

Maryland Journal of International Law

Volume 30

Issue 1 Symposium: "Investor-State Disputes"

Article 6

The Impact of *Republic of Argentina v. NML Capital, Ltd.*: Why the Supreme Court's Ruling Against Argentina Avoided a Host of Unintended, Negative Consequences

Ellen Ginsberg Simon

Q Monty Crawford

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>

 Part of the [International Law Commons](#)

Recommended Citation

Ellen G. Simon, & Q. M. Crawford, *The Impact of Republic of Argentina v. NML Capital, Ltd.: Why the Supreme Court's Ruling Against Argentina Avoided a Host of Unintended, Negative Consequences*, 30 Md. J. Int'l L. 55 (2015).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol30/iss1/6>

This Articles & Essays is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

ARTICLE

The Impact of *Republic of Argentina v. NML Capital, Ltd.*: Why the Supreme Court's Ruling Against Argentina Avoided a Host of Unintended, Negative Consequences

ELLEN GINSBERG SIMON[†] AND Q. MONTY CRAWFORD,^{††}

“How much easier it is to be critical than to be correct.”¹

I. INTRODUCTION

Concern over and criticism of the Supreme Court's decision in *Republic of Argentina v. NML Capital, LTD.*² has focused on fears that more creditors will be persuaded to hold out against bond restructuring deals in the future, successful debt exchanges will be more difficult to coordinate, and other restructuring efforts will end up similarly mired in litigation. Detractors of the decision fail to

[†] Ms. Simon is an Associate in the Baltimore office of DLA Piper LLP (US). Ms. Simon holds an A.B. from Brown University, an M.Phil. from the University of Oxford, and a J.D. from Harvard Law School. The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which she is associated.

^{††} Mr. Crawford is a Partner in the Baltimore office of DLA Piper LLP (US). Mr. Crawford holds a B.A. from Bucknell University and a J.D. from the University of Chicago. The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.

1. 156 PARL. DEB., H.C. (3d ser.) (1860) 75-116 (U.K.) (statement of Benjamin Disraeli).

² 573 U.S. ___ (2014).

consider, however, the myriad negative consequences had the Supreme Court ruled otherwise and read into the Foreign Sovereign Immunities Act (“FSIA”) a nonexistent provision immunizing sovereigns from post-judgment discovery. Critics of the decision deflect attention from the actual ruling, which was limited in scope to a highly specific question of statutory interpretation: whether the FSIA immunizes a foreign-sovereign judgment debtor from post-judgment discovery of information concerning its extraterritorial assets. Instead, these critics substitute the Second Circuit’s and the District Court for the Southern District of New York’s findings that Argentina violated the *pari passu* clause and must make ratable payments to the minority holdout creditors, ignoring the actual content of the Supreme Court’s circumscribed decision.

The case was not a referendum on sovereign debt restructuring and its appropriate mechanisms. Concern about the potential ramifications of the Second Circuit’s ruling on sovereign debt restructuring is not sufficient reason to disregard the actual question before the Supreme Court, which comes attendant with its own ramifications in the world of judgment enforcement. One must consider the alternative, negative consequences of such a ruling when passing judgment. These unintended, negative consequences similarly would have threatened investor-state relations and parties’ abilities to reasonably rely on the enforceability of judgments in international arbitration and cross-border litigation. While concerns about the deleterious effect of the District Court’s decisions may be valid, resolution of those apprehensions belongs to a different, more appropriate arena.

This essay first explores the reasons the Supreme Court correctly interpreted the FSIA. It examines the negative consequences of an alternative ruling, including the implications of a contrary decision on the ability to enforce judgments against international “bad actors” and the deleterious effect on international commerce. It concludes with a review of more appropriate methods of addressing the problem of sovereign defaults proposed by several international financial organizations in the wake of the decision.

