

DON'T CRY FOR SOVEREIGN DEBTORS: WHY ARGENTINA'S DEFEAT IN U.S. COURTS DOES NOT JUSTIFY A SOVEREIGN DEBT TREATY

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ABSTRACT

The recent triumph of holdout bondholders over Argentina in U.S. court litigation arising out of Argentina's 2001 default on its sovereign bonds has renewed calls for the creation of an internationally-administered sovereign debt restructuring mechanism (SDRM). Such a "sovereign bankruptcy" mechanism is needed, supporters have argued, because future Argentina-style holdout litigation could undermine the ability of sovereigns to reach equitable restructurings. This Article argues that the danger of future disruptive sovereign debt litigation in U.S. courts is overstated. A close analysis of the legal basis for U.S. court decisions in the Argentina litigation suggests that it will be difficult for future holdout creditors to replicate this strategy against other foreign sovereigns. U.S. law still grants foreign sovereigns enormous and nearly insurmountable legal advantages in U.S. courts over private creditors. While there may be good reasons to create an SDRM, the fear of future Argentina-style U.S. litigation is not one of those reasons.

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INTRODUCTION

In 2001, the government of Argentina defaulted on over \$80 billion in sovereign debt,¹ which remains one of the largest sovereign debt defaults in history. Although Argentina was later able to win agreement from a majority of its bondholders to restructure much of that debt at a considerable discount, a group of investment funds and small private investors continued to demand to be paid in full. These holdout creditors engaged Argentina in a no-holds-barred legal struggle in U.S. federal courts that led to five separate U.S. Supreme Court petitions for certiorari,² one Supreme Court decision,³ and an eventual legal triumph for those holdout creditors.⁴

The legal victories of holdout creditors in U.S. courts, which has led Argentina to enter into another default, has already spurred new calls for the International Monetary Fund and leading nations to create a sovereign debt restructuring mechanism ("SDRM") or some other kind of international mechanism to protect sovereign debtors from future Argentina-style holdout creditor litigation. For many supporters of a SDRM, the ability of holdout creditors to use U.S. courts to force repayment of sovereign debt will undermine the ability of future sovereign debtors to negotiate a fair and equitable restructuring of distressed sovereign debt.⁵ A breakdown in restructurings, supporters further argue, would have deleterious effects on global financial markets as well as on

¹ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 201 (2013).

² *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 201, *cert. denied* (2013); *Republic of Argentina v. EM Ltd.*, 131 S. Ct. 1474, *cert. denied* (2011); *Aurelius Capital Partners, LP v. Republic of Argentina*, 559 U.S. 988, *cert. denied* (2010); *EM Ltd. v. Republic of Argentina*, 552 U.S. 818, *cert. denied* (2007); *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819, *cert. denied* (2014).

³ *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) (affirming power of district court to order post-judgment discovery for overseas assets); *EM Ltd. v. Republic of Argentina*, 552 U.S. 818, *cert. denied* (2007).

⁴ *See, e.g., NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013); *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012).

⁵ *See, e.g., W. Mark C. Weidemaier & Anna Gelpern, Injunctions in Sovereign Debt Litigation*, 31 *YALE J. ON REG.* 189 (2014) (asserting that injunctions in sovereign debt litigations are ineffective because by imposing costs to third parties they can hardly secure compliance of sovereign governments).

the ability of developing countries to provide necessary services to their citizens.⁶

This Article does not dispute that a breakdown in the ability of sovereigns to restructure their distressed debt would be a serious problem, but it argues that it is unlikely future holdout creditors will be able to replicate the U.S. litigation strategy used against Argentina. A close legal analysis of the Argentina cases reveals that foreign sovereigns maintain enormous advantages over private creditors when they default on their debt obligations. Although creditors have often sought to enforce defaulted bonds against sovereign deadbeats in U.S. courts, such efforts have almost never succeeded.⁷ The legal victories against Argentina depended in no small degree on Argentina's unusually aggressive strategy for dealing with holdout creditors, especially its decision to enact a "Lock Law" that prohibits any payment to holdouts.

The Article begins in Part 1 by offering a brief history of Argentina's sovereign debt issuance, its 2002 default, its subsequent efforts to restructure that debt, and its eventual defeat in U.S. court litigation at the hands of holdout bondholders. In Part 2, the Article reviews arguments made by scholars and policymakers in favor of a statutory sovereign debt restructuring mechanism to prevent future holdouts from using litigation to block the restructuring of distressed sovereign debt.

Part 3 goes on to explain why, despite appearances to the contrary, U.S. law makes it nearly impossible to win an enforceable judgment in U.S. courts against a sovereign defaulting on its debt. The Article will then describe in detail the two creative legal strategies used by the holdout creditors to overcome these obstacles against Argentina. Only one of these strategies, the *pari passu* clause strategy, actually succeeded.

⁶ See, e.g., Felix Salmon, *Annals of Ignoble Cowardice*, *Second Circuit Edition*, REUTERS (Sept. 10, 2013), available at <http://blogs.reuters.com/felix-salmon/2013/09/10/annals-of-ignoble-cowardice-second-circuit-edition> (criticizing decisions against Argentina as worse than allowing mere defaults).

⁷ This has not prevented creditors from bringing lawsuits, which have increased in recent years. Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *Sovereign Defaults in Court*, at 8-12, available at <http://ssrn.com/abstract=2189997> (showing that there has been a rise in creditor litigation related to sovereign defaults in the United States and United Kingdom since 1976 and illustrating this rise in Figure 2, entitled "The rise of creditor litigation"). *Id.* at 35.

In Part 4, the Article assesses the effect of these innovative legal strategies on the future of sovereign debt claims in U.S. courts. It concludes that traditional and common sense legal analysis of the relevant bond contracts and immunity law supports U.S. courts' decisions to grant an injunction to holdout creditors. However, the decisions relied heavily on the unusually broad language in Argentina's *pari passu* clause and highlighted the unusual actions Argentina has taken to lock out the holdout creditors. Thus, it is likely that Argentina's unusually aggressive strategy for dealing with its holdout creditors, especially its decision to adopt legislation prohibiting payments to holdouts, was a crucial factor in the U.S. courts' decisions. In other words, the danger of holdout litigation to future foreign sovereigns can be avoided in many cases, and is manageable for the rest.

