



# Partial Justice: The US Courts v Argentina

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By Jeremy Smith

*This paper provides an in-depth critique of how the US courts have interpreted the law and exercised their wide discretion in the disputes between NML and Argentina. Partially, the courts got it right when they decided that Argentina was in breach of the bonds' "pari passu" clause, which said that Argentina's "payment obligations shall at all times rank at least equally" with all its other present and future external debt. By enacting laws which precluded the government from paying anything on the original bonds, Argentina had legally ranked NML's bonds below later ones. But the paper argues that the US courts went wrong in also claiming that "rank" was not limited to legal ranking, as previously understood, but also covered different treatment of creditors in practice. And above all, the way the US courts exercised their discretion was partial, i.e. the opposite of impartial. They wholly subordinated the general public interest in orderly post-crisis debt restructuring processes to the narrow financial interests of NML. The paper proposes that a fair remedy would have been to order Argentina to pay NML on the identical basis to the exchange bond-holders.*

## Introduction

“The appellant (“NML”) is a Cayman Island Company. It is an affiliate of a New York based hedge fund of a type sometimes described as a “vulture fund”. Vulture funds feed on the debts of sovereign states that are in acute financial difficulty by purchasing sovereign debt at a discount to face value and then seeking to enforce it.”

Not our words, but those of British Supreme Court judge Lord Phillips in 2011, in a UK case on issues of sovereign immunity. He found against Argentina (another story there), but the opening words of his judgment have the merit of highlighting the true nature of the Plaintiff company NML - which forms part of hedge fund billionaire Paul Singer’s commercial empire - as well as drawing attention to its tax haven base.<sup>1</sup>

And yet the US courts have ended up ordering the Republic of Argentina, via the terms of an injunction, to pay NML and other plaintiff “hold-outs” the entire amount of principal plus interest on the bonds which NML bought up at a mere fraction of their face value. If Argentina does not pay every penny to the vulture fund at the same time, it is barred from paying the current tranche due to the 92% of exchange bond-holders who (in 2005 and 2010 exchange agreements) have accepted much less favourable terms to resolve Argentina’s debt crisis. What is more, the US Supreme Court’s majority has now backed the Order that the (once?) sovereign state of Argentina disclose all its assets worldwide – including its wholly immune assets – to the Cayman Island’s NML.

How did we reach such a truly bizarre legal outcome, which so handsomely rewards, through legal process, the purest and least socially useful form of financial speculation?

I would emphasize here at the outset that Argentina – from the beginning in 1991 – has been in fair part responsible for its own misfortune – along with others. Moreover in its truly disdainful (one might say contemptuous) manner of treating the US Courts, it has undoubtedly alienated judges and no doubt tempted them, at a human and maybe (small p) political level, to look for ways of responding in kind.

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<sup>1</sup> Lord Phillips also tells us that the case in question related to bonds bought up between June 2001 and September 2003 on behalf of NML at a little over half their face value, with a principal value of US\$172m, and for which in May 2006 NML obtained summary judgment for a total, including interest, of US\$ 284m in a Federal Court in New York.

If these bonds were bought at \$90 million, i.e. a little over half the face value of \$172m, NML’s judgment awarded them the return of their outlay (\$90m) plus a further \$184m, or 216% in total interest over the 3 to 5 year period. Taking an average of 4 years, NML’s return would be over 50% per year – if they could enforce it.

It is often said that “hard cases make bad law”, meaning that a truly sympathy-inducing plaintiff with a legally weak case may get a judgment in her favour which responds to the court’s idea of justice, but requires a bending of the law to get that result.

With Argentina, we have a variant on this – a (to the courts) unsympathetic defendant has managed to get the courts to make bad orders, certainly a far worse order against her than the respective merits of the case would indicate. Indeed, it is one of the counter-triumphs of Argentina’s tactics to make vulture funds seem marginally less undeserving than they truly are!

However, at the end of the day it is for the courts to shed such prejudices and decide fairly on the issue. That is the test for the US courts, and one which – for reasons set out below – they have largely failed.

In consequence of this panoply of US court decisions, it is clearer than ever that we urgently need a fair, internationally agreed and supported system for resolving sovereign debt disputes between debtors and creditors, taking away once and for all the power of vulture funds to overturn overwhelmingly agreed processes of debt resolution. Almost all debt crises are the joint (usually roughly equal) responsibility of debtors and creditors, and we should not continue to rely on a system of one-sided creditors’ justice dispensed by national courts.

The IMF, alas, has taken a major backward step from its Sovereign Debt Restructuring Mechanism proposals (SDRM) discussed in 2002 which, whatever its weaknesses, saw the need to move away from a pure contractual basis. In their recent paper, “The Fund’s Lending Framework and Sovereign Debt” (May 2014), the authors say

“Consistent with the above, while the paper recognizes that collective action problems may complicate the restructuring process, it relies on a contractual—rather than statutory—solution to the problem.” (page 8).

This will prove to be a major error. What is needed, as much today as ever, is a process that enables sovereigns to achieve a fresh start, but through a process – akin to chapter 9 of the US bankruptcy system that applies to municipalities – that fairly balances the interest of creditors and debtors while recognizing that it is a country’s citizens who ultimately need protecting. This proposal – as timely and necessary as ever – was first put forward by Professor Kunibert Raffer of the University of Vienna in his paper “What’s good for the United States must be good for the world: advocating an international Chapter 9 insolvency”, first published by the Bruno Kreisky Forum for International Dialogue in 1993.

## **A quick recap – the collapse of the Argentinian economy, and default**

A quick rewind to recall (however incompletely) the history. For those interested in how the disaster began and unfolded, the best book on the Argentine debt crisis is by Paul Blustein, “And the Money Kept Rolling In (and Out)”.

