creditors everywhere are not flocking to the Southern District of New York with defaulted bonds in tow. As seen in the Argentine case, if restructuring is to be facilitated in the most difficult cases, the debtor must be encouraged to shift from its absolute position of nonpayment. The court's equitable powers can be utilized to bring otherwise unwilling debtors and creditors to table.

²⁷⁰ See, e.g., Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L L. REV. 1, 34 (2008) ("The riskiest element of the vulture funds' investment was not the defaulted Congolese debt that they purchased; it was the risk of successfully navigating the FSIA in U.S. courts.").

²⁷¹ See Horacio T. Liendo III, *Sovereign Debt Litigation Problems in the United States: A Proposed Solution*, 9 OR. REV. INT'L L. 107, 110 (2007) (arguing that bond terms correlate to risk, in that where bond terms are more attractive, the risk of nonpayment is generally higher); see also Samuel E. Goldman, Comment, *Mavericks in the Market: The Emerging Problem of Hold-outs in Sovereign Debt Restructuring*, 5 UCLA J. INT'L L. & FOREIGN AFF. 159, 182 (noting that bond contract terms, specifically interest rates, reflect the risk of permanent nonpayment).

²⁷² See generally James Thuo Gathii, *The Sanctity of Sovereign Loan Contracts and Its Origin in Enforcement Litigation*, 38 GEO. WASH. INT'L L. REV. 251, 304 (2006) ("[I]t would therefore be reasonable to assume that these holdouts are often aware of the financial handicaps of sovereign debtors and by buying bonds underwritten by such indebted sovereigns they are assuming the risk of non-payment.").

In addition to the benefits in terms of added efficiency that come from ending the perpetual litigation cycle, the agreement between the debtor and creditors will be blessed with the court's stamp of approval, providing comfort to both sides that the terms of the plan will be respected.²⁷³ Interest holders outside the primary parties would also reap the benefits of settlement. For instance, in the Argentine case, the holders of the exchange bonds would continue to receive payments without the constant specter of default, Argentina and its citizens would avoid the repercussions of another default, and Argentina's trading partners would receive assurance that the Republic has eliminated a threat to its financial stability.

V. Conclusion

The decisions in *NML Capital* were a victory for Elliot and other distressed asset investors who have pursued a judicial enforcement mechanism capable of compelling payment on defaulted sovereign debt securities. The court's willingness to employ its equitable powers against Argentina, despite the Republic's sovereign immunity, is a powerful precedent for creditors who opt out of restructuring, even if the Injunction in the Argentine case will ultimately fail to produce the desired result.²⁷⁴

In order to facilitate restructuring in the most precarious sovereign debt cases, the court must craft a remedy applying pressure directly on the sovereign debtor. While Judge Griesa's Injunction was a creative attempt to bridge the enforcement gap in sovereign debt litigation, it will fail to meet its objectives because it focuses its most coercive provisions on third parties. Now that the court has shown its willingness to experiment with equitable powers in sovereign debt litigation, it should utilize that tool to induce negotiation. The approach suggested here is but one possible avenue towards resolution. There are likely to be additional failed attempts along the way. If, however, the court were able to craft a mechanism capable of bringing the most recalcitrant debtors and relentless vultures to settlement, the future of sovereign restructuring would be the major beneficiary. Added efficiency not only benefits the sovereign debtor and the holdout

²⁷³ See Payment Terms Order, *supra* note 250.

²⁷⁴ See Order Clarifying the Scope of the Injunction, *supra* note 11.

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creditors, but also benefits the countless other constituencies affected by sovereign default and restructuring.