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## Mass Sovereign Debt Litigation: A Computer-Assisted Analysis of the Argentina Bond Litigation

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# Mass Sovereign Debt Litigation: A Computer-Assisted Analysis of the Argentina Bond Litigation in the U.S. Federal Courts 2002–2016

*Gregory Makoff and W. Mark C. Weidemaier\**

*This Article presents a computer-assisted analysis of the first large-scale mass litigation of sovereign debt claims. Between 2002 and 2016, hundreds of lawsuits were filed against Argentina in the United States, virtually all in the Southern District of New York. Historically, litigation against a foreign government would have involved a few hedge funds that had invested in debt at distressed prices. Argentina faced thousands of investors, including small retail bondholders, in litigation that more closely resembled a mass tort or federal multidistrict litigation than any prior episode involving a sovereign's debt default.*

*To study this sprawling litigation, this Article combines traditional analysis of court records with computer-assisted analysis of dockets and hearing*

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\* Copyright © 2023 Gregory Makoff and W. Mark C. Weidemaier. Makoff (CFA, Ph.D., Physics, University of Chicago) is non-resident Senior Fellow with the Centre for International Governance Innovation (CIGI), formerly worked at Citibank and predecessor Salomon Brothers advising sovereign and other borrowers on debt management, and is currently writing a book-length treatment of the Argentina bond cases. Weidemaier is Ralph M. Stockton Jr. Distinguished Professor at the University of North Carolina School of Law. We thank Ram Balasubramanian for writing code and Logan Fairbourn for research assistance. For comments on prior drafts, we thank Nikita Aggarwal, Logan Fairbourn, Jonah Gelbach, Anna Gelpert, Mitu Gulati, Dave Hoffman, and Antonia Stolper. One of us (Makoff) would like to thank Henry Minsky (CTO of Leela AI), Timothy Cerino (of KPMG Lighthouse), and Nikita Aggarwal (Ph.D. Candidate at Oxford Law) for conversations that inspired this computer analysis, and Jeff Makoff and Brittany Stange for help during the early phases of the research.

*transcripts using machine learning techniques. It provides the most comprehensive account of the Argentina bond litigation and advances the literature on legal enforcement in sovereign debt markets, demonstrating that a wide range of investment funds and even retail investors can finance and aggressively pursue litigation against a foreign state. The Article develops metrics to measure the intensity of litigation, shows that a relative handful of cases and litigants generated disproportionate activity, and reveals patterns in how groups of plaintiffs competed and coordinated. The findings suggest that, despite recent reforms designed to reduce litigation, sovereign debt litigation is here to stay.*

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## INTRODUCTION

In April of 2016, the Republic of Argentina issued \$16.5 billion worth of bonds through Wall Street underwriters.<sup>1</sup> More than half of the proceeds — around \$10 billion — went to settle claims brought by a dispersed group of holdout creditors, some of whom had spent fifteen years and tens of millions of dollars chasing Argentina and its assets through courtrooms around the world.<sup>2</sup> The plaintiffs were bond investors who had not been paid since Argentina's \$100 billion debt default in 2001, the largest such default in the two-century history of sovereign bond markets.<sup>3</sup> Having declined to participate in Argentina's 2005 and 2010 debt restructurings, the plaintiffs sought to recover the full face value of the bonds, plus accrued interest. Now, finally, they were to be paid.

That creditors would invest so much time and money in litigation against a foreign government might strike many as odd. Some foundational models of sovereign debt assumed that investors had no legal recourse.<sup>4</sup> The reason is the law of foreign sovereign immunity. Except in limited cases, foreign states are immune from suit in the courts of other states, and their assets are immune from attachment and execution.<sup>5</sup> If sovereign immunity blocks litigation, then sovereigns are

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<sup>1</sup> Julie Wernau & Carolyn Cui, *Argentina Returns to Global Debt Markets with \$16.5 Billion Bond Sale*, WALL ST. J., <https://www.wsj.com/articles/argentina-returns-to-global-debt-markets-with-16-5-billion-bond-sale-1461078033> (last updated Apr. 19, 2016, 9:05 PM ET) [<https://perma.cc/F7PZ-SPGN>].

<sup>2</sup> Republic of Arg., Registration Statement (Schedule B) (Mar. 10, 2017), <https://www.sec.gov/Archives/edgar/data/914021/000119312517078981/d314222dsb.htm> [<https://perma.cc/A3HL-TWXT>]; Alexandra Stevenson, *How Argentina Settled a Billion-Dollar Debt Dispute with Hedge Funds*, N.Y. TIMES (Apr. 25, 2016), <https://tinyurl.com/bdzxey5d> [<https://perma.cc/P9PT-QDPS>].

<sup>3</sup> Composed of approximately \$80 billion principal amount and \$20 billion in past due interest as of the date of restructuring. See THE WORLD BANK, COUNTRY ASSISTANCE STRATEGY FOR THE ARGENTINE REPUBLIC FOR THE PERIOD 2006-2008, at 83 (2006), <https://tinyurl.com/2pya6h5r> [<https://perma.cc/YF8A-P4BV>].

<sup>4</sup> See Jonathan Eaton & Mark Gersovitz, *Debt with Potential Repudiation: Theoretical and Empirical Analysis*, 48 REV. ECON. STUDS. 289, 289 (1981).

<sup>5</sup> See 28 U.S.C. § 1602 (2018); see also Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411, 411-12 (2015) (describing and testing the common understanding that the Foreign Sovereign Immunities Act of 1976 ("FSIA") depoliticized immunity determinations by transferring them from political actors to the courts); W. Mark C. Weidemaier, *Sovereign*

not “bound by the contracts they signed” except insofar as reputational or other nonlegal considerations induce compliance.<sup>6</sup> And if creditors have no legal recourse, why bother to sue?

Other models relax the assumption of non-enforceability. Recognizing that sovereign immunity is not absolute, these models posit that borrower governments may have reason to fear litigation before foreign courts.<sup>7</sup> For a time there was not much evidence to support this view.<sup>8</sup> But recent research shows that, beginning in the 1990s, litigation increasingly followed a default on sovereign debt.<sup>9</sup> The increase

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*Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 86-101 (discussing evolution of sovereign immunity and contracting practices in sovereign debt markets).

<sup>6</sup> Rohan Pitchford & Mark L. J. Wright, *Holdouts in Sovereign Debt Restructuring: A Theory of Negotiation in a Weak Contractual Environment* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16632, 2010). Pitchford and Wright recognize that the doctrine of sovereign immunity has weakened but note that it remains very difficult for creditors to collect on favorable judgments. *Id.*; see also Cristina Arellano, *Default Risk and Income Fluctuations in Emerging Economies*, 98 AM. ECON. REV. 690, 693 (2008) (modeling sovereign debt on the assumption that “[d]ebt contracts are not enforceable and the government can choose to default on its debt at any time[,]” subject to temporary capital markets exclusion and costs to the domestic economy); Yulia Sinyagina-Woodruff, *Russia, Sovereign Default, Reputation and Access to Capital Markets*, 55 EUR.-ASIA STUDS. 521, 538 (2003) (the threat of asset seizure is “not credible and therefore cannot motivate repayment”).

<sup>7</sup> Jeremy Bulow & Kenneth Rogoff, *A Constant Recontracting Model of Sovereign Debt*, 97 J. POL. ECON. 155, 158 (1989); Jeremy Bulow & Kenneth Rogoff, *Sovereign Debt: Is to Forgive to Forget?*, 79 AM. ECON. REV. 43, 49 (1989).

<sup>8</sup> Writing in 2009, Panizza, Sturzenegger, and Zettelmeyer reviewed the literature and noted that, despite a few litigation victories by holdout creditors, “full payment has remained the exception, and many holdouts have received nothing.” Ugo Panizza, Federico Sturzenegger & Jeromin Zettelmeyer, *The Economics and Law of Sovereign Debt and Default*, 47 J. ECON. LIT. 651, 659 (2009) (citation omitted). However, perhaps anticipating future developments, they noted the possibility that legal risks might contribute to capital markets exclusion and identified Argentina as a potential example. *Id.* at 688.

<sup>9</sup> See Chuck Fang, Julian Schumacher & Christoph Trebesch, *Restructuring Sovereign Bonds: Holdouts, Haircuts and the Effectiveness of CACs*, 69 IMF ECON. REV. 155, 156 (2021) (noting the possibility of disruptive holdout litigation); Kris James Mitchener & Christoph Trebesch, *Sovereign Debt in the 21st Century* 47-52 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28598, 2021) (examining historical and modern relevance of legal enforcement); Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *Sovereign Defaults in Court*, 131 J. INT'L ECON. 1, 2 (2021), <https://www.sciencedirect.com/science/article/abs/pii/S0022199620301033> [<https://perma.cc/>

coincided with the arrival of a new class of investors: hedge funds that buy distressed sovereign debt at steep discounts and sue to collect full payment.<sup>10</sup> Foundational work by Schumacher, Trebesch, and Enderlein suggests that these specialized plaintiffs can disrupt a sovereign's access to foreign capital markets by threatening to attach the proceeds of a new loan.<sup>11</sup> Creditor lawsuits also may impose costs not directly linked to the risk of asset attachment.<sup>12</sup>

This Article seeks to advance the literature on legal enforcement in sovereign debt markets, although our findings and methods have implications for other fields of study, including the broader study of complex civil litigation in U.S. courts. At the highest level of generality, our goal is to shift attention from what makes sovereign debt litigation unique — the law of sovereign immunity — to what it has in common with other forms of complex civil litigation.<sup>13</sup> Sovereign immunity is not

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K336-ZH7X] [hereinafter *Sovereign Defaults*] (documenting rise in creditor enforcement actions beginning in 1990s); Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *What Explains Sovereign Debt Litigation*, 58 J.L. & ECON. 585, 585 (2015) [hereinafter *Sovereign Debt Litigation*] (examining potential causes of recent increase in creditor lawsuits).

<sup>10</sup> Schumacher et al., *Sovereign Defaults*, *supra* note 9, at 11-21.

<sup>11</sup> Schumacher et al. find that creditor litigation reduces the probability that a sovereign will access foreign capital markets over and above the negative effect attributable to the default itself. *See id.* at 16-19.

<sup>12</sup> For example, judicial rulings that increased the perceived likelihood of a future sovereign default were linked to a decline in the prices of Argentine sovereign bonds and corporate stocks. *See* Faisal Z. Ahmed & Laura Alfaro, *Market Reactions to Sovereign Litigation*, 12 CAP. MKTS. L.J. 141, 143, 151-56 (2017); Benjamin Hébert & Jesse Schreger, *The Costs of Sovereign Default: Evidence from Argentina*, 107 AM. ECON. REV. 3119, 3141-43 (2017).

<sup>13</sup> The International Monetary Fund, U.S. Treasury, and other policy actors have demonstrated a keen interest in the role of creditor litigation in sovereign debt markets, often acting in the belief that too much litigation can disrupt effective market functioning. *See, e.g.*, Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 WASH. U. L. REV. 1627 (2006) (describing the role of government officials, including in the U.S. Department of the Treasury, in encouraging adoption of contract terms designed to limit litigation by holdout creditors); IMF, *STRENGTHENING THE CONTRACTUAL FRAMEWORK TO ADDRESS COLLECTIVE ACTION PROBLEMS IN SOVEREIGN DEBT RESTRUCTURING* (Oct. 2014) (recommending contract changes in response to judicial decisions in the litigation against Argentina, noting that these decisions “may exacerbate collective action problems and, accordingly, make the sovereign debt restructuring process more complicated”).

an insuperable barrier.<sup>14</sup> It lets creditors impose substantial penalties on foreign states.<sup>15</sup> Over time, the desire to escape these penalties may induce the sovereign to pay.<sup>16</sup> But to bring the sovereign to heel, a creditor must devote substantial resources to litigation and tolerate long payment delays. These activities are not natural to most investors and investment funds, but neither are they natural to many other plaintiffs. In all settings, effective litigation requires access to capital, the ability to manage the risks of protracted litigation, and tools for coordinating the efforts of multiple plaintiffs.<sup>17</sup>

Seen through the prism of litigation finance and risk management, there is nothing especially unique about suing a foreign state. The barriers to success parallel those found in other complex civil disputes pitting multiple plaintiffs against a single defendant: litigation is expensive, time-consuming, and unpredictable in outcome.<sup>18</sup> The mere fact of the plaintiffs' numerosity also gives the defendant a structural advantage, letting it capture economies of scale that no single plaintiff can match.<sup>19</sup> Third-party finance and creditor coordination are well-

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<sup>14</sup> It is true that sovereign nations are entitled to immunity from suit in foreign courts and also benefit from immunity from attachment and execution. But these immunities are not absolute, and sovereigns typically waive them in connection with bond issuance. See Weidemaier, *supra* note 5, at 88 & fig.1.

<sup>15</sup> See *supra* text accompanying notes 11-12.

<sup>16</sup> See W. Mark C. Weidemaier & Anna Gelper, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. ON REG. 190, 206-09 (2014). Argentina is the poster child for this new reality, but many other sovereigns are living it. See, e.g., W. Mark C. Weidemaier, *Piercing the (Sovereign) Veil: The Role of Limited Liability in State-Owned Enterprises*, 46 BYU L. REV. 795 (2021) (describing successful efforts to enforce claims against Venezuela by attaching assets belonging to state-owned firms).

<sup>17</sup> *Infra* Part I.A.

<sup>18</sup> See *infra* Part I.A.

<sup>19</sup> See *infra* Part I.A; see also Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1379-80 (2000):

In the separate action process, a defendant facing a large number of plaintiffs generally has an enormous, and unwarranted, upper hand over the plaintiffs. The defendant firm, but not the plaintiffs, can take advantage of economies of scale in case preparation, enabling it to invest far more cost-effectively in the litigation. The upshot is that the plaintiffs—precisely because of their large number—will recover less at trial or in settlement than they would have if there had been fewer of them. In effect, the defendant is able to use the plaintiffs'

known responses. For example, a plaintiff's lawyer operating on contingency both provides financing and assumes some of the risk that the claim will prove valueless.<sup>20</sup> Class actions, when certified, let plaintiffs capture economies of scale rivaling those enjoyed by defendants.<sup>21</sup> The plaintiff's bar also uses informal methods of aggregation — pooling resources, coordinating strategy — “to achieve efficiencies and to try to level the playing field with defendants.”<sup>22</sup>

It is no surprise that hedge funds are associated with the rise of sovereign debt litigation. Many of these firms are well-positioned to

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numerosity against them, so that the value of their claims is reduced *for no reason other than the fact that they are in large numbers*.

<sup>20</sup> See, e.g., Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 270-71 (1998) (finding that contingency fee agreements provide financing and transfer to the attorney some of the risk associated with variable outcomes); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 90 (2010) (noting that contingent fee agreements transfer some litigation risk “risk from one-time plaintiffs, who are ill equipped to bear that risk, to attorneys who hold a diverse portfolio of lawsuits and, therefore, can more easily bear the risk of losing any one suit”); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1276, 1323-25 (2011) [hereinafter *Whose Claim?*] (noting that third party funding can ensure access to justice and highlighting differences between financing services provided by contingency-fee lawyers and third party litigation finance entities).

<sup>21</sup> See, e.g., Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1379-80 (2000) (noting that class actions let plaintiffs capture economies of scale naturally available to defendants); David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305, 306 (2014) (noting that class actions create “equivalent aggregate investment incentives” for both sides).

<sup>22</sup> See, e.g., Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012) (examining role of plaintiff firms in financing aggregate litigation and potential conflicts of interest); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386-401 (2000) (describing informal aggregation among plaintiff firms); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 10-11 (2021) (describing how, given the rarity of class certification, aggregation often takes the form of multidistrict litigation); Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394-1401 (2019) (noting inevitability of aggregation and discussing formal methods of aggregation through the class action, multidistrict litigation, and bankruptcy); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996) (describing methods of organizing plaintiff firms in mass torts).



overcome the hurdles involved in suing a foreign state, and one firm played an outsized role in the earliest sovereign debt cases.<sup>23</sup> Yet large-scale, complex litigation does not require the presence of hedge funds. In fact, the forces that let disaggregated plaintiffs finance other high-stakes litigation appear to have arrived in sovereign debt markets. Among other findings, we show in this Article that sovereign debt litigation is no longer dominated by one firm and that a wide range of investment funds and even retail investors can aggressively pursue litigation against a foreign state.<sup>24</sup>

To make this showing, we draw on a novel, computer-assisted analysis of the Argentina bond cases. Our methods are tailored to that context but are easily adapted to the study of other types of civil litigation. Indeed, the litigation that engulfed Argentina from 2002-2016 resembled a mass tort, or one of the many large-scale civil disputes now pending in federal multidistrict litigation (“MDL”), more than it resembled prior episodes involving a sovereign’s debt default.<sup>25</sup> Plaintiffs filed hundreds of lawsuits against Argentina, virtually all of which wound up before one federal judge: Judge Thomas P. Griesa of the Southern District of New York. They sued individually and in groups. Almost 1,000 small investors retained a single law firm, Dreier LLP, which filed about 50 lawsuits on behalf of investors holding several hundred million dollars

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<sup>23</sup> By our estimate, Elliot Associates — defined to include professionals and lawyers associated or formerly associated with the firm or its professionals — was involved in almost 25% of sovereign debt cases brought between 1976 and 2010. We calculate this proportion using the sample of cases listed by Schumacher et al., *Sovereign Defaults*, *supra* note 9, at 24-30 tbl.7, and attribute cases affiliated with Elliott Associates, Manchester Securities, FG Hemisphere, GP Hemispheres, FH International, Hamsah Investments Ltd., and with Michael Straus as lawyer (including Water Street Bank & Trust) or principal (including Red Mountain Montreux, Wilton, Los Angeles Capital, and Cordoba Capital).

<sup>24</sup> *Infra* Part III.

<sup>25</sup> In multidistrict litigation, federal lawsuits involving common factual questions are consolidated, ostensibly for pretrial purposes only, before one federal district judge. See 28 U.S.C. § 1407 (2018). In 2015, 40% of the entire federal civil caseload was pending in MDL proceedings. See Judith Resnik, “Vital” *State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1770 (2017). On the “intense nationalism” and procedural exceptionalism of MDL practice, see Gluck & Burch, *supra* note 22, at 1, 5.

of bonds in aggregate.<sup>26</sup> Twenty-one cases were filed as class actions. And the plaintiffs couldn't have been more varied. They included individual retail investors from Italy who sued jointly (about 180,000 plaintiffs associated with a trio of lawsuits),<sup>27</sup> banks and companies holding bonds worth a few million dollars, leading U.S. investment funds (including TIAA-CREF and GMO), a reclusive billionaire,<sup>28</sup> and dozens of hedge funds. The activity in court was intense. The presiding district judge held about 150 hearings and issued rulings prompting dozens of appeals to the Second Circuit, multiple certiorari petitions, and one Supreme Court ruling.<sup>29</sup> The litigation was brought to a close in 2016 only after the courts, fed up with Argentina's "uniquely recalcitrant" refusal to settle,<sup>30</sup> fashioned an injunction that forced the country to choose between settling the litigation or defaulting (again) on its public debt.<sup>31</sup>

Studying such a large set of cases creates difficulties. In the United States, the litigation against Argentina generated over 1,000 separate dockets, mostly in the Southern District of New York and Second Circuit, with over 70,000 docket entries. It is next to impossible to analyze each case event. Our method, which fits broadly under the domain of legal analytics,<sup>32</sup> combines traditional analysis of legal opinions, transcripts, and selected records, with a comprehensive computer analysis of dockets and transcripts using Natural Language Processing ("NLP") tools developed for Artificial Intelligence and machine learning applications.<sup>33</sup>

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<sup>26</sup> Author's calculations based on pleadings.

<sup>27</sup> *Abaclat & Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 1 (Aug. 4, 2011).

<sup>28</sup> Kenneth Dart, who controlled plaintiff EM Ltd, owner of \$595 million of bonds. *EM Ltd. v. Republic of Arg.*, No. 03-cv-02507 (S.D.N.Y. Sept. 19, 2003); Declaration of Sharon M. Cornwell in Opposition to Argentina's Motion to Stay the Proceeding, *EM Ltd. v. Republic of Arg.*, No 03-cv-02507 (S.D.N.Y. Aug. 6, 2003).

<sup>29</sup> *Republic of Arg. v. NML Cap., Ltd.*, 573 U.S. 134 (2014).

<sup>30</sup> *NML Cap., Ltd. v. Republic of Arg.*, 727 F.3d 230, 247 (2d Cir. 2013).

<sup>31</sup> See Weidemaier & Gelpern, *supra* note 16, at 196-97.

<sup>32</sup> See, e.g., David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1011 tbl.1 (2021) (describing legal analytics as using tools to perform tasks like citation mappings and document-level analytics).

<sup>33</sup> For other examples of the use of natural language processing and automated text analysis in legal research, see *LAW AS DATA: COMPUTATION, TEXT, AND THE FUTURE OF LEGAL ANALYSIS* (Michael A. Livermore & Daniel N. Rockmore eds., 2019) [hereinafter *LAW AS*

We use a digitized version of the dockets of all cases in the Southern District of New York to track case activity and identify links between cases. To measure the intensity of litigation, we track total docket entries as well as motions, hearings, appeals, orders, and other events that reflect the expenditure of significant judicial and litigant resources.<sup>34</sup> These measures allow us to distinguish litigants who played an active role in shaping the Argentina bond litigation from free-riders who sat back and waited for events to develop. The measures also reveal patterns of inter-plaintiff competition and coordination, showing that the hundreds of cases against Argentina were litigated by a small number of plaintiff groups.<sup>35</sup>

In addition to dockets, we use hearing transcripts to quantify the level of activity of the litigants involved in the Argentina bond cases. This transcript-level analysis validates and complements the analysis of

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DATA]; Charlotte S. Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695, 1695 (2021); Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of Mayo and Chevron*, 38 YALE J. ON REG. 818, 818 (2021); Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 99 (2014); see also Engstrom & Gelbach, *supra* note 32, at 1020-30 (describing use of NLP techniques to facilitate legal problem-solving). Moreover, there is much to be gained from the study of dockets in particular. See generally David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681 (2007) (analyzing data from a thousand cases in four jurisdictions to derive insights about judicial opinion writing). Dockets contextualize litigation, allow observers to “quantify the realities of litigation,” and can provide important insight into the content of legal obligations. *Id.* at 731. More important for our purposes, the study of dockets enables us to measure, albeit indirectly, the resource-intensiveness of litigation. Our study echoes others that focus on docket activity as a measure of litigation intensity, see *infra* note 34, although our methods allow us to study docket activity in more detail and to expand our focus to include other forms of case-related activity, such as words spoken at hearings.

<sup>34</sup> Although their methods differ, a number of studies focus at least in part on docket activity as a measure of litigation intensity. See, e.g., Ross E. Cheit & Jacob E. Gersen, *When Businesses Sue Each Other: An Empirical Study of State Court Litigation*, 25 L. & SOC. INQUIRY 789 (2000) (using docket entries and other measures of the intensity of business-to-business litigation); Josh Lerner, *The Litigation of Financial Innovations*, 53 J.L. & ECON. 807 (2010) (using docket entries and other intensity metrics for patent litigation of financial products); Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1568-71 (2014) (studying intensity of EEOC structural reform cases).

<sup>35</sup> See *infra* Part III.

docket entries. For example, when docket entries reveal that litigants have filed an equal number of motions and briefs, transcript-level analysis lets us identify the “lead” litigant — i.e., the one driving legal strategy. (That litigant’s lawyer will dominate the argument in court.) Not least, transcript analysis provides a sense of the litigation’s scale. Almost 1 million words were spoken in Judge Griesa’s courtroom over the fourteen-year span of the cases. Finally, we create a novel distance metric, which measures the similarity between two dockets and can be used to identify clusters of closely litigated cases. Together, these metrics reveal patterns of litigation activity and enable inferences about the degree to which creditors coordinated their activity.

