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United States Court of Appeals
FOR THE SECOND CIRCUIT



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

(caption continued on inside cover)

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

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

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Plaintiffs-Appellees,

—v.—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

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Plaintiffs-Appellees,

—v.—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

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

Interest of the United States

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

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

did not accept the exchange offers and instead sought recourse from the courts.

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

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

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

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

Notwithstanding these concerns regarding Argentina's continued failure to abide by its obligations, and our strong insistence that it do so promptly, the United States respectfully submits this brief because these consolidated appeals raise two issues of vital

public policy and legal importance to the United States that extend beyond the particular facts of this case.*

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

Second, the United States has a significant interest in ensuring that courts correctly construe the laws

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

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

ARGUMENT

POINT I

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

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

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

* In addition to holding that the *pari passu* clause was violated when Argentina made payments to the holders of exchange bonds without also satisfying its payment obligations under the bonds held by the appellees (SPA-32 at ¶ 5), the district court found that the *pari passu* clause was violated by the enactment of Argentina's Lock Law (SPA-32 at ¶¶ 6-7). The parties here dispute the proper characterization of the Lock Laws. Argentina argues that the Lock Law does not

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

legally subordinate debt, but merely requires legislative approval to authorize new settlements with bondholders. Brief of Defendant-Appellant the Republic of Argentina (“Arg. Br.”) at 45. Plaintiffs-appellees contend, in contrast, that the Lock Law is a legislative enactment that prohibits payments with respect to their bonds and accords a higher legal preference to the exchange bonds. (A-2122). The United States does not have particular expertise on the application of Argentine law in the context of its 2005 and 2010 debt restructuring. Moreover, legal mechanisms to effectuate a default or a restructuring of debt are likely to vary from country to country, and may not exist in all cases. Accordingly, the United States takes no position as to whether the district court correctly concluded that the enactment of the Lock Law constituted a breach of the *pari passu* clause.

sovereign defaults could otherwise have on the global economy.

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

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

For example, the United States has encouraged the inclusion of collective action clauses in sovereign debt contracts, which would permit a super-majority of bondholders to amend a debt instrument even when a

minority creditor refuses to agree to the amendment. The United States considers the progress made in this initiative a demonstration that sovereign debt restructuring can be achieved within the existing framework of contractual relations and consensual negotiation.

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

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

sovereign debt instrument, it is vital that such terms be interpreted according to settled market understanding.

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

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

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

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

As an initial matter, by failing to analyze, let alone defer to, the market understanding of boilerplate language in a commercial instrument, the district

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

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

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

Mean?, 18 Butterworths J. of Int'l Banking and Financial L. 371, 372 (2003).

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

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

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

Notwithstanding this settled commercial understanding, in September 2000, a Belgian court in an *ex parte* proceeding relied upon the *pari passu* clause to enjoin payments by Peru through Euroclear to the holders of bonds issued under a restructuring

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

Edwin Borchard, 1 *State Insolvency and Foreign Bondholders* 337-38 (1951). Professor Borchard went on to note the variety of ways in which discrimination among classes of state obligations had been tolerated in the past. For example, creditors tolerated preferences in favor of certain other creditors in order for the state to maintain its basic functions (*e.g.*, salaries for public employees) and to conduct trade (*e.g.*, preferred payment of short-term trade credits over longer term external loan contracts). *Id.*

agreement. See *Elliot Assocs., L.P. v. Banco de la Nacion*, General Docket No. 2000/QR/92 (Court of Appeals of Brussels, 8th Chamber, Sept. 26, 2000). The Belgian Court of Appeals held, without citation to any authority, that “the various creditors benefit from a *pari passu* clause that in effect provides that the debt be repaid *pro rata* among all creditors.” *Id.* at 3. The Peruvian government was ultimately forced to pay substantially all of the holdout creditor’s debt to avoid defaulting on its Brady Bonds. See *Understanding the Pari Passu Clause, supra*, at 1225.

The Belgian court’s construction of the *pari passu* clause deviated from well-established market practice and was viewed with almost universal consternation by international financial markets. See, e.g., Mark Weidemaier, Robert Scott & G. Mitu Gulati, *Origin Myths, Contracts and the Hunt for Pari Passu*, UNC Legal Studies Research Paper No. 1633439, at 5 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633439 (“The decision sent shockwaves through the sovereign debt world”); Rodrigo Olivares-Caminal, *To Rank Pari Passu or Not to Rank Pari Passu: That is the Question in Sovereign Bonds After the Latest Episode of the Argentine Saga*, 15 Law and Business Review of the Americas 745, 746 (2009) [hereinafter “*To Rank Pari Passu*”]; Michael H. Bradley, James D. Cox & Mitu Gulati, *The Market Reaction to Legal Shocks and Their Antidotes: Lessons from the Sovereign Debt Market*, 39 J. Legal Studies 289, 303 (2010) (“[T]he [Belgian] court’s decision came as a shock to the market and was clearly unanticipated.”).

