NML Capital, Ltd. v. Republic of Argentina and the Changing Roles of the *Pari Passu* and Collective Action Clauses in Sovereign Debt Agreements

The recent defaults or threatened defaults of numerous sovereign states such as the Hellenic Republic, Belize, and Cyprus have made sovereign debt restructuring, once again, an important issue for international financial markets. Of particular interest is the commonplace usage of pari passu *clauses in bond contracts, spurring post-restructuring litigation by "holdout creditors" who claim they should have at least some sort of binding legal "ratable payment" effect. This Note provides a summary of the development of the* pari passu *clause from its beginnings as a form of legal subordination to more senior obligations to the "ratable payment" interpretation. It will show that the Second Circuit's decision in* NML Capital, Ltd. v. Republic of Argentina*, awarding holdout creditors legal rights to ratable payment via a special injunction against Argentina, is particularly controversial given that it is a radical departure from previous decisions attempting to restrain holdout creditors from disrupting the debt restructuring process. However, the anticipated drastic responses from the legislature, courts, and sovereign debt markets did not occur. This Note posits that the existence of "exogenous factors," unrelated to the decision itself, explains why the "interpretive shock" of* NML Capital *did not catalyze revolutionary market change.*

INTRODUCTION

In February 2012, Judge Griesa of the District Court for the Southern District of New York issued injunctions enjoining Argentina from making payments to creditors on its 2005 and 2010 restructurings without making ratable payments to NML Capital, a distressed debt hedge fund that was a holdout creditor in the original two restructurings.[1] In October 2012, the Court of Appeals for the Second Circuit affirmed substantially Judge Griesa's interpretation but remanded the case to the District Court to clarify the meaning of "ratable payment" and how the injunction would affect third parties such as banks processing payments from Argentina to its bondholders.[2] Judge Griesa ruled that "assuming that Argentina pays 100% of what is then due on the Exchange Bonds . . . Argentina would be required to pay 100% 'multiplied by the total amount currently due' to plaintiffs,"[3] which he calculated to be the unpaid principal and accrued interest totaling approximately $1.33 billion.[4]

On August 26, 2013, the Court of Appeals for the Second Circuit affirmed the District Court's orders despite Argentina's threats that it "would not voluntarily obey" the injunctions and numerous amicus briefs filed in support of Argentina's position.[5] In its decision, the Court noted that the almost universal inclusion of collective action clauses ("CACs"), which permit a supermajority of bondholders to impose a restructuring on potential holdouts, would reduce the apparent harshness of the District Court's ratable interpretation on *pari passu* clauses in the future.[6]

Judge Griesa's expansive interpretation of "ratable payment" (and the Court of Appeals' subsequent agreement) has alarmed commentators who consider that the favoring of creditors in restructuring negotiations might result in exploitation by holdout creditors, especially "vulture funds" that purchase distressed debt for

1. NML Capital, Ltd. v. Argentina, No. 08 Civ 6978 (TPG) (S.D.N.Y. Feb. 23, 2012) (granting preliminary injunction).

2. NML Capital, Ltd. v. Argentina, 699 F.3d 246, 264 (2d Cir. 2012).

3. NML Capital, Ltd. v. Argentina, No. 08 Civ 6978 (TPG), 2012 U.S. Dist. LEXIS 167272 (S.D.N.Y. Nov. 21, 2012).

4. *Id.* at *9–10.

5. NML Capital, Ltd. v. Argentina, 727 F.3d 230 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (June 16, 2014). However, the Court stayed enforcement of the injunction pending the outcome of a petition to the Supreme Court for a writ of certiorari on a different issue regarding the Foreign Sovereign Immunities Act, which was subsequently denied.

6. *Id.* at 247–48.

the sole purpose of holding out and profiting.[7] This Note argues that this panic is unwarranted and as an empirical matter has been absent amongst key players for exogenous reasons such as the rise in usage of collective action clauses. Part I of this Note provides a brief overview of academic and judicial interpretations of *pari passu* clauses and *NML Capital*'s contribution to this field. Part II shows that the reactions to this decision by sovereign bond markets, legislatures and courts have been much more limited than might have been expected by commentators. Part III considers the symbiotic relationship between collective action and *pari passu* clauses by turning to the recent Greek sovereign debt restructuring efforts as a comparative example. It argues that the increased prevalence of collective action clauses is an "exogenous reason" that can explain why the "interpretative shock" of the *NML Capital* decision has not sparked stronger reactions.

7. *See, e.g.*, Jeremy Smith & Ann Pettifor, *Don't (Cry for Me) Pay Up Now, Argentina!*, PRIME ECONOMICS (Nov. 24, 2012), http://www.primeeconomics. org/?p=1383 ("By going down the route of 100% support for the hold-out vultures who gorge on the tax revenues used to repay debts (which come from the citizens of much poorer countries), and entirely to the benefit of the 1%, Judge Griesa has shown the world that in America, justice favors the most powerful creditors, the highest finance interest, the most odious of hedge funds."); Theresa A. Monteleone, *A Vulture's Gamble: High-Stakes Interpretation of Sovereign Debt Contracts in* NML Capital, Ltd. v. Argentina, 8 CAP. MARKETS L.J. 149 (2013) ("By interpreting the *pari passu* clause of Argentina's defaulted debt contracts broadly, the court has tipped the balance of power toward creditors in restructuring negotiations, increasing the risk presented by holdout creditors."); *see also* Press Release, Jubilee USA Network, Hedge Fund Wins 2nd Circuit Court Ruling in NML Capital vs. Argentina; Global Poor Lose (Aug. 23, 2013), http://www. commondreams.org/newswire/2013/08/23/hedge-funds-win-2nd-circuit-court-ruling-nml-capital-vs-argentina-global-poor (arguing that the decision "hurts poor people around the globe" and that the Supreme Court must bear the responsibility of "overturn[ing] the 2nd Circuit ruling in order to prevent . . . hedge funds from targeting poor countries and struggling economies"). *Cf.* Felix Salmon, *Don't Worry About an Elliot vs Argentina Precedent*, REUTERS, Jan. 11, 2013, *available at* http://blogs.reuters.com/felix-salmon/2013/01/11/dont-worry-about-an-elliott-vs-argentina-precedent/ (arguing that the broad-based panic about sovereign restructurings is unjustified as the Argentina case is unique on many levels and "very few investors would consider [the decision] . . . to be a green light encouraging them to try the same tactics for future restructurings").

I. *NML CAPITAL*'S INTERPRETATION OF THE *PARI PASSU* CLAUSE IN LIGHT OF THE HISTORY OF ITS USAGE

The *pari passu* clause is a standard clause in public or private international unsecured debt obligations;[8] translated literally it means "with equal step," and has historically been considered to have "no special virtue" in a debt contract aside from the fact that the bonds "were intended to stand on the same level footing without preference or priority among themselves."[9] However, modern interpretations of the *pari passu* clause have seen it evolve from a formality, with little meaning, to a form of legal subordination, to a powerful legally binding promise of ratable payment.

A. Legal Subordination

In the early 1990s, commentators predominantly adopted an intuitive reading of the *pari passu* clause borrowed heavily from its insolvency origins: the clause was seen as a provision that prevented the borrower from incurring obligations to other creditors that ranked legally senior to the debt instrument containing it.[10] The practical significance of equal ranking would be that in the event of the debtor's insolvency, any legally senior obligations would enjoy a priority claim against the debtor's assets in liquidation and would receive preferential treatment over subordinated creditors in a Chapter 11-type debt reorganization.[11]

The somewhat paradoxical inclusion of *pari passu* clauses

8. *See* Rodrigo Olivares-Caminal, *The* Pari Passu *Clause in Sovereign Debt Instruments: Developments in Recent Litigation*, 72 BANK INT'L SETTLEMENTS PAPERS 121 (2013), *available at* http://www.bis.org/publ/bppdf/bispap72u.pdf.

9. Lee C. Buchheit & Jeremiah S. Pam, *The* Pari Passu *Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869, 871 (2004) (quoting SIR FRANCIS BEAUFORT PALMER & ALFRED FRANK TOPHAM, PALMER'S COMPANY PRECEDENTS (1900)).