1. BACKGROUND – ARGENTINA AND SOVEREIGN DEBT

In 1994, the Republic of Argentina sold government bonds to foreign investors in New York and other international financial markets pursuant to a Fiscal Agency Agreement (FAA). To ease investor concerns about their ability to recover payments in the event of default or nonpayment, Argentina agreed to give buyers of these FAA bonds a number of legal protections.

First, Argentina agreed to submit to the jurisdiction of “any New York state or federal court sitting in the Borough of Manhattan, The City of New York . . . over any suit, action, or proceeding against it or its properties, assets or revenues with respect to” the securities it issued.⁸

Second, Argentina agreed to waive legal immunity defenses that sovereigns typically enjoy from the jurisdiction of domestic courts.

Argentina “has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or

⁸ EM Ltd. v. Republic of Argentina, 720 F. Supp. 2d 273, 278 (S.D.N.Y. 2010), *vacated sub nom.* Terms and Conditions Governing the 10.000% New AR\$ Global Bond due September 19, 2008, ISIN # XS0130278467, *quoted in* NML Capital, Ltd. & EM Ltd. v. Banco Cent. de la República Argentina, 652 F.3d 172 (2d Cir. 2011).

the issue of any process in connection with any Related Proceeding or Related Judgment.”⁹

The waiver went on to assure investors that Argentina also waived immunity to the fullest extent permitted for “any of its revenues, assets or properties” that would otherwise be entitled to immunity “from attachment prior to judgment, from attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy.”¹⁰

Finally, Argentina offered investors protection from subordination. In what has become known as the *pari passu* clause, Argentina declared that:

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.¹¹

Pursuant to these and other assurances, Argentina went on to raise billions of U.S. dollars from private investors in New York. By 2001, such debt amounted to approximately \$80 billion.

Beginning in 2001, Argentina began to suffer from economic and financial stresses that severely limited its ability to make payments on debt it owed to foreign investors, especially debt denominated in U.S. dollars. These domestic economic and political problems eventually led Argentina to announce in December 2001 that it was declaring a “temporary moratorium” on principal and interest payments on all of its external debt, including the debt sold in New York.¹²

This “temporary moratorium” was renewed each subsequent year until 2005 when Argentina reached an agreement with about 76% of its private creditors to exchange the original 1994 debt for

⁹ *Id.*

¹⁰ *Id.*

¹¹ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012) *cert. denied*, 134 S. Ct. 201 (2013) (alteration in original).

¹² *Id.*

new bonds paying about 25 to 29 cents on the dollar. In the course of offering these new exchange bonds, Argentina noted that it “has no intention of resuming payment on”¹³ any bonds not exchanged or tendered at the restructured rate. Argentina’s legislature reinforced this statement by enacting a law prohibiting its president from “conducting any type of in-court, out-of-court or private settlement with respect to the bonds”¹⁴ not tendered as part of the exchange offer. This so-called “Lock Law” made it illegal under Argentina law for payment to be made to any creditors refusing to accept the new (much less valuable) bonds.¹⁵

In 2010, Argentina again made an offer to exchange the original 1994 debt for new (substantially less valuable) bonds. It temporarily suspended its “Lock Law” to do so and succeeded in attracting investors holding another 15% of its 1994 bonds. Thus, by 2010, investors holding bonds worth about 91% of the 1994 issuance had agreed to the exchange. Argentina then reinstated the Lock Law, ensuring that remaining creditors who were now holding bonds worth 9% of the remaining 1994 debt would not be paid.¹⁶

At various times after Argentina announced its default in 2001, hedge funds affiliated with Elliott Associates began buying up Argentina’s 1994 debt (at a substantial discount). Rather than accepting the terms of the 2005 and 2010 exchange offers, the hedge funds (along with a number of original investors in the 1994 debt) continued to demand full payment. NML, the lead Elliott-fund holding Argentine debt, filed lawsuits in 2009 and 2011. Relying upon Argentina’s agreement to jurisdiction in New York courts, the funds demanded full payment on the defaulted 1994 debt. As I will describe in more detail below in Part 4, the funds won judgments against Argentina but were frustrated in their efforts to execute those judgments in U.S. courts.

U.S. courts did accept the funds’ argument that the *pari passu*

¹³ *Id.* at 260.

¹⁴ *Id.* at 252 (alteration in original).

¹⁵ *Id.* at 252. As one commentator noted, Argentina’s harsh line with its creditors looks even harsher since it had by this time recovered enough foreign capital to actually pay off its debt with very modest debt service. See Arturo C. Porzecanski, *Guest Post: Argentina Threw Its Creditors Under the Bus*, FIN. TIMES, (NOV. 12, 2013, 7:00 PM), <http://blogs.ft.com/beyond-brics/2013/11/12/guest-post-argentina-threw-its-creditors-under-the-bus/> (criticizing that Argentina aggressively restructured the public debt).

¹⁶ NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, at 252–53.

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clause in Argentina's bond contracts allowed the hedge funds to demand "equal treatment" with bondholders who had accepted Argentina's less favorable exchanges in 2005 and 2010.¹⁷ This interpretation, which Argentina failed to reverse in appeals to the U.S. Supreme Court, led to a standoff in the summer of 2014. Argentina refused to pay the holdout hedge funds, but the U.S. court refused to allow Argentina to pay the other exchange bondholders, placing Argentina in a technical default. As of the time of this writing, Argentina and its holdout creditors have failed to reach a settlement.¹⁸

2. THE CALL FOR A SOVEREIGN DEBT RESTRUCTURING

Long before Argentina's default in July 2014, leading observers and policymakers were troubled by the precedents emerging from the Argentina litigation in the U.S. Indeed, an earlier successful litigation involving a similar *pari passu* strategy against Peru in the late 1990s led to serious discussions at the International Monetary Fund about the creation of an international treaty mechanism to protect sovereigns from disruptive litigation during default and restructuring of their debt. In particular, experts were concerned that litigation by holdout creditors could impede a sovereign's effort to restructure its debt with other creditors willing to accept reduced payments. As a recent IMF study explains:

While private creditors as a group may recognize that support for a rapid restructuring is in their own interest, they may hesitate to agree to a restructuring out of concern that other creditors may hold out and press for full payment on the original terms after the agreement has been reached. Thus, collective action problems could either make restructuring unsuccessful due to the holdout strategy or cause de-

¹⁷ See discussion, *infra* Part 3.2.