In 1991, the Argentine government decided to make the peso fully convertible to the US dollar, at a rate of one to one, and enabling footloose capital to flow freely in and out. For the next few years, Argentina achieved much lower inflation than before, and saw significant increases in GDP. It became the IMF’s “poster child” for the perceived benefits of the Washington Consensus liberalisation policy toolkit. The government was able to borrow with ease on the international bond markets – indeed, the banks and bond dealers effectively begged the Argentinian government to borrow ever larger sums from them in US dollars, always at a juicy interest rate which reflected significant elements of risk.

However, when the emerging market crises hit in the late 1990s, notably in east Asia and Russia, but also Brazil, Argentina too started to suffer capital outflows and economic decline, aggravated by a strengthening of the US dollar which by definition took no account of Argentina’s needs. From 1998, the situation rapidly worsened until, in the course of 2001, the country faced economic meltdown.

Borrowing on the international markets became far harder and dearer for Argentina as the crisis unfolded, with very high risk premiums reflected in interest rates that soared to over 15%. The IMF, meanwhile, also lent significant additional sums in unsuccessful hope that the economy would recover over a period, without breaking the peso-dollar link. (The IMF’s role was heavily criticized a few years later in a highly critical evaluation report, “The IMF and Argentina 1991-2001”).

In December 2001, the government finally accepted reality, ended the peso-dollar parity, devalued the peso, and declared a moratorium on paying its external debts. At the same time, the collapse of the peso against the dollar meant that the huge volume of international debt owed to private creditors, mainly dollar-denominated, at a stroke became far larger and costlier - in fact, unpayable.

In short, Argentina defaulted. Not because it wanted to, but because the situation was untenable. All in all, from 1998 to 2002, GDP fell (peak to trough) by 28%, before recovering from 2003 onwards, once the country was freed from the dollar linkage.

In 2005, Argentina offered a “deal” under which those bond-holders who agreed to participate in a re-structuring of the debt were offered new bonds to replace the existing ones, on far less favourable terms (around 30 cents in the dollar), and

achieved a 76% acceptance level. The offer was re-opened in 2010, and following this, the proportion of exchange bond-holders rose to 92%.

Heartened by the legal success in Belgian courts in 2000 - in which Elliott Associates (part of billionaire Paul Singer's corporate "empire", as is NML) forced the government of Peru to pay the full value of their "hold-out" bonds, despite Peru's own debt restructuring agreements - Mr Singer's firms, plus other hedge funds, started to buy up Argentina's debt at knock down prices. For example, we read from the US think-tank [CEPR's website \(2<sup>nd</sup> April 2013\)](#) that NML had paid US\$49 million for debt with a face value of \$220 million, i.e. just over 20 cents in the dollar, which if correct is more favourable still than the return on the bonds referred to by the UK Supreme Court, see page 1 above). From that time on, there has been a relentless battle between the "vultures" – using every legal tool available – and the government of Argentina, which has vowed not to pay what are known as "the hold-outs."

A final important point to recall – in part as a result of Argentina and Peru's experience with hold-outs, as well as that of many other highly indebted poorer countries, the IMF in the early 2000s started to promote the idea of a Sovereign Debt Restructuring Mechanism (SDRM) – see Anne Krueger's 2002 IMF paper "[A New Approach To Sovereign Debt Restructuring](#)" - as a way of resolving issue of debt unsustainability between debtors and creditors, taking it outside the purely contractual framework under which – as states cannot go bankrupt – there can never in theory be any escape for debtors, however unjust the result. The SDRM process was in the event killed off by the US government, amongst others. There are other proposals for dealing more fairly with sovereign debt issues – for example, to create a process with elements similar to those of the US Chapter 9 bankruptcy framework for insolvent municipalities (referred to above, page 2).

### **The three key legal issues**

Now let's return to the legal disputes between NML (and other similar hedge funds) and Argentina. The Argentinian bond contracts were expressly subject to New York law, hence the involvement of the New York courts in the years of dense litigation.

There are in essence three key legal issues involved. The first is the meaning of the "pari passu" clause in the original bond contracts. The second is the scope of the remedy of injunction as the means of enforcement against Argentina. The third is the scope of NML's claim for discovery in its attempt to locate assets it can seize to enforce its judgments.

### **Latin tags**

NML's claims can be summarised in two Latin phrases. First, the general principle that "pacta sunt servanda", or "contracts must be honoured", whatever the consequences.

In general, individuals and companies can in the modern world escape the very harshest consequences of inability to pay, through the legal process of bankruptcy, where once they would have been imprisoned for debt. But since states cannot be made bankrupt, this principle exposes not only governments but whole peoples to the risk of long-term enslavement to creditors, without escape. A recent article on Argentina by Martin Wolf in the Financial Times (24<sup>th</sup> June 2014) used the analogy with debtors' prisons:

“A world in which the choice for sovereigns and their creditors is between full payment and absolute non-payment would be as bad as one in which debtors had to choose between starvation and prison. A better way must now be found.”

And the second Latin tag is “pari passu” – literally “with equal step” – as the basis of treatment of bond-holders. Most sovereign bond contracts include such a clause, though the precise wording may differ – and lawyers have written tomes explaining the history of such clauses, and trying to explain their meaning.

### **The mystery of the Pari Passu Clause**

On 26<sup>th</sup> October 2012, the US Court of Appeals rejected Argentina's appeal against the permanent injunctions entered by the United States District Court for the Southern District of New York, by Judge Griesa, “to remedy Argentina's failure to pay bondholders after a default in 2001 on its sovereign debt. The district court granted plaintiffs summary judgment and enjoined Argentina from making payments on debt issued pursuant to its 2005 and 2010 restructurings without making comparable payments on the defaulted debt.”

Please note the word “comparable”. We will return to that.

To clarify the issues – first, there was never any doubt that, in pure contract law, NML was entitled to judgment against the Republic of Argentina for non-payment of amounts due under the bonds it held, having bought them at a knock-down price. But that simply means that they could enforce the judgment against any non-immune property owned by Argentina – not an easy matter.