10. *Id.* at 872–74; *see also* LEE C. BUCHHEIT, HOW TO NEGOTIATE EUROCURRENCY LOAN AGREEMENTS 83 (2d ed. 2000) ("The purpose of the *pari passu* clause is to ensure that the borrower does not have, nor will it subsequently create, a class of creditors whose claims against the borrower will rank legally senior to the indebtedness represented by the loan agreement."); FRANK GRAAF, EUROMARKET FINANCE: ISSUES OF EUROMARKET SECURITIES AND SYNDICATED EUROCURRENCY LOANS 350 (1991) ("[The *pari passu* clause] . . . requires the borrower to ensure that the lending banks' rights under the loan agreement will, at all times, rank at least equally with all of the borrower's other unsecured and unsubordinated obligations so that the banks' share of the borrower's assets in the event of its liquidation will be equal to that of all other unsecured and unsubordinated creditors.").

11. Buchheit & Pam, *supra* note 9, at 873.

into debt instruments for sovereign borrowers who were not subject to domestic bankruptcy legislation resulted in a "degree of agnosticism"[12] about their use. Some argued that they served the purpose of "earmarking" a sovereign's assets to service a particular debt,[13] others considered that they "migrated" from cross-border corporate debt instruments to sovereign debt instruments,[14] and still others opined that they were included as "boilerplate" clauses out of ignorance or convenience.[15] Therefore, the conclusion might very well be that the inclusion of a *pari passu* clause in a loan agreement simply means that sovereign borrowers can, as a practical matter, discriminate amongst creditors as long as they do not attempt to justify their behavior by purporting to establish a legal basis for the discrimination.[16]

B. Ratable Payment I: Elliott Associates v. Republic of Peru

The litigation in *Elliott* arose out of the purchase by a distressed debt fund of loans from two Peruvian banks that were guaranteed by the government of Peru and subsequent refusal of the fund to participate in the "Brady Plan" of debt restructuring by the Peruvian government.[17]

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12. *Id.* at 875.

13. *See, e.g.*, PHILLIP WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE 156 (1980) ("In the case of a sovereign state . . . [t]he clause is primarily intended to prevent the earmarking of revenues of the government or the allocation of its foreign currency reserves to a single creditor and generally is directed against legal measures which have the effect of preferring one set of creditors over the others or discriminating between creditors."); William Tudor John, *Sovereign Risk and Immunity under English Law and Practice*, *in* INTERNATIONAL FINANCIAL LAW 79, 96 (Robert S. Rendell ed., 2d ed. 1983) ("[T]he *pari passu* clause . . . is primarily intended to prevent the earmarking of revenues of the government towards a single creditor").

14. Buchheit & Pam, *supra* note 9, at 875 ("[T]his type of clause had a tendency to migrate—through the ignorance or inattention of contract drafters—from cross-border corporate debt instruments to sovereign debt instruments.").

15. *See generally* MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN (2013).

16. Lee C. Buchheit, *The* Pari Passu *Clause* Sub Specie Aeternitatis, 10 INT'L FIN. L. REV. 11, 12 (1991).

17. Elliott Associates, L.P. v. Banco de la Nacion, 194 F.R.D. 116 (S.D.N.Y. 2000). The Brady Plan was a strategy devised by the incoming Bush Administration at the end of the 1980s that emphasized debt-forgiveness for highly indebted foreign countries. *See generally* Ian Vasquez, *The Brady Plan and Market-Based Solutions to Debt Crises*, 16 CATO J. 233 (1996).

Elliott Associates, the distressed debt fund, relied on the following expert testimony of Professor Andreas F. Lowenfeld:

> I have no difficulty in understanding what the *pari passu* clause means: It means what it says—a given debt will rank equally with other debt of the borrower, whether that borrower is an individual, a company, or a sovereign state. A borrower from Tom, Dick and Harry can't say "I will pay Tom and Dick in full, and if there is anything left over I'll pay Harry." If there is not enough money to go around, the borrower faced with a *pari passu* provision must pay all three of them on the same basis . . . . But if the borrower proposed to pay Tom [everything], Dick [something] and Harry nothing, a court could and should issue an injunction at the behest of Harry. The injunction would run in the first instance against the borrower, but I believe (putting jurisdictional considerations aside) to Tom and Dick as well.[18]

In 2000, the Brussels Court of Appeal endorsed the above judgment and issued an *ex parte* injunction to restrain Euroclear, the international clearing bank Peru intended to use to distribute its payments to Brady Plan creditors, from issuing those payments. It held:

> The basic agreement regulating the reimbursement of the Peruvian foreign debt also indicates that the different creditors enjoy a "*pari passu* clause," which has a result that the debt should be diminished equally towards all creditors in proportion to their claim. From this, one seems to have to conclude that, in case of the payment of interests, no creditors can be excluded from its proportional part.[19]

The broad "ratable payment" interpretation was a radical departure from the restrained effect *pari passu* clauses were believed to have in sovereign bonds and sparked a slew of criticism from various academics. Professors G. Mitu Gulati and Kenneth N. Klee argue that such an interpretation has the hidden costs of increasing holdout leverage, vulture investor opportunism, and legal costs of

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18. Declaration of Prof. Andreas F. Lowenfeld, Aug. 31, 2000, at 11–12 (footnote omitted); Elliot Associates, 2000 WL 1449862 (96 Civ. 7916 (RWS), 96 Civ. 7917 (RWS)), *quoted in* Buchheit & Pam, *supra* note 9.

19. Elliott Associates, L.P., General Docket No. 2000/QR/92 (Ct. App. Of Brussels, 8th Chamber, Sept. 26, 2000), *quoted in* Buchheit & Pam, *supra* note 9.

restructuring.[20] Professor William Bratton considered the shift to *ex post* interpretation of the *pari passu* clause to highlight the vulnerability of a purely contractual debt framework. He preferred an *ex ante* timeframe which would guide contract interpretation and protect values freely allocated by the contracting parties from opportunistic *ex post* recapture, and suggested a sovereign bankruptcy regime instead of the current contractual framework.[21]

If the effect of *Elliott Associates* was to send shockwaves across the sovereign debt community and render sovereign immunity that much more vulnerable, market players reacted strongly against it. While the use of *pari passu* clauses in private debt agreements continued to rise,[22] policymakers responded by pushing for a coordinated sovereign bankruptcy scheme to prevent coordination problems amongst creditors,[23] while courts in the United States[24] and

20. G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635, 651 (2001).

21. William W. Bratton, Pari Passu *and a Distressed Sovereign's Rational Choices*, 53 EMORY L.J. 823, 867 (2004).

22. *See* Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72, 83 (2013).

23. *See, e.g.*, Ann Krueger, First Deputy Managing Director, International Monetary Fund, Address at the National Economists' Club Annual Members' Dinner, International Financial Architecture for 2002: New Approach to Sovereign Debt Restructuring (Nov. 26, 2001), *available at* http:///www.imf.org/external/np/speeches/2001/112601.htm (demonstrating the IMF's usage of *Elliott Associates* as its argument for a treaty-based Sovereign Debt Restructuring Mechanism (SDRM) that would enforce some form of supermajority collective action binding all creditors amongst private foreign-law instruments); Financial Markets Law Committee of the Bank of England *Pari Passu* Clauses Working Group, *Analysis of the Role, Use and Meaning of* Pari Passu *Clauses in Sovereign Debt Obligation as a Matter of English Law* (Mar. 2005) (supporting the "narrow interpretation" that *pari passu* treatment of creditors applies only when actual insolvency proceedings have commenced).

24. *See, e.g.*, Red Mountain Finance, Inc. v. Democratic Republic of Congo and National Bank of Congo, No. CV 00-0164 R, 2000 WL 34479543 (C.D. Cal. Nov. 20, 2000) (entering an order in favor of a judgment creditor enjoining the Democratic Republic of Congo and its central bank from making or authorizing payments with respect to any external debt without making a "proportionate payment" to the judgment creditor, but there is no indication that the creditor in that action was able to implement the relief granted by the court against the DRC); Nacional Financiera, S.N.C. v. Chase Manhattan Bank, No. 00 Civ. 1571, 2003 WL 1878415 (S.D.N.Y. Apr. 14, 2003) (endorsing an interpretation of *pari passu* as an equal treatment of creditors despite citing *Elliot Associates* in dicta, noting that since the agreement had not specified a right for the noteholders to obtain an injunction to bar the issuer's preferential payments, there was no obligation on any noteholder to refuse payment of money that it was owed until it had received assurances that other noteholders were receiving proportionate payments).

the United Kingdom[25] were hesitant to apply *Elliott Associates*' broad interpretation to subsequent cases with similar facts.