Part I of this Article lays theoretical groundwork, explaining how the plaintiff’s bar uses formal and informal methods of aggregation to capture litigation economies of scale. We keep this discussion relatively brief in deference to the large literature that explores these topics in other settings. Our primary focus is on how litigation against sovereign states raises similar issues, which, at least in theory, have similar solutions. Part II describes the litigation against Argentina, focusing on key events and time periods that will lend context to the data.

Parts III and IV turn to our computer-assisted analysis, which builds on a broader literature using automated text analysis, alongside traditional legal methods, to study legal problems.<sup>36</sup> The analysis reveals that even small investors sustained protracted litigation against Argentina, although their cases generally were litigated less intensely than those filed by large investors. The intensity of litigation also varied significantly within the large and small investor categories, as a relative

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<sup>36</sup> See, e.g., LAW AS DATA, *supra* note 33 (compiling articles about innovative computational tools helpful to studying the law); Alexander & Iannarone, *supra* note 33 (using computational text analysis tools to study consumer arbitration decisions); Choi, *supra* note 33 (analyzing tax regulations using NLP and various statistical methods); Frank Fagan, *From Policy Confusion to Doctrinal Clarity: Successor Liability from the Perspective of Big Data*, 9 VA. L. & BUS. REV. 391 (2015) (employing quantitative machine learning and “big data” processing techniques to explore the application of the successor liability doctrine); Renana Keydar, *Listening from Afar: An Algorithmic Analysis of Testimonies from the International Criminal Courts*, 2020 U. ILL. J.L. TECH. & POL’Y 55 (applying topic modeling methods to international criminal court trial data); Macey & Mitts, *supra* note 33 (describing use of NLP techniques to facilitate legal problem-solving).

handful of cases and litigants generated a disproportionate share of the activity. This variance suggests both free-riding and deliberate coordination among plaintiffs, and we analyze patterns of case activity to reveal patterns in how groups of plaintiffs competed or coordinated over time. We also explain how the class action, a key formal aggregation device in U.S. civil litigation, did not meaningfully affect the outcome in Argentina, while less formal methods of inter-plaintiff coordination thrived.<sup>37</sup> The Article concludes by discussing implications, both for sovereign debt and for the study of complex civil litigation.

### I. THEORETICAL BACKGROUND

As will become clear, distressed debt funds and other specialized, well-capitalized investors played a major role in the litigation against Argentina and may have been the key forces in bringing that litigation to a close.<sup>38</sup> To that extent, the story we tell is consistent with other accounts of sovereign debt litigation.<sup>39</sup> In their review of sovereign debt cases between 1976 and 2010, Schumacher et al. stress that distressed debt funds “have become the dominant type of plaintiff filing suit” and find that such funds accounted for 65% of lawsuits filed between 2000 and 2010.<sup>40</sup> They note the presence of retail lawsuits filed in the United States and United Kingdom but focus on how the entry of specialized distressed debt funds changed the market for sovereign debt litigation.<sup>41</sup>

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<sup>37</sup> See generally Lahav, *supra* note 22, at 1394-1401 (discussing the class action, multidistrict litigation, and bankruptcy as formal aggregation devices). Note that bankruptcy is not an option for sovereign states.

<sup>38</sup> See *infra* Part III.

<sup>39</sup> See, e.g., Juan J. Cruces & Tim R. Samples, *Settling Sovereign Debt's "Trial of the Century,"* 31 EMORY INT'L L. REV. 5, 11 (2016) (arguing that between 1997 and 2013 “distressed debt hedge funds” produced an outbreak of litigation against Argentina); Giselle Datz, *Ties that Bind and Blur: Financialization and the Evolution of Sovereign Debt as Private Contract*, 2 REV. EVOL. POL. ECON. 571, 573 (2021) (using the American lawsuit between the hedge fund “NML” and Argentina to show the evolution of sovereign debt in global commerce); Schumacher et al., *Sovereign Defaults*, *supra* note 9, at 2 (arguing that sovereign debt litigation is in large part driven by hedge funds); Schumacher et al., *Sovereign Debt Litigation*, *supra* note 9, at 591 (arguing that “hedge funds are now the dominant player” for filing lawsuits after buying debt at depressed prices).

<sup>40</sup> Schumacher et al., *Sovereign Defaults*, *supra* note 9, at 10.

<sup>41</sup> *Id.* app. D, at 39-40.

These findings reinforce the idea that successful litigation against a foreign sovereign requires legal sophistication and the ability to tolerate risk — areas in which distressed debt funds excel.<sup>42</sup>

We do not doubt that distressed debt investors are capable litigants, nor that they have played a key role in transforming sovereign debt markets.<sup>43</sup> Among other reasons, such investors are likely to buy debt in secondary markets at distressed prices, magnifying the potential returns from litigation.<sup>44</sup> But the presence of large numbers of small investors also may be a significant development. In other litigation settings, risk-averse plaintiffs who lack legal sophistication routinely bring large-scale litigation against well-resourced defendants. This is possible because the plaintiff's bar and its financiers provide financing and assume some of the risk, relying on formal and informal methods of aggregation to capture economies of scale.<sup>45</sup>

#### A. *Overcoming Structural Barriers to “Ordinary” Complex Litigation*

Litigation is expensive, time consuming, and risky.<sup>46</sup> Few individual plaintiffs can afford to hire a lawyer to bring a lawsuit.<sup>47</sup> Even those who can may find that resource constraints create pressure to accept low-ball settlement offers.<sup>48</sup> The alternative is to persist, potentially for years, through trial and, if the defendant will not pay, the uncertain process of judgment enforcement.<sup>49</sup> Beyond the need to finance litigation, there is

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<sup>42</sup> *Id.* at 10 (describing sovereign debt litigation as a “high-risk, high-return strategy”).

<sup>43</sup> As noted, one firm in particular played an outsized role in the early cases. *See supra* note 23.

<sup>44</sup> *See* Cruces & Samples, *supra* note 39, at 25-27.

<sup>45</sup> *See* MICHEAL D. GREEN, BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 241 (1996); Erichson, *supra* note 22, at 387-88.

<sup>46</sup> Molot, *supra* note 20, at 99 (noting resource-intensiveness of litigation); Steinitz, *Whose Claim?*, *supra* note 20, at 1276 (explaining link between litigation finance and settlement value).

<sup>47</sup> Kritzer, *supra* note 20, at 268 (noting relationship between contingency fees and access to justice).

<sup>48</sup> Steinitz, *Whose Claim?*, *supra* note 20, at 1276.

<sup>49</sup> Nationally, for the twelve-month period ending June 30, 2016, median time from filing to trial in federal district courts was 27.1 months. *See* ADMIN. OFF. OF THE U.S. COURTS, UNITED STATES DISTRICT COURTS – NATIONAL JUDICIAL CASELOAD PROFILE 1,

the need to mitigate the risks associated with negative (or simply unpredictable) outcomes.<sup>50</sup> It is hard to predict litigation outcomes, especially early in the proceedings, and consequently hard to assign an expected value to the lawsuit.<sup>51</sup> Even if this were not so, plaintiffs are rarely risk-neutral.<sup>52</sup> Few are indifferent between a sure payment of \$100,000 and a 50% chance of winning \$200,000 at trial. Outcome variability may create additional pressure to settle at a discount.<sup>53</sup>

In addition, a structural asymmetry exists whenever the defendant's conduct harms multiple potential plaintiffs. Formal legal barriers to multi-party proceedings, and practical barriers to informal coordination among plaintiffs, can channel plaintiffs into individual lawsuits in which they are likely to be outspent by the defendant.<sup>54</sup> This is not because — or not only because — the defendant is likely to have greater resources.

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[https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0630.2016.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2016.pdf) (last visited Sept. 16, 2022) [<https://perma.cc/C9FZ-6VYT>]. The figure excludes some civil cases that tend to be processed quickly, such as land condemnation proceedings. ADMIN. OFF. OF THE U.S. COURTS, EXPLANATION OF SELECTED TERMS 2 (2016), [https://www.uscourts.gov/sites/default/files/june\\_2016\\_explanation\\_of\\_selected\\_terms\\_o.pdf](https://www.uscourts.gov/sites/default/files/june_2016_explanation_of_selected_terms_o.pdf) [<https://perma.cc/J7X5-79AB>].

<sup>50</sup> Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 493-95 (2012) [hereinafter *Litigation Finance*] (noting difficulty of predicting outcomes).

<sup>51</sup> *Id.*; Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 637-38 (2006).

<sup>52</sup> See Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 195-96 (2007).

<sup>53</sup> Molot, *supra* note 20, at 72 (noting that outcome variability and risk preferences control settlement prospects and result in the “dramatic mispricing of lawsuits” in the absence of risk-transferring mechanisms). Additional scholarship suggests that risk averse (or risk seeking) behavior is influenced by cognitive biases that can shape the behavior of plaintiffs and defendants in different ways. For instance, people tend to overweight outcomes that are presented as certainties and underweight outcomes that are presented as probabilities. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 267-69 (1979). These tendencies are influenced by whether a potential outcome is framed as a gain or a loss. In a typical civil lawsuit, a plaintiff's natural framing involves a prospective gain. Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 129 (1996). In higher-merit suits, individual plaintiffs tend to be risk-averse. See *id.* at 121. The tendency to overweight certainty may create pressure on plaintiffs to accept settlement offers, even at the cost of foregoing a higher-expected value result at trial.

<sup>54</sup> David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 393-94 (2000).

Instead, it is because the defendant naturally views the potential claims against it as an aggregate.<sup>55</sup> When an individual plaintiff's lawsuit raises issues common to lawsuits by other plaintiffs, the defendant's investment in litigating those issues will have positive spillover effects for other lawsuits.<sup>56</sup> Investments in legal strategy, developing expert and fact witnesses, and other matters create generic assets that pay dividends across multiple cases.<sup>57</sup> Likewise, investments in a vigorous defense can yield lasting reputational benefits — for instance, a belief among plaintiff's lawyers that the defendant will rarely settle even meritorious cases.<sup>58</sup> By contrast, individual plaintiffs may forego investments that could increase the collective value of all plaintiffs' claims. This is because, when different plaintiffs are represented by different lawyers, “no plaintiff's lawyer will be able to spread the costs of and reap the full return from his investment on the common questions in all the claims.”<sup>59</sup> These asymmetric investment incentives can skew outcomes towards defendants and against individual plaintiffs.<sup>60</sup>

Yet any observer of modern civil litigation understands that this bleak picture is incomplete. Third parties routinely finance the costs of litigation and assume some or all of the risk that the claim will prove valueless.<sup>61</sup> The most common form of financing and risk-bearing consists of contingent fee legal services.<sup>62</sup> Beyond financing litigation

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<sup>55</sup> Rosenberg & Spier, *supra* note 21, at 306.

<sup>56</sup> *Id.* at 316 (Rosenberg and Spier assume for purposes of their model that these investments are equally valuable across lawsuits, but the point holds even if that assumption is relaxed).

<sup>57</sup> See RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 13-14 (2007) (distinguishing generic from specific litigation-related assets; investments in the former yield benefits over a portfolio of similar cases).

<sup>58</sup> See Carrie Menkel-Meadow, *Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 26-27 (1999).

<sup>59</sup> Hay & Rosenberg, *supra* note 19, at 1384.

<sup>60</sup> *Id.*

<sup>61</sup> See generally STEVEN GARBER, RAND CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN 1, 7-13 (2010), <https://tinyurl.com/2p9cfubz> [<https://perma.cc/Y7M7-ENSE>] (describing forms of alternative litigation finance beyond the traditional lawyer's contingency fee).

<sup>62</sup> HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 9 (2004). Technically, the attorney finances the cost of



expenses, lawyers working on contingency assume some of the risk of loss, relying on portfolio diversification to eliminate much of this risk.<sup>63</sup> As firms have grown larger over time and gained access to deeper pools of capital, their capacity to finance litigation and bear the associated risks has grown.<sup>64</sup> The arrival of specialized investment firms focused on litigation finance has accelerated this process, giving law firms and individual plaintiffs access to large new pools of capital and allowing for better management of portfolio risk.<sup>65</sup>

Likewise, in modern civil litigation the structural asymmetry that favors defendants is mitigated by procedural and other mechanisms for aggregating plaintiffs' claims.<sup>66</sup> Formal aggregation methods include procedural devices like the class action.<sup>67</sup> Although class actions have proven difficult to certify in some contexts,<sup>68</sup> in sovereign debt cases it should be relatively easy to certify a class of bondholders, at least when membership is limited to holders of the same bond series during a

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their services on a non-recourse basis but may only advance other litigation-related expenses.

<sup>63</sup> Molot, *supra* note 20, at 90; see also Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty*, 71 CHI.-KENT L. REV. 625, 680 (1995); Steinitz, *Whose Claim?*, *supra* note 20, at 1314.

<sup>64</sup> See, e.g., Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 203-05 (2001) (arguing that "sophisticated finance" has come to litigation).

<sup>65</sup> See GARBNER, *supra* note 61, at 24-26 (exploring costs and risks of alternative litigation finance); Painter, *supra* note 63, at 680-81 (noting that institutional investors can better diversify a portfolio of cases than lawyers); Steinitz, *Litigation Finance*, *supra* note 50, at 479-82 (drawing analogy between litigation finance firms and venture capital); Michael K. Velchik & Jeffrey Y. Zhang, *Islands of Litigation Finance*, 24 STAN. J.L. BUS. & FIN. 1, 15-35 (2019) (identifying other forms of third-party litigation finance).

<sup>66</sup> Erichson, *supra* note 22, at 412-14; Gluck & Burch, *supra* note 22, at 3-4, 10-16.

<sup>67</sup> Hay & Rosenberg, *supra* note 19, at 1380; Rosenberg, *supra* note 54, at 421 ("Nothing short of class-wide aggregation . . . assures sufficient economic incentive not only for plaintiffs to make the optimal investment maximizing their aggregate and per claim value, but also for defendants to make the optimal investment in taking reasonable precautions against accident . . .").

<sup>68</sup> See, e.g., Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 88 (2011) (noting that the mass tort class action has become "virtually extinct"); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 626-27 (2012) (discussing the difficulty of certifying class actions in consumer and other cases).

defined time period.<sup>69</sup> Moreover, even when the class action is unavailable, large-scale consolidation of cases, as in the context of federal multidistrict litigation, can achieve many of the same efficiencies.<sup>70</sup>

Finally, plaintiff's firms engage in a variety of practices that aggregate claims in less formal ways.<sup>71</sup> The practice of amassing a large portfolio of claims within a single firm mitigates the risk of losing any particular case and justifies larger investments in litigation.<sup>72</sup> This practice is facilitated by a "hub-and-spoke structure" in which some plaintiff firms specialize in bundling many similar claimants for referral to other firms that specialize in handling the litigation and settlement negotiations.<sup>73</sup> Notwithstanding rivalries and competition, networks of plaintiff firms also pool resources and coordinate litigation strategy in ways that can offset the defendant's inherent advantages.<sup>74</sup> And of course, these features of modern civil litigation often combine, as when a federal judge presiding over a multidistrict litigation appoints a subset of firms —

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<sup>69</sup> See FED. R. CIV. P. 23(b)(3) (permitting certification of damages class actions only if, among other requirements, common questions predominate over individual issues); *Brecher v. Republic of Arg.*, 806 F.3d 22, 25 (2d Cir. 2015) (reversing class certification order for failure to define the class period or otherwise impose a temporal limitation on class membership). However, the fact that a bondholder class action *should* prove easy to certify does not mean this form of aggregate litigation will prove effective in sovereign debt cases. We discuss below the limited impact of class action cases on the Argentina bond litigation. See *infra* Part III.

<sup>70</sup> Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 845 (2017).

<sup>71</sup> Erichson, *supra* note 22, at 386-401.

<sup>72</sup> Burch, *supra* note 22, at 1286; Yeazell, *supra* note 64, at 199-200.

<sup>73</sup> Erichson, *supra* note 22, at 464 (noting the control wielded by lawyers at the center of the hub and spoke network); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1623 (2004) (noting divide between the firms that conduct the litigation and those that primarily attract and screen potential clients); Yeazell, *supra* note 64, at 200-03 (describing networks of referral and fee-splitting); see also Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 311-14 (1996) (describing varied roles of lawyers involved in aggregated mass tort litigation).

<sup>74</sup> Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1045 (1993).

often those with a large inventory of related cases — to make important strategic decisions on behalf of the group.<sup>75</sup>

### B. Sovereign Debt Litigation Is Not So Different

Sovereign debt litigation shares many of these features. When a government defaults on its public debt, it causes injuries to a large and dispersed group of investors.<sup>76</sup> Some will have very large claims and the capacity to make significant litigation investments. But many will have suffered smaller injuries and will have no realistic prospect of funding litigation on their own.<sup>77</sup> The difficulty is not getting jurisdiction nor obtaining a judgment. Jurisdiction is virtually automatic because practically all sovereign bond issuers provide broad waivers of sovereign immunity from suit.<sup>78</sup> Getting a judgment is easy because liability is clear and governments in default rarely dispute it.<sup>79</sup> This means that small

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<sup>75</sup> See Bradt, *supra* note 70, at 846 (“In practice, the MDL process looks, in many ways, very much like the class action process, with judge-appointed steering committees of attorneys representing the plaintiffs as a whole.”); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015) (noting crucial role of judicially-appointed steering committees in multidistrict litigation); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 540-41 (noting how lawyers at the center of the “hub-and-spoke” model perform work on behalf of the larger group); Gluck & Burch, *supra* note 22, at 12-15 (describing how multidistrict litigation centralizes control in a plaintiff’s steering committee or other leadership group).

<sup>76</sup> Many bondholders are investment firms or other organizational claimants. Compared to retail investors, such claimants may be less risk-averse and less subject to cognitive biases. See, e.g., Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 749 (2005) (“Large corporations, for example, may be relatively risk-neutral, especially because they are generally held by shareholders in diverse portfolios.”); David Charny & G. Mitu Gulati, *Efficiency Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for “High-Level” Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 64 n.25 (1998) (discussing the example of a potential risk-averse employer in considering a black woman engineer from MIT).

<sup>77</sup> This will especially be true when there is a sizable retail holder base.

<sup>78</sup> Weidemaier, *supra* note 5, at 88 & fig.1.

<sup>79</sup> See, e.g., *Seijas v. Republic of Arg.*, 606 F.3d 53, 56 (2d Cir. 2010) (reversing class certification order but noting that “[n]o significant questions existed concerning liability because it was clear that Argentina had defaulted on the bonds and owed money to the bondholders”).

players can afford to file complaints and seek judgments; the costs are small and predictable.

The problem is enforcement. The law of foreign sovereign immunity limits the investor's right to enforce a judgment even when the sovereign waives immunity at the time of debt issuance.<sup>80</sup> Under U.S. law, the holder of a money judgment may enforce it against assets that the sovereign uses for a commercial activity in the United States.<sup>81</sup> Yet in practice, sovereigns tend to keep attachable assets hidden away.<sup>82</sup> Creditors must hunt for assets around the globe, act quickly when they find them, and be ready to litigate the sovereign's inevitable sovereign immunity objection.<sup>83</sup> The cost and delay is such that few non-specialist investors tried their hand before the Argentine litigation. A benchmark to keep in mind is that Elliott Associates spent an estimated \$10 million in legal expenses suing Peru between 1996 and 2000.<sup>84</sup> A lone plaintiff contemplating filing a sovereign debt lawsuit needs millions or tens of millions in litigation finance and a long time-horizon for repayment.

However, creditors with capital and patience have leverage.<sup>85</sup> The threat of attachment can deny the sovereign access to foreign capital markets and disrupt commercial transactions outside its borders.<sup>86</sup> This can lead countries in default to rely on less efficient forms of finance and

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<sup>80</sup> A foreign state's waiver of execution immunity lets creditors attach and execute upon assets, but only when "used for a commercial activity in the United States." 28 U.S.C. § 1610(a) (2018).

<sup>81</sup> *Id.* §§ 1610-1611.

<sup>82</sup> FEDERICO STURZENEGGER & JEROMIN ZETTELMEYER, DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES 55-56 (2007); William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 11 (2004); Weidemaier & Gelper, *supra* note 16, at 206.

<sup>83</sup> Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, 225-29 (2010).

<sup>84</sup> Letter from Philip S. Kaplan to Minister Carlos Bolona (Oct. 1, 2000) (noting the "judgment of the Court, including interest and attorneys' fees, amounted to a little more than \$67 million"); Docket at 10/20/2000, *Elliott Assocs. V. Republic of Peru* (S.D.N.Y. 1998) (No. 96-cv-07917) (judgment of \$57.2 million representing the "principal amount and the past due interest thereon").

<sup>85</sup> See *supra* text accompanying notes 11-12.

<sup>86</sup> Schumacher et al., *Sovereign Defaults*, *supra* note 9, at 2; Weidemaier & Gelper, *supra* note 16, at 6-7.

to engage middlemen to carry out day-to-day international trade, both of which entail a significant incremental cost.<sup>87</sup> Creditors also can use discovery tools and lobbying efforts to create frictions with the country's bilateral, multi-lateral, and corporate counterparts.<sup>88</sup> Collectively, these activities produce negative spillover effects in the sovereign's domestic economy.<sup>89</sup> The large holdout creditors count on it. Their fundamental bet is that over a long enough period of time, a sovereign will pay up rather than endure these costs.<sup>90</sup> As a result, sovereign debt cases are a war of attrition. Talking tough, one famously successful holdout creditor said that sovereign defaulters will come to recognize "that not all creditors will fold their tents and disappear."<sup>91</sup>

### C. Sovereign Debt Cases May Be Easier to Finance

Like other kinds of complex litigation, then, sovereign debt litigation is feasible for creditors with access to capital, a long-time horizon, and a healthy appetite for risk. In fact, claims under defaulted sovereign bonds may be even more amenable to large-scale litigation than other legal claims. Unlike, say, a personal injury claimant, a risk-averse bondholder can readily sell to an investor with deeper pockets and a greater appetite for risk.<sup>92</sup> Champerty laws and rules of legal ethics complicate, although they typically do not forbid, the transfers of an interest in a legal claim.<sup>93</sup>

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<sup>87</sup> See Schumacher et al., *Sovereign Defaults*, *supra* note 9, at 19-20 (providing case studies of creditor interference).

<sup>88</sup> *EM Ltd. v. Republic of Arg.*, 695 F.3d 201, 203-04 (2d Cir. 2012) (describing creditors' efforts to subpoena information from Bank of America and other financial institutions that worked with Argentina); Schumacher et al., *Sovereign Defaults*, *supra* note 9, at 19 (noting lobbying efforts by creditors).

<sup>89</sup> See, e.g., Ahmed & Alfaro, *supra* note 12 (discussing litigation in Argentina and negative spillover effects); Hebert & Schreger, *supra* note 12 (discussing governments repayment of debt in response to deteriorating economic conditions).

<sup>90</sup> Weidemaier & Gelpern, *supra* note 16, at 206-08.

<sup>91</sup> Laurence Fletcher, *Ex-Elliott Sovereign Debt Supremo Gears up for Final Battle in India*, *FIN. TIMES* (Oct. 3, 2021), <https://www.ft.com/content/0eb70a27-1878-4a26-a8ad-95fcc191bofo> [<https://perma.cc/LJP3-RUTS>] (quoting Jay Newman).

<sup>92</sup> See, e.g., Cruces & Samples, *supra* note 39, at 25-27 (noting post-default secondary market sales of Argentine bonds and computing returns to investors who purchased at various times).

<sup>93</sup> See, e.g., Steinitz, *supra* note 50, at 481-88 (discussing relationship between legal funding and champerty and ethical rules).