Second, until the most recent litigation by NML, there was equally no doubt that Argentina was paying all the sums as they fell due, in terms of interest and principal, on the exchanged bonds held by the 92% of original bond-holders.

The key issue for the courts was what, if any, equitable relief to grant NML in an attempt to enforce their judgment and oblige Argentina to pay up on the hold-outs' bonds. Under common law systems, equitable relief – in the form of injunctions which

restrain a party from doing something, or “specific performance” orders to do something, are discretionary remedies. The remedy must be founded on a finding that the other party is legally in the wrong – but then the question is, what remedy is appropriate to the situation?

So first, could NML point to a legal wrong (apart from non-payment itself) which could trigger a stronger remedy? This is where the argument over the “pari passu” (sometimes called the equal treatment clause) clause comes in. What does it say?

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

The Securities – the originally issued bonds – are unsecured, and “rank pari passu without any preference among themselves”. The word “rank” in this first sentence has almost universally been understood as meaning “legally rank”, i.e. none of them is legally subordinated to, nor superior to, any other creditor in relation to that bond issue. It does not say, and has not been understood to mean, that all creditors within the same rank must always be paid exactly the same percentage at the same time.

The second sentence, however, is of greater importance in the present case. The “payment obligations” under the original bonds “shall at all times rank at least equally with” all its other present and future unsecured, unsubordinated external debts. But what does it mean to say that “payment obligations” under one bond issue “rank at least equally” with other external debt? There is no express statement about an obligation to make rateable payments (i.e. if you pay x% of his debt to A, you must pay x% of his debt to B at the very same moment, otherwise you are in breach of this clause), for the evident reason that creditors rarely do so, save when in accordance with decisions of bankruptcy courts. The word “rank” again has traditionally been understood to mean “rank in law”.

Thus, Argentina argued that the pari passu Clause was a “boilerplate provision” that, in the sovereign context, “has been universally understood for over 50 years . . . to provide protection from legal subordination or other discriminatory legal ranking by preventing the creation of legal priorities by the sovereign in favor of creditors holding particular classes of debt.”

## The US Government's Amicus Brief – in support of the traditional interpretation

And not only Argentina – the US Justice Department for example entered an Amicus Brief (an Amicus Brief is a contribution from a “friend of the court” who has an interest in but is not a party to the case), which includes this:

“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 favour of another creditor . . . .” Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 Emory L.J. 869, 870 (2004);...

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.”

The French government made similar points on the meaning of *pari passu* clauses in its Amicus Brief.

### Other cases on *pari passu*

There was one earlier court decision, however, which interpreted the clause differently, in favour of the hold-outs’ position. This was the case brought by Elliott Associates in the Belgian courts against the government of Peru in 2000, on another bond contract under New York law. It is summarised in the Justice Department’s brief:

“A Belgian court in an *ex parte* proceeding [i.e. without hearing the defendant] relied upon the *pari passu* clause to enjoin [prevent] payments by Peru through Euroclear to the holders of bonds issued under a restructuring agreement. See *Elliot Assocs., L.P. v. Banco de la Nacion* (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...” The Peruvian government was ultimately forced to pay substantially all of the holdout creditor’s debt to avoid defaulting on its Brady Bonds.

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. 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." [Our emphasis]

The Amicus Brief then refers to one other case in which *pari passu* clause was examined:

"In *Kensington Int.'l Ltd. v. Republic of the Congo*, (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. The court nonetheless observed that it gave "little weight" to the *Elliot* decision, which "was made upon an *ex parte* application," 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.'"

### **Pari passu in NML v Argentina – the Appeals Court decision**

Fast forward again to the US Appeals Court in October 2012. This is their interpretation of the specific *pari passu* clause:

"We are unpersuaded that the clause has this well settled meaning. Argentina's selective recitation of context-specific quotations from arguably biased commentators and institutions notwithstanding, the preferred construction of *pari passu* clauses in the sovereign debt context is far from "general, uniform and unvarying".

The Court then sets out a series of comments from experts about the lack of certainty as to what such clauses precisely mean.

"In short, the record reveals that Argentina's interpretation of the *Pari Passu* Clause is neither well settled nor uniformly acted upon. Once we dispense with Argentina's customary usage argument, it becomes clear that the real dispute is over what constitutes subordination under the *Pari Passu* Clause. See *Singh v. Atakhanian* (N.Y. App. Div. 2d Dep't 2006) ("A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect."...

Instead, we conclude that in pairing the two sentences of its *Pari Passu* Clause, the FAA [Fiscal Agency Agreement] **manifested an intention to protect bondholders from more than just formal subordination**. See *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009).

The first sentence (“[t]he Securities will constitute . . . direct, unconditional, unsecured, and unsubordinated obligations . . .”) **prohibits Argentina, as bond issuer, from formally subordinating the bonds by issuing superior debt.**

The second sentence (“[t]he payment obligations . . . shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.”) **prohibits Argentina, as bond payor, from paying on other bonds without paying on the FAA Bonds.** Thus, **the two sentences of the *Pari Passu* Clause protect against different forms of discrimination: the issuance of other superior debt (first sentence) and the giving of priority to other payment obligations (second sentence).**

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

In fact, the Court had perfectly respectable grounds for holding to the traditional interpretation of the *Pari Passu* clause, as meaning that rights under the original bonds are not legally subordinated to the rights of those under the exchanged bonds. This is because of an Act of the Argentinian Parliament known as the Lock Act, which expressly forbids the government to pay anything under the original bonds. Thus, by Argentine law, the original bonds were de jure, and not just de facto, subordinated. Here is what the US Court of Appeal said on this:

“Thus, even under Argentina’s interpretation of the Equal Treatment Provision as preventing only “legal subordination” of the FAA Bonds to others, the Republic breached the Provision. See Appellant’s Br. 35 (stating that “the clause must mean that, for example, there is no statutory or constitutional or other rule of law . . . subordinating the debt to other debt”). In short, the combination of Argentina’s executive declarations and legislative enactments have ensured that plaintiffs’ beneficial interests do not remain direct, unconditional, unsecured and unsubordinated obligations of the Republic and that any claims that may arise from the Republic’s restructured debt do have priority in Argentinian courts over claims arising out of the Republic’s unstructured debt.”