C. Ratable Payment II: NML Capital, Ltd. v. Republic of Argentina

Twelve years later, this novel *pari passu* interpretation was re-examined in *NML Capital*. *NML Capital* involved the interpretation of a *pari passu* clause in Argentina's 1994 Fiscal Agency Agreement (FAA), which essentially promised a ranking of payment obligations:

> The Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness . . . .[26]

NML Capital, Ltd., a vulture hedge fund subsidiary of Elliot Management Corporation, purchased the FAA bonds on a secondary market for a price lower than the original amount.[27] After Argentina's first default in 2001,[28] its President declared a "temporary moratorium" on principal and interest payments on more than $80 billion of its public debt, including the FAA bonds. Each year since then, Argentina has passed legislation renewing the moratorium and has made no principal or interest payments on the defaulted debt.[29]

In 2005, Argentina initiated an exchange offer allowing FAA bondholders to exchange their defaulted bonds for new unsecured and unsubordinated debt. In order to induce bondholders to accept

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25. In *Kensington Int'l, Ltd. v. Republic of the Congo*, the English Court of Appeal expressed strong reservations about Elliott Associates' interpretation of the *pari passu* clause and considered it unpersuasive. Kensington Int'l, Ltd. v. Republic of the Congo, [2003] EWCA Civ 709, A3/2003/1036 (appeal taken from Eng.).

26. Fiscal Agency Agreement between the Republic of Argentina and Bankers Trust Company, Oct. 19, 1994, Exhibit 1 at 2–3, NML Capital, Ltd. v. Argentina, 699 F.3d 246 (2d Cir. 2012) (No. 12-105).

27. NML Capital, Ltd. v. Argentina, 699 F.3d 246, 251 (2d Cir. 2012).

28. Sophie Arie & Andrew Cave, *Argentina Makes Biggest Debt Default in History*, TELEGRAPH, Dec. 24, 2001, *available at* http://www.telegraph.co.uk/news/worldnews/southamerica/argentina/1366218/Argentina-makes-biggest-debt-default-in-history.html.

29. *NML Capital*, 699 F.3d at 251.

the exchange offer, Argentina made a risk factor disclosure in its prospectus, stating that the Government had no intention of making payment on any bonds not tendered.[30] The Argentine legislature also passed Law 26.017 (the "Lock Laws"), declaring that "the national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to the bonds."[31] Argentina's second exchange offer in 2010 was made on similar terms, and NML Capital, Ltd. did not participate in either restructuring. Instead, it sued the Government for defaulting on the FAA bond payment obligations.[32]

Judge Griesa interpreted this to mean that "assuming that Argentina pays 100% of what is then due on the Exchange Bonds . . . Argentina would be required to pay 100% 'multiplied by the total amount currently due' to plaintiffs" and ordered an injunction to prevent any effort to make payments under the terms of the Agreement without also concurrently or in advance making payment to NML Capital.[33]

In this context, Judge Griesa's district court decision drew controversy as an anomalous departure from the trend of moving away from Elliott Associates' "broad interpretation" of the *pari passu* clause,[34] the "genealogy of a mistake."[35] Why, therefore, did it receive the subsequent affirmation of the Court of Appeals of the Second Circuit,[36] and to what extent should it be considered good law to be adopted in subsequent cases?

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30. Argentina, Prospectus Supplement to Prospectus (Dec. 27, 2004, Jan. 10, 2005), at 18, *available at* http://www.mecon.gov.ar/finanzas/download/us_prospectus_and_prospectus_supplement.pdf ("The Government has announced that it has no intention of resuming payment on any bonds eligible to participate in [the] exchange offer . . . that are not tendered or otherwise restructured as part of such transaction.").

31. Law No. 26.017, Feb. 9, 2005, [30.590] B.O. (Arg.).

32. *NML Capital*, 699 F.3d. at 253–55.

33. NML Capital, Ltd. v. Argentina, No. 08 Civ 6978 (TPG) (S.D.N.Y. Feb. 23, 2012) (granting preliminary injunction).

34. *See generally* Rodrigo Olivares-Caminal, *The* Pari Passu *Interpretation in the Elliott Case: A Brilliant Strategy but an Awful (Mid-Long Term) Outcome?*, 40 HOFSTRA L. REV. 39 (2011).

35. Romain Zamour, Note, NML v. Argentina *and the Ratable Payment Interpretation of the* Pari Passu *Clause*, 38 YALE J. INT'L L. 55, 60 (2013) (providing a historical account of the debate surrounding the *pari passu* clause and arguing that this genealogy of the fierce debate surrounding the *pari passu* clause explains how the Second Circuit decisions were framed in the mind of most commentators).

36. NML Capital, Ltd. v. Argentina, 727 F.3d 230 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (June 16, 2014).

On one hand, Romain Zamour points out that the Second Circuit did not clearly articulate a test to determine whether Argentina breached the *pari passu* clause because even under the narrowest interpretation of the clause, Argentina was in breach. He cites with approval Professors Gulati and Klee's theory that because the *pari passu* clause is boilerplate, "it must be interpreted with a strong emphasis on policy and the efficiency of the financial markets."[37] The Second Circuit was merely deciding two very different questions: whether Argentina breached the *pari passu* clause, and whether the injunction was an appropriate remedy for the breach.[38] In this light, the Second Circuit's decision was a highly contextual one, applying to Argentina's position as a uniquely bad debtor with a uniquely restrictive *pari passu* clause.

The Second Circuit seemed to adopt this approach in its August 2013 decision, where it held that "this case is an exceptional one with little apparent bearing on transactions that can be expected in the future." It went on to state that

> [its decision] does not control the interpretation of all *pari passu* clauses or the obligations of other sovereign debtors under *pari passu* clauses in other debt instruments . . . [W]e have not held that a sovereign debtor breaches its *pari passu* clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor's rights. We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA.[39]

On the other hand, some commentators adopt a broader view of the decision as an attempt to overhaul the current sovereign bankruptcy regime, which makes for bad law and policy. They argue that this could result in several effects: maximizing collateral damage by pushing bankrupt sovereigns to defy court orders, arbitrarily allowing single enterprising creditors large windfalls that are not shared with other defaulted bondholders, and reducing both the debtors' and the creditors' willingness to restructure defaulted debt due to the increased litigation risk premium.[40] Going forward,

37. Zamour, s*upra* note 35*,* at 65; *see also* Gulati & Klee, *supra* note 20.

38. Zamour, *supra* note 35, at 56.

39. NML Capital, 727 F.3d at 247.

40. Anna Gelpern, *Sovereign Damage Control*, Peterson Institute for International Economics Policy Brief, PB13-12 (May 2013), at 9–12.

Theresa Monteleone recommends that sovereign issuers take immediate action to amend the terms of their bond offerings to prevent being caught under this broad interpretation.[41]

D. Conclusion: NML Capital—*A Step Backwards?*

Reading *NML Capital* in light of the genealogy of *pari passu* interpretation and the criticism of and judicial attempts to reverse the effect of its predecessor, *Elliott Associates*, it is at least arguable that *NML Capital's* "ratable payment" interpretation of Argentina's *pari passu* clause was a radical departure from previous precedent and a systemic cause for concern for the many sovereigns who had previously issued bonds with *pari passu* clauses extremely similar in language to Argentina's.[42]

II. REACTIONS TO *NML CAPITAL V. ARGENTINA*: MARKETS, POLICYMAKERS, AND COURTS

Because *NML Capital's* broad "ratable payment" interpretation conflicts with years of attempts by the sovereign debt market, legislatures, and courts to undo the same wayward direction of *Elliott Associates*, its positive and normative significance as a precedent must be assessed with reference to the reactions of the same key players.

41. Monteleone, *supra* note 7.

42. *See supra* Part I.C.