¹⁸ See Peter Eavis, *Argentine Debt Dispute Remains Murky Even as London Court Sheds Some Light*, N.Y. TIMES (Feb. 13, 2015, 6:32 PM), available at <http://dealbook.nytimes.com/2015/02/13/argentine-debt-dispute-remains-murky-even-as-london-court-sheds-some-light/> (describing continuing deadlock between Argentina and its holdout creditors).

lay due to uncertainty about creditor participation.¹⁹

Discussions at the IMF centered on a “sovereign debt restructuring mechanism” (SDRM) that would address this “collective action” problem. An SDRM would allow a sovereign to call a “temporary standstill” in a manner akin to the protections from creditor litigation provided by bankruptcy under domestic law. In a domestic bankruptcy, a debtor is protected from creditors’ lawsuits while it undergoes restructuring. In the SDRM framework, the IMF would play a role in evaluating the sovereign ability to pay its debts and decide on what level of “haircut” or reduction bondholders would have to accept.²⁰

Proponents of the SDRM mechanism argue that it would stabilize international financial markets when a sovereign faces the stresses on its ability to make its debt payments. It would encourage sovereigns to restructure their debt earlier rather than try to borrow their way out of their debt crisis. Crucially, it would also shield sovereigns from holdout creditors and domestic litigation.²¹

The SDRM concept appeared to receive support from the IMF’s staff, but it ultimately failed to win broad support from the IMF’s shareholders. Instead, the Fund suggested that sovereigns add collective action clauses to their bond contracts that would allow them (via contract law) to eliminate holdout creditors’ claims once a certain threshold of support from other bondholders is reached. Such Collective Action Clauses (“CACs”) were believed to provide a private sector solution to the problem the SDRM was designed to address.²²

The fallout from Argentina’s July 2014 default has renewed calls to consider the SDRM or some other legal mechanisms to protect sovereign debtors from holdouts. For instance, the Brookings Institution issued a report calling for amendments to both the Eu-

¹⁹ *Sovereign Debt Restructuring – Recent Developments and Implications for the Fund’s Legal and Policy Framework*, Apr. 26, 2013, at 12 [hereinafter IMF], available at <https://www.imf.org/external/np/pp/eng/2013/042613.pdf>.

²⁰ Anne Krueger, First Deputy Managing Director, Int’l Monetary Fund, *International Financial Architecture for 2002: A New Approach to Sovereign Debt Restructuring* (Nov. 26, 2001), available at <https://www.imf.org/external/np/speeches/2001/112601.htm>.

²¹ *Id.*

²² IMF, *supra* note 19, at 12.

ropean mechanisms of debt restructuring as well as for a greater role for the IMF. Citing the Argentina judgments in U.S. courts, the report called for a "Sovereign Debt Adjustment Facility" that would, *inter alia*, provide a shield for sovereigns seeking to restructure their debt.²³

Other critics of the U.S. court rulings also noted how the U.S. litigation highlights the needs for a "sovereign bankruptcy" mechanism. Otherwise, "[t]he balance of power will be tipped strongly away from debtors toward their creditors; there will be little incentive for debtors toward their creditors; there will be little incentive for creditors to negotiate with troubled sovereigns."²⁴ These concerns were echoed by the Secretary General of the Organization of American States, who suggested that the U.S. courts' decisions do

not only threaten... the financial stability of [Argentina; they] also wreak . . . havoc [on] the sovereign debt restructuring mechanisms that have been developed over time, [and] with the acquiescence of international lending agencies, to enable numerous countries to overcome their debt crises and embark once again on a path to growth.²⁵

Similarly, Professor Diane Desierto called the Argentina cases "an extreme example of the pathological consequences to the absence of a binding international treaty that would assist sovereigns in the coordination of debt restructuring with all holders of gov-

²³ LEE C. BUCHHEIT ET AL., BROOKINGS INST., COMM. ON INT'L ECON. POL'Y & REFORM, REVISITING SOVEREIGN BANKRUPTCY 31-33 (2013) available at <http://www.brookings.edu/research/reports/2013/10/sovereign-debt> (arguing for a limited "statutory reform" to deal with holdout problem).

²⁴ Brett House, *Argentina's Debt Saga Shows Why We Need a Better Way to Deal with Bankrupt Countries*, QUARTZ (Mar. 24, 2014), available at <http://qz.com/191388/argentinas-debt-saga-shows-why-we-need-a-better-way-to-deal-with-bankrupt-countries/>; see also Robin Wigglesworth & Alan Beattie, *Bankruptcy Regime for Nations Urged*, FIN. TIMES (Jan. 6, 2013), <http://www.ft.com/cms/s/0/ad3068d6-4613-11e2-ae8d-00144feabdc0.html#axzz3BqXIOAO> (discussing the justifications for implementing a sovereign debt restructuring mechanism, such as the one proposed by the IMF in 2002).

²⁵ Press Release, Org. of Am. States, Meeting of Consultation of Ministers of Foreign Affairs of the OAS Supports Argentina in the Restructuring of its Sovereign Debt (July 3, 2014), available at http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-286/14.

ernmental debt.”²⁶

This section illustrates, however, that supporters of an SDRM have repeatedly cited the Argentina litigation in U.S. courts as a major factor in why an SDRM is needed. The merit of an SDRM is beyond the scope of this Article. As I will argue in subsequent sections, however, these SDRM supporters are overstating the threat of future copycat Argentina holdout litigations.