But these rules do not impede the transfer of a distressed sovereign bond to an investor who intends to demand full payment and to sue if it is not forthcoming.<sup>94</sup> Thus, a well-funded plaintiff can easily accumulate a block of claims to make litigation worthwhile, often at a discount, as dispersed, smaller investors sell into the market for the lack of resources and expertise to enforce their rights.<sup>95</sup> Of course, the fact that bonds are readily transferrable reduces the need for more traditional forms of litigation finance. Rather than retain a lawyer to sue on the bond, a small investor can sell the security to a creditor with a greater appetite for litigation. But as is clear from the pattern of cases filed against Argentina, not every small investor will take this route.

A second reason that sovereign debt cases are easier to finance is that federal courts in New York hear virtually all such cases in the United States, and the bonds in these cases are governed by New York law.<sup>96</sup> This lets investors capitalize on New York's high rate of pre-judgment interest, effectively self-financing litigation through claims accruals.<sup>97</sup> Under New York law, debt accrues at its contractual rate until the date of judgment, and interest on missed payments accrues at 9%.<sup>98</sup> This leads to a rapid compounding of claim value, especially for plaintiffs who hold bonds with high coupons, such as 10%.<sup>99</sup> The trick is for the plaintiff to

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<sup>94</sup> Champerty laws in many jurisdictions prohibit agreements in which the owner of a legal claim agrees to share litigation proceeds with an unrelated party. Initially, it was not clear whether an investor would run afoul of these laws by buying a bond at distressed prices and suing for full payment. That confusion was mostly put to rest in *Elliott Assocs. V. Banco da la Nacion*, 194 F.3d 363, 381 (2d Cir. 1999), which interpreted New York law to permit distressed debt litigation so long as the investor's "primary goal" is found to be satisfaction of a valid debt and its intent is only to sue absent full performance."

<sup>95</sup> Cruces & Samples, *supra* note 39, at 25-27.

<sup>96</sup> When the sovereign is subject to jurisdiction in the United States, it is usually because the bond includes a clause submitting to jurisdiction in state and federal court in New York, and virtually all such bonds also include a choice-of-law clause selecting New York law. Weidemaier, *supra* note 5, at 70. The litigation will almost certainly be in federal, not state, court. Claims against foreign states are within the original jurisdiction of the federal courts, 28 U.S.C. § 1330 (2018), and, under *id.* § 1441(d), may be removed to federal court if brought in state court.

<sup>97</sup> For discussion in the context of Argentina, see Cruces & Samples, *supra* note 39, at 18-26.

<sup>98</sup> See N.Y. C.P.L.R. § 5004 (2022).

<sup>99</sup> *NML Cap. v. Republic of Arg.*, 621 F.3d 230, 239-43 (2d Cir. 2010) (awarding statutory interest on missed post-acceleration interest payments and requesting Court

delay filing a lawsuit as long as possible, subject to the six year statute of limitations under New York law,<sup>100</sup> or drag its feet once the lawsuit is filed. The reason to delay is that, while state law provides for a high rate of pre-judgment interest accruals,<sup>101</sup> a federal statute sets a low post-judgment interest rate for federal court judgments.<sup>102</sup> The federal rate is exceptionally low, equivalent to the prevailing 1-year T-bill rate (about 1% per annum at the time).<sup>103</sup>

An example will show just how dramatically these rules can influence claim value. Assume an investor owns \$100 million of bonds with a 10% annual coupon and that the principal and final coupon went unpaid on December 31, 2001. We calculate the value of the investor's judgment under these rules for judgments obtained on the default date and the annual anniversary of default through December 31, 2015, the date we assume the judgments are satisfied. Then, we project the value of the investor's claims from each judgment date to the satisfaction date. The results are in Table 1. The extraordinary result is that an investor who obtained a \$110 million judgment (for par value plus one past-due interest payment) immediately after default in 2001 will be paid \$125.4 million on a holding of \$100 million of bonds in 2015, a 14% increase due to accrual of interest for 14 years at the scenario 1% federal statutory rate. By contrast, an investor holding the exact same bond, who received a judgment in December 2015, will be paid \$344.5 million. The difference is due to the fact that the latter investor's claim grows at the bond coupon plus the addition of interest on missed payments at the relatively high 9% rate set by New York law.<sup>104</sup>

To be sure, there is one benefit to an early money judgment: After getting the judgment, the investor is free to use the threat of asset

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of Appeals of New York to clarify whether New York law awarded statutory interest on such payments that came due after bond maturity).

<sup>100</sup> The applicable statute of limitations is six years. N.Y. C.P.L.R. § 213.

<sup>101</sup> *NML Cap.*, 621 F.3d at 239.

<sup>102</sup> 28 U.S.C. § 1961(a) (2018).

<sup>103</sup> *Id.*

<sup>104</sup> 35% of the excess is attributable to high rate of pre-judgment interest provided by New York law, which we can see by accruing interest on missed payments at 1% rather than 9%.

attachment to disrupt the sovereign's activities abroad.<sup>105</sup> But otherwise, it pays to wait.<sup>106</sup> Aware of this math, and expecting a long drawn out process after 2005, some plaintiffs in the Argentina cases chose to wait to maximize profits.<sup>107</sup> Because of the strategic and financial importance of the decision to seek a final money judgment, in the discussion below we distinguish "post-judgment" claims, in which investors received a final money judgment before 2010, from "pre-judgment claims," in which investors did not seek such a final judgment through the end of the case.

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<sup>105</sup> In limited cases a plaintiff may attach assets in anticipation of getting a judgment, see 28 U.S.C. § 1610(d) (2018), but this is more difficult to do, and would be especially difficult for a plaintiff intent on dragging its feet before reducing its claim to judgment.

<sup>106</sup> While it pays to wait to obtain a judgment after lodging a suit, there is a cost to waiting to file suit: unless otherwise fixed by contract, the statute of limitations for missed payments is six years and so investors who wait to sue will only be eligible to collect missed payments and interest-on-interest and any accelerated principal amount on payments occurring not less than six years prior to the date of the suit.

<sup>107</sup> For more on Argentina's sizeable interest liabilities and on the benefits of delaying a money judgment, see Cruces & Samples, *supra* note 39, at 22-27.



Table 1. Example Judgment Value on \$100 million 10% Annual Pay Bond due 12/31/2001  
(Million US\$)

Date of Judgment	Principal	Past-Due Interest at Contract Rate (10%)	Interest-on-Interest at N.Y. Stat. Rate (9%)	Claim Value on Judgment Date	Value of Claim Accreted to 12/31/2015 at Fed. Stat. Rate (assumed 1%)
12/31/2001	100.00	10.00	0.00	110.00	125.40
12/31/2002	100.00	20.00	0.90	120.90	136.62
12/31/2003	100.00	30.00	2.70	132.70	148.62
12/31/2004	100.00	40.00	5.40	145.40	161.39
12/31/2005	100.00	50.00	9.00	159.00	174.90
12/31/2006	100.00	60.00	13.50	173.50	189.12
12/31/2007	100.00	70.00	18.90	188.90	204.01
12/31/2008	100.00	80.00	25.20	205.20	219.56
12/31/2009	100.00	90.00	32.40	222.40	235.74
12/31/2010	100.00	100.00	40.50	240.50	252.53
12/31/2011	100.00	110.00	49.50	259.50	269.88
12/31/2012	100.00	120.00	59.40	279.40	287.78
12/31/2013	100.00	130.00	70.20	300.20	306.20
12/31/2014	100.00	140.00	81.90	321.90	325.12
12/31/2015	100.00	150.00	94.50	344.50	344.50

## II. THE ARGENTINA LITIGATION

Most accounts of the Argentina litigation focus on the so-called *pari passu* litigation. That chapter ran from roughly fall 2010 through 2016 and resulted in a comprehensive settlement that resolved most remaining claims against Argentina.<sup>108</sup> The impetus for the settlement was an injunction, entered by District Judge Thomas P. Griesa in February 2012, which forbade Argentina from paying holders of its restructured debt

<sup>108</sup> See *infra* pp. 124-135.

unless it also paid holdout creditors in full.<sup>109</sup> After years of unsuccessful appeals and failed attempts to defy the injunction, Argentina ultimately decided that settling with holdouts was preferable to remaining shut out of international capital markets.<sup>110</sup>

The full story of the litigation, however, spans a much longer period, beginning shortly after Argentina's default, in December 2001, on \$100 billion worth of foreign debt.<sup>111</sup> In the Southern District of New York, the first investors filed suit in 2002, and the story of the ensuing litigation unfolds in six stages summarized in Figure 1. A full understanding of our data requires periodization because plaintiff's financing and cooperation strategies evolved in response to events.

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<sup>109</sup> Injunction, *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-6978 (S.D.N.Y. Feb. 23, 2012); *see also* Weidemaier & Gelper, *supra* note 16, at 196-98 (describing the effect of injunction).

<sup>110</sup> Datz, *supra* note 39, § 2.1.

<sup>111</sup> Clifford Krauss, *Argentine Leader Declares Default on Billions in Debt*, N.Y. TIMES (Dec. 24, 2001), <https://www.nytimes.com/2001/12/24/world/argentine-leader-declares-default-on-billions-in-debt.html> [<https://perma.cc/JYT8-K2PZ>].

Figure 1. Litigation Phases

**Phase One: Pre-2005 Offer**

Jan. 2002 – June 2005

- Handful of small investor suits and class actions
- Two large institutional plaintiffs (Dart, Elliott)

**Phase Two: 2005 Offer through 2010 Offer**

July 2005 – Sept. 2010

- Over 100 suits filed by a diverse group of investors
- Many efforts to attach; all but two fail
- 2/3 of holdouts participate in 2010 exchange

**Phase Three: Pari Passu and Default**

Oct. 2010 – July 2014

- Elliott leads pari passu litigation; joined by selected plaintiffs
- Exchange bondholders try to block injunction
- Negotiations fail, injunction goes into effect, Argentina defaults

**Phase Four: Copycat Pari Passu**

Aug. 2014 – Nov. 2015

- Nearly all pre-2010 plaintiffs file copycat pari passu complaints
- New entrant hedge funds file new lawsuits based on pari passu

**Phase Five: Macri's Settlement**

Nov. 2015 – Apr. 2016

- Macri administration engages with leading holdout investors
- Settlement and injunction lifted in April 2016

**Phase Six: Post-Settlement**

May 2016 – present

- Continuing litigation
- New motions seeking pari passu injunctions fail

1. Pre-2005 Offer (Jan. 1, 2002 through June 1, 2005): This period covers the first cases filed against Argentina through the country's first debt restructuring, which closed in mid-2005.<sup>112</sup> In this period, relatively few cases were filed against Argentina.<sup>113</sup> The first cases were brought by

<sup>112</sup> The restructuring was implemented through an exchange offer in which participants swapped their non-performing bonds for new bonds with revised payment terms. Cruces & Samples, *supra* note 39, at 11.

<sup>113</sup> See *infra* Figure 2.

retail investors or companies holding a relatively small amount of bonds. Only two large institutional plaintiffs filed lawsuits at this stage, Kenneth Dart's EM Ltd.<sup>114</sup> and Elliott Associates' NML Capital.<sup>115</sup> Although there were a few efforts to attach Argentine assets before 2005, none succeeded. Holders of all but about \$19.5 billion of defaulted bonds participated in Argentina's first restructuring, an exchange offer which closed in mid-2005.<sup>116</sup> In late 2003, Argentina also asked for an early ruling protecting it against the possible future imposition of a *pari passu* injunction, but Judge Griesa ruled that the issue was not yet ripe for adjudication.<sup>117</sup>

2. 2005 Offer through 2010 Offer (June 1, 2005 through Sept. 30, 2010): The volume of litigation exploded after the closing of Argentina's 2005 exchange. One likely reason is that investors who declined to participate in the 2005 restructuring now understood that Argentina would not pay voluntarily.<sup>118</sup> Moreover, the six year statute of limitations was set to start running out on already matured bonds in late 2007.<sup>119</sup> These cases were

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<sup>114</sup> See Cornwell Declaration, EM Ltd. v. Republic of Arg., No. 03-cv-2507 (S.D.N.Y. Aug. 6, 2003).

<sup>115</sup> Cases 2003-cv-02507 (Dart) and 2003-cv-08845 (Elliott). We will use Elliott and NML interchangeably, although NML was the entity that held Argentine bonds and did the party to the litigation.

<sup>116</sup> The Republic of Arg., Annual Report (Form 18-K) 142 (Sept. 30, 2011), [https://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k\\_0928.htm](https://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.htm) [<https://perma.cc/UX9R-6NF5>] [hereinafter *Annual Report*] (calculated as \$81.8 billion eligible less \$62.3 billion participation).

<sup>117</sup> See Transcript of Conference Before Judge Thomas P. Griesa at 9, Applestein v. Republic of Arg., No. 02-cv-1773 (TPG) (S.D.N.Y. Jan. 15, 2004).

<sup>118</sup> In connection with the exchange offer, Argentina enacted a so-called Lock Law, which forbade the government to settle claims with non-participating creditors. See, e.g., NML Cap., Ltd. v. Republic of Arg., 699 F.3d 246, 260 (2d Cir. 2012) ("Its legislature enacted the Lock Law, which has been given full effect in its courts, precluding its officials from paying defaulted bondholders and barring its courts from recognizing plaintiffs' judgments."). The 2005 exchange offer also included a Rights Upon Future Offerings ("RUFO") clause, which provided that, if the government made a better offer to other creditors within a defined window, then exchange participants would receive the same treatment. The RUFO clause ensured that Argentina would not settle with holdouts on improved terms during that window. Tim R. Samples, *Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law*, 35 NW. J. INT'L L. & BUS. 49, 73-74 (2014).

<sup>119</sup> N.Y. C.P.L.R. § 213 (2022).

brought by a mix of small retail and large institutional investors.<sup>120</sup> There were many attempts to attach assets belonging to Argentina or entities linked to the Republic. All but two failed.<sup>121</sup> As we explain below, litigants varied in their approach.<sup>122</sup> Some were extraordinarily active during this period. Others were largely or completely inactive, doing little other than filing a complaint.

In April 2010, Argentina reopened the exchange offer, giving holdout investors a second chance to accept the restructuring deal.<sup>123</sup> Roughly two-thirds of the remaining holdouts elected to participate, having failed in the preceding five years to find meaningful assets to attach or otherwise to recover anything on their claims. The participants in the 2010 reopening included about 120,000 of the 180,000 Italian retail investors (“TFA”) who were involved in international arbitration proceedings against Argentina but had also filed lawsuits in the Southern District of New York.<sup>124</sup> The remaining 60,000, one-third of the original Italian investor claimants, continued the litigation and arbitration. Large institutional investors also participated in the reopening, including Connecticut-based Gramercy Funds Management LLC (which anchored the transaction),<sup>125</sup> as well as mainstream money managers TIAA-CREF

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<sup>120</sup> See *infra* Fig. 2.

<sup>121</sup> See *NML Cap. v. Republic of Arg.*, 680 F.3d 254, 255-56 (2d Cir. 2012) (affirming order permitting attachment of bank account owned by *Agencia Nacional de Promoción Científica y Tecnológica*); *EM Ltd. v. Republic of Arg.*, 389 F. App’x. 38, 40-41 (2d Cir. 2010) (affirming order permitting attachment of trust assets).

<sup>122</sup> See *infra* Part IV.

<sup>123</sup> *Cruces & Samples*, *supra* note 39, at 11.

<sup>124</sup> The arbitration and litigation on behalf of Italian retail investors was organized by Task Force Argentina (“TFA”), an entity set up by Italy’s eight largest banks. On the legal significance of this arbitration, see S.I. Strong, *Collective Arbitration in ICSID Disputes: Abaclat (formerly Beccara) v. Argentine Republic*, 17 No. 1 IBA ARB. NEWS 84, 84-87 (2012) [hereinafter *Collective Arbitration*]; S.I. Strong, *Mass Procedures as a Form of “Regulatory Arbitration” — Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. 259, 266 (2013) [hereinafter *Mass Procedures*]. TFA also initiated three lawsuits in the Southern District of New York on behalf of these investors. As noted, about two-thirds participated in the 2010 restructuring; the rest continued to pursue the arbitration. See *Abaclat and Others v. Republic of Arg.*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 75 (Aug. 4, 2011).

<sup>125</sup> Jude Webber, *Argentina ‘Delighted’ Over Debt Swap Success*, FIN. TIMES (June 23, 2010), <https://www.ft.com/content/f367d230-7f00-11df-8398-00144feabdco> [<https://perma.cc/U458-E5H7>].

and GMO.<sup>126</sup> When the 2010 exchange closed at the end of September, Argentina had reduced the outstanding claims against it from \$19.5 billion to around \$6.8 billion, but the remaining plaintiffs included the most well-capitalized and sophisticated litigants.<sup>127</sup> Many had already been active in the litigation and likely anticipated what happened next.

3. Pari Passu and Default (Oct. 2010 through July 30, 2014): Weeks after the completion of Argentina's 2010 exchange, Elliott's NML Capital fund launched its *pari passu* attack on Argentina. Elliott sought an injunction blocking payments to the 92% of investors who had accepted Argentina's 2005 and 2010 offers unless Argentina also paid the holdout creditors.<sup>128</sup> The justification for the injunction was that Argentina was in continuing violation of its *pari passu* clause by paying only a subset of its creditors.<sup>129</sup> In a series of rulings ultimately affirmed on appeal, Judge Griesa accepted the argument and issued the injunction.<sup>130</sup>

The litigation in this period differed in important ways from litigation before 2010. Once Elliott brought its *pari passu* motion, plaintiffs appeared to coordinate their activity. Perhaps the most striking example is the division between pre-judgment and post-judgment plaintiffs.<sup>131</sup> Only holders of pre-judgment claims joined Elliott's *pari passu* attack at this stage.<sup>132</sup> The effect of holding back the post-judgment claims was to

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<sup>126</sup> Stipulation and Order for Dismissal Without Prejudice at 1-3, *Teachers Insr. and Annuity Assoc. of America v. Rep. of Arg.*, No. 06-cv-6221 (S.D.N.Y. 2010); Stipulation and Order to Amend Judgement 1-2, *GMO Emerging Country Debt Fund v. Rep. of Arg.*, No. 05-cv-10383 (S.D.N.Y. Aug. 18, 2010). GMO participated with some but not all of its holdings.

<sup>127</sup> *Cruces & Samples*, *supra* note 39, at 15-18; also document the holdout rates by bond and the concentration of holdouts into bonds governed by New York law. Republic of Arg., 2010 Annual Report 8 (2011).

<sup>128</sup> See *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-6978 (TPG), 2011 WL 9522565 \*1-3 (S.D.N.Y. Dec. 7, 2011) (accepting NML's argument but delaying consideration of the request for injunctive relief).

<sup>129</sup> *Weidemaier & Gelper*, *supra* note 16, at 194-95.

<sup>130</sup> See *NML Cap. v. Republic of Arg.*, 727 F.3d 230, 237-38 (2d Cir. 2013); *NML Cap. v. Republic of Arg.*, 699 F.3d 246, 250 (2d Cir. 2012).

<sup>131</sup> On the significance of this distinction, see *supra* notes 104-07 and accompanying text.

<sup>132</sup> Post-judgment claimants would have been perfectly happy for Elliott to absorb all the costs of the *pari passu* litigation, as they could ride on Elliott's coattails. Unlike asset attachment, *pari passu* was not a zero-sum game.

defer the court's consideration of a legal argument that Argentina planned to make: that the entry of a money judgment extinguished claims based on the *pari passu* clause.<sup>133</sup> The delay also allowed more time for a lobbying effort by some of the hedge funds to amend New York law to facilitate litigation of post-judgment *pari passu* claims.<sup>134</sup> That legislative effort failed, but the plaintiffs still won the point in court.<sup>135</sup>

Those who joined the early *pari passu* litigation also had close ties to Elliott. Mark Brodsky, the manager of Aurelius Capital, used to work at Elliott.<sup>136</sup> Bracebridge, as manager of the Olifant Fund, joined Elliott's initial *pari passu* attack<sup>137</sup> and was listed jointly with Elliott as a member of the lobbying group American Task Force Argentina.<sup>138</sup> Two other

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<sup>133</sup> The argument is an application of claim preclusion doctrine, which prevents parties from asserting a claim that could have been asserted in prior lawsuit that resulted in a judgment on the merits. Because the post-judgment claims were held in reserve, Argentina could not raise the argument until 2015, when post-judgment claimants' claims sought comparable relief. The district judge rejected Argentina's argument and extended the *pari passu* injunction to cover post-judgment claims. See *NML Cap., Ltd. v. Republic of Arg.*, No. 14-cv-8601 (TPG), 2015 WL 3542535 at \*4-6 (S.D.N.Y. June 5, 2015); see also *Exp.-Imp. Bank of the Republic of China v. Grenada*, No. 13-civ-1450 (HB), 2013 WL 4414875 at \*3 (S.D.N.Y. Aug. 19, 2013) (rejecting the argument in a similar case).

<sup>134</sup> See Michael C. Spencer Declaration at 13, Exhibit 3 at 13, *Milberg LLP v. HWB Alexandra Strategies Portfolio et al.*, No. 19-cv-04058 (S.D.N.Y. May 6, 2019) ("I spoke to Mr. Cohen about joining a contingent of hedge fund representatives for a planned meeting with state legislators in Albany about 'anti-merger legislation,' a bill to clarify state law on the merger doctrine to foreclose one possible objection to Equal Treatment motions in post-money-judgment cases.").

<sup>135</sup> *NML Cap., Ltd.*, 2015 WL 3542535 at \*8.

<sup>136</sup> Daniel Bases, *Aurelius Sees No Realistic Private Solution in Argentine Dispute*, REUTERS, <https://www.reuters.com/article/uk-argentina-debt-aurelius/aurelius-sees-no-realistic-private-solution-in-argentine-dispute-idUKKBNoGD21820140813> (last updated Aug. 13, 2014, 1:57 PM) [<https://perma.cc/AL3H-BQSQ>]; Mark Brodsky, AURELIUS CAP. MGMT., <https://www.aurelius-capital.com/team/mark-brodsky> (last visited Oct. 7, 2022) [<https://perma.cc/YM9S-BEMQ>].

<sup>137</sup> See Declaration of Michael Rashes 8, *Olifant Fund, Ltd. v. Republic of Arg.*, No. 10-cv-09587 (S.D.N.Y. Jan. 26, 2012).

<sup>138</sup> On coordination between Bracebridge and Elliott, see *infra* Part IV. A screen shot from the American Task Force Argentina website (on file with authors) from Jan. 5, 2008 lists "current supporters" as Bracebridge Capital, LLC; Elliott Associates, L.P.; FH International Asset Management, LLC; Grantham, Mayo, Van Otterloo & Co. LLC; and Montreux Partners. On Bracebridge's management of the Olifant, FFI Fund and FYI Ltd, see Bracebridge Cap. CAPITAL, Uniform Application for Investment Adviser Registration and Report by Exempt Reporting Advisers (Form ADV) 65, 74, 88 (July 2, 2018).

Bracebridge-operated funds, FFI Fund and FYI, joined the *pari passu* litigation later.<sup>139</sup> The three Bracebridge funds owned just one of the many types of defaulted Argentine securities: Floating Rate Accrual Notes (“FRANs”).<sup>140</sup> The first of Bracebridge’s lawsuits was filed in early 2005, close in time to similar suits by Elliott and Montreux, which also owned FRANs. Together, Bracebridge, Elliott, and Montreux owned nearly the entire outstanding stock of FRANs and litigated the value of these securities together, obtaining judgments in mid-2009.