A. Sovereign Bond Issuers and Markets

1. Ukraine, Côte d'Ivoire, Serbia, Mongolia, and Costa Rica: No Change to Wording of *Pari Passu* Clauses or Risk Assessments

Most sovereign issuers with *pari passu* clauses similarly worded to Argentina's[43] in their fiscal agreements have neither modified them nor added an additional risk factor disclaimer in light of *NML Capital*. For example, Ukraine retained a similarly worded clause in its Prospectus dated February 8, 2013 without any form of rectification or risk disclosure:

> The Notes constitute direct, unconditional, and . . . unsecured obligations of the Issuer and . . . rank *pari passu* without any preference among themselves. The payment obligations of the Issuer under the Notes shall rank at least *pari passu* with all other unsecured and unsubordinated obligations of the Issuer, present and future, save only for such obligations as may be preferred by mandatory provisions of applicable law."[44]

Côte d'Ivoire,[45] Serbia,[46] Mongolia,[47] and Costa Rica[48] did the same.

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43. HR 23 maart 2001, JOR 2001, 117 m.nt. Th.A.L. Kliebisch (Nederlandsche Trustmaatshcappij B.V. et ano./ ABN AMRO BANK N.V.) (Neth.); *see* Weidemaier, Scott & Gulati, *supra* note 22.

44. Ukraine, U.S. $100,000,000,000 7.8%. Notes due 2022, Prospectus, Feb. 8, 2013, *available at* http://ftalphaville.ft.com/files/2013/02/Ukraine-Feb-8-2013.pdf. *Cf.* Ukraine, U.S. $1,250,000,000 7.8%. Notes due 2022, Prospectus, Nov. 26, 2012, *available at* http://ftalphaville.ft.com/files/2012/12/Ukraine-pari.pdf. It must be noted, however, that these were governed by U.K. and not New York law.

45. Côte d'Ivoire, U.S. $186,755,000, New U.S. Dollar Denominated Step-Up Bonds due 2032, Listing Prospectus, Nov. 30, 2012, *available at* http://ftalphaville.ft.com/files/2012/12/Ivory-Coast-pari.pdf ("The Securities are unsecured. The Securities constitute direct, general, unconditional and unsecured and unsubordinated obligations of the Republic ranking *pari passu*, without any preference among themselves with all other outstanding, unsecured and unsubordinated obligations, present and future, of the Republic.").

46. Serbia, U.S. $750,000,000, 5.250%. Notes due 2017, Prospectus, Nov. 19, 2012, *available at* http://ftalphaville.ft.com/files/2012/12/Serbia-pari.pdf ("The Notes will constitute direct, unconditional and . . . unsecured obligations of the Issuer. The Notes rank and will rank *pari passu* among themselves and at least *pari passu* in right of payment with all other present and future unsecured obligations of the Issuer, save only for such obligations as may be preferred by mandatory provisions of applicable law. The full faith

2. Mexico, Colombia, and Paraguay: Risk Factor Disclosures

Mexico,[49] Colombia,[50] and Paraguay[51] chose to highlight the Second Circuit proceedings in their own securities offering supplemental risk factor disclosures, noting the outcome might make sovereign debt restructuring more difficult in the future. The risk disclosure statement, once idiosyncratic to the law firm Cleary Gottlieb Steen & Hamilton LLP, which had in the past represented both Mexico and Colombia as sovereign issuers, as well as the Initial Purchasers in Paraguay's issue, is becoming common among other issuers:

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and credit of the Issuer is pledged to the due and punctual payment of all amounts due in respect of the Notes."). Note, however, that Serbia's issue of bonds was governed by English and not New York law.

47. Mongolia, U.S. $5,000,000,000 Global Medium Term Note Program, Information Memorandum, Nov. 21, 2012, *available at* http://ftalphaville.ft.com/files/2012/12/Mongolia-pari.pdf ("The Notes and any relative Receipts and Coupons are direct, unconditional, unsubordinated and . . . unsecured obligations of the Issuer and rank and will rank *pari passu*, without preference among themselves, with all other unsecured and unsubordinated External Indebtedness . . . of the Issuer, from time to time outstanding.").

48. Costa Rica, U.S. $1,000,000,000, 4.250%. Notes due 2023, Offering Circular, Nov. 16, 2012, *available at* http://ftalphaville.ft.com/files/2012/12/Costa-Rica-pari.pdf ("The Notes will constitute general, direct, unconditional and unsecured Public External Indebtedness of the Republic and will rank *pari passu* in right of payment, without any preference among themselves, with all unsecured and unsubordinated obligations of the Republic, present and future, relating to Public External Indebtedness of the Republic. The Republic has pledged its full faith and credit for the due and punctual payment of all amounts due in respect of the Notes.").

49. *See* Mexico, Global Medium-Term Notes, Series A, Due Nine Months or More from the Date of Issue, U.S. $1,500,000,000, 4.750% Global Notes Due 2044, Terms Agreement, Jan. 7, 2013, *available at* http://www.sec.gov/Archives/edgar/data/101368/000119312513009509/d465688dex992.htm. It has become a mainstay in subsequent notes issues. *See also* Mexico, Final Terms and Conditions, 2.75% Global Notes due 2023, Apr. 9, 2013, *available at* http://www.sec.gov/Archives/edgar/data/101368/000119312513149206/d519676dfwp.htm; Mexico, U.S. $110,000,000,000 Global Medium-Term Notes, Series A, Final Pricing Supplement, Jan. 9, 2014, *available at* http://www.sec.gov/Archives/edgar/data/101368/000119312514008099/d657042d424b2.htm.

50. *See* Colombia, Preliminary Prospectus Supplement to Prospectus (Dec. 20, 2011; Jan. 22, 2013), *available at* http://www.sec.gov/Archives/edgar/data/917142/000119312513018436/d470699d424b3.htm.

51. Paraguay, U.S. $500,000,000, 4.625% Bonds due 2023, Offering Circular, Jan. 17, 2013, *available at* http://ftalphaville.ft.com/files/2013/02/Paraguay-2013.pdf.

> Recent federal court decisions in New York create uncertainty regarding the meaning of ranking provisions and could potentially reduce or hinder the ability of sovereign issuers to restructure their debt.
>
> In ongoing litigation in federal courts in New York captioned *NML Capital, Ltd. v. Republic of Argentina*, the U.S. Court of Appeals for the Second Circuit has ruled that the ranking clause in bonds issued by Argentina prevents Argentina from making payments in respect of the bonds unless it makes pro rata payments on defaulted debt that ranks *pari passu* with the performing bonds . . . . We cannot predict when or in what form a final appellate decision will be granted. Depending on the scope of the final decision, a final decision that requires ratable payments could potentially hinder or impede future sovereign debt restructurings and distressed debt management unless sovereign debt issuers obtain the requisite bondholder consents pursuant to a collective action clause, if applicable, in their debt, such as the collective action clause contained in the Notes . . . . Mexico cannot predict whether or in what manner the courts will resolve this dispute or how any such judgment will be applied or implemented.[52]

However, Cleary Gottlieb Steen & Hamilton LLP stopped short of changing their contracts to remove or refine *pari passu* clauses used in their documentation pre-*NML Capital*, despite the fact that this wording was functionally identical to Argentina's problematic clause in *NML Capital*.[53]

In Paraguay's case, "[t]he Bonds will be general, direct,

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52. This additional risk disclosure was first included in a notes issue dated January 7, 2014. *See* Mexico, Global Medium-Term Notes, Series A, Due Nine Months or More from the Date of Issue, U.S. $1,500,000,000, 4.750% Global Notes Due 2044, Terms Agreement, Jan. 7, 2013, *available at* http://www.sec.gov/Archives/edgar/data/101368/000119312513009509/d465688dex992.htm. It has become a mainstay in subsequent notes issues. *See also* Mexico, Final Terms and Conditions, 2.75% Global Notes due 2023, Apr. 9, 2013, *available at* http://www.sec.gov/Archives/edgar/data/101368/000119312513149206/d519676dfwp.htm; Mexico, U.S. $110,000,000,000 Global Medium-Term Notes, Series A, Final Pricing Supplement, Jan. 9, 2014, *available at* http://www.sec.gov/Archives/edgar/data/101368/000119312514008099/d657042d424b2.htm. Identical language is used in Colombia's and Paraguay's prospectuses. *See* sources cited *supra* notes 50–51.