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

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

* Although two other lower level courts have issued orders requiring a sovereign to make *pro rata* payments to holders of defaulted sovereign debt instruments, neither court engaged in any substantive consideration of the *pari passu* clause, and both orders were later vacated. A Belgian court enjoined Euroclear from making payments to holders of debt instruments issued by the Republic of Nicaragua, but this decision merely adhered to the precedent set by the *Elliot* decision. *Republic of Nicaragua v. LNC Investments and Euroclear Bank S.A.*, Docket No. 240/03 (Brussels Commercial Ct. Sept. 11, 2003). This decision was reversed on appeal on grounds unrelated to the

The one court to examine the *pari passu* clause in depth since the *Elliot* decision was issued expressed skepticism regarding its conclusion. In *Kensington Int'l Ltd. v. Republic of the Congo*, 2002 No. 1088, [2003] EWHC 2331 (Comm) (Commercial Ct. Apr. 16, 2003), the court denied an application for an injunction requiring Congo to make *pro rata* payments to its creditors. The court ultimately based its decision upon, *inter alia*, the excessive and intrusive nature of the injunction that was sought. *Id.* at ¶¶ 93-94. The court nonetheless observed that it gave “little weight” to the *Elliot* decision, which “was made upon an *ex parte* application,” *id.* at ¶ 63, and which was contrary to language in the Encyclopaedia of Banking Law stating that the *pari passu* clause is not violated “merely because one creditor is, in fact, paid before another,” *id.* at ¶ 67.

interpretation of the *pari passu* clause. In another case, a district court in California denied a judgment creditor’s motion for specific performance of the *pari passu* clause. Despite denying that motion, the court nonetheless enjoined the Democratic Republic of Congo from making payments on any debts unless proportionate payments were made to the plaintiff in that case. Order dated May 21, 2001, *Red Mountain Finance, Inc. v. Democratic Republic of Congo*, No. CV-00-0164 R (C.D. Cal.) (A-1369–A-1372). The district court’s order contained no reasoning and so it is unclear on what basis the court entered the injunction. In any event, the injunction was vacated after the parties arrived at a settlement while the case was on appeal. (A-2216–A-2225).

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

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

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

Reinterpreting standard *pari passu* clauses after decades of settled market practice could change the balance of interests that, to date, has induced the majority of creditors and debtors to recognize a

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

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

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

supervising the timing and amount of payments made by Argentina to its creditors.

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

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

The ratable payment interpretation of the *pari passu* clause adopted by the district court could also impede the repayment of loans extended by IFIs to sovereigns experiencing unserviceable debt burdens. Although the district court’s holding that Argentina breached the *pari passu* clause by its terms is limited to

Argentina's payments to holders of exchange bonds, the logical implication of its decision is that any selective payment of external indebtedness by a sovereign debtor, including to IFIs, constitutes a violation of the *pari passu* clause.

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

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

The IFIs—with the encouragement of the United States and other members—provide financial support to reforming countries at times when private capital is unavailable. Continued financial support for nations facing balance of payment difficulties and undertaking needed reforms is vital to maintaining the stability of the international financial system. *See, e.g.*, International Monetary Fund, Policy on Lending into

Arrears to Private Creditors, available at <http://www.imf.org/external/pubs/ft/privcred/> (1999).

The IFIs would be hampered in their ability to serve this function were they no longer able to expect timely and complete payments from their borrowers. See John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter*, 33 Va. J. of Int'l Law 591, 603-04 (1993). Therefore, as a matter of established custom, sovereign debtors routinely service debts owed to IFIs—even though those debtors may lack the resources to pay their other obligations. This custom is well understood by the international financial community. See, e.g., Matthew H. Hurlock, *New Approaches to Economic Development: The World Bank, the EBRD, and the Negative Pledge Clause*, 35 Harv. Int'l L. J. 345, 365-66 (1994); Testimony of Deputy Assistant Secretary Mark Sobel Before the House Oversight Committee on TARP, Financial Services, and Bailouts of Public and Private Programs (Dec. 16, 2011), available at <http://www.hftreview.com/pg/newsfeeds/hftreview/item/30378/written-testimony-of-deputy-assistant-secretary-mark-sobel-before-the-house-oversight-and-government-reform-subcommittee-on-tarp-financial-services-and-bailouts-of-public-and-private-programs-what-the-euro-crisis-means-for-taxpayers-and-the-us-economy> (“The Fund is regarded as the world’s preferred creditor, meaning that the IMF’s member countries acknowledge and agree that it gets repaid first.”); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, div. I, Pub. L. No. 112-74, § 7071(b), 125 Stat. 786.1254 (2011) (directing the Secretary of the Treasury to “instruct the United States Executive Director of the [IMF] to seek to ensure that

any loan will be repaid to the IMF before other private creditors”). Any interpretation of the *pari passu* clause that would potentially prevent states from continuing to service their IFI debt during, or as they emerge from, financial crisis is contrary to U.S. interests.