Finally, a small group of retail investors represented by Michael Spencer of Milberg LLP joined the initial *pari passu* litigation (the “Varela” plaintiffs). Michael Spencer reported in a subsequent lawsuit over legal fees that Elliott invited his firm’s clients to join in with Elliott and the other hedge funds.<sup>141</sup> One can infer that the Varela plaintiffs (holding in aggregate under \$500,000 in bonds)<sup>142</sup> were invited because it would put a human face on the *pari passu* litigation to have the plaintiffs include retail investors who bought their bonds at par.<sup>143</sup> This

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<sup>139</sup> See, e.g., Complaint at 1-2, FFI Fund v. Republic of Arg., No. 14-cv-8630 (Oct. 29, 2014) (complaint seeking *pari passu* injunction filed on behalf of FFI Fund, Ltd. And FYI Ltd.).

<sup>140</sup> The FRANs were unique because, after default, their interest rate shot up 101.5% annually after Argentine defaulted due to an idiosyncratic feature of the securities. See NML Cap. v. Republic of Arg., 621 F.3d 230, 234 (2d Cir. 2010). For Elliott’s first FRAN lawsuit, see Complaint, NML Cap. v. Republic of Arg., No. 05-cv-02434 (Feb. 28, 2005), filed Feb. 28, 2005; for Bracebridge’s first FRAN lawsuit for FFI Fund and FYI, see Complaint, FFI Fund v. Republic of Arg., No. 05-cv-03328, filed (Mar. 29, 2005); and for Montreux Partners first FRAN lawsuit, see Complaint, Montreux Partners v. Republic of Arg., No. 05-cv-04239, filed (Apr. 28, 2005).

<sup>141</sup> See Declaration of Michael C. Spencer at ¶ 27, Milberg LLP v. HWB Alexandra Strategies Portfolio, No. 19-cv-04058 (S.D.N.Y. May 6, 2019). Spencer says, “I have always made it clear that Dechert (later joined by Gibson Dunn, largely for appellate work), representing NML, led the Equal Treatment strategy among its group of hedge funds (Ed Friedman of Friedman Kaplan [for Aurelius] and Robert Carroll of Goodwin Procter [for Bracebridge] also played large roles); and Milberg was also invited to join, which we did. The group developed and coordinated the ongoing strategy . . . .”

<sup>142</sup> Complaint at 1-2, Varela v. Republic of Arg., No. 10-cv-05338 (S.D.N.Y. July 13, 2010).

<sup>143</sup> According to Spencer, “Mr. Cohen [Elliott’s counsel] and I began discussing the possible utility of having an Equal Treatment motion initiated by non-hedge fund plaintiffs — i.e., small or individual investors, who had bought their bonds at or near full price before default . . . and whose claims had not gone to money judgments. Unlike hedge funds, those investors could not be easily attacked by Argentina as foreign bond



strategy successfully neutralized the argument that courts should not impose a disruptive equitable remedy on Argentina that would only benefit professional investors positioned to make outsized returns.<sup>144</sup> Subsequent court papers provide evidence that Elliott led this group and worked closely with the others.<sup>145</sup>

Another distinguishing feature of this phase was the entry of a wide range of third parties into the litigation. The most high-profile were the exchange bondholders, the investors who had participated in the 2005 and 2010 exchanges and thus owned bonds whose payment would be blocked if Elliott's *pari passu* strategy succeeded. These bondholders went to court to oppose the entry of the injunction and, when that failed, fought to limit its scope.<sup>146</sup> However, bondholders were not the only third parties caught up in the litigation. The Bank of New York and Citibank, and the European clearing systems Euroclear and Clearstream, entered the litigation against the injunction and argued against its broad international scope on the basis that it would disrupt their operations and might force them to violate foreign laws.<sup>147</sup> Still others entered appearances after plaintiffs served them with subpoenas demanding information about Argentine offshore assets.

The district judge appointed a Special Master to oversee settlement negotiations in June 2014 with the idea that the pending effect of the

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speculators who had purchased at large discounts but were litigating for full recoveries." Declaration of Michael C. Spencer, *supra* note 141, ¶ 24.

<sup>144</sup> As an example, during argument before the Second Circuit, Argentina's lawyer, Jonathan Blackman, suggested that it would not be equitable to grant an injunction enforcing the *pari passu* clause, as this would only enable hedge funds to make a huge profit. "Some of them are individuals," Judge Reena Ragi responded. Transcript of Oral Argument at 18-19, *NML Cap., Ltd. v. Republic of Arg.*, No. 12-105, (2d Cir. July 23, 2012).

<sup>145</sup> See Declaration of Michael C. Spencer, *supra* note 141, ¶ 27 ("Dechert (later joined by Gibson Dunn, largely for appellate work), representing NML, led the Equal Treatment strategy among its group of hedge funds . . .").

<sup>146</sup> See, e.g., Notice of Motion to Vacate Injunction Pursuant to Rule 60(b) at 2, *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-06978 (S.D.N.Y. Nov. 16, 2012) and Opposition Brief of Interested Non-Party Fintech Advisory Inc. at 1-3, *NML Cap., Ltd.*, No. 08-cv-06978 (S.D.N.Y. Nov. 19, 2012).

<sup>147</sup> See, e.g., Brief for Non-Party Appellant the Bank of New York Mellon, as Indenture Trustee at 1-2, *NML Cap. v. Republic of Arg., Ltd.*, No. 12-105 (2d Cir. Dec. 28, 2012); Euroclear Bank Correspondence at 1-4, *NML Cap., Ltd. v. Republic of Arg.*, No. 12-105, (2d Cir. Jan. 10, 2013).

injunction would force Argentina to settle.<sup>148</sup> However, the negotiations failed. Argentina and its holdout creditors did not reach agreement before midnight on July 30, 2014, when the grace period for certain past-due payments expired.<sup>149</sup> Argentina defaulted on its public debt again, despite a frantic month of trying to forge a compromise that would allow a stay of the injunction.<sup>150</sup>

4. *Copycat Pari Passu* (Aug. 2014 through Nov. 2015): The period of August 2014 through November 2015 was marked by continuing litigation over the scope of the injunction and by the filing of a new wave of *pari passu* claims.<sup>151</sup> Elliott and other *pari passu* plaintiffs had won relief with respect to their pre-judgment bonds. Their victory prompted a new wave of *pari passu* filings. At the time, many in the sovereign debt markets referred to these as the “me too” cases.<sup>152</sup> We will call them “copycat

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<sup>148</sup> See Order for Appointment of Special Master, at 1, *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-06978 (S.D.N.Y. June 23, 2014) (“The Court hereby appoints Daniel A. Pollack . . . as Special Master to conduct and preside over settlement negotiations between and among the parties to this litigation.”); Transcript of Oral Argument at 48:18-20, 48:24, 50:1:4, and 51:2, *NML Capital, Ltd. v. Republic of Arg.*, No. 08-cv-06978 (S.D.N.Y. Feb. 23, 2012) (When imposing the injunction in 2012, Judge Griesa said, “What the plaintiffs here are trying to do is to see if there is yet another device which might get them their just payments and end the litigation . . . I am going to sign the order . . . It seems to me that after all these years of difficult litigation . . . it seems to me that there is something highly salutary in attempting to fashion a remedy which is effective here . . . this litigation will be over with.”).

<sup>149</sup> Sarah Marsh, *Argentine Markets Fall Post-Default*, *NY Hearing on Friday*, REUTERS, <https://www.reuters.com/article/argentina-debt-idINKBNOG01KR20140801> (last updated July 31, 2014, 5:42 PM) [<https://perma.cc/AEX7-UW3V>].

<sup>150</sup> See Daniel A. Pollack, *Statement of Daniel A. Pollack, Special Master in Argentina Debt Litigation*, PR NEWSWIRE (July 30, 2014, 12:02 ET), <https://www.prnewswire.com/news-releases/statement-of-daniel-a-pollack-special-master-in-argentina-debt-litigation-269156101.html> [<https://perma.cc/FHS5-63DW>] (recapping how the several hour meeting between the Argentinian delegation and the bondholders failed to lead to a resolution).

<sup>151</sup> See, e.g., Opinion of March 12, 2015 at 1, 6, *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-06978 (S.D.N.Y. Mar. 12, 2015) (denying financial intermediary CitiBank’s motion to narrow the scope of the injunction).

<sup>152</sup> See, e.g., Jonathan Stempel, *Argentina Must Pay “Me-Too” Bondholders when It Pays Others*, REUTERS, <https://www.reuters.com/article/argentina-debt-ruling-idUSL1N12U24R20151030> (last updated Oct. 30, 2015, 11:56 AM) [<https://perma.cc/3X5Q-ARPD>] (using the term “‘me-too’ plaintiffs”). The phrase had been used much earlier to refer to the social justice movement empowering victims of sexual violence but had not yet become widely associated with that movement.

injunction” cases, to distinguish them from cases in which the plaintiff’s primary objective was a money judgment.

Because of the copycat injunction cases, there was a sharp increase in the number of cases filed against Argentina during this period. As shown in Figure 2, these fell into two groups. The first consists of copycat lawsuits filed by retail and institutional plaintiffs that had already obtained money judgments before 2010 and now wanted a *pari passu* injunction like the one entered in favor of Elliott and others on pre-judgment bonds. These are the “old plaintiff” *pari passu* cases in Figure 2. The second group (“new entrant *pari passu* cases”) consists of copycat lawsuits filed by a group of hedge funds that bought bonds after the commencement of the *pari passu* litigation in anticipation of a settlement driven by Elliott’s activity in court.<sup>153</sup> None of these plaintiffs sought money judgments on their bonds, perhaps to take advantage of claim accrual as explained in Table 1.<sup>154</sup>

5. Macri’s Settlement (Nov. 2015 through Apr. 30, 2016): Mauricio Macri was elected President of Argentina in November 2015, after a campaign in which he had committed to resolve Argentina’s dispute with holdout creditors.<sup>155</sup> By the end of February 2016, Argentina had settlement agreements in hand with the vast majority of its plaintiffs, and, on March 2, 2016, Judge Griesa indicated that he would lift the *pari*

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<sup>153</sup> These new entrant funds included VR Global Partners, Procella Holdings, Honero Fund, Spinnaker, Stonehill Institutional Partners, Red Pines, Arag-A (and other similarly named funds), Yellow Crane Holdings, Trinity Investments, Bybrook Capital, MCHA Holdings, White Hawthorne, Bybrook Capital, Tortus Capital, Attestor Value Master Fund.

<sup>154</sup> Some of the new entrants also sought injunctions with respect to bonds documented under different laws, many of their purchases of bonds denominated in European currencies and subject to different documentation and governing law.

<sup>155</sup> Joshua Partlow & Irene Caselli, *Mauricio Macri Elected President of Argentina*, WASH. POST (Nov. 23, 2015), [https://www.washingtonpost.com/world/the\\_americas/argentina-head-to-polls-to-choose-new-president—and-their-future-course/2015/11/22/oaf46af9-fb32-424d-be46-70f61f62fcf9\\_story.html](https://www.washingtonpost.com/world/the_americas/argentina-head-to-polls-to-choose-new-president—and-their-future-course/2015/11/22/oaf46af9-fb32-424d-be46-70f61f62fcf9_story.html) [https://perma.cc/KM7C-MAKK].

*passu* injunction.<sup>156</sup> Argentina settled with most plaintiffs in April 2016.<sup>157</sup> The class action suits were settled in 2017 and 2018.<sup>158</sup>

**6. Post Settlement** (May 1, 2016 to the present): Argentina continued to settle with stragglers on the same terms for several years. A handful of investors refused to participate in the settlement, some unsuccessfully seeking new attachments and *pari passu* injunctions.<sup>159</sup> In July 2020, in the context of renewed financial crisis and COVID, Argentina restructured its sovereign bonds for the second time in 20 years.<sup>160</sup> The vast majority of bonds issued after 2001 were included in this restructuring. However, a small number of the country's pre-2001 bonds remain untendered and unpaid. Argentina is no longer settling with these stragglers and litigation over the untendered debt remains pending.

Figure 2 charts cases filed per year by investor and claim type. Through 2010, cases were filed by sophisticated institutional (large) investors, retail and small corporation (small) investors, and as class actions. We denote lawsuits involving FRAN securities separately because these securities, owned only by Elliott, Bracebridge, and the Montreux group of plaintiffs, provided an outsized return.<sup>161</sup> As noted, *pari passu* cases fall

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<sup>156</sup> *NML Cap. v. Republic of Arg.*, No. 08-cv-6978 (TPG), 2016 WL 836773, at \*12-13 (S.D.N.Y. Mar. 2, 2016).

<sup>157</sup> See generally Alexandra Stevenson, *How Argentina Settled a Billion-Dollar Debt Dispute with Hedge Funds*, N.Y. TIMES (Apr. 25, 2016), <https://www.nytimes.com/2016/04/25/business/dealbook/how-argentina-settled-a-billion-dollar-debt-dispute-with-hedge-funds.html> [<https://perma.cc/2288-ACSW>] (describing the negotiations that led to settlement with most plaintiffs).

<sup>158</sup> See Second Stipulation and [Proposed] Order to Extend Class Settlement Payment Date at 3, *Seijas v. Republic of Arg.*, No. 04-cv-400 (S.D.N.Y. Apr. 23, 2018); Stipulation and Order of Dismissal at 1, *Brecher v. Republic of Arg.*, No. 06-cv-15297 (S.D.N.Y. Sept. 27, 2017).

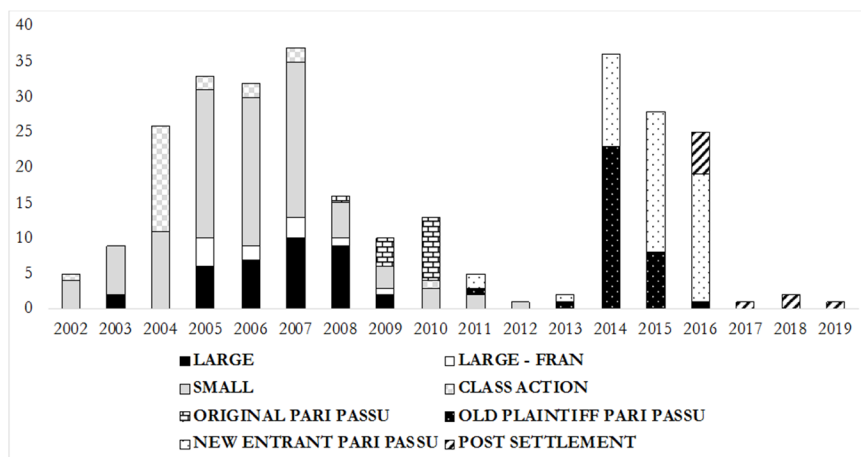
<sup>159</sup> See, e.g., *Bison Bee LLC v. Republic of Arg.*, 778 F. App'x 72, 73 (2d Cir. 2019) (summary order).

<sup>160</sup> Benedict Mander & Colby Smith, *Argentina Digs in for Debt Talks as It Skips Payment*, FIN. TIMES (Apr. 22, 2020), <https://www.ft.com/content/28492bbb-129d-47d9-af8b-e193ecocoodo> [<https://perma.cc/9UJY-PFL6>].

<sup>161</sup> The FRANs were unique because, due to an idiosyncratic feature of the securities, their interest rate shot up to 101.5% annually after Argentine defaulted — and stayed there. See Statement of Material Facts Pursuant to Local Rule 56.1 at 3-5, *Montreux Partners, L.P. v. Argentina*, No. 05-cv-04239-LAP (S.D.N.Y. Apr. 10, 2008) (“Following Argentina’s issuance of the FRANs, Morgan Stanley, as Argentina’s Determination Agent, calculated interest rates in accordance with the interest rate formula for the FRANs . . .

into three buckets: (1) the “original *pari passu* cases” filed by Elliott, Bracebridge’s Olifant Fund, Aurelius, Blue Angel, and the Varela Plaintiffs; (2) the “old plaintiff *pari passu* cases” by plaintiffs who had already sued and obtained money judgments before; and (3) “new entrant *pari passu* cases” filed by hedge funds that had, in most cases, made fresh investments after seeing Elliott’s successful *pari passu* litigation. Finally, Figure 2 depicts a tail of post-settlement lawsuits by a variety of plaintiffs, which were largely unsuccessful.

Figure 2. Cases filed by year, by Plaintiff category



### III. THE INTENSITY OF LITIGATION AGAINST ARGENTINA

By any metric, the litigation against Argentina was extraordinary. The number of lawsuits alone make it the most significant event in the history of sovereign debt litigation. Data compiled by Schumacher et al. indicate that these lawsuits constitute nearly one-third of the entire universe of sovereign debt cases filed between 1976 and 2010, and this estimate *excludes* lawsuits by retail investors in Argentine bonds.<sup>162</sup> Here, we take

Morgan Stanley made and published the following interest calculations . . . [For the period] October 10, 2004 through April 10, 2005: 50.526% (i.e. \$505.26 payable per \$1000 in principal amount for that period) . . . )...Argentina allowed Morgan Stanley’s appointment as Determination Agent for the FRANs to lapse . . . There as thus no Determination Agent to calculate and publish the interest rates payable on the FRANs for the interest period ending October 10, 2005, or for any subsequent period.”).

<sup>162</sup> Estimated based on Table 7 in *Sovereign Defaults*, *supra* note 9, at 24.

a closer look at the universe of cases filed against Argentina in the Southern District of New York, which is to say the vast majority of cases pending against the country in U.S. district courts.<sup>163</sup>

#### A. *Methods*

In all, 272 bond-related cases were filed against Argentina in the Southern District of New York through then end of April 2016, generating over 37,000 docket entries in that court alone.<sup>164</sup> It is difficult to study such a sprawling litigation. We began by reviewing all published opinions and the transcripts or recordings of many of the hearings held in the district court and Second Circuit. In connection with another project, one of us (Makoff) also undertook a more thorough review of many of the lawsuits and parties. This included reviewing motions, accompanying legal memoranda, and evidentiary materials (such as witness declarations); interviewing many of the lawyers and litigants; and reviewing plaintiff disclosure statements, lists of attendees at hearings and settlement negotiations, and settlement agreements published by Argentina or presented in court.

This research produced an overall roadmap of the litigation and good understanding of key developments and litigants. But it left significant gaps in our understanding of litigant behavior and the intensity of the litigation against Argentina. We supplemented it with a computer-assisted analysis, focusing on case material amenable to digitization,

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<sup>163</sup> While there was some notable litigation in other federal districts, the cases were derivative of the litigation in the Southern District of New York. For the most part, they were focused on either attachment or discovery.

<sup>164</sup> From 2002-2016, there also were 47 cases in other federal districts related to the Argentina bond cases. Elliott was involved in 28 cases outside the Southern District, the majority of which were related to discovery. Many of these cases saw substantial activity. The remaining cases outside the Southern District were filed by a mix of plaintiffs, but most saw little activity, and quite a few were filed simply to register judgments. The only substantial cases brought outside the Southern District by a plaintiff other than Elliott were brought by Guillermo Gleizer. These were actions filed in California in 2007 trying to attach Argentine presidential airplane Tango 1 when it was in California for engine service. See Plaintiffs' Ex Parte Application to Have Their Motion for a Writ of Execution Pursuant to 28 U.S.C. § 1610(C) Heard on an Emergency Basis at 2, *Colella v. Republic of Arg.*, No. 07-mc-80084 (N.D. Cal. Mar. 27, 2007).

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including dockets and hearing transcripts. Here, we provide a truncated description of our methods. The Appendix provides details.

We began by downloading (from Unicourt.com) dockets for all cases filed against Argentina in the Southern District of New York. The docket data includes header information (case name, date, number, parties, etc....) and a docket table in three columns (date, docket entry number, and the text of the docket entry). We created two spreadsheet tools to explore the data. One is a docket-entry exploration tool to search the universe of downloaded dockets using key words and filters (filing date, plaintiff, defendant, court, etc.). The second allows us to associate docket entries to categories of litigation activity (e.g., motion, order, declaration, memorandum, etc.) and count entries within each category.

The raw material of the analysis is the docket text generated by the user of the court's electronic filing ("ECF") system. This is a mix of standard and free-form text, and it varies substantially given the wide range of event types and inconsistencies in usage. Even entries within the same functional category — say, motions for summary judgment — are not described with the same text.<sup>165</sup> Thus, additional steps were required to associate docket entries with categories of litigation activity.

Most entries begin with an ALLCAPS word or phrase describing the filing.<sup>166</sup> We extracted a list of all unique capitalized phrases at the beginning of a docket entry, by frequency of use.<sup>167</sup> For the relatively small percentage of entries that did not begin with an ALLCAPS word or

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<sup>165</sup> To make the point concrete, here is the text of two docket entries for summary judgment motions filed by the same party in *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-6978 (S.D.N.Y. Aug. 5, 2008): (1) "MOTION for Summary Judgment for Principal and Interest Due. Document filed by NML Capital, Ltd. (Cohen, Robert) (Entered: 10/20/2010)"; (2) "MOTION for Summary Judgment and for Injunctive Relief Pursuant to the Equal Treatment Provision. Document filed by NML Capital, Ltd. (Cohen, Robert) (Entered: 10/20/2010)."

<sup>166</sup> For example, "SUPPLEMENTAL REPLY MEMORANDUM OF LAW in Opposition to Cross-Motion of NML Capital, Ltd. to Confirm Priority. Document filed by Aurelius Capital Partners, LP, Aurelius Capital Master, Ltd., Blue Angel Capital I LLC. (Attachments: # 1 Certificate of Service) (Ostrager, Barry) (Entered: 02/23/2009)." *NML Cap., Ltd.*, 08-cv-6978 (S.D.N.Y. Feb. 23, 2009).

<sup>167</sup> Thus, for the entry *supra* note 166, the tool would extract "SUPPLEMENTAL REPLY MEMORANDUM OF LAW."

phrase, we extracted the first 25 characters.<sup>168</sup> This produced a list of 1,310 separate phrases, representing unique docket entries found in our universe of cases. Most phrases appeared in multiple entries.<sup>169</sup> For efficiency, we focused on those that appeared at least five times across the universe of cases. This left us with 355 unique phrases capturing 96.5% of the total docket activity. We manually assigned each phrase to one of 20 categories of litigation activity (e.g., Declaration or Affidavit, Motion, Memorandum, Complaint or Answer, Order, Opinion).

We carried out a second, complementary analysis using the transcripts from 145 hearings held in the District Court. This data was processed using Natural Language Processing (“NLP”) techniques, which allowed the parsing of sentences and counting of words spoken. This was used to count the number of appearances, statements, and words spoken in court by the various parties in the case. One benefit of this transcript-level analysis is that it lets us distinguish litigants and lawyers who played a primary role in shaping events from more passive actors.<sup>170</sup>

### *B. Measuring Litigation Intensity*

Hedge funds and other large investors filed more than half (53%) of all lawsuits over the full period covered by our sample (2002-April 2016), excluding class action cases and Italian retail cases (“TFA”), which we consider separately. Yet large investors comprised fewer than 10% of all plaintiffs. Several filed ten or more suits, and a number acted on behalf

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<sup>168</sup> Typically, entries without ALLCAPS phrases at the beginning captured some ministerial action by the court or clerk’s office, or else recorded a less significant ruling entered as a minute order. For example, “Minute Entry for proceedings held before Judge Thomas P. Griesa: Oral Argument held on 2/23/2012 re: 360 MOTION Renewed Motion for Specific Performance of the Equal Treatment Provision. Filed by NML Capital, Ltd. Motion granted and order to follow. (cd) (Entered: 02/27/2012).” NML Cap., Ltd., 08-cv-6978 (S.D.N.Y. Feb. 23, 2012). For this entry, our automated method would extract “Minute Entry for proceedi.”

<sup>169</sup> For example, across all cases, 34 docket entries began, “ORDER MODIFYING ATTACHMENT AND RESTRAINING ORDERS.”