53. *See infra* notes 54–57 and accompanying text. For the language of Argentina's clause, see Fiscal Agency Agreement between the Republic of Argentina and Bankers Trust Company, *supra* note 26.

unconditional, unsubordinated, and unsecured External Debt of Paraguay and will be backed by the full faith and credit of Paraguay. The Bonds will rank equally in right of payment with all existing and future unsubordinated and unsecured External Debt of Paraguay."[54]

And in Colombia's case:

> The bonds offered by this prospectus supplement will be direct, general, unconditional, unsecured and unsubordinated external indebtedness of Colombia and will be backed by full faith and credit of Colombia. The bonds will rank equally in right of payment with all of Colombia's present and future unsecured and unsubordinated external indebtedness.[55]

This phenomenon of including risk factor disclosures instead of actual *pari passu* clauses is an interesting development. Several commentators have explained it as the product of a fear of novelty and the "stickiness" of the boilerplate *pari passu* clause, a lack of foreseeable holdout creditors, or the improbability that the issuer itself will default.[56]

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54. Paraguay, U.S. $500,000,000, 4.625% Bonds due 2023, Offering Circular, Jan. 17, 2013, *available at* http://ftalphaville.ft.com/files/2013/02/Paraguay-2013.pdf.

55. Colombia, 2.625% Global Bonds due 2023, Prospectus Supplement, Jan. 22, 2013, *available at* http://www.sec.gov/Archives/edgar/data/917142/0001193125 13021964/d47 0699d424b5.htm.

56. *See* Anna Gelpern, *Don't Fix It, Call It a Risk Factor! (Updated)*, CREDIT SLIPS (Feb. 21, 2013, 8:45 PM), http://www.creditslips.org/creditslips/2013/02/dont-fix-it-call-it-a-risk-factor-.html (arguing that the *pari passu* clauses are not redrafted because lawyers let sleeping dogs lie, that *pari passu* clauses are commitment devices, that they are in any event of marginal relevance to upstanding debtors who will never default, and that lack of knowledge of the outcome of the NML Capital litigation prevents lawyers from working on a solution to the *pari passu* problem); Joseph Cotterill, *A Sovereign Risk Factor is Born*, FT ALPHAVILLE (Feb. 11, 2013), http://ftalphaville.ft.com/2013/02/11/1380812/a-sovereign-risk-factor-is-born/ (suggesting that sovereign issuers are including a risk factor instead of redrafting "vulnerable" *pari passu* clauses because they do not see a holdout threat or do not like novelty and see this version of the clause as "boilerplate"); *see also* Parag Patel, *Upheaval in the Sovereign Debt Market: The Argentinean Story (Part 2)*, THE NETWORK: BUSINESS AT BERKELEY LAW (Apr. 23, 2013, 6:01 AM), http://thenetwork.berkeleylaw blogs.org/2013/04/23/upheaval-in-the-sovereign-debt-market-the-argentinean-story-part-2/.

3. Italy: Changes to Wording of a *Pari Passu* Clause

Italy's original *pari passu* clause differed from that used by Argentina and its progeny in that it consisted of a promise of ratable payment as opposed to a mere ranking of payment obligations:[57]

> The Securities are the direct, unconditional and general and . . . unsecured obligations of Italy and will rank equally with all other evidences of indebtedness issued in accordance with the Fiscal Agency Agreement and with all other unsecured and unsubordinated general obligations of Italy for money borrowed . . . . Amounts payable in respect of principal of (and interest on) the Securities will be charged upon and be payable out of the [Treasury of Italy], equally and ratably with all other amounts so charged and amounts payable in respect of all other general loan obligations of Italy.[58]

In January 2013, Italy amended its *pari passu* clause to remove the ratable payment obligation:

> The Securities are direct, unconditional and general and . . . unsecured obligations of Italy and will rank equally with all other evidences of indebtedness issued in accordance with the Fiscal Agency Agreement and with all other unsecured and unsubordinated general obligations of Italy for money borrowed, except for such obligations as may be preferred by mandatory provisions of international treaties and similar obligations to which Italy is a party. Italy hereby pledges its full faith and credit for the due and punctual payment of the Securities and for the due and timely performance of all obligations of Italy with respect thereto.[59]

Italy's old *pari passu* clause was considered one of the most

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57. Gelpern *Sovereign Damage Control*, *supra* note 40, at 4 (identifying the difference between ranking of payment obligations and promise of ratable payment).

58. Fiscal Agency Agreement Between Republic of Italy and Citibank, N.A., May 15, 2003, *available at* http://www.sec.gov/Archives/edgar/data/52782/000115697303000912/u46221exv99wa.htm. For the most recent usage of this clause, see Italy, 3.125% Notes due 2015, Prospectus Supplement, Jan. 19, 2010, *available at* http://www.sec.gov/Archives/edgar/data/52782/000095012310004088/u08215 e424b5.htm.

59. Fiscal Agency Agreement Between Republic of Italy and Citibank, N.A. (Jan. 29, 2013), *available at* http://www.sec.gov/Archives/edgar/data/52782/000119312513038559/d475398dex99a.htm.

vulnerable in the market,[60] and its unusually direct and unambiguous provision to pay bonds "equally and ratably"[61] with all of Italy's debt was long overdue for a change in light of the interpretations of the clause proffered in *Elliot Associates* and *NML Capital*.[62] It should be noted that the exclusion of "obligations as may be preferred by mandatory provisions of international treaties and similar obligations to which Italy is a party" is hypothesized[63] to be a reference to the European Stability Mechanism (ESM) Treaty,[64] under which ESM loans are supposed to enjoy a "preferred creditor status in a similar fashion to those of the International Monetary Fund (IMF), while accepting preferred creditor status of the IMF over the ESM."[65] Therefore, Italy's amendment of its *pari passu* clause was probably motivated by both the vulnerability of its original clause and its need to emphasize the preferred ranking of ESM loans because of its accession to the ESM Treaty, instead of the *NML Capital* decision.

B. Legislatures

1. Argentina: "Unique" Recalcitrance and Reliance on Intercreditor Negotiation

Following constant criticism by the U.S. courts, legal scholars expected that Argentina would begin phasing out usage of its "Lock Laws," which effectively shut out creditors who did not accept a steep discount on their bonds within months by requiring congressional approval to pay holdout creditors.

However, almost immediately after the Second Circuit's decision in August 2013 to grant a stay on the injunction pending the

60. *See, e.g.*, Anna Gelpern, *Italy's* Pari Passu *Scrubbing*, CREDIT SLIPS (Apr. 17, 2013, 12:17 AM), http://www.creditslips.org/creditslips/2013/04/italys-pari-passu-scrubbing.html; Joseph Cotterill, *Was That Promise of Ratable Payment Wrong, Should Italy Not Have Done That?*, FT ALPHAVILLE (Apr. 18, 2013), http://ftalphaville.ft.com/2013/04/18/1464972/was-that-promise-of-ratable-payment-wrong-should-italy-not-have-done-that/.

61. Fiscal Agency Agreement Between the Republic of Italy and Citibank, *supra* note 58.

62. Some commentators are indifferent towards the question of whether Italy's amendment was a result of the outcome of *NML Capital*. *See*, *e.g.*, Cotterill, *supra* note 60.

63. *Id.*

64. Treaty Establishing the European Stability Mechanism, 2011 O.J. (L 91) 1, *available at* http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf.

65. *Id.* at 7.

outcome of the appeal to the U.S. Supreme Court,[66] Argentina started to display defiance as a "uniquely recalcitrant debtor."[67] Its Minister of Economy vowed that Argentina's "policy" of paying on the Exchange Bonds but not paying anything to the Respondents "is not going to change,"[68] and its President proposed a new bond swap offer aimed at holdout creditors. This proposed swap represented a change from prior deals in that it was open-ended and governed by Argentine rather than New York law—a move clearly calculated to protect payments on restructured debt from the ruling in *NML Capital*.[69] This proposal blatantly ignored the district court's preliminary injunction prohibiting Argentina from taking "any action" to "evade" or "render . . . ineffective" the district court's orders[70] and was considered by the Respondents' lawyers as a "mockery of Argentina's assurance to the Second Circuit . . . that it was not devising schemes to evade the injunctions."[71]

In October 2013, Gramercy Funds Management, a rival group of hedge funds, proposed an intercreditor negotiation scheme under which Argentine exchange bondholders would agree to pay holdout creditors, including NML Capital, 20% of their coupons for approximately five years to stop their legal attempts to force Argentina to pay them in full.[72] This would ensure that holdout creditors receive a higher payout, bondholders see an increase in the value of their bonds as the threat of default would be greatly reduced, and Argentina maintains its public policy stance of not bowing to holdout creditors.[73] Although it is unlikely that the proposed scheme

66. NML Capital, Ltd. v. Argentina, 727 F.3d 230 (2d Cir. 2013).

67. *Id.*; *see also* Bob Van Voris, *Argentina Loses U.S. Appeal of Defaulted Bonds Case*, BLOOMBERG (Aug. 24, 2013, 10:04 AM), http://www.bloomberg.com/news/2013-08-23/argentina-loses-u-s-appeal-of-defaulted-bonds-case.html.