But the Court quite unnecessarily went beyond this finding of legal subordination, when it said (as cited above):

“We conclude that in pairing the two sentences of its *Pari Passu* Clause, the FAA manifested an intention to protect bondholders from more than just

formal subordination... The second sentence...prohibits Argentina, as bond payor, from paying on other bonds without paying on the FAA Bonds.”

I would argue that – in terms of precedent – this part of the judgment was quite superfluous to the Court’s decision, and need not and should not be followed. It was enough that Argentina had legally (by statute) subordinated its payment obligations under the initial bonds to the exchanged bonds. Such a decision, confined to the facts of the case and in particular the Lock Law, would not have overturned the generally shared traditional interpretation of the scope of the Pari Passu clause.

This argument – that the court has gone further than the facts and law require - is in fact strengthened by a strange passage in the US Appeals Court judgment, dealing with the issue of payments to the IMF. They say:

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

But this truly undermines the hold-outs’ broader claim as to the meaning of the Pari Passu Clause. Remember that the second sentence says:

“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.”

Is debt to the IMF an external indebtedness? Of course. Is it excluded from the Pari Passu Clause? No. So why, logically, would the sovereign’s de facto or de jure **policy** of subordinating obligations to commercial creditors to those of multilateral organisations NOT violate this provision, if NML and the Appeals Court’s interpretation is otherwise correct? I do not know whether the relevant contracts of Argentina with the IMF do or do not subordinate other debt to that of the IMF – if so, there is a clear breach of the Pari Passu Clause on legal ranking, and the Court should logically prevent Argentina making payments to the IMF unless the holdouts are simultaneously paid.

And if there is no legal ranking subordination, then the Appeal Court and NML have accepted that a sovereign may lawfully discriminate against classes of creditors on policy grounds without being in breach of the Pari Passu Clause. And if a **policy** of

giving priority to the IMF over other creditors is wholly acceptable, why is a government's **policy** to decline to pay holdouts not acceptable, where their insistence on nothing short of 100% payment - of principal and interest on bonds usually bought up on the cheap - risks undermining the whole debt restructuring process?

### The exercise of discretion

Let us assume, after all, that the Appeals Court had a good ground for deciding that – due to the Lock Act – Argentina had discriminated in breach of the Pari Passu Clause against the hold-outs now holding the original bonds. That is not the end of the matter – far from it. It is then in the Court's discretion what “relief” (order) to give to the successful party. And this is where the US Courts – no doubt out of frustration at Argentina's constant refusal to accept any decision that involved paying anything to the hold-outs – have acted in a way that is both inequitable and calculated to reward the least justifiable forms of predatory financial speculation.

The first Order was made by Judge Griesa on 7<sup>th</sup> December 2011, including the following:

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

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

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

Finally, at point 8., the Court stated that it would not order an immediate injunction, but consider the terms of such injunction further.

The passages above in bold are my emphasis. Although Judge Griesa relies in part on the Lock Acts' legal subordination of payment obligations under the holdouts' bonds – the most justifiable legal argument in favour of NML – paragraph 4 takes a very broad brush approach that goes well beyond the terms of the Pari Passu Clause by referring to the relegation of the holdouts' bonds to a non-paying class “by failing to pay the obligations currently due under NML's Bonds while at the same time making

payments currently due to holders” of other unsecured debt, i.e. the exchange bond-holders. “At the same time” introduces an element that appears out of thin air; it is not included in the Pari Passu Clause. And nowhere in that Clause is there mention of paying the amounts currently due under bond A if you pay the amounts due under Bond B.

In February 2012, Judge Griesa awarded the injunction. The US Appeals Court, considering the matter in October 2012, takes up the story:

“The Injunctions provide that “whenever the Republic pays any amount due under the terms of the [exchange] bonds,” it must “concurrently or in advance” pay plaintiffs the same fraction of the amount due to them (the “Ratable Payment”). **We are unable to discern from the record precisely how this formula is intended to operate. It could be read to mean that if, for example, Argentina owed the holders of restructured debt \$100,000 in interest and paid 100% of that amount then it would be required to pay the plaintiffs 100% of the accelerated principal and all accrued interest. Or it could be read to mean that, if such a \$100,000 payment to the exchange bondholders represented 1% of the principal and interest outstanding on the restructured debt, then Argentina must pay plaintiffs 1% of the amount owed to them.** We cannot tell precisely what result the district court intended. On remand the district court will have the opportunity to clarify precisely how it intends this injunction to operate.” (My emphasis).

And in a footnote, we are told:

“Under the Injunctions’ terms, calculating the Ratable Payment requires first determining a “Payment Percentage,” a fraction calculated by dividing “the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.”...The Payment Percentage is in turn multiplied by “the total amount currently due to [plaintiffs],” including pre-judgment interest. Because Argentina has defaulted on all of plaintiffs’ bonds, the “amount currently due” on the FAA Bonds is the amount due under the FAA’s Acceleration Clause – the entire principal amount of the bonds – plus pre-judgment interest which, according to plaintiffs, totals approximately \$1.33 billion.”