II. BACKGROUND OF THE CASE

The case originally stems from Argentina’s 2001 default on more than \$80 billion in bonds.³ Over more than a decade later and

3. NML Capital, Ltd. v. Republic of Argentina (*Equal Treatment Case I*), 699

2015] AVOIDING UNINTENDED, NEGATIVE CONSEQUENCES 57

after negotiating two debt exchanges in 2005 and 2010, Argentina had restructured its debt with approximately 91 percent of its creditors.⁴ One of the remaining holdout creditors was NML Capital, Ltd., a U.S. hedge fund associated with Elliott Associates that speculates in distressed debt. Unable to reach a settlement, NML Capital brought 11 actions against Argentina in the Southern District of New York to collect on the defaulted bonds, alleging breach of contract and seeking injunctive relief.⁵ Jurisdiction was based on Argentina's broad waiver of sovereign immunity in the bond indenture agreements. NML Capital was successful in each action, and it sought to execute its judgments against Argentina. This resulted in protracted litigation and multiple appeals to the Second Circuit.⁶

On December 7, 2011, Judge Thomas Griesa ruled that Argentina breached the *pari passu* clause of its bond agreements by "relegating NML's bonds to a non-paying class."⁷ On February 23, 2012, Judge Griesa granted injunctive relief to NML Capital, holding that Argentina violated the *pari passu* clause in its original bonds by its refusal to pay holdout creditors, by enacting laws impeding settlement, and by making official statements of defiance.⁸ Judge Griesa required Argentina to pay both the old and new bonds ratably, obligating Argentina to pay NML Capital and its co-plaintiffs full principal and past-due interest whenever it makes its periodic coupon payment on the restructured bonds.⁹ Argentina was enjoined from paying the restructured debt holders without also paying the holdouts who demand full payment plus interest.¹⁰ The order also threatened to sanction third parties, including exchange bondholders and

F.3d 246, 251 (2d Cir. 2012); CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY 10, 12 (2009).

4. *Equal Treatment Case I*, 699 F.3d at 252–53.

5. *Id.* at 253.

6. Emma Kingdon, *Leveraging Litigation: Enforcing Sovereign Debt Obligations in NML Capital, Ltd. v. Republic of Argentina*, 37 B.C. INT'L & COMP. L. REV. 30, 30–31 (2014); REINHART & ROGOFF, *supra* note 3.

7. Order, *NML Capital, Ltd. v. Republic of Argentina*, ____ (S.D.N.Y. Dec. 7, 2011) (No. 08 Civ. 6978), 2011 WL 9522565, at *2.

8. Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 23, 2012) [hereinafter Feb. 23, 2012 Order]; *Equal Treatment Case I*, 699 F.3d at 254–55 (internal citations omitted).

9. Feb. 23, 2012 Order, *supra* note 8.

10. *Id.* While affirming, the Second Circuit remanded the case for greater clarification of the terms of the injunction, and Judge Griesa provided clarification regarding the injunction in a subsequent opinion. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012), *on remand*, 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012) (stayed by the Second Circuit on Nov. 28, 2012).

financial institutions both domestic and abroad, that might try to help Argentina pay the debt and prohibited Argentina from rerouting payments on the new bonds.¹¹

On October 26, 2012, the U.S. Court of Appeals for the Second Circuit unanimously upheld Judge Griesa's finding that Argentina violated the *pari passu* clause and should make ratable payments, rejecting the U.S. government's argument that the order would obstruct future attempts at debt restructurings and violated the FSIA.¹² On August 23, 2013, the Second Circuit affirmed Judge Griesa's formula for ratable payment, refusing to limit the territorial reach of Judge Griesa's injunction.¹³

Argentina appealed the decision to the Supreme Court in June 2013, seeking review both on the substantive holding of the lower courts' order requiring it to make ratable payments to the holdout creditors and on whether the District Court's order violated the FSIA by permitting postjudgment discovery on third parties regarding Argentina's extraterritorial assets. While declining to review the former issue, the Supreme Court granted certiorari on the latter question.¹⁴ On June 16, 2014, the Supreme Court ruled in favor of NML Capital on the issue of postjudgment discovery.¹⁵

III. THE POTENTIAL UNINTENDED NEGATIVE CONSEQUENCES OF AN ALTERNATIVE DECISION

A. *The Supreme Court Correctly Interpreted the FSIA*

When divorced from the hype and rhetoric surrounding this case about the disproportionate power of so-called "vulture funds" threatening to derail future restructurings and taking advantage of debt crises at the expense of all other creditors willing to negotiate a debt exchange, the Supreme Court's ruling was a simple matter of statutory interpretation of a much more limited topic. It was a straightforward determination that the FSIA contains no provision to immunize foreign-sovereign judgment debtors from post-judgment discovery of information concerning their extraterritorial assets. In

11. *Id.* (internal citations omitted).