<sup>170</sup> For example, an analysis of docket entries alone cannot readily distinguish a lead plaintiff who develops a novel legal argument from a copycat plaintiff who duplicates the lead plaintiff’s work. However, the transcript analysis shows who is doing the heavy lifting. The lead plaintiff’s lawyers will dominate argument in court, while lawyers for copycat plaintiffs rarely appear or say more than a word or two.



of multiple investors set up as separate legal entities. By contrast, the vast majority of plaintiffs were small investors, most of whom participated in only one lawsuit, often joining together with other small investor plaintiffs. Small investors filed the earliest cases and mostly stopped by 2010, while large investors continued to file cases at a healthy rate to the very end.<sup>171</sup>

Table 2. Lawsuits by Plaintiff Type, 2002 – April 2016

	Lawsuits	Max Lawsuits per Plaintiff	Median Lawsuits Per Plaintiff	Max Listed Plaintiffs per Lawsuit
Large Investor (>\$100mm) <sup>172</sup>	131	15	2	16
Small Investor (Excluding TFA)	115	2	1	481
Italian Small Investor (TFA)	3	1	1	180,000
Class Action	23	3	1	14

It is not surprising that large investors filed their own lawsuits while small plaintiffs sued in groups. Few small investors acting alone have the resources to invest in the litigation needed to recover from a foreign government.<sup>173</sup> However, small investors coordinated in various ways, often through joint representation. For example, about 50 of the small investor lawsuits were brought by a single law firm and litigated almost

<sup>171</sup> For a depiction of these patterns, see Figure 2.

<sup>172</sup> The Large Investor category is comprised of institutional investors. The maximum judgment reported in this group is \$670 million while the median judgment size is \$134 million. The Small Investor category is comprised of retail investors and corporations; the maximum judgment reported in this category is \$47 million and the median judgment size is in the area of \$1-\$3 million. We include cases filed by fund manager Willi Brand in the Small Investor category because they were litigated by Dreier LLC alongside dozens of retail investor cases.

<sup>173</sup> Small investors also may not be repeat players, for whom litigation can have positive spillover effects that increase the value of future investments. See, e.g., Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 100 (1974) ("Repeat players can play for rules as well as immediate gains.").

identically, which allowed the law firm to offer an attractive fee arrangement to investors who otherwise could not afford to undertake sovereign debt litigation.<sup>174</sup> The TFA cases demonstrate an alternative form of plaintiff coordination, a coalition of 180,000 or so Italian retail investors organized by the Italian banking system, which underwrote the cost of suing Argentina.<sup>175</sup> These cases represented holders of \$4.3 billion in bonds but caused little activity in the Southern District because TFA stayed the suits while pursuing an arbitration claim lodged with the International Centre for the Settlement of Investment Disputes (“ICSID”).<sup>176</sup> The class action cases, of course, represent the traditional form of small plaintiff coordination.

#### 1. Litigation Intensity as Reflected in Total Docket Entries

After filing, how intensively were the cases litigated? An initial, rough measure of activity uses total docket entries as a proxy for the intensity of the litigation.<sup>177</sup> Table 3 reports, for the same four categories used above, the total number of docket entries for all cases filed before Argentina’s April 2016 settlement.<sup>178</sup> Separately, the table reports the number of entries for the subset of cases filed before October 2010. It is useful to isolate pre-October 2010 cases because this allows an apples-

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<sup>174</sup> See Declaration of Michael C. Spencer, *supra* note 141, ¶¶ 14-15. Start-up fees were 0.56% of the face amount of bonds plus a contingency fee of 8 to 12% of recoveries above a floor amount set between 0.35% and 0.65% of par. Attorney out-of-pocket expenses would not be subtracted before the percentage contingency fees were calculated.

<sup>175</sup> See history of TFA from <http://www.tfargentina.it/chisiamo.php.html> (on file with authors); ASSOCIAZIONE PER LA TUTELA DEGLI INVESTITORI IN TITOLI ARGENTINI, TANGO BOND: LA TFA SMENTISCE ARTICOLO DE “AMBITO FINANCIERO” 1 (2010).

<sup>176</sup> Decision on Jurisdiction and Admissibility, *Abaclat and Others v. The Argentine Republic* at 10, No. ARB/07/5 (ICSID Aug. 4, 2011). On the history of this arbitration, see Strong, *Mass Procedures*, *supra* note 124, at 266-71. For related discussion, see Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT’L ARB. 335, 335-37 (2006); Strong, *Collective Arbitration*, *supra* note 124 (explaining and discussing *Abaclat*); Michael Waibel, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT’L L. 711, 718-32 (2007) (discussing ICSID jurisdiction over debt instruments).

<sup>177</sup> See, e.g., Cheit & Gersen, *supra* note 34, at 796-97 (setting a lower bound of 30 docket entries as a measure of intensively litigated cases); Lerner, *supra* note 34, at 824 (using total docket entries as a measure of “effort expended by the parties”).

<sup>178</sup> Thus, we exclude only cases designated as “Post-Settlement” in Figure 2.

to-apples comparison of the activity undertaken by the small and large investors groups. Most cases filed after October 2010 were relatively inactive because the sole purpose was to obtain *pari passu* injunctions, so including them biases the measures downwards.

Table 3. Total Docket Entries, by Plaintiff Type

	Cases filed Jan. 2002 - Apr. 2016			Cases filed Jan. 2002 - Oct. 2010		
	Mean	Median	Range	Mean	Median	Range
Large Investor	164	68	14 - 1,087	284	111	14 - 1,087
Small Investor (not TFA)	97	82	8 - 367	105	91	8 - 367
Italian Small Investor (TFA)	72	28	28 - 159	72	28	28 - 159
Class Action	184	87	11 - 497	184	87	11 - 497

Focusing on the pre-October 2010 cases, Table 3 yields four immediate results. First, large investor cases were the most active if measured by the mean, median, and the top of the range. Second, small investor cases were still quite active, with the median case involving 91 docket entries versus 111 for large investor cases. Third, class action cases involved significant activity, although much was focused on class certification and other issues unique to that context. Finally, the TFA cases were relatively inactive. The reason is that these were stayed relatively early on, pending the outcome of the ICSID arbitration case.<sup>179</sup> We therefore exclude the TFA cases from the rest of our discussion.

The wide range of docket entry counts across investor categories hints at stark differences in litigation strategies. The upper end of the activity range was set by aggressive, well-capitalized plaintiffs.<sup>180</sup> But cases exhibited low activity for many reasons. Some investors filed suit simply to keep the statute of limitations from expiring.<sup>181</sup> Others may have been free-riding on, or at least deferring to, the efforts of more active litigants.

<sup>179</sup> See *supra* note 176 and accompanying text.

<sup>180</sup> See *infra* note 202 and accompanying text.

<sup>181</sup> See N.Y. C.P.L.R. § 213 (CONSOL. 2022) (providing a six-year statute of limitations for contract claims).

Some high activity plaintiffs filed multiple lawsuits but concentrated activity in a subset of cases.<sup>182</sup> We need a more granular analysis to identify differences among plaintiffs (and among cases filed by the same plaintiff).

But first, it is useful to put the total number of docket entries into context. By any reasonable metric, Argentina confronted a significant amount of litigation. Some lawsuits in federal court are dismissed after only a handful of docket entries, or perhaps a few dozen, typically because a prompt settlement leads to voluntary dismissal.<sup>183</sup> Even complex commercial cases litigated through trial in federal court can generate fewer than 150 docket entries.<sup>184</sup> By this standard, the median case against Argentina was reasonably active, especially for cases filed before October 2010. Also, while not strictly comparable, the Argentina bond cases in the Southern District, in the aggregate, include nearly twice as many docket entries as the bankruptcy case of the Commonwealth of Puerto Rico as of the date of plan confirmation.<sup>185</sup> Finally, consider the

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<sup>182</sup> For instance, cases against third parties, or targeting Argentine instrumentalities, might involve relatively few docket entries even though the filing party was active elsewhere in the litigation. *See, e.g., Aurelius Cap. Partners LP v. Banco Central de la Republica Arg.*, No. 10-cv-03059 (S.D.N.Y. Apr. 9, 2010) (action primarily seeking declaratory relief that central bank was the government's alter ego; voluntarily dismissed after little activity).

<sup>183</sup> *See, e.g., 2FA Tech., LLC v. Oracle Corp.*, No. 1:10-cv-09648-BSJ-MHD (S.D.N.Y. Dec. 29, 2010) (31 entries; voluntarily dismissed right after filing of amended complaint); *Indem. Ins. Co. v. Fed. Express Corp.*, No. 1:06-cv-15535-GBD (S.D.N.Y. Dec. 29, 2006) (6 entries; dismissed before defendant's answer was filed). In a study of business-to-business litigation in state court the late 1980s, Cheit and Gersen found that over 70% of business litigation was resolved with fewer than 15 docket entries, typically because of early settlement. Cheit & Gersen, *supra* note 34, at 796-97.

<sup>184</sup> *See, e.g., Stillman v. InService Am. Inc.*, 1:05-cv-06612-GWG (S.D.N.Y. July 22, 2005) (161 entries through judgment, appeal, and taxing of costs); *MCI Worldcom v. LD Wholesale, Inc.*, No. 1:01-cv-06310 (S.D.N.Y. July 12, 2001) (44 docket entries through bench trial and appeal in lawsuit between telecommunications services provider and corporate customer); *First Nat'l Bank v. Ackerly Comm'n, Inc.*, 1:94-cv-07539 (S.D.N.Y. Oct. 18, 1994) (47 docket entries over 8 years, through bench trial and affirmance on appeal, in litigation over purported exercise of interest rate swap).

<sup>185</sup> The plan confirmation order in the Puerto Rico bankruptcy was entry 19,812 on the docket. *See Order and Judgment Confirming Eighth Amended Title III Joint Plan of Adjustment of the Commonwealth of P.R. et al., The Fin. Oversight and Mgmt. Bd. for Puerto Rico as rep. of the Commonwealth of P.R. et al as Debtors*, 17 BK 32820-LTS. As noted, viewed in the aggregate, the Argentine bond cases in the Southern District totaled over 38,000 docket entries.

fact that even the *median small investor lawsuit* in the Argentina bond cases involved more docket activity than many of the most famous sovereign debt cases from the 1990s.<sup>186</sup>

## 2. Key Filings by Type in Large and Small Investor Cases

The total docket entries associated with a case is a quick and easy measure of litigation intensity. However, not all activity is equally meaningful. Some entries mark trivial developments or ministerial actions, such as housekeeping orders entered by the judge or clerk.<sup>187</sup> Others mark actions that require significant expenditures of money, time, or both by litigants, lawyers, and the judge.<sup>188</sup> Examples include entries for motions, attachment-related entries, declarations and affidavits, legal memoranda, and orders and opinions. Figure 3 reports results for cases filed by large and small investors before October 2010.<sup>189</sup>

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<sup>186</sup> For example, see the dockets in *Elliott Assocs. v. Banco de la Nacion*, No. 96-cv-07916 (RWS) (S.D.N.Y. Oct. 21, 1996) (270 entries); *Elliott Assocs. v. Republic of Peru*, No. 96-cv-07917 (RWS) (S.D.N.Y. Oct. 21, 1996) (129 entries); *Water St. Bank v. Poland*, No. 95-cv-00042 (LAP) (Jan. 4, 1995) (8 entries); *Water St. Bank v. Banco Central Del Ecuador*, No. 95-cv-05253 (JES) (July 14, 1995) (10 entries); *Water St. Bank v. People's Republic of the Congo*, No. 94-cv-01894 (SS) (S.D.N.Y. Mar. 18, 1994) (38 entries); *Water St. Bank v. Republic of Ivory Coast*, No. 94-cv-02376 (LMM) (S.D.N.Y. Apr. 04, 1994) (9 entries); *Water St. Bank v. Poland*, No. 94-cv-02428 (LAP) (S.D.N.Y. Apr. 06, 1994) (23 entries); *Water St. Bank v. Republic of Pan.*, No. 94-cv-02609 (HB) (S.D.N.Y. Apr. 12, 1994) (29 entries); *Pravin Banker Assocs. v. Banco Popular Peru*, No. 93-cv-00094 (RWS) (S.D.N.Y. Jan. 7, 1993) (99 entries).

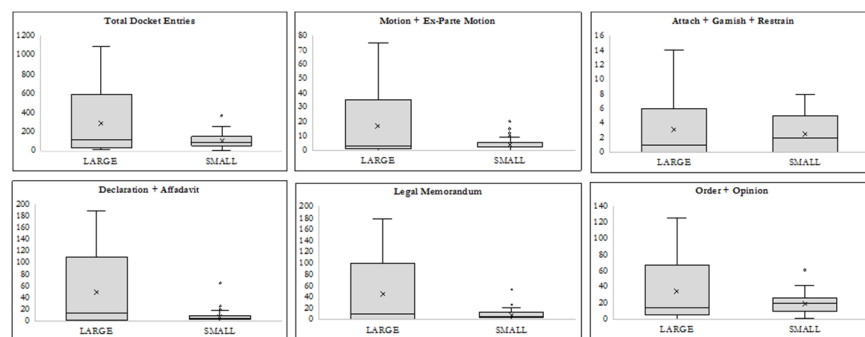
<sup>187</sup> For example, each docket contains entries noting the judge to whom the case has been assigned and designating the case as related to others filed against Argentina.

<sup>188</sup> For example, an entry for the filing of a summary judgment or other substantive motion triggers a process that will involve significant judicial time and resources. See FED. JUD. CTR., 2003-2004 DISTRICT COURT CASE WEIGHTING STUDY app. Y, tbl.4 (2004) (reporting event times and case times across all civil case categories, with the highest values typically found for orders on summary judgment and other substantive or "time intensive" motions).

<sup>189</sup> Our method of coding entries is described *supra* Part III.A, and in more detail in the Appendix. Also notes our definition of "Total Docket Entries" counts in the total both text entries assigned a document number (i.e., #1) as well as text entries not assigned a document number.

The Figure uses a box and whiskers format to incorporate information about the distribution of filings.<sup>190</sup>

Figure 3. Docket Entries and Key Filings, By Investor Type, Cases Filed 2002 - 2010



Our choice of metrics for Figure 3 was driven by the nature of the Argentina litigation, where many important case events revolved around attachment efforts, often initiated through ex parte hearings seeking to temporarily block the removal of an asset from the jurisdiction.<sup>191</sup> Ex parte attachment orders targeting assets belonging to Argentina or one of its instrumentalities routinely prompted a flurry of legal briefing.<sup>192</sup>

<sup>190</sup> On the box and whisker plot, see FREDERICK HARTWIG & BRIAN E. DEARLING, EXPLORATORY DATA ANALYSIS 23 (Sage Publ'ns, Inc. 1979). The middle horizontal line in the box represents the median number of docket entries or filings of the designated type across all cases filed by that investor type. The bottom and top lines of the box represent the first and third quartiles, and the X represents the mean. The whiskers (vertical lines) extend to the minimum and maximum number of docket entries. Dots represent outliers, defined as values that are above the third quartile by an amount that exceeds 1.5 times the interquartile range, where the interquartile range is the range containing the central 50% of values. For instance, if the bottom one-quarter of cases had 20 or fewer docket entries, and the top had 100 or more, the interquartile range would be 80, and any case with 220 or more docket entries ( $1.5 \times 80 + 100$ ) would be flagged as an outlier. In plots with outliers, the bar at the top of the whisker represents the highest value not considered an outlier.

<sup>191</sup> See, e.g., Order to Show Cause, *Morata v. Argentina*, No. 04-cv-03314 (S.D.N.Y. Nov. 6, 2008) (indicating a hearing was scheduled to show why a restraining and enjoining order pursuant to Fed. R. Civ. P. 64 should not be made).

<sup>192</sup> See, e.g., Motion to Vacate and Quash Ex Parte Orders, *Morata v. Argentina*, No. 04-cv-03314 (S.D.N.Y. Mar. 26, 2010) (showing a set of legal briefings in response to ex parte attachment orders).

We also took guidance from the Federal Judicial Center's ("FJC") case weighting project, which assigns weights to case activities for the purpose of measuring demands on judicial resources.<sup>193</sup> The FJC identifies entering orders on substantive motions as especially demanding, assigning a lesser but still substantial weight to the need to hold and prepare for evidentiary hearings.<sup>194</sup> Finally, we consulted prior research, which uses substantive motions, discovery motions, and judicial orders and opinions as proxies for litigation intensity.<sup>195</sup>

The top middle panel reflects litigant motions. The top right panel measures entries related to efforts to attach assets, such as attachment orders, writs of execution, and restraining notices. The bottom left panel reports the number of affidavits and declarations filed in the case. These provide the evidentiary basis for a litigant's motion and thus serve as a proxy for the density of the factual information presented to the court. The bottom middle panel reports the number of legal memoranda filed, a similar proxy for the density of legal argument. The bottom right panel combines orders and opinions entered by the judge, not including minute entries and other perfunctory notations of case activity.<sup>196</sup>

Figure 3 reveals some interesting patterns. Note the rough similarity between large and small investor cases in terms of estimated attachment-related activity.<sup>197</sup> Although the especially active large investor cases involved more filings, the median and mean attachment-related filings were comparable across case types. The median small investor case also generated more orders and opinions than the median large investor case.<sup>198</sup> But in other respects, large investor cases generated significantly more activity. In more than one-quarter of large investor cases, judicial orders and opinions exceeded the maximum

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<sup>193</sup> FED. JUD. CTR., *supra* note 188.

<sup>194</sup> *Id.* app. Y, tbl.4, at 7 (case weight computations for Other Contract Actions, assigning greatest weight to entering orders on substantive or time-intensive motions).

<sup>195</sup> *See, e.g.,* Schlanger & Kim, *supra* note 34, at 1568-69 (using substantive motions, discovery motions, and judicial involvement to discuss intensity of litigation).

<sup>196</sup> We coded orders and opinions separately but report them together. All opinions are accompanied by orders, while many (but not all) orders include an opinion in the same document.

<sup>197</sup> See discussion in the Appendix of challenges in measuring attachment-related activity.

<sup>198</sup> The medians are 20 for small investor cases, versus 14 for large investor cases.

number entered in any case filed by a small investor.<sup>199</sup> The differences are even starker if we focus on motions, declarations or affidavits filed to establish facts, or legal memoranda. Each of these metrics reveals a substantially higher intensity of litigation in cases filed by large investors and, one can assume, a concomitantly higher legal expenditure.

The variance *within* the large and small investor categories is also noteworthy. Some cases involve intense activity, while others lie mostly dormant. Note how, for each metric in Figure 3, the minimum number of filings is both low in absolute terms (often zero) and quite close to the marker for the bottom quartile.<sup>200</sup> In short, an appreciable proportion of cases filed by both large and small investors involved little activity. Even among more active cases, a relative handful generated a disproportionate share of the activity. For example, one especially active case (filed by NML Capital) involved the filing of 73 motions, an activity level far above the top of the third quartile of cases.

### 3. Core Docket Activity Analysis

As an aggregate measure of meaningful filings generated by litigants, we define a “Core Docket Activity Score” as the sum of docket entries flagged as evidentiary materials (declarations and affidavits), motions and ex parte motions, legal memoranda, and attachment-related entries (attachment, garnishment, and restraint).<sup>201</sup> We use this score to measure the relative intensity of litigation.

Figure 4 plots the Core Docket Activity Score associated with cases filed by each plaintiff. For plaintiffs that filed multiple cases (such as Elliott) we plot the maximum score in any of its cases. Thus, the figure represents the most intensively litigated case filed by each plaintiff.

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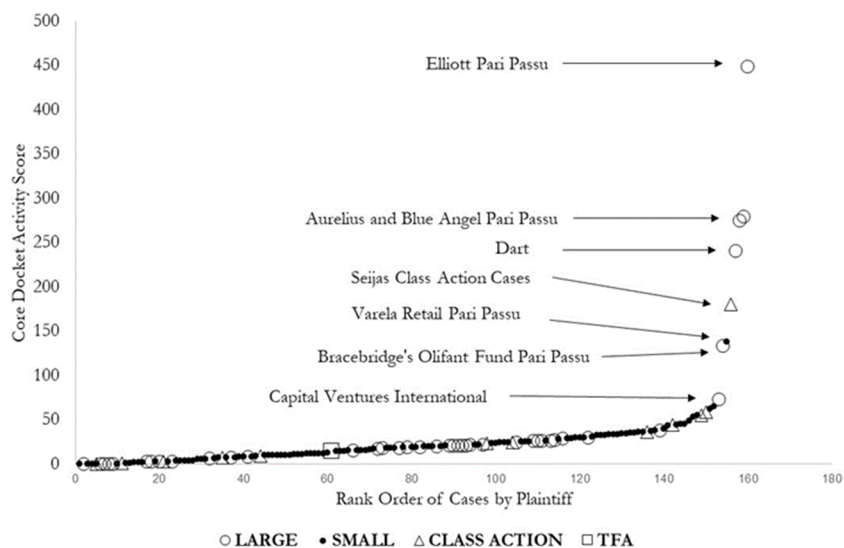
<sup>199</sup> The top quartile in large investor cases produced 66 or more orders and opinions. The maximum for small investor cases was 61.

<sup>200</sup> For example, in large investor cases, the minimum number of declarations and affidavits filed in a case was zero, and the first quartile begins at one.

<sup>201</sup> Attachment-related entries are often represented on the docket by the court’s entry of an order, often after ex parte proceedings. We include them because they are some of the most significant events in the course of litigation against a foreign government and because these orders are typically drafted by a litigant. They are relatively few in number, and excluding them does not change the pattern observed in Figure 3.



Figure 4. Maximum Core Docket Activity Score in Cases Filed by Each Plaintiff



Cases filed by four large investors stand out for generating the highest share of litigation activity. In descending order of key filings, these are cases brought by Elliott's NML Capital, Aurelius, Blue Angel, and Kenneth Dart's EM Ltd.<sup>202</sup> Just below them are the Seijas class action cases, the original *pari passu* cases brought by Bracebridge for its Olifant Fund and by Milberg LLP for the Varela plaintiffs. Rounding out the group of most active plaintiffs is Capital Ventures International ("CVI").<sup>203</sup>

The Core Docket Activity Score is also useful for studying litigant activity over time. Table 4 shows activity in selected cases between 2002 and 2016. Some were continuously active, while others slowed down after 2010 when the *pari passu* litigation got started. Cases filed by Elliott

<sup>202</sup> Aurelius and Blue Angel acted jointly, as evidenced by the nearly identical number of key filings in cases involving the two litigants.

<sup>203</sup> Susquehanna Advisors Group is listed as the authorized agent of CVI in Declaration of Eric S. Meyer in Support of Plaintiff's Motion for Partial Summary Judgment at 1, *Cap. Ventures Int'l v. Republic of Arg.*, No. 05-cv-4085 (S.D.N.Y. July 14, 2005) ("I am an authorized trader for Susquehanna Advisors Group Inc., the authorized agent of plaintiff Capital Ventures International.")

and Aurelius were *continuously active*. These litigants generated significant activity in both their pre-judgment and post-judgment cases in each year from the filing date through the 2016 settlement.<sup>204</sup> Few others kept up this pace. Activity trailed off in cases filed by Kenneth Dart's EM Ltd. and by Capital Ventures International.<sup>205</sup> Likewise, litigation trailed off in cases brought by law firms Dreier LLP, Guillermo Gleizer, and Moss & Kalish on behalf of small investors. Aside from the cases filed by Elliott and Aurelius, only the eight "Seijas" class action cases generated relatively continuous activity throughout the whole period, mostly in relation to issues specific to the class action context.<sup>206</sup> The issue that generated the most activity in the Seijas cases was a thrice-appealed dispute over the amount of bonds held by members of the classes.<sup>207</sup>

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<sup>204</sup> As Table 4 reveals, beginning in 2010 and 2011, much of the activity shifted from the post-judgment cases to the pre-judgment cases filed by these litigants.