Therefore, by taking as the starting-point “the amount due” under the different types of bond, the Court was going beyond the Pari Passu terms of the contract which simply state that “the payment obligations of the Republic under the Securities shall at all times rank at least equally with other unsecured debt.” To rank equally, for example, could simply mean that some payment should be made under each set of bonds within a similar time frame. Or that a similar percentage of the overall sum outstanding should be made under all relevant bonds. Or frankly, anything that is broadly just and equitable in the light of all the circumstances. There is nothing

whatsoever that refers to a “ratable payment”, and for obvious reason. No one ever imagined that there would or should be a duty to make “ratable payments” under these contracts. It is pure judicial invention.

The extent of potential discretion is clearly demonstrated in the Appeal Court’s inability to understand (“discern”) the meaning of Judge Griesa’s formula. The two alternatives they pose are hugely different in financial outcome, and (I would add) in equity.

Thus to take the example, if Argentina were due to make a payment to the exchange bond-holders of 100% of \$100,000, then 100% of the amount of principal and interest due to NML (as accelerated due to the non-payment) would be...\$1.33 billion. Indeed, this sum is then payable whatever the amount due to be paid to the exchange bond-holders. This is an odd way to interpret the word “ratably”. The alternative construction would mean that while Argentina still pays the 100% of the \$100,000 due to the exchange bond-holders, since that is only (in this example) 1% of the overall contractual amount, then NML is entitled to be paid 1% of \$1.33 billion, namely \$13,300,000.

Since the Appeal Court did not rule out either alternative, but simply sent the matter back to Judge Griesa for clarification, we may presume that it considered both to be possible proper outcomes. Which only goes to underline the vast degree of discretion available to the Court in such a matter.

### **The terms of Judge Griesa’s injunction**

So back to Judge Griesa, who made his order on 21<sup>st</sup> November 2012. Here are the most relevant passages for the purposes of this article (it includes other procedural matters) – I have marked a few important passages in bold:

1. It is DECLARED, ADJUDGED, and DECREED that **NML is irreparably harmed by and has no adequate remedy at law for the Republic’s ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA**, in that:
  - a. Absent equitable relief, **NML would suffer irreparable harm because the Republic’s payment obligations to NML would remain debased of their contractually-guaranteed status**, and NML would never be restored to the position it was promised that it would hold relative to other creditors in the event of default.

- b. There is **no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c)** of the FAA because the Republic has made clear – indeed, it has codified in Law 26,017 and Law 26,547 – its intention to defy any money judgment issued by this Court.
  - c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to NML. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting NML to harm. On the other hand, the Order requires of the Republic only that which it promised NML and similarly situated creditors to induce those creditors to purchase the Republic's bonds. **Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both NML (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness,** after repudiating its payment obligations to NML, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.
  - d. **The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises.** No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.
2. The Republic accordingly is permanently ORDERED to specifically perform its obligations to NML under Paragraph 1(c) of the FAA as follows:
    - a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" to NML (as defined below and as further defined in the Court's Opinion of November 21, 2012).
    - b. Such "Ratable Payment" that the Republic is ORDERED to make to NML shall be an amount equal to the "Payment Percentage" (as defined below)

multiplied by the total amount currently due to NML in respect of the bonds at issue in these cases ..., in including pre-judgment interest (the “NML Bonds”).

- c. Such “Payment Percentage” shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.
- d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to NML.
- e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all participants in the payment process of the Exchange Bonds (“Participants”). Such Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to NML.

....

- 3. NML shall be entitled to discovery to confirm the timing and amounts of the Republic’s payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;
- 4. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court’s ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval by the Court;
- 5. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.”

### **The lessons from the injunctions – an essay in increasing moral hazard**

So let us draw out the key points:

- NML – a vulture fund registered in a tax haven - is “irreparably harmed” [sic] by, and has no adequate remedy at law for, the Republic’s ongoing violations of Paragraph 1(c) of the FAA, and that **the equities and public interest** strongly support issuance of equitable relief, i.e. in the terms provided. This is the central issue for the US Courts. They see no equities or public interest in resolving sovereign debt issues in an orderly manner in agreement with an overwhelming majority of creditors, and without encouraging the moral hazard of encouraging future hold-outs and vulture funds.
- The Court considers that since Argentina has the “financial wherewithal” to meet its “commitment” of providing equal treatment to both NML and “similarly situated creditors” and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is “particularly appropriate”, given that the Republic has engaged in “an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to NML”. But what is extraordinary is that the Court does not even weigh in the balance the public interest in orderly settlement of sovereign debt crises. It is not, after all, as if there were no economic collapse in Argentina – there was. But the only interest the Court is interested in protecting in exercising its full discretion in equity is to force Argentina through extraordinary injunctive terms to pay not just part but the totality of what is strictly due to NML, despite the fact that NML thereby gets a return of usurious scale, probably over 1000%. The US think-tank CEPR has given an estimated interest rate of around 1380% based on Judge Griesa’s order, in an article by Arthur Phillips and Jake Johnston (2<sup>nd</sup> April 2013):

“The key point here is that the lead plaintiff, NML Capital, as well as the other “vulture funds,” bought most of this debt for just cents on the dollar *after* Argentina’s default. NML purchased the majority of their holdings from June-November 2008, paying an estimated \$48.7 million for over \$220 million in defaulted bonds, a price of just over 20 cents on the dollar. The Argentine offer, far from forcing NML to take a loss, would imply a 148% aggregate return in terms of current market value, and would become more valuable over time. This compares to the payment formula proposed by the district court, which would imply a 1,380% return for NML.”

- But the most significant point is 1d. where Judge Griesa’s order claims that “the public interest of enforcing contracts and upholding the rule of law” will be served by the issuance of this Order, particularly because “creditors of the Republic have no recourse to bankruptcy regimes to protect their interests” and must rely upon courts to enforce contractual promises – “there is a strong

public interest in holding the Republic to its contractual obligations.” But this ignores the fact that bonds have interest rates attached that carry a risk premium - and that was absolutely the case with Argentina, whose bond interest rates were far greater than US Treasuries. As the FT’s Martin Wolf neatly put it (24<sup>th</sup> June 2014):

“A creditor compensated for the risk of a default cannot be surprised by it. The solution is portfolio diversification.”