12. *Equal Treatment Case I*, 699 F.3d at 265.

13. *NML Capital, Ltd. v. Republic of Argentina (Equal Treatment Case II)*, 727 F.3d 230, 237 (2d Cir. 2013).

14. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014).

15. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2254 (2014).

this limited context, Justice Scalia's opinion typifies a clean, strict reading of the statute, noting that, "the question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA."¹⁶ Analyzing the relevant statutory language, the opinion reviews the two immunity-conferring provisions it contains, which: (1) allow foreign states immunity from the jurisdiction of U.S. courts (which, the Court notes, Argentina waived and thus is "liable in the same manner and to the same extent as a private individual under like circumstances"); and (2) provide that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter."¹⁷ The Court concludes that "[t]here is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets" and declines to "draw meaning" from this silence by reading absolute immunity from execution to equate with immunity from discovery in aid of execution.¹⁸ Acknowledging that the creditors ultimately may not be able to execute the judgment against certain properties, Justice Scalia points out "that NML *does not yet know* what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law."¹⁹

Similar to many detractors of the opinion who worried about the policy implications for future sovereign debt restructurings, Argentina based its claim of immunity from post-judgment discovery largely on extra-legal arguments with which the U.S. Government concurred in its amicus brief. These arguments related to international comity, the impact on international relations, and fears of reciprocal adverse treatment of the United States in foreign courts.²⁰ They implicated concerns that "a United States court's allowance of unduly broad discovery concerning a foreign state's assets may cause the United States to be subjected to similar treatment abroad."²¹

The U.S. Government highlighted its concern about the implications on foreign relations should a foreign state's property "be

16. *Id.* at 2258 (citing *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992)).

17. *Id.* at 2256 (citing 28 U.S.C. §§ 1605(a)(1), 1606, 1609 (2011)).

18. *Id.*

19. *Id.*

20. Brief for the United States of America as Amicus Curiae On Petition, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014) (No. 12-842).

21. *Id.* at 11.

the subject of broad-ranging discovery, regardless of whether that property could be subject to execution in the United States.”²² In further attempting to argue that the FSIA supports its position, Argentina, echoed by the U.S. Government, conflated the concepts of the scope of discovery with the scope of attachment and execution under the statute. In their desire to promote their policy objectives, they failed to distinguish these two, distinct issues, promoted a distorted reading of the FSIA, disregarded legislative history and amendments to the statute that support Justice Scalia’s understanding, and endorsed a changed understanding of the statute that would have resulted in more realistic and ultimately destructive policy implications.

One of the central purposes of the FSIA is to ensure that the judicial system holds sovereign states accountable for their commercial activities. The FSIA states this purpose in no uncertain terms: “states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.”²³ The FSIA is based on and codifies the U.S.’s long-standing restrictive theory of immunity, which holds that public acts (*jure imperii*) of sovereign states are entitled to immunity while states’ private conduct and commercial acts (*jure gestionis*) are not.²⁴ Under the restrictive theory of immunity, states that subject themselves to the jurisdiction of U.S. courts through their commercial endeavors (as did Argentina through its own bond contract provisions) submit to normal judicial processes, including the discovery rules in the Federal Rules of Civil Procedure. In addition, numerous foreign jurisdictions also have codified this long-standing distinction for the purposes of immunity.²⁵ Argentina’s understanding of the statute would have undermined a significant

22. *Id.* at 19.

23. 28 U.S.C. § 1602 (2014).

24. This theory has its earliest roots in *The Schooner Exchange v. McFadden*, in which Justice Marshall, while adopting a broad form of state immunity at the time, also laid the foundational seeds for the restrictive theory of sovereign immunity in his discussion of the distinction between armed public vessels such as the one in question and private merchant ships doing trade with the United States. 11 U.S. (7 Cranch) 116 (1812). Thus, common law support for the distinction between the public acts of states as compared to commercial acts is centuries old.

25. Draft Articles on Jurisdictional Immunities of States and Their Property, 1991 (United Nations 2005), available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/4_1_1991.pdf; see also European Convention on State Immunity, May 16, 1972, ETS 74.