<sup>205</sup> Dart was involved with Elliott in separate litigation with the Central Bank of Argentina not fully reflected in Declaration of Sharon M. Cornwell in Opposition to Argentina's Motion to Stay the Proceeding, EM Ltd. v. Republic of Arg., No. 03-cv-2507 (S.D.N.Y. Aug. 6, 2003).

<sup>206</sup> The Seijas cases that were jointly litigated were Chorny v. Republic of Arg., No. 04-cv-2118 (S.D.N.Y. Mar. 17, 2004), Puricelli v. Republic of Arg., No. 04-cv-2117 (S.D.N.Y. Mar. 17, 2004), Seijas v. Republic of Arg., No. 04-cv-400 (S.D.N.Y. Jan. 16, 2004), Seijas v. Republic of Arg., No. 04-cv-401 (S.D.N.Y. Jan. 16, 2004), Azza v. Republic of Arg., No. 04-cv-1085 (S.D.N.Y. Feb. 10, 2004), Valls v. Republic of Arg., No. 04-cv-937 (S.D.N.Y. Feb. 4, 2004), Castro v. Republic of Arg., No. 04-cv-506 (S.D.N.Y. Jan. 22, 2004), Hickory Sec. v. Republic of Arg., No. 04-cv-936 (S.D.N.Y. Feb. 04, 2004), each with respect to a different single series of Argentine U.S. dollar global bonds; the Brecher class action case was with respect to a single series of Euro denominated bonds, and was litigated on a stand-alone basis with different counsel.

<sup>207</sup> Seijas v. Republic of Arg., 606 F.3d 53 (2d Cir. 2010); Summary Order at 7, Hickory Sec. v. Republic of Arg., No. 11-3317 (2d Cir. Aug. 14, 2012) ("The district court erred in granting aggregate class-wide judgments without sufficiently accounting for non-continuous bondholders."); Puricelli v. Republic of Arg., 797 F.3d 213 (2d Cir. 2015) ("After previous panels of this Court twice vacated judgments entered by the District Court in favor of plaintiff classes, we remanded with specific instructions. Rather than follow our instructions, the District Court certified and expanded plaintiff classes. Because doing so was foreclosed by the mandate issued on the prior appeal we VACATE and REMAND.")

Table 4. Core Docket Activity Over Time (Selected Large and Small Investor Cases)

	'02	'03	'04	'05	'06	'07	'08	'09	10	11	12	13	14	15	16	Tot.
<b>Large Post-Judgment</b>																
Dart (03-cv-2507)		35	13	10	29	8	26	54	39	27	1	0	0	0	3	245
Elliott (03-cv-8845)			21	11	15	8	33	71	57	50	6	16	19	14	0	321
Aurelius (07-cv-2715)						4	26	53	17	60	25	12	12	16	0	225
CVI (05-cv-4085)				20	20	3	3	18	12	0	0	0	0	0	0	76
<b>Large Pari Passu</b>																
Elliott (08-cv-6978)							41	57	63	50	42	31	85	54	24	447
Aurelius (09-cv-8757)									14	74	42	22	61	52	12	277
<b>Small Post-Judgment</b>																
Moss & Kalish (02-cv-3804)	8	5	4	4	9	0	0	2	4	0	0	0	0	0	0	36
Gleizer (02-cv-5932)	8	8	23	6	1	0	6	0	4	0	0	0	0	0	0	56
Dreier LLP (03-cv-4693)	0	14	2	1	3	1	1	2	9	0	0	0	14	0	0	47
<b>Class Action</b>																
Seijas (04-cv-0400)	0	0	22	16	8	0	21	7	29	0	0	3	7	3	35	151

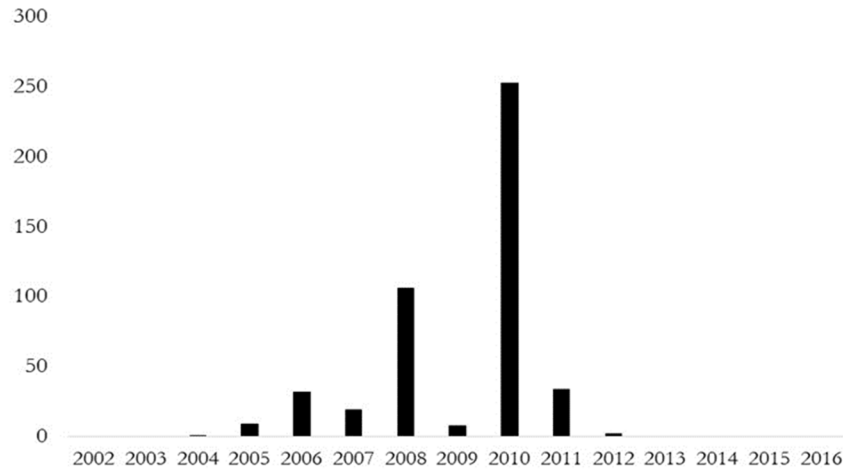
Several findings emerge from our analysis thus far. First, large investor cases were generally the most active, although some small investor cases were quite active.<sup>208</sup> Second, litigation activity was concentrated in a subset of cases brought by a relative handful of plaintiffs.<sup>209</sup> We also see that activity became more concentrated over time, with Elliott and Aurelius driving most of the action in court after 2010. The nature of litigation activity also changed over time. For example, attachment efforts began relatively early in the litigation, becoming most intense in 2010, which saw hundreds of attachment-related docket entries.

<sup>208</sup> As noted, the median small investor case against Argentina involved more docket activity than many of the most famous sovereign debt cases of the 1990s. *See supra* note 186.

<sup>209</sup> *See supra* Figure 4.

However, as Figure 5 shows, attachment activity trailed off once the *pari passu* litigation began.<sup>210</sup>

Figure 5. Attachment-Related Docket Entries by Year, Across All Cases



#### 4. Transcript Analysis

The transcripts for the hearings held in the Southern District provide a complementary data source for measuring litigant activity. The transcripts we obtained record about 850,000 words spoken in court. As Figure 6 shows for the period from the onset of litigation through the 2016 settlement, Judge Griesa and lawyers for the various plaintiffs did most of the speaking, followed by counsel for Argentina. About 5% of words were spoken by lawyers for third parties, mostly financial intermediaries who became swept up in the *pari passu* litigation or in discovery activity by Elliott and Aurelius against Argentina.<sup>211</sup>

<sup>210</sup> Corresponding trends (not depicted in Figure 5) reveal that filings related to the issuance of subpoenas were concentrated between 2009 and 2015, when much litigation focused on discovery-related issues, including whether plaintiffs could force disclosure of offshore information about Argentine government assets. *See, e.g.*, Republic of Arg. v. NML Cap., Ltd., 573 U.S. 134, 139-140 (2014) (rejecting argument that the Foreign Sovereign Immunities Act blocked post-judgment discovery into the location of Argentine assets). Likewise, docket entries using the phrase “specific performance” appeared hundreds of times between 2012 and 2016, when litigants were debating the meaning and enforcement of the *pari passu* clause.

<sup>211</sup> Weidemaier & Gelpert, *supra* note 16, at 191-92.

Figure 6. Proportion of Words Spoken in Court, by Speaker Type (2002-2016)

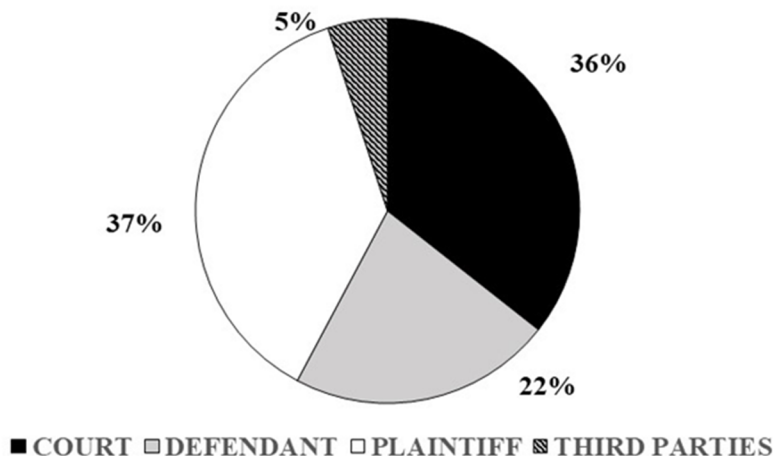


Table 5 breaks down the words spoken by lawyers for different plaintiffs for each year between 2003 and 2016. The patterns correspond to those revealed by the Core Docket Activity Scores.<sup>212</sup> Lawyers for Elliott and Aurelius were continually active, as were lawyers representing the Seijas class. By contrast, lawyers for most other plaintiffs spoke little, if at all, after 2010.

A few other details jump out of Table 5. Among large investors, lawyers for Kenneth Dart's EM Ltd. were the first to be active and spoke a great deal in the early years of the litigation. Elliott's lawyers became active in early 2004, while lawyers for Aurelius (who also spoke for Blue Angel) got active in 2008.<sup>213</sup> As noted, lawyers for Capital Venture International and other plaintiffs rarely spoke after 2010, with the exception of lawyers in

<sup>212</sup> See *supra* Table 4.

<sup>213</sup> Aurelius Capital was founded by Mark Brodsky, an Elliott alumnus who left in 2005. See *Mark Brodsky, supra* note 136. The investor behind Blue Angel was Davidson Kempner, a New York-based hedge fund. See *Spencer Declaration, supra* note 134, at 15. Because the two funds shared counsel and took most actions jointly, with Aurelius in the lead, we refer to them jointly as "Aurelius" (see lawyers listed in *Aurelius Cap. Partners, LP v. Republic of Arg.*, No. 07-07-cv-2715 (S.D.N.Y. filed Apr. 3, 2007) and *Blue Angel Cap. I LLC v. Republic of Arg.*, No. 07-cv-2693 (S.D.N.Y. filed Apr. 3, 2007) and joint litigation of agricultural patents *Aurelius Cap. Partners, LP v. Republic of Arg.*, No. 07-cv-2715, 2012 WL 983564 (S.D.N.Y. Mar. 22, 2012)).

the class action. Note the sheer dominance of Elliott and Aurelius after 2010. Lawyers for these two plaintiffs accounted for 82% of words spoken in court by plaintiff's lawyers from 2011 through 2015. Finally, Table 5 reveals the somewhat puzzling fact that lawyers for Montreux and Bracebridge — both lead plaintiffs with substantial positions — said barely a word in over 10 years of litigation, a topic we return to in Part IV.

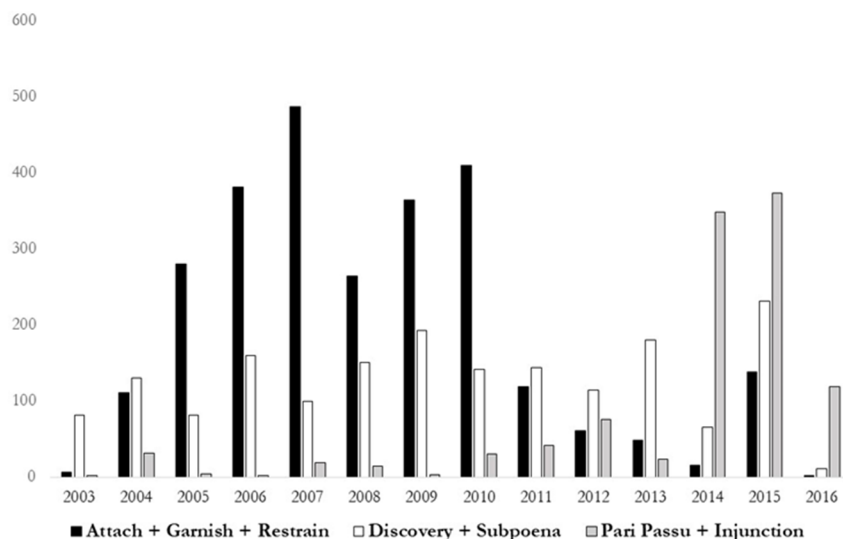
Table 5. Words Spoken in Court, by Plaintiff and Year

	'03	'04	'05	'06	'07	'08	'09	10	11	12	13	14	15	16	Tot.
<b>Large Plaintiffs</b>															
Elliott		1,825	2,790	2,405	10,653	7,416	12,371	5,370	9,735	9,131	6,261	12,346	18,229	885	99,417
Aurelius (and Blue Angel)						4,677	10,601	9,562	873	2,077	2,338	8,276	6,483	1,108	45,995
Dart	4,472	5,224	5,456	8,950	7,211	1,618	322	993			501			1,470	36,217
Capital Ventures Inter- national			3,695	5,056	11,716			1,515							21,982
Montreux Partners														760	760
Bracebridge (FFI Fund, FYI, Olifant)				415						48					463
<b>Small Plaintiffs</b>															
Seijas (Class Action)		943	2,046		676	3,022		10,425	1,123			852	4,115	4,933	28,135
Guillermo Gleizer	1,603	4,328	499	985		833		4,872	1,052					618	14,790
Moss & Kalish	1,772	523	1,016	6,079	2,251		711								12,352
Dreier LLC	2,435	2,402	2,292	1,638											8,767

Digitization of the transcripts also allows measurement of the shifts in the thematic focus of the litigation over time. Figure 7 shows the number of times words related to attachment, discovery, and *pari passu* were spoken in court over the years. Attachment was the focus from 2005 through 2010. Beginning in 2010, *pari passu* became a theme, growing to dominate by 2014. Yet discovery was also a pretty steady theme from

2009. Elliott was particularly forceful in pursuing discovery, both in the Southern District and elsewhere.<sup>214</sup>

Figure 7. Frequency of Use of Key Words in Court, by Year



#### IV. LITIGATION GROUPS, PATTERNS, AND STRATEGIES

The docket entry and transcript data reveal broad patterns of litigation activity. Here, we draw on this data to make some general observations about groups of plaintiffs and how they approached the litigation. What emerges is a picture of a diverse set of litigants with varied approaches to financing litigation and different legal strategies. To return to a point made out the outset, sovereign debt litigation now resembles modern mass tort litigation as much or more than it resembles the sovereign debt litigation of the 1990s, which was typically brought by a single firm.<sup>215</sup>

<sup>214</sup> See, e.g., *NML Cap., Ltd.*, 573 U.S. 134 (rejecting argument that the Foreign Sovereign Immunities Act blocked post-judgment discovery into the location of Argentine assets); see also *NML Cap., Ltd.’s Motion to Compel Production of Documents from Entities Affiliated with Non-Party Lazaro Baez*, *NML Cap., Ltd. v. Republic of Arg.*, No. 14-cv-00492 (D. Nev. Apr. 11, 2014); *NML Cap., Ltd. v. Republic of Arg.*, No. 12-mc-0080 (N.D. Tex. Aug. 23, 2012).

<sup>215</sup> See *supra* note 25; see also Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV.

A. *Patterns in Litigation Activity*

The *pari passu negotiating bloc*: When settlement negotiations began in January 2016, Elliott, Aurelius, Blue Angel, Bracebridge, Montreux and Dart sat across the table from Argentina.<sup>216</sup> Controlling over 70% of outstanding claims, these investors had substantial leverage over the government, whose stated policy was to settle the litigation.<sup>217</sup> Before the settlement negotiations, members of this litigation group (in particular, Elliott, Aurelius, and Dart) had been the most tenacious plaintiffs facing the government.<sup>218</sup> There were tight connections between the plaintiffs. Elliott and Dart had jointly litigated between 2005 and 2010.<sup>219</sup> Elliott, Bracebridge, and Montreux had all sued on the FRAN securities since 2005 and were listed members of anti-Argentina lobbying group American Task Force Argentina.<sup>220</sup> Montreux's Straus worked as Elliott's lawyer in the 90s and had lodged a *pari passu* claim with respect to bonds owned by his own firm, Red Mountain.<sup>221</sup> Aurelius and Blue Angel worked

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1587, 1604-06 (1995) (noting differing and conflicting strategies of plaintiff's firms in mass tort litigation); Judith Resnick, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 309-26 (1996) (describing differing roles and lawyering structures within mass torts).

<sup>216</sup> Declaration of Jay Newman ¶ 3, *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-6978 (S.D.N.Y. Feb. 18, 2016); *see also* Order for Appointment of Special Master, *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-6978 (S.D.N.Y. June 23, 2014) (order appointing the Special Master, which applied to just Elliott and Aurelius); Amended and Supplemental Order of Appointment of Special Master, *NML Cap., Ltd. v. Republic of Arg.*, No. 08 Civ. 6978 (S.D.N.Y. Nov. 3, 2014) (order amended to extend his remit to include cases brought by Blue Angel, Bracebridge, and Varela).

<sup>217</sup> *See supra* note 155.

<sup>218</sup> Again, we refer to Aurelius and Blue Angel jointly as "Aurelius." *See supra* note 213.

<sup>219</sup> For example, as joint plaintiffs against the Central Bank of Argentina, *see EM Ltd. v. Banco Central de la República Arg.*, No. 06-cv-7792 (S.D.N.Y. Sept. 28, 2006), and in attachment efforts recorded in *EM Ltd. v. Republic of Arg.*, No. 03-cv-2507 (S.D.N.Y. Apr. 10, 2003) and *NML Cap., Ltd. v. Republic of Arg.*, No. 03-cv-8845 (S.D.N.Y. Nov. 7, 2003).

<sup>220</sup> *See About Us*, AM. TASK FORCE ARG. (Jan. 5, 2008), <https://web.archive.org/web/20080105154044/http://www.atfa.org:80/about/> [<https://perma.cc/ED8K-ET4E>] (listing "current supporters" as Bracebridge Capital, LLC; Elliott Associates, L.P.; FH International Asset Management, LLC; Grantham, Mayo, Van Otterloo & Co. LLC; and Montreux Partners).

<sup>221</sup> *Elliott Assocs. v. Republic of Peru*, 12 F. Supp. 2d 328, 333 (S.D.N.Y. 1998) ("Elliott set up an investment team for the purchase of emerging market debt, consisting principally of Jay Newman . . . Andrew Kurtz . . . Paul Singer . . . and Ralph Dellacamera. . .



together, while Aurelius' Mark Brodsky used to work at Elliott.<sup>222</sup> Finally, Elliott, Aurelius, Blue Angel, and Bracebridge were original *pari passu* plaintiffs, while Montreux submitted an amicus brief in support.<sup>223</sup>

Individually and as a group, these investors most closely match the traditional model of sovereign debt litigation: sophisticated hedge funds that buy debt at distressed prices and use the prospect of large recoveries to fund litigation.<sup>224</sup> Each had claims against Argentina of at least \$400 million, and each sued for over a decade. Yet there also were important differences.

First, only Elliott, Aurelius, and Blue Angel (and, for one position, Bracebridge<sup>225</sup>) filed new lawsuits based on new bond purchases in which they didn't seek final money judgments, allowing them to benefit from the increased interest accrual on their claims under New York law.<sup>226</sup> These funds also were continuously active as litigants, which may partly be explained by the fact their pre-judgment claims were accreting at a rate of over 10% a year. As noted, such rapid claims accrual can justify substantial investments in litigation.<sup>227</sup>

Second, Elliott, Bracebridge, and Montreux all held Floating Rate Accrual Notes ("FRANs") issued by Argentina, which offered a particularly high return.<sup>228</sup> In 2009, the three firms obtained judgments totaling about \$2.8 billion dollars on holdings of about \$295 million of these bonds (nearly the entire outstanding stock owned by these three funds). This extraordinary 10-to-1 ratio of judgment value to par value resulted from the high rate of contractual interest on the FRANs (eight years at a contractual rate of 101.5%) plus the compounding of interest-

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. Additionally, the team retained Michael Straus [later a principal of Montreux] as outside counsel."); *see also* Order Granting Motion for (1) Specific Performance in Aid of Execution and (2) Assignment of Assets, *Red Mountain Fin., Inc. v. Democratic Republic of Congo*, No. 00-cv-0164 (C.D. Cal. May 30, 2001).

<sup>222</sup> *See supra* note 136.

<sup>223</sup> Brief for Montreux Partners and Wilton Capital as Amici Curiae Supporting Appellees, *NML Cap., Ltd. v. Republic of Arg.*, No. 12-105-cv (2d Cir. Apr. 17, 2012).

<sup>224</sup> Schumacher et al., *Sovereign Defaults*, *supra* note 9, at 2.

<sup>225</sup> Complaint at 2, *Olifant Fund, Ltd. v. Republic of Arg.*, No. 10-cv-9587 (S.D.N.Y. Dec. 23, 2010) with respect to holding of \$5 million of FRANs.

<sup>226</sup> *See supra* note 98.

<sup>227</sup> *See supra* Part I.C.

<sup>228</sup> On FRANs, *see supra* note 140.

on-interest at the New York statutory rate of 9%.<sup>229</sup> FRANs absorbed about 20% of the aggregate payments made to creditors in 2016 to settle the default. Table 6 breaks out the ownership of the FRANs among these three fund managers.

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<sup>229</sup> Joint letter from the FRAN plaintiffs on Elliott's judgments (Exhibit 1) along with an example calculation of FRAN judgment value (Exhibit 2) are available in Letter to Judge Thomas P. Griesa from Dennis H. Hranitzky, *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-03302 (S.D.N.Y. July 28, 2009); Bracebridge's judgments are available in Judgment #09,1031, *FFI Fund, Ltd. v. Republic of Arg.*, No. 05-cv-3328 (S.D.N.Y. May 29, 2009) and Corrected Judgement #09,1031, *FFI Fund, Ltd. v. Republic of Arg.*, No. 05-cv-3328 (S.D.N.Y. Feb. 1, 2010); Montreux group case settlements are detailed in Letter to Judge Thomas P. Griesa from Michael A. Paskin, *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-6978 (S.D.N.Y. Feb. 12, 2016).

Table 6. FRAN Owner Subgroup (Elliott, Bracebridge, Montreux)

<b>Plaintiff Subgroup Group or Plaintiff Name</b>	<b>Fund</b>	<b>Date</b>	<b>Case Number</b>	<b>Nominal FRANs<sup>230</sup> (mm)</b>	<b>Judgment<sup>231</sup> (mm)</b>
Elliott	NML Capital, Ltd.	2/28/2005	05-cv-02434	\$32.0	\$311.2
Elliott	NML Capital, Ltd.	8/25/2006	06-cv-6466	\$54.9	\$533.3
Elliott	NML, Capital, Ltd.	4/2/2007	07-cv-2690	\$15.3	\$148.1
Elliott	NML Capital, Ltd.	4/2/2008	08-cv-3302	\$29.9	\$290.3
Elliott	NML Capital, Ltd.	2/24/2009	09-cv-1707	\$0.03	No Judgment
Bracebridge	FFI Fund, Ltd.	3/29/2005	05-cv-3328	\$69.3	\$673.7
Bracebridge	FYI Ltd. (reportedly 100% owned by Yale University Endowment) <sup>232</sup>	3/29/2005	05-cv-3328	\$46.1	\$448.3
Bracebridge	Olifant Fund	12/23/2010	10-cv-9587	\$5.0	No Judgment
Montreux	Montreux Partners, L.P.	4/28/2005	05-cv-04239	\$5.0	\$48.6
Montreux	Los Angeles Capital	12/5/2005	05-cv-10201	\$8.4	\$82.2
Montreux	Los Angeles Capital	3/21/2007	07-cv-2349	\$7.7	\$74.8
Montreux	Cordoba Capital	8/3/2006	06-cv-5887	\$10.3	\$100.3
Montreux	Wilton Capital	3/1/2007	07-cv-1797	\$4.1	\$39.7
Montreux	Wilton Capital	1/14/2009	09-cv-0401	\$6.8	\$66.1
Total				\$294.8 million	\$2,816.6 million Ultimately settled for about 75% of claim amount or \$2.1 billion.