68. Taos Turner, *Argentine Minister Says Won't Change Plans to Pay Holdout Creditors*, WALL ST. J., Aug. 25, 2013, *available at* http://bankruptcynews.dowjones.com/Article?an=DJFDBR0020130826e98qi8pfj.

69. Hugh Bronstein & Walter Bianchi, *Argentina Has New Bond Swap Plan: Same Terms, No End Date*, REUTERS, Aug. 28, 2013, *available at* http://www.reuters.com/article/2013/08/28/us-argentina-debt-reopen-idUSBRE97 R0RL20130828.

70. NML Capital, Ltd. v. Argentina, No. 08 Civ 6978 (TPG), 2012 U.S. Dist. LEXIS 167272, at *16 (S.D.N.Y. Nov. 21, 2012).

71. Argentina Opposition to Plaintiff's Motion to Amend Stay at 11–12, NML Capital, Ltd. v. Argentina, No. 12-105 (2d Cir. Dec. 3, 2012).

72. Joseph Cotterill, *Look Ma, No Uniquely Recalcitrant Sovereign*, FT ALPHAVILLE (Nov. 1, 2013), http://ftalphaville.ft.com/2013/11/01/1677502/look-ma-no-uniquely-recalcitrant-sovereign/.

73. Benedict Mander, *Funds Offer Way to Avert Default by Argentina*, FIN. TIMES, Oct. 24, 2013, http://www.ft.com/intl/cms/s/0/2537ebf8-3c07-11e3-b85f-00144feab7de.html?

would come to fruition given the 85% approval threshold for both the exchange bondholders and the holdout creditors, it demonstrates a trend towards intercreditor negotiation as a means to undercut the litigation leverage of holdout creditors.[74]

Argentina's recalcitrance, therefore, might not be "unique" to its status as a debtor scorned by the courts, but may signal an increasing reliance on intercreditor negotiation rather than litigation to deal with holdout creditors. In this light, the *NML Capital* decision might have limited significance as sovereign debtors turn to intercreditor negotiation as a means to circumvent the clout of holdout creditors.

2. Belize: An "Understanding" of Ranking of Obligations, not Ratable Payment

In September 2012, Belize came close to a full default on its 2029 Bonds,[75] failing to make a $23 million interest payment even after a ninety-day grace period, and was subsequently categorized by Standard & Poor's as being in "selective default."[76] In December 2012, the Government proposed a debt exchange offer containing terms such as a reduction of the coupon from 8.5% to 5% coupled with a step-up coupon structure rising to 6.767% in August 2017, and an extension of maturity of the 2029 Bonds to 2038.[77]

The Government took it upon itself to clarify its accepted meaning of the *pari passu* clause. Belize's Offering Memorandum for its 2038 Bonds (the "New Bonds") references and rejects the *NML Capital* interpretation of "pro rata payment"—*pari passu* here is understood to mean ranking of obligations and not ratable payment.[78] It states that "to ensure clarity on the point, Belize does

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74. NML Capital, Ltd. v. Argentina, 727 F.3d 230 (2d Cir. 2013).

75. *See* Belize, U.S. Dollar Bonds Due 2029, Listing Memorandum (the "*New Bonds*"), Mar. 5, 2007, *available at* http://ambergriscaye.com/art2/Belizesup.pdf.

76. *Belize Wins 60-Day Reprieve After Partial Debt Payment*, BBC NEWS, Sept. 21, 2012, http://www.bbc.co.uk/news/business-19672659.

77. *See* Press Release, Belize Ministry of Fin., Belize Launches Debt Exchange Offer (Feb. 15, 2013), http://www.mof.gov.bz/index.php/2012-08-30-03-42-02/2012-10-04-16-45-58/2012-10-04-17-02-43/finish/17-belize-2013-debt-restructuring/52-belize-launches-debt-exchange-offer; *see also* Georgia Wells, *Belize Announces New Debt Restructuring Terms*, WALL ST. J., Feb. 12, 2013, *available at* http://online.wsj.com/article/BT-CO-20130212-714640.html.

78. Belize, Offer to Exchange U.S. Dollar Bonds Due 2038 (the "*New Bonds*"),

not understand [its *pari passu* clause] or any comparable provision in any other debt instrument of Belize, to require Belize to pay all items of its Public Debt on a ratable basis."[79] The resolution further states:

> The New Bonds will be general, direct, unconditional and unsecured obligations of Belize and will rank at least equally among themselves and with all of Belize's existing and future unsecured and unsubordinated bond indebtedness (it being understood that this equal ranking status shall not require Belize to pay all items of its bond indebtedness on a ratable basis.[80]

Belize's debt exchange offer was successful, with 86.17% of the 2029 bonds tendered and exchanged for the new bonds.[81]

The impact of the Government's "clarification" on any future holdout litigation is debatable. On one hand, the Government's understanding that it did not believe it was required to make payments on a ratable basis does not necessarily mean that bondholders agree with this definition; nor does it necessarily quell fears of future litigation. This is because the clarification was inserted into the bond's offering memorandum, not the bond contract itself,[82] and a subsequent New York decision makes it clear that purported "promises" in offering memoranda do not command as much authority as contractual terms.[83] On the other hand, it is at least arguable that the bondholders knew what they were getting into, as the Government had made clear its understanding of the meaning of payment by putting it into law.[84] Moreover, the offering

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Offering Memorandum, Feb. 15, 2013, *available at* http://www.mof.gov.bz/index.php/downloads/finish/17-belize-2013-debt-restructuring/47-belize-offering-memorandum-final.

79. *Id.* at 29.

80. Nat'l Assembly of Belize, *Resolution: Government of Belize—External Debt Restructuring Motion*, Feb. 13, 2013, *available at* http://ftalphaville.ft.com/files/2013/02/BNAresolution.pdf.

81. Press Release, Belize Ministry of Fin., Belize Debt Exchange Offer Successful (Mar. 8, 2013), http://www.mof.gov.bz/index.php/2012-08-30-03-42-02/2012-10-04-16-45-58/2012-10-04-17-02-43/finish/17-belize-2013-debt-restructuring/51-debt-exchange-offer-successful.

82. Joseph Cotterill, *I Can't Belize It's Not Ratable Payment*, FT ALPHAVILLE (Feb. 25, 2013), http://ftalphaville.ft.com/2013/02/25/1398302/i-cant-belize-its-not-ratable-payment/.

83. Ex.-Imp. Bank of China v. Grenada, 13 Civ. 1450 (HB), 2013 WL 4414875, at *3–4 (S.D.N.Y. Aug. 19, 2013).

84. Joseph Cotterill, *And the Beat Goes on,* Pari Passu *and Sovereign Restructuring Edition*, FT ALPHAVILLE (Mar. 11, 2013), http://ftalphaville.ft.com/2013/03/11/1418412/and-the-beat-goes-on-pari-passu-and-sovereign-restructuring-edition/.

memorandum emerged from a hotly negotiated restructuring and after extensive discussions on terms.[85] In addition, Belize's *pari passu* clause is considerably narrow because it refers to "ranking" rather than "payment" in terms of equal treatment.[86] It therefore does differ substantially from Argentina's *pari passu* clause.[87]

C. Courts: Export-Import Bank of China v. Grenada

A major concern after *NML Capital* was the possibility of increased holdout litigation.[88] Many considered this fear realized when the Export-Import Bank of the Republic of China (Ex-Im Bank) sued Grenada to enforce a *pari passu* clause in its loan agreements promising to rank obligations to Ex-Im Bank proportionally to its other external debts denominated in currency other than Grenada's and payable to a nonresident of Grenada.[89] Ex-Im Bank also sued to enforce a negative covenant in Grenada's Offering Memorandum stating that it did not intend to pay any debt that was not restructured "unless resources became available to do so" and "if, at the time such payment is due, a payment default then existed under any new bond issued in the exchange."[90] Ex-Im Bank

85. Opposition to Motion for Emergency Motion to Amend Stay Order, on Behalf of Appellant Republic of Argentina, Blue Angel Capital I LLC v. Argentina, No. 12-158 (2d Cir. Dec. 3, 2012).