3. FOREIGN SOVEREIGN DEBTORS IN U.S. COURTS

As one of the world’s largest financial markets, it is not surprising that sovereign governments have commonly used New York financial institutions to borrow money, or to underwrite bond offerings to the general public. It is also not surprising that New York courts, both federal and state, have become a common U.S. venue for litigation between creditors and sovereign states that have defaulted on their loans or bond offerings.

Although defaulting sovereigns have often been sued in New York and other U.S. courts, the success record of such lawsuits is extremely low. The reason for the failure of most creditor lawsuits is the doctrine of foreign sovereign immunity. This doctrine, drawn from the international law of sovereign immunity, limits the ability of domestic U.S. courts to assert jurisdiction over foreign sovereigns and their assets. As articulated by Chief Justice Marshall, one sovereign “can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station . . . will be extended to him.”²⁷ The dignities and rights accruing to a sovereign under international law prohibit the exercise of another sovereign’s powers over it or its assets.

U.S. courts honored Marshall’s injunction for most of the next 150 years. Indeed, even in cases where the sovereign expressly

²⁶ Diane Desierto, *Republic of Argentina v. NML Capital Ltd.: The Global Reach of Creditor Execution on Sovereign Assets and the Case for an International Treaty on Sovereign Restructuring*, EJIL: TALK! (June 22, 2014), <http://www.ejiltalk.org/republic-of-argentina-v-nml-capital-ltd-the-global-reach-of-creditor-execution-on-sovereign-assets-and-the-case-for-an-international-treaty-on-sovereign-restructuring/>.

²⁷ *Schooner Exch. v. McFaddon*, 11 U.S. 116, 137 (1812).

waived any immunity it possessed, U.S. courts traditionally allowed such sovereigns to revoke the waiver and reassert immunity once a lawsuit arose.²⁸ The adherence of U.S. courts to the immunity of foreign sovereigns, and the revocability of waiver, meant that defaulting sovereigns almost always escaped the jurisdiction of U.S. (usually New York) courts in lawsuits brought by angry creditors.

The principle of absolute immunity for all foreign sovereigns began to change shortly after World War II when the U.S. State Department announced it would no longer recommend immunity for sovereigns acting in a commercial capacity.²⁹ This rise of the principle of "restrictive" immunity, later codified and expanded in the Foreign Sovereign Immunities Act (FSIA),³⁰ allowed creditors to overcome sovereign immunity pursuant to certain exceptions. With respect to waiver, the FSIA clarified that once a foreign government waived its immunity, it could not subsequently revoke that waiver.³¹

Yet the shift away from absolute immunity did not automatically benefit creditors of sovereign debtors. To be sure, sovereign borrowers like Argentina often waive their immunity from the jurisdiction of U.S. courts. This waiver subjects them to money judgments for non-payment. But though creditors might win money judgments, the FSIA still severely limits the power of courts

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In a 1961 case, *Rich v. Naviera Vacuba*, the State Department's suggestion of immunity for Cuba opined that an ex ante waiver of immunity 'is binding only on the conscience of the sovereign and, once given, may be revoked at will.' Memorandum for the United States [In Opposition to Application for Stay of Mayan Lines, S.A.], 1 I.L.M. 276, 297 (1961).

W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 73 n.27 (2014). This rule was long recognized in U.S. courts - see *Beers v. State of Arkansas*, 61 U.S. 527, 529 (1857) (stating that a sovereign state, even after previously waiving its immunity from suit, "may withdraw its consent whenever it may suppose that justice to the public requires it.").

²⁹ See Letter from Jack B. Tate, Acting Legal Adviser, U.S. DEPT. OF STATE, to Philip B. Perlman, Acting U.S. Attorney General (May 19, 1952), reprinted in 26 DEP'T. ST. BULL. 984, 984-85 (1952) (discussing and explaining the U.S. government's altered position that un-consenting foreign governments would no longer receive absolute immunity in U.S. courts for certain types of cases).

³⁰ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976), codified at 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611 (1990).

³¹ 28 U.S.C. § 1610(a)(1).

to *execute* those money judgments against a sovereign's assets or property.

Most notably, although the FSIA opened the door to execution against sovereign assets used for the "commercial activity in the United States," it continues to shield all other sovereign assets from execution.³² Thus, a sovereign debtor like Argentina can essentially ignore a money judgment against it by keeping whatever funds it uses for commercial activities outside the jurisdiction of a U.S. court. All other assets remain execution-proof. This includes official governmental assets for conducting diplomatic activities or for conducting financial transactions for official government accounts.

Additionally, the FSIA goes out of its way to make clear that certain other sovereign military-related assets are also immune from execution, whether or not the sovereign had issued a general waiver of immunity.³³ Thus, even though Argentina has issued a waiver of immunity it might claim from "attachment," U.S. law limits this waiver to assets Argentina uses for a commercial purpose. To prevent any of its holdout creditors from collecting on the defaulted debt, a sovereign debtor like Argentina simply keeps such assets outside of New York.

In sum, a sovereign who waives its immunity from both jurisdiction and execution in a U.S. court is actually exposing itself to very little liability. It can almost never be forced to pay on those debts because it can move any attachable assets out of the jurisdiction before execution. Unless the sovereign has assets used for commercial activities in the U.S., the sovereign can continue to operate freely within the U.S. jurisdiction without any fear of attachment or execution. It is not surprising that many commentators have described sovereign debtors as essentially litigation-proof.³⁴

Facing these legal obstacles, it is surprising that any creditors bother to file lawsuits against sovereign bond issuers in U.S. courts and even more surprising that SDRM supporters cite such litigation as a threat to sovereign debt restructurings. Yet Argentina's

³² See, e.g., 28 USC § 1609 (giving immunity to foreign state property unless qualifying under exceptions in section 1610).

³³ 28 U.S.C. § 1611.

³⁴ See, e.g., Weidemaier, *supra* note 28, at 69 n.8 (noting that "many lawsuits and arbitration claims arising out of Argentina's 2001 default are still pending, without creditors recovering a cent."), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180228.

holdout creditors have developed two strategies to overcome these immunity-from-execution defenses. Both of these strategies, while innovative, have faced strong opposition from experts in the field of sovereign debt as well as from the U.S. government. And only one of these approaches has succeeded in court.