<sup>230</sup> The nominal amounts of holdings that appear in this table can be found in the complaints of the various cases.

<sup>231</sup> The judgment amounts that appear in this table can be most conveniently found in the complaints filed in the copycat pari passu actions filed by all of the FRAN plaintiffs in 2014. Complaint ¶ 54, NML Cap., Ltd. v. Republic of Arg., No. 14-cv-8601 (S.D.N.Y. Oct. 28, 2014); Complaint at 7, FFI Fund, Ltd. v. Republic of Arg., No. 14-cv-8630 (S.D.N.Y. Oct. 28, 2014); Complaint ¶ 4, Montreux Partners, LP v. Republic of Arg., No. 14-cv-7171 (S.D.N.Y. Sept. 5, 2014); Complaint ¶ 4, L.A. Cap. v. Republic of Arg., No. 14-cv-7169

By contrast, Kenneth Dart's EM Ltd. sued regarding only one large claim on which it obtained a judgment in 2003. As far as we know from the public record, it didn't own any rapidly accreting pre-judgment claims, nor did it own any high-value FRANs. Its activity in court diminished over time. Although we do not know the reason, many litigants would find it hard to justify significant ongoing investments in litigation to enforce a post-judgment claim growing at the relatively anemic federal statutory rate of about 1% a year.

Although Elliott, Bracebridge, and Montreux each owned FRANs, there were significant differences in litigation activity. Previously, we noted that lawyers for Bracebridge and Montreux rarely spoke in court.<sup>233</sup> Table 7 also shows low Core Docket Activity Scores for their cases in comparison to Elliott. The activity also focused on litigating the value of the FRANs, not on efforts to attach assets.<sup>234</sup> These differences in activity prompt questions, which our review of the publicly available data does not allow us to answer. Did Montreux and Bracebridge intend to free ride on Elliott's heavy expenditure on enforcement with the intention of

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(S.D.N.Y. Sept. 5, 2014); Complaint ¶ 4, *Cordoba Cap. v. Republic of Arg.*, No. 14-cv-7164 (S.D.N.Y. Sept. 5, 2014); Complaint ¶¶ 4, 7, *Wilton Cap., Ltd. v. Republic of Arg.*, No. 14-cv-7166 (S.D.N.Y. Sept. 5, 2014).

<sup>232</sup> As of 2006, soon after the suit was filed, FYI Ltd. reportedly was 100% owned by Yale University Endowment, see YALE UNIV., INTERNAL REVENUE SERV. FORM 990 pt. IX (2006), while later the University reported that it was an owner of New FYI Ltd, another Bracebridge fund, see YALE UNIV., INTERNAL REVENUE SERV. FORM 990 sched. R, pt. IV (2012); see also *Breaking Argentina*, 33 WALL ST., [http://www.33wallstreet.org/uploads/2/0/5/2/20520884/bracebridge\\_argentina.pdf](http://www.33wallstreet.org/uploads/2/0/5/2/20520884/bracebridge_argentina.pdf) (last visited Sept. 18, 2022) [<https://perma.cc/37WE-BA3R>] ("Yale owns 100% of New FYI Ltd, a Cayman Islands hedge fund managed by Bracebridge Capital. New FYI Ltd in turn owns 97.87% of FYI Ltd, which makes Yale's share of the settlement \$358.6 million, an estimated \$315 million gain on its original investment."); Tomás Lukin, *Buitres con Título Universitario [Vultures with a University Degree]*, PÁGINA 12 (Sept. 10, 2017, 8:58 PM), <https://www.pagina12.com.ar/61998-buitres-con-titulo-universitario> [<https://perma.cc/R88H-P8ZZ>] (reporting that FYI Limited was "controlled by Yale"). See generally Sabrina Willmer & Tom Moroney, *The Secretive Fund That's Generating Huge Profits for Yale*, BLOOMBERG (Feb. 4, 2016, 2:00 AM PST), <https://www.bloomberg.com/news/articles/2016-02-04/the-secretive-hedge-fund-that-s-generating-huge-profits-for-yale> [<https://perma.cc/98VJ-P8VG>].

<sup>233</sup> See *supra* Table 5.

<sup>234</sup> In May 2005, shortly after filing suit for FFI Fund and FYI, Bracebridge pursued one attachment. See Motion for Order of Attachment, *FFI Fund, Ltd. v. Republic of Arg.*, No. 05-cv-03328 (S.D.N.Y. May 12, 2005).

joining the *pari passu* litigation later? Did they see no value in efforts to attach Argentine assets, knowing these efforts wouldn't work? Or was it something else? This pattern of behavior is so strikingly different — and interesting — that we can only hope that the principals at the fund explain what they were thinking someday.

Table 7. FRAN Cases Core Docket Activity 2005 - 2010

	'05	'06	'07	'08	'09	10	Tot.
Elliott (05-2434)	22	14	1	47	90	47	221
Bracebridge (05-cv-3328)	22			16			38
Montreux (05-cv-4239)		4		17			21

This heterogenous activity makes it fair to question how far one should go in lumping Elliott, Bracebridge, Montreux, Aurelius, Blue Angel, and Dart as a “*pari passu* negotiating bloc.” At the highest level it is surely correct. It is documented that these funds negotiated across the table from Argentina in sessions held on January 13 and February 1, 2016.<sup>235</sup> And as noted, there were many links between the firms.<sup>236</sup> But the extent to which the firms coordinated negotiations is unclear. In February 2016, Montreux and Dart each independently settled with Argentina, suggesting any arrangements were informal at best.<sup>237</sup> However, Elliott, Aurelius, Blue Angel, and Bracebridge remained together as a negotiating bloc and held 65% of the total outstanding claims through the end. The four firms signed a joint settlement agreement on February 26, 2016.<sup>238</sup> They also appeared in court in February to slow down the lifting of the

<sup>235</sup> Declaration of Jay Newman, *supra* note 216, ¶¶ 3-4.

<sup>236</sup> See *supra* notes 216-23.

<sup>237</sup> Alexandra Stevenson & Jonathan Gilbert, *Argentina Reaches Debt Deal with 2 Hedge Funds*, N.Y. TIMES (Feb. 5, 2016), <https://www.nytimes.com/2016/02/06/business/dealbook/argentina-debt-deal-hedge-funds.html> [<https://perma.cc/Y9CX-JSAP>].

<sup>238</sup> AGREEMENT IN PRINCIPLE (Feb. 29, 2016) (between Republic of Argentina and NML Capital, various Aurelius funds, Blue Angel Capital I, Olifant Fund, Ltd., FFI Fund Ltd., and FYI Ltd.).

injunction<sup>239</sup> and appealed Judge Griesa's decision to lift the injunction in March.<sup>240</sup>

Solo, attachment-focused litigation: Some large, active plaintiffs litigated on their own. Capital Ventures International (“CVI”) entered the litigation on April 25, 2005, just as Argentina was about to close the exchange offer in its first restructuring, seeking to attach the collateral held at the Federal Reserve Bank of New York on behalf of the country's holders of Brady Bonds.<sup>241</sup> The timing suggests the investment fund thought it could recover more than Argentina was offering by attaching a specific asset before any other investors did. CVI failed to grab the Brady collateral before the closing of the 2005 exchange offer, but succeeded in getting a second lien attachment on the collateral remaining after the deal closed.<sup>242</sup> This victory later blocked Argentina from including its Brady bonds in its 2010 reopening.<sup>243</sup>

CVI's attachment efforts kept it busy in the pre-2010 period, and its lawyers made frequent appearances in district court between 2005-2007.<sup>244</sup> In 2011, CVI's activity in court slowed to a trickle and remained low until Elliott's *pari passu* victory. In 2014, CVI joined Elliott's *pari passu* effort, seeking injunctive relief on its post-judgment claim. It thus joined the ranks of the copycat *pari passu* plaintiffs, although the

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<sup>239</sup> One day in court in February 2016, Gibson Dunn's Matthew McGill said he was speaking on behalf of “NML Capital, the Aurelius appellees and FFI and [FYI] Funds.” Transcript of Oral Argument at 3:22-23, *Aurelius Opportunities Fund II. LLC v. Republic of Arg.*, No. 08-cv-06978 (2d Cir. Feb. 24, 2016).

<sup>240</sup> On March 3, 2016, Elliott appealed in Notice of Interlocutory Appeal, *NML Cap., Ltd. v. Republic of Arg.*, No. 08-cv-06978 (S.D.N.Y. Mar. 3, 2016); Bracebridge appealed in its cases for FFI Fund and FYI in Notice of Appeal, *FFI Fund, Ltd. v. Republic of Arg.*, No. 14-cv-08630 (S.D.N.Y. Mar. 3, 2016); Aurelius appealed in Notice of Appeal, *Aurelius Cap. Master, Ltd. v. Republic of Arg.*, No. 09-cv-8757 (S.D.N.Y. Mar. 3, 2016); and Blue Angel appealed in Notice of Appeal, *Blue Angel Cap. I LLC v. Republic of Arg.*, No. 10-cv-4101 (S.D.N.Y. Mar. 3, 2016). *See also* *Aurelius Cap. Master, Ltd. v. Republic of Arg.*, 644 F. App'x 98, 105 (2d Cir. Apr. 15, 2016).

<sup>241</sup> *See* Transcript of Oral Argument at 14:4-6, *Cap. Ventures Int'l v. Republic of Arg.*, No. 05-cv-04085 (S.D.N.Y. Apr. 25, 2005) (“We are seeking to attach all Argentina's assets which, I believe includes the collateral, [that] would normally have secured all the collateral as Brady Bonds.”).

<sup>242</sup> *Cap. Ventures Int'l v. Republic of Arg.*, 443 F.3d 214, 223 (2d Cir. 2006).

<sup>243</sup> *See Cap. Ventures Int'l v. Republic of Arg.*, 652 F.3d 266, 273-74 (2d Cir. 2011).

<sup>244</sup> *See supra* Table 4.

distinguishing feature of CVI's effort was its standalone effort to attach collateral.

Passive, protecting the statute of limitations: In contrast to the active large holders, Gramercy undertook a completely inactive litigation style. The firm filed many suits with respect to over \$300 million bonds but was completely inactive. The docket for its first suit had only 17 entries, and an activity score of zero, compared to over 1,000 entries and an activity score of 449 for Elliott's most active suit.<sup>245</sup> Because Gramercy subsequently anchored Argentina's 2010 exchange offer, one possible explanation is that the firm filed lawsuits to prevent the statute of limitations from running while undertaking consensual negotiations with the country.

Informal aggregation of small investors: Around 50 cases originated from Dreier LLP, which had developed an inventory of smaller investors. The Dreier cases were a somewhat atypical version of the hub and spoke model common to the financing of litigation on behalf of many individual plaintiffs.<sup>246</sup> They resulted from a partnership between the law firm and Patricia Rosito Vago, an Argentine lawyer.<sup>247</sup> As noted, the Dreier cases were reasonably active, especially relatively early in the litigation.<sup>248</sup> After Elliott's successful *pari passu* attack (and now represented by new counsel), they joined as copycat *pari passu* claimants.

Alternative third-party funding: Although we have not focused on the TFA plaintiffs given their limited activity in the Southern District, we note that their claims were enabled by less traditional forms of third-

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<sup>245</sup> The activity score is the sum of key litigant-generated filings, including evidentiary materials (declarations and affidavits), motions, legal memoranda, and attachment-related entries. See *supra* p. 144-46.

<sup>246</sup> See *supra* note 73.

<sup>247</sup> See, e.g., Michael Spencer Declaration, *supra* note 141, ¶¶ 7-8 (Dreier and Patricia Rosito Vago had an arrangement, "Rosito Vago was responsible for originating and communicating with clients and maintaining all client records and case files in Buenos Aires; and Dreier was responsible for the litigation in New York. Fees were to be shared 50-50"). Dreier ultimately filed for bankruptcy in 2008 under circumstances that can best be described as colorful. See Ashby Jones, *Dreier LLP Files for Bankruptcy; Millions in Unpaid Bills*, WALL ST. J. (Dec. 17, 2008, 1:42 PM ET), <https://www.wsj.com/articles/BL-LB-7015> [<https://perma.cc/BCC4-AKAJ>]. Thereafter, many of its former clients retained Milberg LLP or Duane Morris LLP to continue the representation.

<sup>248</sup> See *supra* Table 5.

party financing.<sup>249</sup> It is evident that the 180,000 Italian retail investors that joined the TFA suits as active plaintiffs did so because the Italian banks were paying their legal bills.<sup>250</sup> Otherwise few, if any, could have afforded the cost of litigation.

Cost-minimization and free-riding: Some investors used a cost control strategy or undertook a pure free-rider approach. For example, the Moss & Kalish law firm filed a pair of lawsuits in 2002 and employed a selective litigation strategy. The firm was reasonably active in efforts to attach Argentine assets in the early days,<sup>251</sup> but was a copycat on Elliott's *pari passu* initiative. Banca Arner, in a suit brought in 2005 by Will & Emery on about \$30 million in bonds, was a low-activity, pure free rider: Banca Arner's initial suit included only 32 entries, 1 motion, and 2 legal memoranda filed by the law firm over 11 years, although the bank joined the *pari passu* activity with a copycat case in 2015.<sup>252</sup> Similarly, in 2007, Bryant University Professor Andrea Boggio filed a case on behalf of Andraxex Corporation, an owner of a \$5 million claim.<sup>253</sup> The only substantial activity in the case was a copycat effort to attach Argentine pension assets in 2008 and copycat *pari passu* activity.<sup>254</sup>

The dropouts: Many investors followed no discernable strategy or lacked conviction in their chosen approach. About 120,000 Italian retail investors — two-thirds of the total — dropped out of the litigation in 2010, which was no surprise given that many of them were elderly retirees with no financial and legal sophistication. TIAA-CREF, the

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<sup>249</sup> On the TFA plaintiffs, see *supra* notes 124–25.

<sup>250</sup> See *supra* note 124. Notably, their claims were further aggregated into a novel mass arbitration proceeding in which tens of thousands of retail investors were joined as claimants. See Decision on Jurisdiction and Admissibility at 30, *Abaclat v. Republic of Arg.*, ICSID Case No. ARB/07/5 (ICSID Aug. 4, 2011) (“[B]anks and financial intermediaries have created the Association for the Protection of Interests of the Investors in Argentinean Bonds, (*Associazione per la Tutela degli Investitori in Titoli Argentini*”), which has the following purposes: to represent, free of charge . . .”).

<sup>251</sup> See *supra* Table 5.

<sup>252</sup> See Complaint at 1, *Banca Arner v. Republic of Arg.*, 15-cv-1508 (S.D.N.Y. Mar. 2, 2015).

<sup>253</sup> Complaint at 6, *Andraxex Ltd. v. Republic of Arg.*, No. 2014-cv-09093 (S.D.N.Y. Oct. 1, 2008).

<sup>254</sup> Complaint at 1, *Andraxex Ltd. v. Republic of Arg.*, No. 2014-cv-09093 (S.D.N.Y. Nov. 14, 2014).



leading investment manager for educators in the U.S., dropped out in 2010.

The class action lawsuits: Theoretically an attractive strategy for retail plaintiffs, the class action cases failed to add value in their first widespread application to sovereign debt litigation. The class action cases generated a lot of activity in court.<sup>255</sup> Yet they offered little value for the plaintiffs, the defendant, or the court as a dispute resolution mechanism. The central problem was that class counsel could not come up with a convincing argument for the size of the class, which led the Second Circuit to repeatedly reject judgments entered by the district judge.<sup>256</sup> Ultimately, class members settled on the same terms, 1.5 times par, as most other plaintiffs.<sup>257</sup> Less than \$30 million dollars was paid out via the class action lawsuits, or less than 0.30% of the approximately \$10 billion paid out in total.<sup>258</sup> Net of attorney fees, the recovery to class members was only 1.05 times par, a relatively small sum, especially when paid 16 years after the default, in late 2017 (for the Brecher plaintiffs)<sup>259</sup> and in mid 2018 for the Seijas plaintiffs.<sup>260</sup> Based on the information available to us, it appears that class members would have been better off accepting Argentina's 2005 offer and reinvesting the proceeds.

We have looked at the Argentina litigation from multiple angles, combining traditional legal analysis with automated analysis of dockets and transcripts. The analyses support a number of insights about plaintiffs' litigation strategies and efforts to coordinate. Table 8 summarizes these insights and estimates potential recoveries for the

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<sup>255</sup> See *supra* Table 5.

<sup>256</sup> Among other problems, proposed classes failed the ascertainability requirement by failing to account for how secondary market trading would cause class membership to shift over time. See, e.g., *Brecher v. Republic of Arg.*, 806 F.3d 22 (2d Cir. 2015) (also documenting the history of Second Circuit rejections of classes certified by the district court).

<sup>257</sup> See, e.g., Final Judgment at 1-2, *Brecher v. Republic of Arg.*, No. 06-cv-15297 (S.D.N.Y. May 24, 2017) (the final judgement required Argentina to pay the "escrow agent 150% of the outstanding principal amount of the bonds owned . . .").

<sup>258</sup> See *infra* Table 8.

<sup>259</sup> The judgment in the Brecher case, *supra* note 256, was marked satisfied on September 27, 2017. See Order of Satisfaction of Judgment, *Brecher v. Republic of Arg.*, No. 06-cv-15297 (S.D.N.Y. Sept. 27, 2017).

<sup>260</sup> *Seijas v. Republic of Arg.*, No. 04-cv-400 (S.D.N.Y. Apr. 23, 2018).

various plaintiffs. As many plaintiffs changed approach after 2010 (marked by the completion of Argentina's 2010 reopening and Elliott's filing of a motion to obtain a *pari passu* injunction), the table divides the litigation into those two periods.

Table 8. Litigation Patterns and Estimated Recoveries

Investor	Pre-2010	Pari Passu Strategy	Litigation Pattern	Amount Settled in 2016 <sup>261</sup>	Activity Score	Transcript Word Count
Elliott	Active	Negotiating Bloc	Attachment, FRAN, Pre-judgment, Buy More	\$2.4 billion	High	High
Dart	Active	Negotiating Bloc	Attachment	\$849 million	High	High to 2010
Aurelius and Blue Angel	Active	Negotiating Bloc	Attachment, Pre-judgment, Buy More	\$742 million and \$385 million	High	High
Bracebridge: FFI Fund, FYI-Yale, and Olifant <sup>262</sup>	Inactive	Negotiating Bloc	FRAN, Pre-judgment and Buy More (Olifant only)	\$542 million (FFI) \$340 million (FYI-Yale) \$44 million Olifant	Low	Low
Montreux	Inactive	Negotiating Bloc	FRAN, Buy More	\$309 million	Low	Low
Capital Ventures International (CVI)	Active	Copycat	Attachment	\$222 million	Moderate	High 2005-2007
Late Entrant Hedge Funds	N.A.	Copycat	Pre-judgment, Copycat, Buy in anticipation of settlement	\$924 million <sup>263</sup>		

<sup>261</sup> JEFATURA DE GABINETE DE MINISTROS [ARGENTINA CHIEF OF CABINET OF MINISTERS], INFORME DEL JEFE DE GABINETE DE MINISTROS LICENCIADO D. MARCOS PEÑA A LA HONORABLE CÁMARA DE DIPUTADOS DE LA NACIÓN: INFORME N. 95 [ARGENTINA DEPUTIES REPORT: REPUBLIC OF ARGENTINA INFORME NO. 95 CHAMBER OF DEPUTIES] 15 (2016).

<sup>262</sup> See Bracebridge Capital, Uniform Application for Investment Adviser Registration and Report by Exempt Reporting Advisors (Form ADV) (July 2, 2018) (Bracebridge has \$23 billion under management; FFI Fund Ltd large gross assets of \$17.3 billion with 348 beneficial holders; FYI Ltd had \$3.4 billion gross assets, 10 beneficial holders; Olifant Fund, Ltd had \$2.5 billion in gross assets, 2 beneficial holders).

<sup>263</sup> See ARGENTINA CHIEF OF CABINET OF MINISTERS, *supra* note 261 (Yellow Crane \$250 million, VR Global \$68 million, Procella holdings \$170 million, Honero \$80 million,

GMO	Low Activity	Copycat (part); and Drop Out (part)	Unclear	\$120 million	Low	Low
Teachers	Low Activity	Drop Out	Unclear	Settled 2010	Low	Zero
Gramercy Capital	Low Activity	Drop Out	Consensual Negotiations	Settled 2010	Low	Zero
Banca Arner	Inactive	Copycat	Copycat	Not available	Low	None
TFA	Activity Stayed	None	Arbitration funded by 3 <sup>rd</sup> party	\$1 bln settled 2016	Low	Low
Seijas Cases	Active	None	Class Action	\$25 million <sup>264</sup>	Moderate	Moderate
Dreier LLP	Active	Copycat	Attachment	Not available <sup>265</sup>	Moderate	High to 2005
Guillermo Gleizer	Active	Copycat	Attachment	Not available	Moderate	High to 2005
Moss & Kalish	Active	Copycat	Attachment	\$10.6 million	Moderate	High to 2006
Andrea Boggio	Low Activity	Copycat	One copycat attachment	\$5 million	Low	Zero

### B. Using Docket Similarity and Clustering Measures to Identify Patterns

To supplement our analysis, we define a quantitative metric to validate the litigation groups identified in the previous section.<sup>266</sup> We employ a novel technique to compute “case distance” between any two cases by examining the docket entries for the cases: the smaller the distance, the

Spinnaker \$99 million, Stonehill \$7 million, Red Pines \$144 million, Arag-A (-V, -T, O) \$106 million).

<sup>264</sup> Final judgment amounts granted on Nov. 30, 2017, in cases: 04-cv-400, 04-cv-401, 04-cv-506, 04-cv-936, 04-cv-937, 04-cv-1085, 04-cv-2117, and 04-cv-2118. See Final Judgment, *Seijas v. Republic of Arg.*, No. 04-cv-00400 (S.D.N.Y. Nov. 30, 2017); Final Judgment, *Seijas v. Republic of Arg.*, No. 04-cv-00401 (S.D.N.Y. Nov. 30, 2017); Final Judgment, *Castro v. Republic of Arg.*, No. 04-cv-00506 (S.D.N.Y. Nov. 30, 2017); Final Judgment, *Hickory Sec. v. Republic of Arg.*, No. 04-cv-0936 (S.D.N.Y. Nov. 30, 2017); Final Judgment, *Azza v. Republic of Arg.*, No. 04-cv-00937 (S.D.N.Y. Nov. 30, 2017); Final Judgment, *Azza v. Republic of Arg.*, No. 04-cv-01085 (S.D.N.Y. Nov. 30, 2017); Final Judgment, *Puricelli v. Republic of Arg.*, No. 04-cv-02117 (S.D.N.Y. Nov. 30, 2017); Final Judgment, *Chorny v. Republic of Arg.*, No. 04-cv-02118 (S.D.N.Y. Nov. 30, 2017).

<sup>265</sup> Authors’ estimate that the Dreier-Vago clients represented at their peak about \$400 million in claims.

<sup>266</sup> On the use of machine learning algorithms in classification, including in legal contexts, see Marion Dumas & Jens Frankenreiter, *Text as Observational Data*, in *LAW AS DATA*, *supra* note 33, at 62.

more similar the litigation. We calculate this distance for all pairs of cases in our database and use a clustering algorithm to identify cases that cluster together.