2015] AVOIDING UNINTENDED, NEGATIVE CONSEQUENCES 61

U.S. interest, enshrined in the statute itself, in enhancing the effectiveness of U.S. court judgments and the ability of parties to enforce those judgments abroad, while simultaneously upending traditional interpretation of the FSIA as well as centuries of common law and customary international law.

Instead of hindering comity and reciprocity, the Supreme Court's decision promotes these two worthwhile ends in several ways. First, it supports the restrictive theory of immunity which enhances global commerce and champions the rule of law in international relations and the integrity of our court's judgments to which Argentina *contractually bound itself*.²⁶ Enforcement of valid judgments and encouraging respect for judgments emanating from U.S. courts is, in itself, a fundamental foreign relations interest.²⁷ Foreign sovereigns have no reasonable expectation of immunity under either the FSIA or international legal principles when they voluntarily enter the commercial arena. States also have a reasonable expectation of the need to submit to the normal course of the judicial process (including discovery) once a court has jurisdiction either pursuant to immunity exceptions such as waiver or the commercial activity doctrine.²⁸ Upsetting those reasonable expectations would, in

26. See Complaint at Exhibit A, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. 2008) (No. 08 CIV 6978) (explaining that the waiver provision establishes the State of New York as the jurisdiction with venue over any disputes arising out of the agreement, stating in pertinent part, "The Republic hereby irrevocably and unconditionally waives, to the fullest extent permitted by law, any objection which it may now or hereafter have to the laying of venue of any aforesaid action arising out of or in connection with this Agreement brought in any such court has been brought in an inconvenient forum. . .The Republic hereby irrevocably waives and agrees not to plead any immunity from the jurisdiction of any such court to which it might otherwise be entitled in any action arising out of or based on the Securities or this Agreement by the holder of any Security.").

27. Brief of Competitive Enterprise Institute & Former State Department Officials as Amici Curiae Supporting Respondent, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014) (No. 12-842).

28. The Federal Rules of Civil Procedure possess adequate remedies to overcome any potential problems related to comity or reciprocity that arise in attempts to conduct post-judgment discovery, including the foreign sovereign's ability to object on grounds of relevance or burdensomeness available to any other judgment debtor. Courts can also weigh the risks of and foreign state's interest in potential disclosure of sensitive information. As Justice Scalia suggests in footnote 6 of the opinion, any attempted discovery related to property that is per se exempt under international law from either attachment or execution or pursuant to treaty obligations that might pose a comity or reciprocity problem could be handled according to "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state." *NML Capital, Ltd.*, 134 S. Ct. at 2258 n.6 (quoting *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. Of Iowa*,

fact, have *upset* principles of international comity by undermining the validity of judicial decisions in cross-border litigation and by threatening litigants' ability to rely on judgments rendered in such cases. Argentina's perversion of the FSIA's plain language and content would have undermined the United States' vital national interests in the rule of law, enforcement of valid judgments against foreign states, and respect for the U.S. judicial system.

B. A Contrary Decision Would Have Been A Boon For International Bad Actors

A decision barring post-judgment discovery based on sovereign immunity likely would immunize a number of bad actors in the international sphere from post-judgment discovery. Such a decision would have imposed yet one more roadblock to the enforcement of many outstanding judgments against recalcitrant, uncooperative, and hostile nations, rogue states, and terrorist groups.²⁹

Litigants with judgments against Iran, Syria, the Russian Federation, and other states from which they seek to recover damages would have faced yet one more hurdle in an already difficult struggle to enforce judgments. These states possess few if any attachable assets in the U.S. as a consequence of U.S. sanctions laws. They also commonly and intentionally hide their assets in complex structures overseas. Furthermore, they typically show contempt for U.S. discovery orders, refusing to recognize the U.S. court's authority and to comply with any such orders.

Such actors, which already have numerous unenforced judgments against them for their roles in terrorist attacks or in the illegal seizure of property, would have scored yet another victory and would have been given another tool to resist the enforcement of U.S. court judgments. Many of the U.S. citizens who struggled for years to obtain judgments against states found liable for the deaths of their relatives or for illegal seizures of their property would lack the resources of an entity such as NML Capital to enforce those judgments if they were stripped of normal avenues of discovery to locate unidentified, attachable assets.