3.1. *The Central Bank Assets*

As noted above, the FSIA explicitly protects the property of a “foreign central bank or monetary authority held for its own account”³⁵ from execution or attachment. The policy basis for this immunity appears to be Congress’ concern that to do otherwise would discourage foreign central banks from depositing their reserves in New York.³⁶

Yet, as NML and other holdout creditors have argued, this immunity should not apply to the Banco Central de la República Argentina (BCRA), Argentina’s central bank. First of all, some central banks are not legally or functionally independent from their sovereign governments, and at least one district court agreed that where such central banks lack independence, their assets should be attributable to the sovereign.³⁷

Second, not all of the assets in the BCRA, even if independent, are held for the BCRA. NML argued that those assets were actually being used by the government of Argentina to pay other debtors, most notably the bondholders who had agreed to exchange their bonds in 2005. In this way, NML and other creditors sought to read the FSIA’s language limiting immunity to property held for the central banks’ “own account” to exclude assets being funneled

³⁵ 28 U.S.C. § 1611(b)(1).

³⁶ See S. REP. NO. 94-1310, at 31-32 (1976) (explaining that the policy behind giving immunity to central bank funds from execution is to prevent foreign funds from being discouraged to deposit in the United States).

³⁷ See *EM Ltd. v. The Republic of Argentina*, 720 F.Supp.2d 273, 300-01 (S.D.N.Y. 2010) (finding that the Republic of Argentina’s exercise of control over funds held by BCRA was “entirely inconsistent with any idea of central bank independence” and accordingly that BCRA was the alter ego of the Republic of Argentina), *vacated sub nom.* *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172 (2d Cir. 2011).

through the BCRA to other bondholders.³⁸

Third, NML argued that Argentina's broad waiver of immunity defense from attachment should be interpreted to include a waiver of defenses for its central bank.

Although the holdout creditors managed to convince one district court to allow attachment of certain assets in the BCRA,³⁹ this decision was eventually reversed by the Second Circuit.⁴⁰ The appeals court held that the central bank's independence had nothing to do with whether it was protected from attachment.⁴¹ It further held that courts should adopt a presumption that all of a central bank's assets are immune from liability, placing on plaintiffs the burden of rebutting this presumption.⁴² To rebut the presumption, plaintiffs must demonstrate with specificity that the funds are not being used "for central banking functions as such functions are normally understood, irrespective of their commercial nature."⁴³

Applying this test to the BCRA, the Second Circuit held that plaintiffs could not overcome the presumption that all of the assets belonged to the BCRA. Taking note of Argentina's "appalling record of keeping its promises to its creditors," it nonetheless dismissed the holdout creditors' action.⁴⁴ The plaintiffs appealed to the Supreme Court, but the Court denied review.

3.2. *Pari Passu*

Though they failed to attach Argentina's central bank assets, the holdout creditors simultaneously pursued a separate strategy to pierce Argentina's immunity defenses. This second (ultimately more successful) strategy focused courts on Argentina's promise to treat all bonds as "direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari*

³⁸ See *EM Ltd. and NML Capital, Ltd. v. Republic of Argentina and Banco Cent. de la República Argentina*, 2010 WL 2725571 (C.A.2), at 63-64 (2010).

³⁹ *Id.* at 303-04.

⁴⁰ *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 194 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012).

⁴¹ *Id.* at 190.

⁴² *Id.* at 196.

⁴³ *Id.* at 194.

⁴⁴ *Id.*

passu without any preference among themselves.”⁴⁵

The holdout creditors argued that this language prevented Argentina from giving preference to the exchange bondholders (those bondholders who had agreed to the restructured debt) over the holdouts. Yet Argentina was not only regularly paying the exchange bondholders pursuant to the new (much reduced in value) bonds, but it enacted a Lock Law that made it illegal under Argentina law to pay the holdouts at all. Such differential treatment formally and legally subordinated the original bonds to the new exchange bonds. The district court accepted this interpretation of the *pari passu* clause, stating that “it’s hard for me to believe that there is not a violation of the [Equal Treatment Provision] accomplished by the [Lock Law], simply saying that the Republic will not honor these judgments.”⁴⁶ The district court then issued injunctions blocking Argentina (and those working in active concert with Argentina) from making any payments to exchange bondholders unless it made comparable payments to holdout creditors as well.

This interpretation of the boilerplate *pari passu* clause proved highly controversial. The U.S. government took the unusual step of filing an amicus brief at the appeals court level opposing this interpretation of the clause.⁴⁷ Thus, Argentina (with the U.S. government in support), argued that the clause should be understood to allow different payments to different classes of bonds, as long as those bonds were given equal treatment when similarly situated. Hence, if the exchange bonds were defaulted, and Argentina only resumed payments for the exchange bonds and not the holdouts, then it would violate the *pari passu* clause. In that case, the exchange bonds would have been given formal legal priority to the holdout creditors’ bonds. But because there was no formal subordination of the holdout creditor bonds here, Argentina argued it was not in violation.

Furthermore, even if there was a violation, Argentina again sought the protection of the FSIA, arguing that the district court’s

⁴⁵ NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 251 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 201 (2013).

⁴⁶ *Id.* at 254.

⁴⁷ Brief for the United States of America as Amicus Curiae in Support of the Republic of Argentina’s Petition for Panel Rehearing and Rehearing En Banc, NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 251 (2d Cir. 2012) (No. 12-105).

injunctions effectively operated extraterritorially by requiring Argentina to use assets held outside of New York to pay the holdout creditors. The FSIA, Argentina argued, only allowed injunctions against property within the United States.