We performed this analysis on the 272 cases in the Southern District and looked only at entries prior to May 1, 2016, and only at meaningful docket entries (i.e., motions, declarations, and other entries marking substantive litigation activity, but excluding the “other” category and two categories related to appeals activity). Docket text was pre-processed to eliminate proper names and frequently occurring words, such as “an” and “the,” after which the remaining text was converted into a 300-dimensional vector using pre-trained word-embeddings.<sup>267</sup> Once vectorized, we were able to compute a measure of similarity between any two docket entries (using cosine distance between two vectors). To compute case-level distance between two cases, we looked at every docket entry in the first case and identified the closest docket entry of the same type in the second (using the docket-entry level similarity computation described above). The case-level distance is the weighted average of these docket-entry level distances. The weight we used was docket entry length, so that longer docket entry pairs have a higher weighting than shorter pairs with the same similarity score. This is a computationally robust method based on a minimum of assumptions, as described in the Appendix.

Figure 9 shows the power of the calculated distance measure to identify case clusters. It shows the distance between all cases in our database and the primary Seijas class action case (04-cv-0400). The cluster of cases with a score below 0.05 are all class action cases that were jointly litigated by the same law firms. Most case clusters fall within a distance measure of 0.10, but the Seijas cases are extra close because they were litigated in nearly identical ways during most periods of time.

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<sup>267</sup> See STEVEN BIRD, EWAN KLEIN & EDWARD LOPER, *NATURAL LANGUAGE PROCESSING WITH PYTHON 90-91* (2009).

Figure 9. Seijas Cluster of Cases Identified by Relative Distance Score

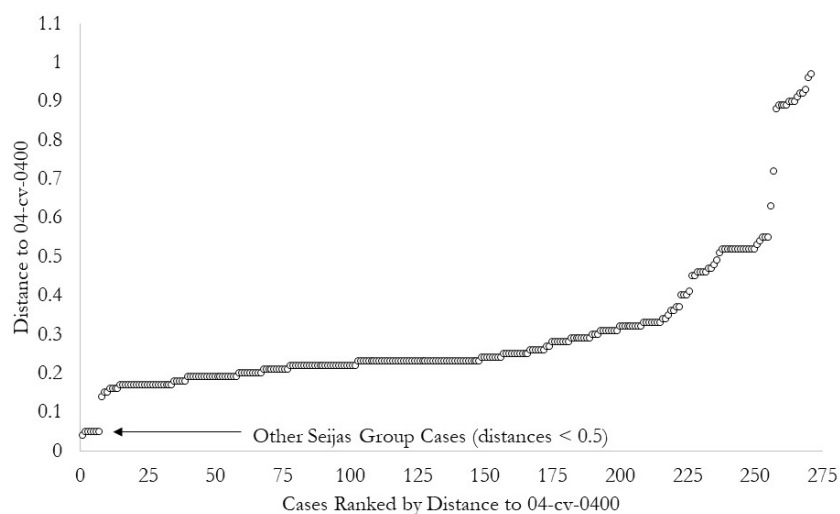


Table 9 applies the same method to the original *pari passu* cases and to the FRAN cases. Although not reported in the table, we observe similar clusters for post-judgment cases brought by Dart and Elliott, for post-judgment cases brought by Aurelius and Blue Angel, for the approximately 50 cases brought by Dreier LLC, for the low-activity cases brought by Gramercy, for the three cases brought by GMO, for the two cases brought by Capital Ventures International, for the two cases brought by Moss & Kalish, for two of the three cases brought by TFA, and for a large group of the Old Plaintiff and New Entrant copycat *pari passu* cases. All together, about 80% of the cases were readily clustered using our similarity score. The 20% that did not cluster as expected include cases with idiosyncratic features. One example is Elliott's FRAN case (05-cv-2423), which does not fall into the Montreux-Bracebridge FRAN cluster because of the difference in activity level set out in Table 7.

Table 9. Docket Distance Scores for Selected Lead Plaintiff Cases

FRAN Case Cluster vs Montreux Case 05-cv-4239		
Plaintiff	Case Number	Distance
Wilton Capital (Montreux group)	07-cv-1797	0.04
Cordoba Capital (Montreux group)	06-cv-5887	0.05

group)		
Los Angeles Capital (Montreux group)	07-cv-2349	0.05
Bracebridge (FFI Fund and FYI)	05-cv-3328	0.09
Elliott (NML Capital)	05-cv-2423	0.24 (out of cluster; much higher activity)
<b>Original Pari Passu Case Cluster vs Elliott Case 08-cv-6978</b>		
Plaintiff	Case Number	Distance
Aurelius	09-cv-8757	0.08
Blue Angel	10-cv-4101	0.09
Bracebridge (Olifant Fund)	10-cv-9587	0.12
Varela	10-cv-5258	0.12

#### CONCLUSION

A primary goal of this Article has been to complement the literature on litigation analytics, providing an example of how complex litigation is amenable to analysis using natural language processing tools.<sup>268</sup> Although human judgment is required to make them work well, these tools enable researchers to study of large-scale, complex disputes in ways that would be impossible using traditional methods of legal analysis.

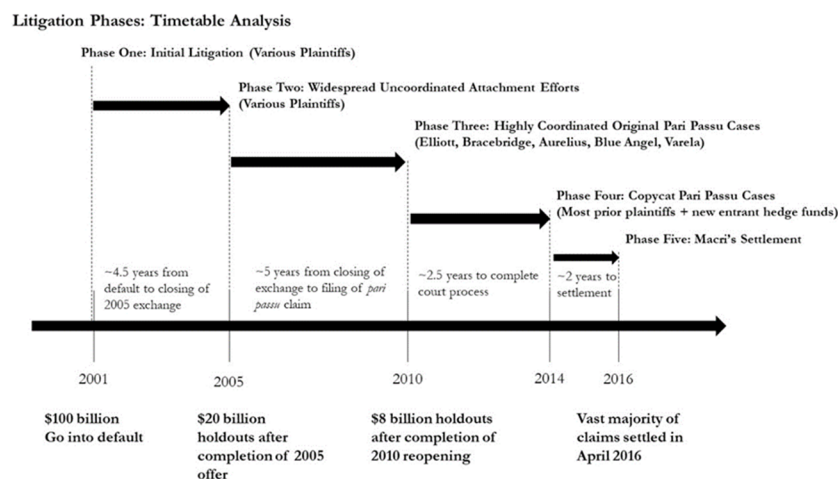
We studied the first, large-scale mass litigation of sovereign debt claims using a dataset including digitized dockets and transcripts. We introduced two new metrics: a Core Docket Activity Score, which counts the more meaningful party-driven activity in a docket, and a distance metric, which measures the similarity between two dockets and can be used to find clusters of closely-litigated cases. These metrics reveal analysis of patterns of litigation activity and enable inferences about the degree to which creditors coordinated their activity. Analyzing transcripts of court hearings adds a further dimension by helping identify

<sup>268</sup> See *supra* note 33; see also Daniel Martin Katz, *Quantitative Legal Prediction — or — How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909, 913 (2013) (exploring use of information technology in legal practice, including in predicting outcomes).

lawyers (and thus, litigants) who played a primary role during various phases of the litigation.

Figure 10 provides a summary timeline of events. Our main focus has been on Phase Two, which saw widespread, largely uncoordinated litigation by many plaintiffs, and Phases Three and Four, which involved the highly-coordinated *pari passu* litigation led by Elliott.

Figure 10: Timeline of Argentina Cases



Most of the literature on the Argentina bond cases has focused on the *pari passu* remedy and on Elliott. We have shown that Elliott was not the only hedge fund actively involved in the litigation. Indeed, sovereign debt litigation is no longer solely the domain of hedge funds. Multiple segments of the market were able to finance protracted litigation and should be expected to take part next time an opportunity arises. Even small investors got involved, as lawyers aggregated cases in ways both formal (the class action) and informal (the hub-and-spoke model) to finance litigation. In short, large-scale civil litigation has finally arrived in sovereign debt markets.

To be sure, there remain a number of open questions. One is whether hedge funds are *necessary* to sovereign debt litigation. A few considerations come to mind in the Argentina bond cases. The lead plaintiffs were all hedge funds. Most of the retail investors were organized by lawyers and did not buy at distressed prices, which limits potential returns from litigation. Moreover, the plaintiff's bar and its

financiers may be reluctant to invest heavily in litigation given the long payment delays inherent in sovereign debt cases.<sup>269</sup> For these and other reasons, we suspect that sovereign debt litigation will continue to be driven by hedge funds. However, that does not rule out active involvement of small and medium-sized plaintiffs. The model may be that hedge funds lead the litigation while other investors follow their lead, as in the Argentina cases.

Another question is whether legal developments that have limited the scope for *pari passu* attacks will make sovereign debt litigation less appealing to creditors.<sup>270</sup> Certainly, these developments may increase the barriers to successful litigation. But it bears repeating that litigation and the threat of attachment impose significant costs, including capital markets exclusion, independent of the *pari passu* remedy.<sup>271</sup> A well-capitalized, patient plaintiff can impose these costs for a long time. And in fact, litigation against foreign governments is increasingly backed by alternative litigation finance vehicles with deep pools of capital, diversified litigation portfolios, and long time-horizons.<sup>272</sup> Balanced against these forces, we see little reason to think that a narrowing of the *pari passu* remedy will put a stop to litigation.

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<sup>269</sup> In the traditional mass tort context, settlements provide a regular stream of income. Likewise, law firms appointed to the steering committee of a multidistrict litigation can expect regular payments for generating common benefits for the plaintiff group. See Gluck & Burch, *supra* note 22, at 13-14 (discussing “common benefit fees” received by lead counsel). In many sovereign debt cases, by contrast, payment is deferred for many years. Argentina’s settlement occurred fifteen years after its default. Of course, the presence of large investment vehicles (i.e., litigation finance firms) that back diverse portfolios of lawsuits may mitigate this problem.

<sup>270</sup> Later cases have emphasized that the remedy was imposed against Argentina only because it was a “uniquely recalcitrant” debtor. See, e.g., Bugliotti v. Republic of Arg., 952 F.3d 410, 415 (2d Cir. 2020) (affirming the district court’s dismissal “for injunctive relief to enforce the bonds’ *pari passu* clause”).

<sup>271</sup> See *supra* notes 11–12.

<sup>272</sup> An example is the litigation against Venezuela backed by Tenor Capital Management. See generally Duarte G. Henriques, *Third-Party Funding – in Search of a Definition*, 28 AM. REV. INT’L ARB. 405, 411-12 (2017) (describing financing structure in the *Crystallex* case); Ravi D. Soopramanien, *Mind the GAP: Tailoring the Form and Substance of Political Risk Insurance in Order to Bridge the Enforcement Gap in Investment Arbitration*, 50 INT’L L. 585, 607 (2017) (describing *Crystallex* as an example of how third-party finance may be necessary for investors).



The importance of legal enforcement in sovereign debt markets remains a matter of debate. Effective legal remedies enable commitment.<sup>273</sup> All else equal, a sovereign that can more credibly commit to repay should benefit in the form of lower borrowing costs.<sup>274</sup> But all is not always equal, and many are skeptical of the value added by legal enforcement in the context of a sovereign's debt distress. For years, policy actors in the official sector have been concerned about the potentially disruptive effect of sovereign debt litigation.<sup>275</sup> Recently, these concerns have prompted reforms designed to limit the scope for sovereign debt litigation. Mostly notably, many sovereign bonds now include so-called aggregated collective action clauses ("CACs"), which allow bondholders to approve a collectively-binding restructuring across much or all of the debt stock.<sup>276</sup>

In conversations with market participants, we have repeatedly heard the claim that these clauses, combined with the use of trustee structures and other devices, will eliminate the risk of widespread holdout litigation. But this view strikes us as too optimistic, for at least three reasons. First, much of the outstanding stock of sovereign bonds does not include aggregated CACs.<sup>277</sup> For this part of the debt stock, investors retain the ability to opt out of a restructuring. Second, CACs are a tool for restructuring bond debt and do not help with other obligations that may need to be restructured during crisis, including trade credits and arbitration awards. Creditors inclined to litigate may gravitate towards these obligations. Finally, sovereigns have amassed substantial contingent liabilities, such as guarantees issued to cover the debt of

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<sup>273</sup> Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 519 (1983).

<sup>274</sup> Andrei Shleifer, *Will the Sovereign Debt Market Survive?*, 93 AM. ECON. REV. 85, 87 (2003).

<sup>275</sup> See *supra* note 13.

<sup>276</sup> Anna Gelpern, Ben Heller & Brad Setser, *Count the Limbs: Designing Robust Aggregation Clauses in Sovereign Bonds*, in TOO LITTLE, TOO LATE: THE QUEST TO RESOLVE SOVEREIGN DEBT CRISES 109 (Martin Guzman, José Antonio Ocampo & Joseph E. Stiglitz eds., 2016); Antonia E. Stolper & Sean Dougherty, *Collective Action Clauses: How the Argentina Litigation Changed the Sovereign Debt Markets*, 12 CAP. MKTS. L.J. 239, 240 (2017).

<sup>277</sup> Odette Lienau, *Sovereign Debt, Private Wealth, and Market Failure*, 60 VA. J. INT'L L. 299, 349-50 (2020).

state-owned enterprises.<sup>278</sup> These guarantees typically do not include CACs of any sort, nor is it common for the primary obligor's debt contract to include a mechanism for restructuring or eliminating the sovereign's guarantee.<sup>279</sup> These obligations, too, are susceptible to litigation, and they rarely contain CACs or other mechanisms to corral unruly creditors. This is not to say that mass, Argentina-style litigation will be a common feature of the sovereign debt landscape. The developments discussed above will likely make future litigation less messy, along with other factors, such as regulations that reduce the number of retail plaintiffs that own sovereign debt, particularly in Europe,<sup>280</sup> and the more frequent use of bond trustee structures to centralize litigation with the trustee.<sup>281</sup> However, given the increasingly deep pools of capital available to finance litigation, we are skeptical of the view that sovereign debt litigation is a thing of the past.

#### APPENDIX: METHODOLOGY & CHALLENGES

##### Docket Entry Analysis

A digitized version of the docket for each case brought in federal district court for the Southern District of New York was downloaded from Unicourt.com, an online provider of court data. The Unicourt data was accessed via calls to an Application Programming Interface ("API") via a Python notebook. The docket data included header information (case name, date, number, parties, etc.) and a docket table in three columns (date, entry #, and entry text). The data was processed in Python and exported to a tool created in Google Sheets that allowed for more efficient exploration.

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<sup>278</sup> Lee C. Buchheit & Mitu Gulati, *Restructuring a Sovereign Debtor's Contingent Liabilities*, in SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE LENDING AND BORROWING 2-3 (Carlos Esposito, Yuefen Li & Juan Pablo Bohoslavsky eds., 2013).

<sup>279</sup> Lee C. Buchheit & G. Mitu Gulati, *Sovereign Contingent Liabilities*, in SOVEREIGN DEBT MANAGEMENT 12-13 (Rosa M. Lastra & Lee C. Buchheit eds., 2014).

<sup>280</sup> See Regulation 2017/1129, 2017 O.J. (L 168) 12, 21 (EU) (exempting securities issuances from certain regulations when the securities have a denomination of at least 100,000 euro).

<sup>281</sup> See INT'L MONETARY FUND, FOURTH PROGRESS REPORT ON INCLUSION OF ENHANCED CONTRACTUAL PROTECTIONS IN INTERNATIONAL SOVEREIGN BOND CONTRACTS 9-10 (2019).

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Two spreadsheet tools were created using Google Sheets to facilitate exploration of the data. The first was a search browser that allowed us to search through the universe of cases for key words subject to various filters (date, plaintiff, defendant, court, etc.). The second allowed batch processing of dockets, including the counting of docket entries, number of motions, numbers of orders, with and without filters for date ranges.

Legal subject matter expertise was applied to classify docket entries into useful categories, such as “motions,” and “orders.” Docket text is generated by the clerk and/or ECF user and the fields are populated using a mix of standard and free-form text. Usage is fairly regular, but not fully systematic, which leads to ambiguities requiring the use of judgment to assign docket text to categories. For example, we treat the following extracts from docket entries as representing motions: “MOTION,” “LETTER MOTION,” “MOTION FOR LEAVE TO INTERVENE,” “MOTION TO FILE AMICUS CURIAE BRIEF,” “CROSS MOTION,” “EMERGENCY MOTION,” “CRSSMOTION,” “SUPPLEMENTARY PAPERS TO AN EMERGENCY MOTION TO INTERVENE,” “PLAINTIFF’S MOTION,” “FIRST MOTION,” “MOTION C,” “JOINT LETTER MOTION,” “AMENDED MOTION.” Most docket entries begin with capitalized terms, which is the standard ECF format. However, ECF also allows free form entries, and some entries do not begin with capitalized terms. In this case we extracted the first 25 letters of any non-capitalized text.

Our classification process began with 1,310 unique phrases, representing the initial text extracted from all the docket entries of all the cases in the Southern District. We focused on unique phrases that appeared at least five times across the universe of cases (n=355). These phrases accounted for the vast majority (96.5%) of all docket entries. We assigned these phrases to the following categories: Declaration or Affidavit; Motion; Ex Parte Motion; Letter; Memorandum; Complaint or Answer; Service of Process, Summons; Sealed or Confidential Document; Proposed Order; Stipulation; Order; Opinion; Attachment, Garnishment, or Restraining Order; Minute Entry; Transcript; Notice of Appeal; Other Appeals Action; Judgment; and Other. Then we used the computer to assign one of these categories to every docket entry in every case. The Other category is a catch-all for ministerial and other less important activity.

We validated the robustness of the classification scheme in several ways. The most powerful checking mechanism was to generate files of all of the docket entries classified for each type — e.g., a file for entries classified as Declaration or Affidavit, a file for entries classified as Order, etc. We then scanned these files for correct (and incorrect) classifications. While we found few errors in the specifically assigned categories, we found several cases of systematic undercounting in the Other category. For example, one series of entries categorized under Other began with verbiage explaining that the entries represented unsealed documents that had been confidentially put into the docket at an earlier date. To remove this source of systematic error, we revised the code to strip out unsealing language and categorize the entries based on the remaining text. After completing this and a few other corrections, we believe that there are no other material sources of systematic undercounting coming from the classification scheme.

Another potential source of error comes from the possible failure to identify all relevant dockets. One challenge is the lack of flexibility of PACER. One problem is that PACER records cases against Argentina under a variety of names, including Argentina, the Republic of Argentina, and the Argentine Republic. Even checking all of the variations, it was hard to be sure we had found all cases. We conducted additional searches using the names of Argentina’s lawyers and the names of plaintiffs, which uncovered additional cases. Checking Unicourt’s database under different search parameters uncovered yet a few more cases. We also cross-verified our case database against the case numbers cited in legal opinions, orders, and other items. We believe that we found all (or virtually all) relevant cases and that any missing cases are likely to be immaterial. As a note, we excluded a few cases in which Argentina was joined with the Province of Buenos Aires, because the activity in court was focused on attaching the assets of the Province, not of the Republic.

Another potential source of counting error comes from the limited scope of data contained in docket entries. In some cases, the extracted docket text may not clearly indicate the nature of the activity. For example, we defined a category for Attachment, Garnishment, or Restraint to capture litigation activity associated with efforts to attach Argentine assets. Docket entries beginning with phrases like WRIT OF EXECUTION, RESTRAINING ORDER, and ATTACHMENT ORDER fell easily into this category. However, we discovered that some attachment-

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type activity was embedded in entries captioned “ORDER TO SHOW CAUSE” (which would otherwise have been placed into the Order category). Again, we believe our validation checks — including scanning files of each docket entry and the resulting classifications — kept such errors to a minimum.

#### Transcript Analysis

The transcript analysis started with hard or digital copies of the transcripts for hearings available online, at the records room of the Southern District of New York, or from Southern District Court Reporters. When using hard copies, transcripts were digitized into PDF format using Adobe Acrobat Optical Character Recognition (“OCR”) software. The first step in the analysis was to extract the text from the PDF files. We used `pdftotext`, a standard unix tool. After that, basic text-processing techniques using regular-expressions (`regex`) were used to extract the header information from transcripts (such as the date, case numbers, and parties) and to attribute text blocks to specific speakers. The actual text of the words spoken in the hearing was processed through open-source python library (Natural Language Toolkit – NLTK) to extract words and sentences.

The output of the program was a table of words spoken by each party at each hearing as well as a set of processed transcripts useful for both further analysis and program validation. One set of processed transcript files prints below each text block the computer-identified speaker and the word count. This made it quick and easy to compare an original transcript to a processed transcript to check that the code was working as designed. Another set of output files put the words spoken by each speaker into its own output file (still organized by hearing and by text blocks). These single-speaker files make it possible to search the transcripts by both topic and speaker. This is useful, for example, when looking for the instances when a particular speaker (e.g., Judge Griesa) used a particular term (e.g., *pari passu*). If working with unprocessed transcripts, the analyst would need to search for the term *pari passu* in the database of transcripts and then disregard the many instances in which other speakers used the term.

This data was processed using a Python notebook using widely available Natural Language Processing (“NLP”) libraries, which allowed the parsing of sentences, counting of words, identification of parts of speech, and other digital manipulations. Custom code was built to

extract from each transcript hearing header information, text of statements made by each speaker, and to associate each speaker with a plaintiff, a defendant, the court, or a third party.

The biggest challenge was finding all the transcripts online, in the records room at the courthouse, or through the court reporters in the Southern District. The analysis herein is based on 145 transcripts obtained by the authors. At least eight are known to be missing based on references in other court documents, three of which are not available because they are still sealed. However, because all of the missing documents are related to Elliott, Dart, and Aurelius, and probably relate to ex parte attachment hearings, it is unlikely to skew the overall results of the analysis as the three firms are already the most active speakers in court.

At a computational level, the transcript analysis suffered from a variety of technical problems. Some copies of dockets were partly illegible. Dates and names were sometimes recorded incorrectly. For example, Argentina's counsel "BLACKMAN" was once recorded as "BLACKIVIAN" due to an error in digitizing the transcript, while Guillermo Gleizer's name was occasionally spelled "GLAZIER" not "GLEIZER" by the court reporter.

Another challenge was assigning a law firm and a party to each speaker at each hearing. More than 100 lawyers spoke at the hearings, and the court reporters did not always list all the speakers and their affiliations at the front of the transcripts, which required manual cross-checking against case dockets to sort out.

Validating the code was done manually by the authors through checking a sample of the transcripts by hand. We found the program accurately assigns speakers to text boxes and that word counts done by hand are within 2% of counts done by the computer. The computer counts were systematically lower than the counts performed by hand because the computer code excluded numbers, dashes, and "Mr." and "Ms."

#### Similarity and Clustering Analysis

The case similarity and clustering analysis is based on the same database of docket entries described above. The objective of the analysis is to calculate a similarity score, or "distance," between every pair of cases in the database. This distance data was then fed into a clustering algorithm to identify plaintiffs exhibiting similar litigation behavior.

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The first step in the analysis was to vectorize the text in each docket entry. We vectorized the data into 300 dimensions using pre-trained word embeddings obtained by the gensim word2vec model trained on Google news. We pre-processed docket entries to eliminate common words (e.g., “and,” “the”), named entities and party designators (e.g., Argentina, Plaintiff), and dates. We also limited analysis to text entries flagged as meaningful, rather than administrative by our prior analysis, i.e., not falling in the Other category.

Having vectorized the data and limited ourselves to relevant docket entries we calculated the distance between any given pair of docket entries in our database. The case-to-case similarity score, or “distance,” between a pair of cases was calculated as the weighted average of the distances between each docket entry in the first case and the closest docket entry in the second case. The distance measure used was the cosine distance between the vector representations of the corresponding docket entries. The weights were docket entry length, so that longer docket entry pairs have a higher weighting than shorter pairs with the same similarity score.

The clustering analysis referred to in section 4 was performed using agglomerative clustering using a distance threshold of 0.10.