482 U.S. 522, 543–44 n.28 (1987)).

29. *See generally*, Brief for Family Members and Estates of Victims of State-Sponsored Terrorism as Amici Curiae Supporting Respondent, Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2819 (2014) (No. 12-842); *see also* Brief Amicus Curiae of Agudas Chasidei Chabad of United States in Support of Respondent, Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2819 (2014) (No. 12-842).

2015] AVOIDING UNINTENDED, NEGATIVE CONSEQUENCES 63

This includes, for example, Agudas Chasidei Chabad of United States, which, after suing the Russian Federation and several Russian agencies under the FSIA, obtained a judgment to recover Chabad's library that was seized in violation of international law during the October Revolution of 1917.³⁰ Having obtained a default judgment and, later, a contempt sanction against the Russian Federation after it withdrew from the litigation claiming the court lacked jurisdiction, Chabad now seeks to enforce the judgment and contempt sanction.³¹ This will require it to conduct discovery in the U.S. and abroad to locate attachable assets. Had the Supreme Court decided in Argentina's favor, Chabad and similarly situated litigants' ability to conduct discovery would have been severely hampered and the injunctive order rendered useless.³² That result would have been highly damaging to the value, respect, and dignity of the U.S. judicial system.

Similarly, several families of victims of state-sponsored terrorist attacks are seeking or already have been awarded judgments in U.S. courts. This includes the families of victims of the September 11, 2001 attacks on the U.S., who are suing the Sudan for its role in funding al Qaeda.³³ Family members of Americans killed in the 1998 U.S. embassy bombings in Kenya and Tanzania already have obtained judgments against the Sudan and Iran for their role in supporting the responsible terrorists.³⁴ One family was awarded \$38 million in compensatory damages and \$300 million in punitive damages against the Kurdistan Worker's Party for its abduction of the late Ronald Wyatt.³⁵ A district court in Illinois issued a judgment for \$32 million in compensatory and \$35 million in punitive damages against Iran for its support of Palestinian Islamic Jihad, which perpetrated a terrorist attack on the Leibovitch family in 2003 resulting in the murder of their child.³⁶ Argentina's proposed

30. Brief Amicus Curiae of Agudas Chasidei Chabad of United States in Support of Respondent, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014) (No. 12-842).

31. *Id.*

32. *Id.*

33. Brief for Family Members and Estates of Victims of State-Sponsored Terrorism as Amici Curiae Supporting Respondent at 1, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014) (No. 12-842) [hereinafter Brief for Family Members].

34. *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 157 (D.D.C. 2011); *see also* Brief for Family Members, *supra* note 33, at 2.

35. *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 220–21 (D.D.C. 2012); *see also* Brief for Family Members, *supra* note 33, at 2.

36. *Leibovitch v. Syrian Arab Republic*, 2011 WL 444762 at *4–5 (N.D. Ill.

interpretation of the FSIA would have constrained these plaintiffs' abilities to enforce valid judgments against international bad actors, undermining the value of U.S. court judgments and the integrity of our judicial system.

Such an outcome, moreover, would have contravened Congress' repeatedly affirmed intention of using the FSIA as a vehicle to hold terrorist-sponsoring states accountable for their crimes and to assist the victims of state-sponsored terrorism in their efforts to obtain justice.³⁷ Congress repeatedly has amended the FSIA to support the enforcement of judgments against state sponsors of terrorism, going so far as to permit the attachment of diplomatic property and frozen assets in some circumstances, although presidential authority to waive attachment under this provision based on national security concerns has frustrated attempts to enforce it.³⁸ Congress has instructed executive officials to assist terrorist victims in their efforts to locate attachable assets.³⁹ Congress also passed the Victims of Trafficking and Violence Protection Act of 2000⁴⁰ to require liquidation of Cuban foreign assets to satisfy judgments and the Terrorism Risk Insurance Act (TRIA) of 2002⁴¹ to limit the president's ability to waive attachment of diplomatic property and frozen assets.⁴² Contrary to Argentina's reading of the FSIA and its

2011); *see also* Brief for Family Members, *supra* note 33, at 2–3.