- Judge Griesa’s Order misses the whole point about the absence of and need for a bankruptcy regime to protect sovereign states. They and their peoples – usually poorer than American hedge fund billionaires – are the ones who are left unprotected, under the present non-system, from the catastrophic effects of a debt crisis and the unremitting pressure for creditors for 100% payment. This is especially the case when the debt is denominated in another currency that increases in value when your own currency falls. And all the more so since the creditors are usually just as much to blame as the debtors for the crisis, as was the case with Argentina. The purpose of equitable remedies is to balance different interests fairly, which the US courts have palpably failed to do. This is an extreme example of the power of the law being used to enforce unjustified, unearned and socially damaging speculative gains at effectively huge usurious interest rates.

Alongside the Order itself, Judge Griesa gave an Opinion (21<sup>st</sup> November 2012) which explains some of his reasoning further. Warning to readers - this is a long passage I cite now, but it demonstrates the way in which this judge – and the US court system generally – have shown themselves to be under the ideological sway of Wall Street’s ideology:

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

This result is not only in accordance with the payment formula provisions of the Injunctions, it is consistent with the *Pari Passu* Clause and its Equal Treatment Provision. In saying this, **the court recognizes that the debt now**

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

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

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

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

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

**In accepting the exchange offers of thirty cents on the dollar, the exchange bondholders bargained for certainty and the avoidance of the burden and risk of litigating their rights on the FAA Bonds. However, they knew full well that other owners of FAA Bonds were seeking to obtain full payment of the amounts due on such bonds** through persisting in the litigation. Indeed, the exchange bondholders were able to watch year after year while plaintiffs in the litigation pursued methods of recovery against Argentina which were largely unsuccessful. However, decisions have now been handed down by the District Court and the Court of Appeals based on the *Pari Passu* Clause, which give promise of providing plaintiffs with full recovery of the amounts due to them on their FAA Bonds. **This is hardly an injustice. The exchange bondholders made the choice not to pursue the route which plaintiffs have pursued. Moreover, it is hardly an injustice to have legal rulings which, at long last, mean that Argentina must pay the debts which it owes. After ten years of litigation this is a just result.**” [as ever, my emphasis].

This is really quite breath-taking in its intellectual audacity and paucity. Taking the last point first, the judge is telling the exchange bond-holders in effect that since they took the “safe” route out of the problem by agreeing to the debt sustainability restructuring, they have only themselves to blame for ending up worse off than the hold-outs! No mention of the fact that most of the hold-outs buy up their bonds dirt cheap and take their speculative chances in enforcement. No hint of a thought that an orderly settlement of a debt crisis to enable a country to return to debt sustainability might just be in the public interest. No. Just unadulterated judicial support for the Cayman Island billionaire vulture funds.

But what is worse is the argument on “proportionality” and “ratability”, where the Judge argues that because (by definition) the full amount is due on the unpaid bonds, whereas the exchange bond-holders’ payments are spread in time, it is right *in equity* to make payments to the hold-outs in effect take legal precedence over the rights of the exchange bond-holders. What the judge is doing is in reality the opposite of that intended by the *Pari Passu* clause, by making the earlier debt held by the vulture funds superior in law and rank (by virtue of his order) to the later debt. He even accepts and makes a virtue of the fact that he is NOT carrying out the *Pari Passu* Clause but simply applying a remedy.

It is quite evident to any reasonable observer that the US Appeals Court's second option was far fairer, in proposing that a similar percentage of the totality of each debt should be payable at each stage to each cohort of bond-holder. Thus if the total final payments (interest plus principal) to the exchange bond-holders would be say \$30 billion, and the current payment is \$3 billion or 10%, then the hold-outs would get say 10% of their outstanding sum. But even this is over-generous to them in moral and public interest terms, since it rewards the worst kind of speculation.

The fairest methodology would be to tell the hold-outs that yes, they are entitled by virtue of the *Pari Passu* clause to some payment – but that their equitable relief (which is discretionary) would be to put them in precisely the same financial position as the exchange bond-holders.

So if the exchange bond-holders' total payments over time would be, say, 30% of the amount due under the original bonds, and half of that would have been paid by the end of December 2012, then Argentina would be ordered to pay the holdouts half of 30% of the amounts due under their original bond contracts. This would mean a one-off significant payment (to catch up with the exchange bond-holders) followed thereafter by exactly proportionate payments. At the end of the day, 70% of the amounts due under the original contracts would remain unpaid. For that "balance" on their account - well, let the vultures try to enforce their judgment. But don't come to the court seeking *equitable* relief when there is no justification and no discrimination.

Let's look at this another way. Assume that Argentina honours the payments to the hold-outs as ordered by the court, who thus win 100% (i.e. their 1380% interest, or whatever usurious rate applies) on the back of the twisted *Pari Passu* 'logic' adopted by Judge Griesa. Assume too that soon after, Argentina suffers another economic meltdown and payments are suspended on the exchange bonds. What remedy would the bond-holders have? They could not argue that they are entitled to equitable relief such as NML has been given under the *Pari Passu* clause, as the other (hold-outs') bonds have fully matured and been paid. They are left with their simple legal remedy of enforcement against Argentina – exactly the position that NML would be in but for the Court's overweening concern for their financial interests and alleged but non-credible "irreparable harm" it would suffer.

No, Judge Griesa has clearly and seriously failed in his task of finding a just outcome for all the parties, because his opinion betrays the extent to which his world view is identical to that of the hedge and vulture funds of Wall Street.