86. *Id.*

87. *Id.* at 29.

88. *See, e.g.*, Gulati & Klee, *supra* note 20, at 641–43 (claiming that the ratable payment interpretation of the *pari passu* clause grants holdout creditors more authority in the restructuring process, and "the last thing that a sovereign, already worried about holdouts, desires is to give potential holdouts more leverage").

89. The exact language of the clause was a promise that Grenada would rank "its obligations to the Ex-Im Bank . . . at least *pari passu* with its other External Indebtedness," defined as "debt denominated in a currency other than Grenada's and payable to a nonresident of Grenada." Ex.-Imp. Bank of China v. Grenada, 13 Civ. 1450 (HB), 2013 WL 4414875, at *3–4 (S.D.N.Y. Aug. 19, 2013).

90. The full negative pledge clause reads:

> The Borrower covenants and agrees that, until all amounts payable by the Borrower under this Agreement and the Note have been paid in full, it will not without prior written consent of the Lender . . . (b) Permit any obligation of, or loan, financing and credit made available to the Borrower to have any priority or be subject to any preferential arrangement, whether or not constituting a security agreement, in favor of any creditor or class of creditors, as to security, the repayment of principal and interest or the right to receive income or revenue.

Reply Memorandum of Law of the Export-Import Bank of the Republic of China in Further Support of its Cross-Motion for Judgment on the Pleadings at 6, Exp.-Imp. Bank of China v.

relied substantially on *NML Capital* in its pleadings, arguing that pursuant to *NML Capital*, the contract language was dispositive.[91] However, the District Court denied Ex-Im Bank's cross-motion for partial judgment on the pleadings (relying on *NML Capital*) with respect to Grenada's liability over an insufficiency of its pleadings.[92]

The District Court's interpretation of *NML Capital* was particularly restrictive. Firstly, it was skeptical that the *pari passu* clause and negative covenant at issue could be equated to Argentina's *pari passu* clause in *NML Capital*.[93] For example, Argentina's *pari passu* clause promised equal payment whereas Grenada's clearly promised equal ranking.[94] Secondly and more importantly, it argued that, in *NML Capital*, the Second Circuit affirmed the permanent injunction under the unique circumstances of Argentina's Lock Laws, which "ensured that the plaintiffs' beneficial interests do not remain direct, unconditional, unsecured and unsubordinated obligations of the Republic and that any claims that may arise from the Republic's restructured debt do have priority in Argentinian courts over claims arising out of the Republic's unstructured debt," whereas the pleadings only established that Grenada may have made payments to other external bondholders against its stated "promise" in its Offering Memorandum.[95] Finally, the District Court opined that payments made to other external bondholders instead of the particular creditor—despite a negative covenant not to do so—fail to establish liability under *NML Capital* as the Second Circuit expressly left open the question of whether "a breach would occur with any non-payment that is coupled with payment on other debt . . . or whether 'legislative enactment' alone could result in a breach."[96]

The District Court's refusal to apply *NML Capital* in *Ex-Im Bank v. Grenada* has bolstered the notion among markets and policymakers that *NML Capital* has little impact. The District Court narrowed *NML Capital* by recalling that a sovereign debtor's covenantal breach and the question of granting an injunction were two entirely separate issues, and that injunctive relief was granted in *NML Capital* only after a decade of Argentina's refusals to honor its

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Grenada, 876 F. Supp. 2d 263 (S.D.N.Y. June 20, 2013), *available at* http://ftalphaville.ft.com/files/2013/06/43-main.pdf.

91. *Id.* at 2.

92. Exp.-Imp. Bank of China, 2013 WL 4414875, at *5–6.

93. *Id.* at *5.

94. *Id.*

95. *Id.* at *6.

96. *Id.* at *4.

debt obligations via its Lock Laws.[97] Concerns, particularly those expressed by France in its amicus brief in *NML Capital*,[98] that the decision might open the holdout litigation floodgates, have diminished in light of the District Court's strict approach.

Although the case could go forward and the District Court's opinion might be rejected, it is likely that the two parties will attempt to settle,[99] especially since Grenada must restructure its debt again or risk default.[100]

D. Conclusion: A Surprisingly Non-Reactive Environment

Successive bond contracts, legislative enactments, and holdout litigation have adopted a narrow approach to the ratable payment interpretation in *NML Capital*. Courts and legislatures are unwilling to extend the ratable payment interpretation beyond the unique circumstances of Argentina's Lock Laws and other examples of its recalcitrance.[101] Furthermore, amendments to bond contracts have been minimal, with most sovereigns choosing not to amend, and those choosing to amend opting for risk factor disclosures in prospectuses instead of actually amending the terms of the notes.

As elaborated above, there have been two exceptions to this general trend: Italy's amendment of its *pari passu* clause and Belize's government resolution defining its "understanding" of its *pari passu* clause. This Note has argued that Italy's amendment can be reasonably explained by the fact that it has been widely

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97. Rich Samp, *Grenada Is Not Argentina*, NAT'L REV. ONLINE (Aug. 22, 2013, 11:16 AM), http://www.nationalreview.com/bench-memos/356463/grenada-not-argentina-rich-samp.

98. Brief for the Republic of France as Amicus Curiae in Support of the Republic of Argentina's Petition for a Writ of Certiorari, Argentina v. NML Capital, Ltd., (No. 13-990), 134 S. Ct. 2250, at 17–18, *available at* http://www.shearman.com/~/media/Files/Services/Argentine%20Sovereign%20Debt/2013/Arg34NML20130726FranceAmicusBrief.pdf (last visited July 26, 2013).

99. Anna Gelpern, Pari Passu*'s Caribbean Detour*, CREDIT SLIPS, (Aug. 20, 2013), http://www.creditslips.org/creditslips/2013/08/pari-passu-is-anthony-weiner-grenada-edition.html#more (last visited Aug. 20, 2013).

100. *See Grenada Plans to Restructure Debt*, CARIBBEAN JOURNAL (Mar. 9, 2013), http://www.caribjournal.com/2013/03/09/grenada-plans-to-restructure-debt/ (reporting that "circumstances have forced" the decision, including the global financial crisis and two hurricanes in 2004 and 2005, respectively). Grenada previously restructured its debt in 2005.

101. *See supra* Part II.C.

acknowledged to have the most vulnerable of *pari passu* clauses and has consistently used the same clause since 2003, as well as the fact that its clause had to be amended to accommodate its ESM obligations (the seniority in ranking of ESM debt). This Note has also argued that the Belize's government resolution clarifying the meaning of its own *pari passu* clause may not have a significant impact on the way a court interprets the clause, given that this interpretation was included in the Offering Memorandum, not the bond contract, and was an ex post resolution, and the resolution therefore may not have be representative of the negotiating creditors' understanding of the clause.

III. QUESTIONING THE SYMBIOTIC RELATIONSHIP BETWEEN *PARI PASSU* AND COLLECTIVE ACTION CLAUSES

A. The Second Circuit's Unjustified Overreliance on Collective Action Clauses in NML Capital

If *NML Capital* was a radical decision that drastically broadened the interpretation of the *pari passu* clause after years of attempts to rectify the same result in *Elliott Associates*, the lack of reactionary impact (as detailed above) by sovereign debt issuers, legislators, and courts does not make sense. Could this point to a more deep-rooted trend—that of the growing irrelevance of *pari passu* clauses in sovereign debt instruments altogether?