37. Brief for Family Members, *supra* note 33, at 2–3; *see also* 28 U.S.C. § 1610(f)(1)(A).

38. 28 U.S.C. § 1610(f)(1)(A); *see, e.g.*, John R. Crook, *U.S. Supreme Court Finds President's Waiver of Terrorism Exception to Iraq's Sovereign Immunity Bars Pending Cases*, 103 AM. J. INT'L L. 582, 583 (2009).

39. *See* 28 U.S.C. § 1610 (f)(2)(A).

40. 22 U.S.C. § 7101.

41. 28 U.S.C. § 1610.

42. *See* Brief for Family Members and Estates of Victims of State-Sponsored Terrorism as Amici Curiae Supporting Respondent at 16-17, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014) (No. 12-842); *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541 (Oct. 28, 2000); 28 U.S.C. § 1610 Note.

For a detailed discussion of the history leading to the enactment of these statutes, *see generally* *In re Islamic Republic of Iran Terrorist Litigation*, 659 F.Supp.2d 31 (D.D.C. 2009). Victims have had limited success in attempts to invoke the relevant provisions of these acts, with several failing to obtain relief under the Terrorism Risk Insurance Act because the court found they waived their rights to attachment through acceptance of a pro rata compensation payment under the Victims of Trafficking and Violence Protection Act of 2000. Nonetheless, the relevant provisions of the statutes have been acknowledged and applied by courts and continue to remain good law. For recent examples of application and interpretation of these statutes, *see, e.g.*, *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366 (S. Ct. 2009); *Cruz v. Maypa*, 2014 WL 6734848 (4th Cir. 2014); *Hegna v. Islamic Republic of Iran*, 402 F.3d 97

2015] AVOIDING UNINTENDED, NEGATIVE CONSEQUENCES 65

intent, time and again Congress has spoken unequivocally in favor of supporting the location of attachable assets while never limiting the means by which victims could conduct discovery to do so.

C. *A Contrary Decision Would Have Hindered International Trade and Commerce*

Rather than promoting foreign investment, a decision contrary to that reached by the Court would have hindered the international marketplace. Investors, states, and markets require the predictability of the application of the rule of law. Reinterpreting statutes such as the FSIA to support the shirking of commercial contractual obligations entered into by sovereign states and to deny the application of basic discovery rules undermines that predictability. Rather than undermining the United States' comity and reciprocity interests, as argued by Argentina and the U.S. Government, the Court's decision to uphold investors' ability to conduct discovery in aid of judgment promotes those interests by encouraging states to stand by their commercial obligations and upholding a fundamental tenet of international law – the principle of *pacta sunt servanda*.⁴³

The U.S. has a significant interest in promoting other countries' adherence to their self-imposed, commercial contractual obligations and other international agreements. A state that proactively markets its bonds in the U.S. and then defaults on those bonds directly harms U.S. citizens. Its default further harms its own citizens by raising the cost of their country's debt. Beyond the economic impact on these two populations is the overarching negative impact on commerce caused by a sovereign's apparent ability to disregard its contractual obligations when faced with internal instability. The message a contrary decision would have sent was to condone the overthrow of contractual provisions freely entered into by a sovereign entity as an easy solution to ineffective internal economic policies. Domingo Cavallo, Argentina's former minister of the economy who oversaw its 2001 debt restructuring, has publicly criticized how current Argentine President Cristina Fernandez de Kirchner handled the country's latest debt crisis and has advised compliance with Judge Griesa's order.⁴⁴ Instead of blaming vulture funds and a U.S. District

(2nd Cir. 2005).

43. PETER MALANCZUK, *AKHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 70–71 (7th ed. 2006) (“treaties must be adhered to”).

44. See Landon Thomas Jr., *Argentine Economist Says Bond Holdouts Should Be Paid*, N.Y. TIMES, Sept. 3, 2014, http://dealbook.nytimes.com/2014/09/03/argentine-economic-figure-urges-payments-to-bond-holdouts/?_r=0.