Argentina, of course, appealed against the terms of the injunction, but true to its hard line stance, declined to propose any alternative payments schedule to the Appeals Court for its consideration – in my view an error of judgment, since an offer to pay *as if*

the holdouts had accepted the exchange bonds would have demonstrated that the issue was one of coherence in settling the debt issue, rather than one of confrontation with the US Courts at all costs. If the US Court had refused such a proposal, Argentina would have been in a stronger moral position in the court of public opinion. In the event, the Appeals Court (August 23<sup>rd</sup> 2013) simply upheld Judge Griesa's order and in effect his reasoning:

"We believe that it is equitable for one creditor to receive what it bargained for, and is therefore entitled to, even if other creditors, when receiving what they bargained for, do not receive the same thing. The reason is obvious: the first creditor is differently situated from other creditors in terms of what is currently due to it under its contract."

Thus we end up in line with the moral (or immoral) of the strangest parable in the Christian New Testament, that of the talents which concludes:

"For unto every one that hath shall be given, and he shall have abundance: but from him that hath not shall be taken away even that which he hath. And cast ye the unprofitable servant into outer darkness: there shall be weeping and gnashing of teeth." (Matthew 25:14-30).

No one has ever explained to me why or how, taken in a worldly rather than spiritual sense, this can be seen as a good outcome!

### **Sovereign immunity – the US Supreme Court decision**

So far, I have analysed the US courts' judgments and orders on the plaintiffs' claims from the point of view of their substantive and legal merit, as well as the degree to which the courts have acted fairly in exercising their equitable discretion.

But much of the litigation, unsurprisingly, also focused on the issue of *enforcement* of NML's judgments against Argentina, and therefore raised issues of sovereign immunity. The recent case heard by the US Supreme Court was not on the substance of the *Pari Passu* clause, or the merits of the substantive core of the court injunctions discussed above, but about the extent and scope of orders for "discovery" of Argentine assets globally – which include assets that under international law are immune. In brief, the commonly understood law is that a judgment creditor may enforce against commercial property of a sovereign state, but not against its other state-related assets. In this case, NML had obtained an order from the New York courts demanding discovery (i.e. disclosure) of all Argentina's assets, commercial and other, globally.

Once again, the US court system came down resoundingly against Argentina, and with evident relish as appears from the Supreme Court majority judgment (16<sup>th</sup> June 2014), delivered by Justice Scalia.

He held that all issues to do with sovereign immunity in US law are now to be found in the Foreign Sovereign Immunities Act (FSIA) of 1976, which provides a

“comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.’ The key word there — which goes a long way toward deciding this case — is comprehensive.

The Act’s second immunity-conferring provision states that ‘the property in the United States of a foreign state shall be immune from attachment, arrest, and execution except as provided [in the Act]’. The exceptions to this immunity defense) are narrower. ‘The property in the United States of a foreign state’ is subject to attachment, arrest, or execution if (1) it is “used for a commercial activity in the United States,” and (2) some other enumerated exception to immunity applies, such as the one allowing for waiver...

There is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor’s assets. Argentina concedes that no part of the Act “expressly address[es] [post judgment] discovery.”... Quite right. The Act speaks of discovery only once, in a subsection requiring courts to stay discovery requests directed to the United States that would interfere with criminal or national-security matters, §1605(g)(1).

But of course that is not what the subpoenas seek. They ask for information about Argentina’s worldwide assets generally, so that NML can identify where Argentina may be holding property that is subject to execution. To be sure, that request is bound to turn up information about property that Argentina regards as immune. But NML may think the same property not immune. In which case, Argentina’s self-serving legal assertion will not automatically prevail; the District Court will have to settle the matter.

Today’s decision leaves open what Argentina thinks is a gap in the statute. Could the 1976 Congress really have meant not to protect foreign states from post judgment discovery ‘clearinghouses’?”

Justice Scalia’s answer – who knows? If Congress in 1976 had thought of the facts of such a case as this, then perhaps:

“it would have added to the Act a sentence conferring categorical discovery-in-aid-of execution immunity on a foreign state’s extraterritorial assets. Or, just as possible, it would have done no such thing”.

Nonetheless, Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause ‘a substantial invasion of [foreign states’] sovereignty’, Brief for United States as Amicus Curiae 18, and will ‘undermine international comity,’ *id.*, at 19. Worse, such orders might provoke “reciprocal adverse treatment of the United States in foreign courts,” *id.*, at 20, and will ‘threaten harm to the United States’ foreign relations more generally,’ *id.*, at 21. These apprehensions are better directed to that branch of government with authority to amend the Act.”

With respect, Justice Scalia’s argument represents special pleading and lacks logic. The 1976 Act (FSIA) deals with issues of State Immunity in the US, (a ‘comprehensive set of **legal standards governing claims of immunity**’), but does not seek to define the **extent or scope of orders for discovery of extra-territorial assets**. The absence of provision in the Act dealing with the extent or scope of discovery orders covering the rest of the world beyond the US is obviously due to the fact that the Act was not seeking to deal with the issue. It does not mean that – in its own terms – it is not “comprehensive”, but that it was not trying to cover every conceivable eventuality that might arise on issues related to – but not directly being – issues of immunity in relation to the rest of the world.

It was the vast, one might say imperial, scope of the discovery orders that was at issue – and here once again the American legal system decided to put its toughest enforcement power fully behind the interest of Cayman Island speculative hedge funds, dismissing any interests of sovereign states (including the USA itself) as irrelevant. This is indeed law being deployed in its crudest manner in the service of financial capital.

The dissenting judgment of Justice Ruth Bader Ginsburg demonstrates that – whilst some order for discovery was appropriate - the US Courts once again had a huge area of potential discretion within which to reach their decision. She said:

“A court in the United States has no warrant to indulge the assumption that, outside our country, the sky may be the limit for attaching a foreign sovereign’s property in order to execute a U.S. judgment against the foreign sovereign....Without proof of any kind that other nations broadly expose a foreign sovereign’s property to arrest, attachment or execution, a more modest assumption is in order. See *EM Ltd. v. Republic of Argentina*, 695 F. 3d

201, 207 (CA2 2012) (recognizing that post judgment discovery “must be calculated to assist in collecting on a judgment” (citing Fed. Rules Civ. Proc. 26(b)(1), 69(a)(2))).