This time, Argentina could not win over the Second Circuit. That court affirmed the district court's interpretation of *pari passu* clause as a protection against more than simply formal subordination.⁴⁸ It agreed with the lower court that the clause should also prevent de facto subordination, as Argentina was doing here by paying only exchange bondholders and enacting a Lock Law. Indeed, the Second Circuit emphasized that the Lock Law confirmed that the holdout creditor bonds had been formally subordinated. Since the exchange bonds could be enforced in Argentine courts, whereas the Lock Law specifically prohibited any payment to the holdouts, the Lock Law had both formally (as well as effectively) denied equal treatment to the holdout creditors.

The Second Circuit also roundly rejected Argentina's FSIA argument. It held that while the FSIA did prohibit attachment of assets outside the United States, including injunctions that operate as attachments, the district court's injunctions did not do so here. All of the district court's injunctions required that Argentina comply with its contractual obligation in some way of its own choosing. It could refuse to pay the exchange bondholders, for instance, or pay each set of bondholders a proportionate amount. But the injunction did not "exercise dominion" over any of Argentina's assets by directing particular overseas assets to be used for payment, or that any assets be used at all.

While affirming the judgment, the Second Circuit remanded the case to the district court to clarify precisely how the injunction would apply to third parties and intermediary banks, and to explain the mechanics of the "ratable payment" formula for determining how much money must be paid to holdouts if Argentina makes payments to exchange bondholders.⁴⁹ In November 2012, within weeks of the Second Circuit's decision, the district court provided the requested clarification and strongly reaffirmed its initial injunction. In August 2013, the Second Circuit again affirmed the district court, and in November 2013, it denied en banc review

⁴⁸ NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012), cert. denied, 134 U.S. Ct. 201 (Oct. 7, 2013).

⁴⁹ *Id.* at 265.

before the entire appellate court. Argentina filed a petition seeking Supreme Court review of this decision, but the Court denied certiorari in June 2014.⁵⁰ The highest court's refusal to hear Argentina's case, or even to seek the views of the U.S. government, returned the case to the trial court, which had ordered Argentina to pay the holdouts or the court would block all payments to the exchange bondholders. Despite a court-ordered mediation, Argentina and the holdout creditors failed to reach an agreement before payment on Argentina's bonds became due on July 30th.

4. ASSESSMENT

The Second Circuit's interpretation of the *pari passu* clause shocked numerous observers, especially those who had followed sovereign debt markets closely. Reporters that had confidently predicted the Second Circuit's rejection of the *pari passu* clause argument were now reporting that U.S. courts were threatening to undermine the world's financial system by subjecting sovereign debt to dangerous new remedies.⁵¹ In the Second Circuit's last consideration of this case, it was subjected to a virtual avalanche of amicus briefs from lawyers representing the exchange bondholders and the third party-agents, all of whom vociferously opposed the *pari passu* injunction. The U.S. government supported these arguments as well. As explained in Part II, these observers have also suggested that drastic reforms are needed to respond to the results of these litigations. But as I will argue in this section, the Second Circuit's decision is based on solid legal foundations. Moreover, the unique facts of this case suggest that it will be difficult for future holdout creditors to replicate.

⁵⁰ See *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014) (holding to affirm the district court's injunction order but denying enforcement until resolution by the U.S. Supreme Court).

⁵¹ For instance, Felix Salmon at Reuters has been a relentless critic of the courts' performance in these cases, especially the Second Circuit. See, e.g., Salmon, *supra* note 6.

4.1. Law

The vast majority of the *pari passu* criticism is based on policy rather than law. Put another way, few of the arguments raised by Argentina's supporters offered legal arguments based upon contractual or statutory text and traditional rules of contract interpretation.

This is not surprising because while the policy arguments against a broad reading of *pari passu* have substantial force, the legal arguments are far from compelling.

4.1.1. *Pari Passu*

The *pari passu* language that ended up being central to Argentina's defeat has been a boilerplate feature of sovereign debt contracts for over a century.⁵² Although they take different forms, almost all versions of the *pari passu* clause promise equal footing between different debt obligations.⁵³

The holdout creditors' interpretation of *pari passu* was first advanced against Nicaragua and Peru in earlier lawsuits over sovereign debt defaults. This interpretation of *pari passu* was bolstered by an opinion filed by Andreas Lowenfeld, an eminent scholar of international economic law at New York University.⁵⁴ Lowenfeld argued that the most natural reading of *pari passu* is that a debtor must pay all creditors proportionately or ratably.⁵⁵ Put another way, the *pari passu* language should be read to require payment to all creditors the same proportional amount. Lowenfeld thus concluded that simply stopping to make all payments to some creditors, while making payments to others, violates the basic idea be-

⁵² Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 L. & SOC. INQUIRY 72, 80-81 (2013) (recounting interviews with practicing lawyers about history of *pari passu* clause in sovereign debt contracts).

⁵³ See Anna Gelpern, SOVEREIGN DAMAGE CONTROL, in POL'Y BRIEF, May 2013, at 4 (Petersen Inst. for Int'l Econ. ed., 2013) (explaining the different forms of the *pari passu* clauses and their various effects).

⁵⁴ See *id.*

⁵⁵ See *id.*

hind the *pari passu* clause.⁵⁶

This opinion was endorsed by a Belgian court in 2000, when it blocked the payment agency Euroclear from paying Peru's restructured creditors money unless the holdout creditors like Elliott were paid. Rather than continue to litigate the meaning of *pari passu*, Peru settled with Elliott.

Although the results of this reading raise policy problems (discussed below), it is hard to reject the legal foundations for this *pari passu* interpretation. As the Second Circuit noted, the 1994 FAA instrument actually had two components. In its first sentence, Argentina promised that the bonds would constitute "direct, unconditional, unsubordinated and unsecured obligations false."⁵⁷ In its second sentence, Argentina promised that the bonds shall "at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness."⁵⁸

Argentina interpreted this language to protect bondholders against formal subordination in legal or administrative proceedings. It argued that this language should not be read to require de facto equality and proportional payments to all creditors outside of such proceedings. But this reading of the *pari passu* language that was advanced by Argentina is hardly the most natural reading.

Unlike Argentina's interpretation, the holdout creditors' reading of this language gives meaning to *both* sentences. In the first sentence, the FAA bond promised formal legal equality among all of the bonds issued.⁵⁹ The FAA bond's second sentence promised equality between the bonds and other debt obligations.⁶⁰ The second promise must mean something different from the first, and the most natural reading supports the view that it also prohibits de facto subordination of other debt.