Court, Mr. Cavallo suggested that President Kirchner or a new government employ more responsible policies internally to stabilize the Argentine economy, stem capital flight, and use the returned capital to pay its investors.⁴⁵ Mr. Cavallo further recommended that, instead of attacking the U.S. judicial system, the international community and the IMF need to revisit establishing a bankruptcy regime or mechanism for defaulting sovereigns.⁴⁶

Denying basic application of discovery rules would have proven restrictive of the marketplace, discouraging investors from taking a risk on investing in states that might easily turn around and invoke sovereign immunity to shirk their contractual obligations. Denying discovery to plaintiffs would make international investment and debt purchases less attractive, more risky, and more expensive by alienating risk-averse investors and resulting in higher interest rates for the country's own citizens. This outcome would neither have served Argentina's long-term interests nor those of more responsible states seeking to attract investors. Congress expressly designed the FSIA to protect the rights of holders of foreign sovereign debt by indicating that bond sales should be treated like other similar commercial transactions to avoid a situation in which a foreign state can shift the "burdens of the marketplace onto the shoulders of private parties."⁴⁷ If investors have no recourse to discover the foreign assets of and attempt to recover against governments that shirk their commercial obligations, what security will they have in making investments in the first place? Put simply – if you cannot rely on or predict the rules of the game, you are less likely to play it. Congress cannot have intended for the FSIA to promote such a backward outcome.

IV. CONCERNS ABOUT THE IMPACT OF THE LOWER COURTS' RULINGS CAN AND SHOULD BE ADDRESSED IN MORE APPROPRIATE FORA

International organizations, foreign governments, and even the U.S. government expressed concern about the far-reaching implications of Judge Thomas Griesa's order enjoining Argentina from making payments on its restructured 2005 and 2010 debt without making ratable payments to holdout creditors including NML

45. *Id.*

46. *Id.*

47. See Brief Amicus Curiae of the Judicial Education Project and Professors of Law in Support of Respondent, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014) (No. 12-842).

2015] AVOIDING UNINTENDED, NEGATIVE CONSEQUENCES 67

Capital, Ltd., the so-called “vulture fund” that rejected the restructuring deal.⁴⁸ The decision has been heralded as a triumph for the “vulture fund” – a litigious minority – at the expense of the 93 percent majority of creditors who accepted restructuring.

Arguably, the bargaining power of potential holdouts has increased, while creditors contemplating an exchange offer must now also consider not only an expected reduction in their investment but also face the possibility of costly and protracted litigation by such emboldened holdouts.⁴⁹ Such a result could doom future exchange offers to failure. The reduction in financial incentives for creditors to join orderly debt restructurings may make such deals increasingly difficult to negotiate, especially in the case of the many outstanding bonds that currently have no collective action clauses (“CACs”).⁵⁰ Some have argued that the decision upends a traditional reading of the *pari passu* clause, threatens common understandings of restructuring techniques in practice for nearly a century, and bodes poorly for future attempts at sovereign debt restructuring.⁵¹ The decision has been described by experts in the field as having “shaken the sovereign universe,” with consequences that “spell the End of the World for sovereign immunity [and] sovereign debt as we know it.”⁵² Columbia University economist Joseph E. Stiglitz has likened the situation to “America throwing a bomb into the global economic system,” noting that the problem extends beyond Argentina.⁵³

These concerns may well be valid and potent, but the context of the narrow, discovery-related question before the Supreme Court was not the appropriate forum for their consideration or resolution. Organizations from the International Monetary Fund (“IMF”) to the International Capital Market Association (“ICMA”) have responded

48. Feb. 23, 2012 Order, *supra* note 8.

49. Lee C. Buchheit et al., *Revisiting Sovereign Bankruptcy*, Committee on International Economic Policy and Reform, BROOKINGS INST., Oct. 2013, at 18.

50. United Nations Conference on Trade and Development, June 24, 2014, *Argentina’s ‘vulture fund’ crisis threatens profound consequences for international financial system*, http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=783&Sitemap_x0020_Taxonomy=UNCTAD%20Home.

51. Mark C. Weidemaier, *Sovereign Debt After NML v. Argentina*, 8 CAP. MKTS. L.J. 123, 125 (2013).

52. Anna Gelpern, *Known Unknowns in Pari Passu...and More to Come*, CREDIT SLIPS: A DISCUSSION ON CREDIT, FINANCE, AND BANKRUPTCY (Oct. 28, 2012), <http://www.creditslips.org/creditslips/2012/10/unknown-unknowns-in-pari-passu-and-more-to-come.html>.