Unless and until the judgment debtor [sic – should be creditor], here, NML, proves that other nations would allow unconstrained access to Argentina’s assets, I would be guided by the one law we know for sure—our own. That guide is all the more appropriate, as our law coincides with the international norm. See §1602. Accordingly, I would limit NML’s discovery to property used here or abroad “in connection with . . . commercial activities.” I therefore dissent from the sweeping examination of Argentina’s worldwide assets the Court exorbitantly approves today.”

## Conclusion

So here we have it. The US Court system has ended up giving the fullest support at its disposal, at every level, to the interest of speculative vulture funds against a sovereign state that had reached a deal with 92% of its creditors in relation to a true debt crisis and economic collapse.

Of course, at the heart of the problem is the fact that the private commercial law system, based on national legal jurisdictions, is not an appropriate way of resolving issues of global as well as national importance that arise when sovereign states are genuinely in crisis and have no alternative but to default. And no one has denied that Argentina was in such a situation in 2001.

Yet the US and other rich country governments have prevented the creation of an international system for the resolution of state insolvency or ‘bankruptcy’, for example the SDRM proposed by the IMF in 2002, or the proposals for a system analogous to key parts of the US Chapter 9 process for resolving municipal bankruptcy issues (per the Raffer proposal – see page 2).

Sovereign debt crises are almost always the responsibility not of just one party – the debtor – but of many parties. In the case of Argentina, the crisis arose from serious policy mistakes by the Argentinian government, by the self-serving activities of lenders who both knew and were recompensed for the risks they were taking, and by the support (political and via loans) of the IMF to foolish economic policies that they knew, or should have known, might end in disaster. The Evaluation Report said (page 5):

“In fact, even within the IMF, there was an increasing recognition that Argentina had an unsustainable debt profile, an unsustainable exchange rate peg, or both. Yet no alternative course of action was presented to the Board, and the decisions were made to continue disbursing funds to Argentina under

the existing policy framework, on the basis of largely noneconomic considerations and in hopes of seeing a turnaround in market confidence and buying time until the external economic situation improved.”

It is possible to be to a degree sympathetic to the US courts, especially at the outset, who faced a difficult task of reconciling ordinary commercial contract interpretation with the realities and needs of the international financial system. And the courts were faced with a defendant, Argentina, which went out of its way to thumb its nose at the US courts which – by virtue of the bond contracts’ jurisdictional provisions – had the task of resolving litigation as it arose.

We can go one step further in supporting the line of interpretation of the US Courts. The Pari Passu Clause was not devoid of all meaning, as some commentators have argued. It expressly stated that payment obligations under the original bonds should “rank at least equally” with later external debts, yet by virtue of the Lock Acts, passed by the Argentinian legislature, they were legally subordinated to the later exchange bonds. This is not a criticism either of the Argentinian legislature, who had good reasons for passing such laws. But it does mean that, in my view, the US Courts cannot be criticized for finding that Argentina had indeed broken the terms of the Pari Passu Clause.

But that only gets us to first base (a good American metaphor!). What remedies to provide? By definition, NML and the other hold-outs were entitled to judgment on their bonds for non-payment, but by itself, with all the problems of enforcement, a judgment alone would be unlikely to prove of much value. The hold-outs needed other, stronger remedies. But such other remedies require what is known as “equitable relief”, and equitable relief – orders – are highly discretionary.

This is where the US Courts have shown themselves to be biased and unfair. At every point, they have backed the interests of NML and the holdouts. Nowhere in the judgments is there the slightest recognition of the fact that vulture funds are an extraordinarily destructive force, devoid of any ethical or social merit, which serve only their own usurious interest.

Sovereign debt crises require resolution, and absent a strong international system, the national Courts need to balance the competing interests of those with pure legal rights, against the public interest in orderly resolution. The US Courts have on the contrary failed at any point to have regard to this public interest.

On the contrary, their one-sided orders, if implemented, have the simple effect of transferring resources from the people of Argentina to some of America’s richest hedge fund owners, who use tax havens to register their companies and avoid US taxes, if not US law.

There was indeed a simple way for the US Courts to serve the interest of justice without falling in behind either the vulture funds or the Argentinian government – and recognize the co-responsibility of debtors and creditors in resolving debt crises. That was to make an order – using their discretion in equity - that Argentina pay the hold-outs on the same basis as the exchange bond-holders receive – i.e. to pay a maximum (under the order) of say 30% of the amount due, paid also to the hold-outs over time by similar instalments to those payable to the exchange bond-holders.

That would truly be *Pari Passu*, “with equal step”, and provide real equality of treatment. NML could then take its chances in trying to enforce its legal judgments for the balance, but without being able to use the other bond-holders as hostages in the process.

The most astonishing part of the New York courts’ reasoning is where they seek to justify paying NML a far higher amount than the exchange bond-holders, who are in effect considered to be the authors of their own misfortune in agreeing to settle with Argentina. The fact that they chose to support only the financial interest of Paul Singer’s empire indicates a slide to a more political and ideological agenda on the part of much of today’s American judiciary.

Not so long ago, the US had some of the world’s finest, fairest judges, attracting global respect and influence. Today, alas, the pure service of predatory financial interests appears to be the highest value upheld by its 21<sup>st</sup> century judiciary.

To escape this for the future, a proper, internationally agreed way of resolving sovereign debt issues is not just desirable, but of paramount importance. To rely only on contractual terms alone is to revert to a system in which law and justice, law and equity, are utterly divorced. The alternative is to accept a dystopian world in which the poorest debtors remain in chains till they pay the hedge fund slave-masters the last cent of usurious compound interest due, or die in the process.

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