POINT II

THE DISTRICT COURT’S ORDERS ARE IMPERMISSIBLY BROAD

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

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

The injunctive relief ordered by the district court must be considered against the backdrop of the

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

The FSIA’s presumption of enforcement immunity contains exceptions for foreign state property located “in the United States” that is “used for a commercial activity in the United States” and that meets one of seven other requirements, 28 U.S.C. § 1610(a). Sovereign property located outside of the United States plainly falls outside the court’s enforcement authority. *See, e.g., Walters v. Industrial and Comm. Bank of China, Ltd.*, 651 F.3d 280, 288-89 (2d Cir. 2011) (noting that “special protection [is] afforded to the property of a foreign sovereign” under the FSIA because the judicial seizure of sovereign property is viewed as a

greater affront to sovereignty than the exercise of jurisdiction over a state by itself); *Walters v. People's Republic of China*, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009) (citing cases). “The FSIA did not purport to authorize execution against a foreign state’s property . . . wherever that property is located around the world.” *Autotech*, 499 F.3d at 750.

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

According to Argentina, “the Republic makes its payments on the restructured debt *outside the United States* when it transfers the necessary funds to a trustee.” Arg. Br. at 50. If plaintiffs were to reduce their claims to money judgment, they would be prevented from seeking to attach the funds utilized to pay the exchange bonds under the FSIA’s strictures on enforcement of judgments, as the funds at issue are located outside the United States. Presumably in an

effort to avoid these restrictions, plaintiffs-appellees chose instead to move for equitable relief that purports to constrain Argentina's use of such property.

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

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

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

[S]uch [an injunction] could only have resulted in the disingenuous flouting of the FSIA ban on prejudgment attachment of assets belonging to a

‘foreign state’. . . . The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property. We hold that courts in this context may not grant, by injunction, relief which they may not provide by attachment.

Id. at 418; *see also Weston Compagnie de Finance et D’Investissement, S.A. v. Republic del Ecuador*, 823 F. Supp. 1106, 1115-16 (S.D.N.Y. 1993) (denying injunction that directed sovereign to return funds that had passed through New York but were now located abroad).

Courts have repeatedly resisted creditors’ attempts to evade the restrictions on enforcement set forth in the FSIA, even if creditors frame the collection method as an exercise of jurisdiction over the sovereign, rather than the sovereign’s property. For example, in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010), the Ninth Circuit rejected a creditor’s argument that the court’s exercise of *in personam* jurisdiction over a sovereign provided it with authority to enter an order requiring the sovereign to assign foreign state assets located outside the United States, and hence immune from execution under the FSIA, to the creditor. *Id.* at 1130-32 (“The FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property.”); *see also Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian*, 218 Cal.

App. 3d 1058, 1094, 1099-100 (Cal. Ct. App. 1990) (rejecting argument that assignment order applying to assets worldwide would be “a valid exercise of the court’s personal jurisdiction” over state instrumentality, because such an order would “ignore a long-standing immunity under international law and under the FSIA,” and give the creditor what he could not achieve “through ordinary creditors’ remedies, namely, execution upon foreign property”); *cf. Walters*, 651 F.3d at 288-89 (“[T]he FSIA’s provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently.”).

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

a broad injunction—which also purports to bind non-parties in Argentina—against a private party.

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

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

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

As an initial matter, the same foreign relations concerns that animate the FSIA's restrictions on execution of judgments with respect to sovereign property located abroad exist whether the order is denominated an order of attachment or an injunction restricting the use of sovereign funds. Although there is a widespread acceptance in modern international law that foreign states' immunity from adjudication may be

restricted, “immunity from enforcement jurisdiction remains largely absolute,” and “a foreign State continues largely immune from forcible measures of execution against its person or property.” H. Fox, “International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States,” in M. Evans, ed., *International Law*, 364, 366, 371 (2003).

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

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

regard to those assets as a matter of domestic law or by contract.

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

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CONCLUSION

For the foregoing reasons, the Orders should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6924 words in this brief.

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