53. Peter Eavis & Alexandra Stevenson, *Argentina Finds Relentless Foe in Paul Singer’s Hedge Fund*, N.Y. TIMES, July 30, 2014.

by looking anew at contractual remedies, changed lending policies, and concepts such as a sovereign debt restructuring mechanism to address the increasing problem of sovereign defaults in an international system that lacks a sovereign bankruptcy regime. In December 2013 and in June 2014, the ICMA, a group that represents banks, lawyers, brokers and issuers in 53 countries, published a paper and a supplement recommending new terms for sovereign bonds in order to reduce the risk of future restructurings being held hostage by minority holdout creditors, as occurred in the case of Argentina, and to promote a more stable bond market.⁵⁴ The ICMA paper suggests modifying a typical *pari passu* clause to ensure that it explicitly states that holdout creditors cannot expect guaranteed payment. The IMF, too, has taken up this gauntlet, publishing papers on recent developments in sovereign debt restructuring and suggesting actions to address attendant problems.⁵⁵ The IMF's October 2014 paper, a self-described response to the case of Argentina and the Southern District of New York's decisions which included input from the ICMA among others, recommends modification of the *pari passu* clause "in a manner that ensures that the type of remedy provided to holdout creditors in the case of Argentina would not be replicated in future cases."⁵⁶ The IMF paper recommends crafting such clauses to ensure that issuers are not required to pay creditors on an equal or ratable basis. The paper recommends additional contractual reforms in the form of enhanced CACs that "include a more robust 'aggregation' feature to address collective action problems more effectively."⁵⁷

While these methods would take time to implement and likely would not demonstrate much impact for years to come, they are a superior route to addressing the problem of sovereign debt

54. *ICMA Sovereign Bond Consultation Paper*, INT'L CAPITAL MARKET ASS'N (Dec. 2013), <http://www.icmagroup.org/resources/Sovereign-Debt-Information/>.

55. *Sovereign Debt Restructuring – Recent Developments and Implications for the Fund's Legal and Policy Framework*, INT'L MONETARY FUND (Apr. 26, 2013), <https://www.imf.org/external/np/pp/eng/2013/042613.pdf>;

Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring, INT'L MONETARY FUND (Oct. 2014), <http://www.imf.org/external/pp/longres.aspx?id=4911>.

56. *Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring*, INT'L MONETARY FUND (Oct. 2014), <http://www.imf.org/external/pp/longres.aspx?id=4911>.

57. *Id.*; see also Press Release, INT'L MONETARY FUND, Executive Board Discusses Strengthening the Contractual Framework in Sovereign Debt Restructuring, No. 14/459 (Oct. 6, 2014), <http://www.imf.org/external/np/sec/pr/2014/pr14459.htm>.

2015] AVOIDING UNINTENDED, NEGATIVE CONSEQUENCES 69

restructuring than application of Argentina's flawed claim to sovereign immunity. The problem of a lack of international regime to handle sovereign debt crises likely will and should be addressed through application of economic policy, international negotiation, treaty, contract clause, and various other methods that avoid creating a host of new problems by undermining the FSIA, the legitimacy of U.S. court judgments, and fundamental discovery rules while simultaneously discouraging foreign investment in a system where investors cannot rely on their contractual agreements or the rule of law.

V. CONCLUSION

While the international financial community continues to face the problem of increasing numbers of defaulting states without any rules or overarching regime to govern these crises, *Argentina v. NML Capital* was not the appropriate venue for resolving the many issues surrounding sovereign default. Rather, under the circumstances of this case, had the Supreme Court allowed Argentina to circumvent the strict reading of the FSIA based on its foreign policy arguments, it would not have protected investor-state relations or strengthened the international arbitration and litigation regimes: it would have undermined those processes. Future sovereign debtors are not left without recourse by the Court's decision. Instead, states may begin to adopt stronger, more effectively-crafted collective action clauses and other contractual terms when issuing sovereign debt. The Court's refusal to create an exception for sovereign debtors may also lead to renewed discussions of a sovereign debt restructuring mechanism. Those avenues represent more sound solutions that will neither undermine national and international legal principles nor trigger a host of unintended, negative consequences for the rule of law and the international marketplace.