This reading thus fulfills the traditional interpretive principle for contracts: that all terms in a contract should be given effect. As Article 4.5 of the UNIDROIT Principles for International Commercial Contracts puts it, "[c]ontract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of

⁵⁶ See *id.* at 3–4.

⁵⁷ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 258–59 (2d Cir. 2012), *cert. denied*, 134 U.S. Ct. 201 (Oct. 7, 2013).

⁵⁸ *Id.*

⁵⁹ *Id.* at 258.

⁶⁰ *Id.*

effect.”⁶¹ This principle should apply where the terms of the contract are not clear.

It is revealing that Argentina did not parse or explain this language in its various briefs to the appellate court. Rather, it simply asserted that *pari passu* is a boilerplate contract term that has only one reasonable interpretation. As such, Argentina argued that a court must give the boilerplate term its plain meaning as evidenced by the words of the contract itself,⁶² in light of custom and usage. It then cited the authority of scholars, practitioners, and sovereign governments to buttress its claim that custom and usage should control the interpretation, and that other interpretations would lead to an absurd result.

But the claim that only one “reasonable interpretation” exists belies Argentina’s reliance on claims of custom, usage, and ultimately, policy. Since the *pari passu* language had never been interpreted by courts in the sovereign context, and the testimony of market participants is hardly unanimous, Argentina’s argument ultimately relies on the strength and authority of its supporters rather than on the language of the *pari passu* clause itself.

The weakness of Argentina’s reading of its *pari passu* clause, however, does not mean future litigants will be able to easily replicate this strategy. First, many *pari passu* clauses have much narrower clauses than Argentina’s clause and tend to resemble the first sentence only. For instance, a study of such clauses by Moody’s Investor Service found that more than half of sovereign debt bonds issued in the 2000s merely stated that “the bonds rank *pari passu*” without any further language.⁶³ Unlike the Argentina *pari passu* clause, there is no specific reference to bonds that at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.⁶⁴

⁶¹ International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts 4.5 (1994).

⁶² Brief of Defendant-Appellant Republic of Argentina at 32, *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013) (No. 12-105).

⁶³ See *Moody’s: Impact of Court Ruling on Argentina’s Debt on Future Sovereign Debt Restructurings Is Likely Limited*, MOODY’S INVESTOR SERV. 2 (Mar. 4, 2014), available at <http://factcheckargentina.org/wp-content/uploads/2014/11/Moodys-Report-March-2014.pdf>.

⁶⁴ See *id.* (explaining that the decision in *NML Capital, Ltd. v. Republic of Argentina* will likely not have a major impact on other future sovereign debt restructurings).

And even if a future sovereign faced challenges based on the first sentence, it is unlikely they would face the same judicial censure as Argentina. As I discussed above, Argentina enacted a “Lock Law” that formally subordinated the holdout creditors for the purposes of Argentina law and for the purposes of any payment. The Second Circuit emphasized the Lock Law several times in affirming the lower court’s reading of the *pari passu* clause. Unless a future sovereign acts similarly, it is doubtful that the *pari passu* clause could be wielded against them so effectively.

4.1.2. FSIA

Argentina also invoked Section 1609 of the FSIA, which imposes a general limitation on the attachment or execution on sovereign property.⁶⁵ As discussed above, the FSIA only permits attachments or execution on a narrow (and often non-existent) class of sovereign property used for a commercial activity.

Having defeated the holdout creditors’ efforts to attach their central bank assets, Argentina invoked the same FSIA provisions against the district court’s *pari passu* injunction. Though not an “attachment,” Argentina argued that the injunction is effectively an attachment of assets that would otherwise be protected by the FSIA.⁶⁶

But the appeals court rejected this expansive reading of the FSIA.⁶⁷ Injunctive relief that orders payment, but does not specify which assets or property should be used for that payment, is distinct from attachment or execution. In fact, unlike an attachment of particular property, Argentina could comply with the injunction by simply stopping all payment to the exchange bondholders, thus giving all bonds equal treatment. Or it could pay all the bondholders the amounts demanded. Either action would comply with the injunction, which means Argentina may decide which property (if any) it uses to make payments. Retaining discretion on which

⁶⁵ 28 U.S.C. § 1609 (“[T]he property in the United States of a foreign state shall be immune from attachment arrest and execution”).

⁶⁶ *Id.*

⁶⁷ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 262 (2d Cir. 2012), *cert. denied*, 134 U.S. Ct. 201 (Oct. 7, 2013) (“The Injunctions at issue here are not barred by § 1609. They do not attach, arrest, or execute upon any property”).

property to use, and how to use that property, is hardly consistent with common-sense understandings of attachment.

4.2. Policy

Because Argentina's legal arguments are far from a "slam dunk," it has relied heavily on the specter of massive policy dislocations from the Second Circuit's reading of *pari passu*. In these "End of the World" scenarios, other sovereigns who attempt to restructure their debt by freezing out holdouts will be subject to similarly intensive and disruptive litigation. Such litigation would affect the ability of nations like Greece or Italy to work their way out of debt crises through the traditional means of restructuring. At the very least, New York would likely lose out substantial business to the world's other great sovereign debt market, London, as third-party agents and banks get swept up in the creditor litigation.⁶⁸

These policy arguments are indeed serious, and they are further buttressed by the views of institutions with the primary responsibility for managing policy toward sovereign debt markets: the U.S. Treasury and the Federal Reserve Bank. Indeed, in an earlier case considering the *pari passu* clause, the Federal Reserve Bank of New York described the *pari passu* enforcement strategy as "terrorism of payments and settlements systems."⁶⁹

There are good reasons, however, to think that any damaging policy consequences of the Second Circuit's decision can be limited to Argentina and a few other seriously intransigent sovereign debtors. As the U.S. government noted in its otherwise supportive amicus brief seeking en banc review of the Second Circuit decision, Argentina's decision to enact a Lock Law is unique. Because the Lock Law arguably imposes a formal statutory ranking of debt, and because other nations have almost never resorted to such a measure, the reading of narrower versions of the *pari passu* clause will likely be limited to Argentina's special circumstances.

Additionally, sovereigns are not helpless against holdouts. Many have adopted "collective action clauses" that allow sover-

⁶⁸ Gelpert, *supra* note 53, at 7.

⁶⁹ *Id.* at 5 (quoting Letter from Thomas C. Baxter, Federal Reserve Bank of New York, to the Honorable Thomas P. Griesa, on *Macrotecnic Int'l v. Argentina and EM Ltd. v. Argentina* 1, 5 (Jan. 12, 2004)).

eigns to squeeze out holdouts if creditors holding a super majority of the debt (such as 90%) agree to restructuring. They could also strip *pari passu* language from their debt offerings. Indeed, several sovereigns did so in reaction to the Second Circuit's *pari passu* ruling. Such clauses are not a complete solution since creditors could still hold out if they muster holders of enough debt to block restructuring, but such clauses would still limit the number of future Argentina-like cases that might arise⁷⁰

Pre-transaction planning could also defuse the criticisms of the injunctions from exchange bondholders and third-party intermediaries like the Bank of New York that administer payments to exchange bondholders. The depth of these third parties' opposition is not surprising since they (and not Argentina), will bear the costs if Argentina does not comply with the injunction. Professors Anna Gelpern and W. Mark C. Weidemaier argue in a recent article that these third party costs are unfair since third parties would bear the costs of Argentina's actions.⁷¹ While there is some force to this argument, it is possible that the authors are exaggerating the costs. While payment intermediaries may face some minor monitoring costs, the only serious cost facing these third parties is contempt of court if they defy the district court's injunction and continue to pay the exchange bondholders. But Argentina cannot force the third parties to violate the injunction. So as long as they comply with the injunction, the third parties (excepting the exchange bondholders) face few serious costs.

The exchange bondholders do face considerable losses if the injunction is upheld. But these bondholders (unlike the third-party intermediaries) were warned of the risks of lurking holdout creditors when they accepted the exchange bonds. In any event, since Argentina can in fact comply with the injunction by continuing payment to the exchange bondholder while also paying off the holdouts, the decision to impose costs on the third parties is largely Argentina's responsibility.

In any event, the *pari passu* theory was first invoked in the late

⁷⁰ There is evidence that many sovereigns have already altered their debt contracts in this way. See Presentation by Elena Duggar, *Argentina is Unique - Implications for Sovereign Debt Restructurings* (Dec. 11, 2013), available at <http://www.cato.org/sites/cato.org/files/multimedia/why-argentinias-unique.ppt> (stating that the "vast majority" of debt issuances after 2003 have collective action clauses allowing a super majority of creditors to override holdouts).

⁷¹ Weidemaier & Gelpern, *supra* note 5, at 213.

1990s, but it did not spur a flood of holdout litigation. In fact, as Elena Duggan of Moody's Investor Service has argued, the vast majority of sovereign restructurings that have taken place since 1997 have been resolved without holdout litigation or drawn out negotiations.⁷²

5. THE CONTINUING ADVANTAGES OF FOREIGN SOVEREIGN DEBTORS IN U.S. COURTS

Critics of the holdouts rarely consider the policy consequences of excessive protections that sovereigns currently enjoy.⁷³ The existing law of foreign sovereign immunity in the United States makes a mockery of sovereign debt instruments that assure investors of recourse to U.S. courts. Such waivers, like that made by Argentina in 1994, are essentially meaningless without resort to creative solutions like the *pari passu* clause. As the *NML v. Argentina* saga has illustrated, sovereigns are largely unconstrained by U.S. court orders and judgments when it comes to their debt instruments. Indeed, despite the court rulings against it, Argentina has still not settled with its holdout creditors and has made plans to circumvent the court orders through new bonds issued under Argentina law.

Despite making elaborate waivers, sovereigns are functionally immune from litigation in U.S. courts. They still hold all the cards in restructuring negotiations with creditors. *Pari passu* is the only current path to impose some measure of formal legal accountability on sovereign defaulters like Argentina. And even this accountability is unlikely to extend very broadly in the future since future sovereigns (and third parties) can plan ahead to avoid similar injunctions.

As the fierce litigation over the *pari passu* clause indicates, sovereigns, supported by their third-party intermediaries, will strongly resist any attempt to use court injunctions to collect on unpaid

⁷² Daniel Bases, "Dog-Eared" Debt and the IMF's Sovereign Restructuring Ideas, REUTERS (Jan. 31, 2014), available at <http://blogs.reuters.com/globalinvesting/2014/01/31/dog-eared-debt-and-the-imfs-sovereign-restructuring-ideas/>.

⁷³ But see Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311 (2005) (describing Argentina as a "rogue debtor" that has taken advantage of its legal immunities).

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sovereign debt. Moreover, it is still possible, even with a favorable *pari passu* clause interpretation, for a sovereign to continue to park assets in the United States while the holdout creditors attempt to collect from third-party intermediaries. This may simply allow sovereigns like Argentina to offload their costs onto those third parties. *Pari passu* has resulted in the strongest pressure on Argentina to date, but it may still allow Argentina to largely escape its debt obligations.

Under current U.S. law, foreign defendant sovereigns can issue explicit waivers of their immunity from attachment and execution, but these waivers are largely empty exercises given the limitations U.S. law places on the scope of such waivers.

CONCLUSION

The fallout from a holdout creditor victory in the Argentina debt wars will almost certainly not be as large as Argentina claims and hardly justifies the calls for drastic reform at the international level. As this Article has suggested, U.S. law remains extremely favorable toward foreign sovereign debtors, even when those foreign sovereigns have explicitly waived their immunities. The balance before the holdouts' victory was already tipped very far in favor of sovereign defaulters such as Argentina, and the recent decisions have not significantly changed the balance. While there may be reasons to support a new SDRM, the danger of U.S. litigation against foreign sovereign defaulters is not one of them.