The Second Circuit's justification for its affirmation of Judge Griesa's injunction in *NML Capital* was that a ratable payment interpretation of Argentina's *pari passu* clause would not increase the likelihood of holdouts and make sovereign debt restructuring impossible because of the increasing usage of collective action clauses in sovereign debt instruments.[102] It opined that even if enough bondholders may nonetheless be motivated to refuse restructurings and hold out, or if holdouts could buy up enough bonds of a single series to defeat restructuring of that series, "a restructuring failure on one series would still allow restructuring of the remainder of a sovereign's debt." In any case, "if transaction costs and other procedural inefficiencies are sufficient to block a super-majority of creditors from voting in favor of a proposed restructuring, the

102. NML Capital, Ltd. v. Argentina, 727 F.3d 230, 247–48 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (June 16, 2014) ("We further observed that cases like this one are unlikely to occur in the future because . . . newer bonds almost universally include collective action clauses ('CACs') which permit a super-majority of bondholders to impose a restructuring on potential holdouts.").

proposed restructuring is likely to fail under any circumstances."[103]

The Second Circuit's reasoning has been heavily criticized on four grounds. Firstly, most collective action clauses operate on an issue-by-issue basis, allowing creditors to buy blocking stakes in small issues trading at a deep discount and keep them out of restructuring.[104] Secondly, although aggregation/cross-series modification in a growing number of bond contracts would allow votes across multiple bond issues, they require a double-majority vote and let single bond issues drop out of the restructuring. Therefore holdout litigation is still a distinct, though remote, possibility.[105] Thirdly, though it is recognized that collective action clauses are the norm in post-2003 bonds, some outstanding bonds issued under New York law before 2003,[106] and even a small proportion of New York issues post-2003,[107] do not have collective action clauses. Finally, to have collective action clauses in place to eliminate holdouts at all costs might be to entirely defeat their purpose—granting creditors a meaningful voice, which should include some capacity to hold out if the proposed restructuring is manifestly unfair to them.[108]

There are also some commentators who have voiced opinions against the Second Circuit's reliance on acceleration as a means to defeat the inter-series holdout problem. For instance, Yanying Li argues that the acceleration principle should not be applied to any future legal framework for sovereign debt restructurings because the rationale for this principle is that the contract law theory that the debtor's repayment obligations cannot be assigned to a new entity without the creditor's permission unless the original debtor remains

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103. *Id.*

104. *See* Jeromin Zettelmeyer et al., *The Greek Debt Restructuring: An Autopsy*, 28 ECON. POL'Y 513 (2013) (noting that more than half of Greece's foreign-law issues with collective action clauses failed to get enough votes, held out, and continue to be serviced on time). This made little difference for the overall outcome of the debt exchange because over 90% of the Greek debt stock had been governed by Greek law and was amended across multiple issues, leaving no holdouts.

105. Gelpern, *Sovereign Damage Control*, s*upra* note 40, at 12–13.

106. Yan Liu, *Collective Action Clauses in International Sovereign Bonds* 1–25 (IMF Working Paper, 2002), *available at* http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/liu.pdf.

107. Michael Bradley & Mitu Gulati, *Collective Action Clauses for the Eurozone*, 18 REV. FIN. 1, 1–58 (2013), *available at* http://scholarship.law.duke.edu/faculty_scholarship/2455.

108. NML Capital, Ltd. v. Argentina, No. 08 Civ 6978 (TPG) (S.D.N.Y. Feb. 23, 2012).

responsible, therefore upon liquidation assignment is prohibited and all claims become due and payable immediately. In the case of sovereign debt restructurings, absent any possibility of liquidation, the principle that all claims are automatically accelerated simply should not apply to sovereign states.[109] Furthermore, as empirical evidence from the recent Greek restructuring of March 2012 shows, the acceleration principle might grant payment to holders of bonds with the longest maturity dates before their bonds become due, putting them in a better position than if they had not been included in the restructuring.[110]

B. Exogenous Factors Explaining the Lack of Reaction to NML Capital

By observing the market reactions to the "interpretative shock"[111] of court decisions through a contract negotiation and bargaining approach where there is a form of inertia or resistance to change as parties prefer deferring to boilerplate terms generally used in the marketplace,[112] Professor Umakanth Varottil hypothesizes that the interpretative shock of a court decision does not always impel drafting change in a contract due to "exogenous factors" which operate to maintain the status quo.[113] For example, he argues that an analysis of circumstances surrounding *Elliott Associates* reveals that two exogenous factors—the shift from unanimous action clauses to collective action clauses and the shift from fiscal agent to trustee with sole enforcement powers—explain the lack of market reaction to the interpretative shock of *Elliott Associates*.[114]

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109. Yanying Li, *Question the Unquestionable Beauty of a Collective Proceeding for All Sovereign Debt Claims*, 22 INT'L. INSOLVENCY REV. 85, 100–02 (2013).

110. Liu, *supra* note 106, at 6.

111. Umakanth Varottil, *Sovereign Debt Documentation and the* Pari Passu *Clause*, *in* SOVEREIGN DEBT: FROM SAFETY TO DEFAULT 227 (Robert W. Kolb ed., 2011).

112. *See generally* Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006); GULATI & SCOTT, *supra* note 15.

113. Varottil, *supra* note 111, at 229.

114. *Id.* at 230–31; *see also* Lee C. Buchheit & Elizabeth Karpinski, *Grenada's Innovations*, 21 J. INT'L BANKING L. & REG. 227 (2006) (referring to a novel provision introduced by Grenada in 2005 that did not provide an individual enforcement right to bondholders, with all enforcement rights vested only in the trustee and exercisable for the ratable benefit of all bondholders). This provision, inserted under the advice of Lee Buchheit of Cleary Gottlieb Steen & Hamilton LLP, only appeared in Grenada's 2005 issuance and Belize's 2007 issuance and might not have been the general "shift" that Varottil predicted. *See* Sönke Häseler, *Trustees Versus Fiscal Agents and Default Risk in International Sovereign Bonds*, 34 EUR. J. L. & ECON. 425 (2010).

If, as argued above, the widespread usage of collective action clauses cannot be the sole reason for the court's decision in *NML Capital*, this Note posit that a combination of three linked exogenous factors—the norm of collective action clauses, their combined usage with modification and aggregation devices, and the recent development and growing approval of "retrofit" collective action clauses—explains the lack of market reaction to *NML Capital*.

Modification and aggregation devices in collective action clauses work to allow a defined percentage of bondholders to approve a restructuring proposal in a vote that will bind all holders of that bond, whereas aggregation clauses allow for a similar vote to occur across different bond issues.[115] Prior to Mexico's pivotal issuance of bonds pursuant to New York law containing these devices in February 2003, their usage was practically unheard of, but since then these devices have appeared in almost every sovereign bond issuance.[116] In fact, the E.U. has even published a mandatory model collective action clause for use in Eurozone sovereign bonds from January 1, 2013.[117] These devices restrict the ability of holdout creditors to demand ratable payment by binding them to participate in a particular restructuring program once a given percentage, such as a

115. W. Mark C. Weidemaier & Mitu Gulati, *How Markets Work: The Lawyer's Version*, *in* FROM ECONOMY TO SOCIETY? PERSPECTIVES ON TRANSNATIONAL RISK REGULATION 107–137 (Bettina Lange et al. eds., 2013).

116. *See* Bradley & Gulati, *supra* note 107. *But cf.* W. Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 VA. J. INT'L L. 51 (2013) (arguing that the "conventional" tale of aggregation and modification usage is misleading and that there was already a substantial prevalence of such clauses in Indonesian bonds in the late 1980s); *see also* Cleary Gottlieb Steen & Hamilton LLP, *Collective Action Clauses with Aggregation Mechanisms*, Feb. 11, 2011, *available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3004&context=faculty_scholarship* (showing examples of Uruguay, Argentina, and the Dominican Republic utilizing such aggregation mechanisms).

117. *Model Collective Action Clause,* ECON. & FIN. COMM. OF THE EUROPEAN UNION, (Nov. 18, 2011), http://europa.eu/efc/sub_committee/pdf/cac_-_text_model_cac.pdf; *see also Collective Action Clauses in Euro Area*, ECON. & FIN. COMM. OF THE EUROPEAN UNION, http://europa.eu/efc/sub_committee/cac/index_en.htm (last updated Oct. 24, 2012); Linklaters, *EU Publishes Mandatory Collective Action Clause*, (May 28, 2012), http://www.linklaters.com/Publications/EU-publishes-mandatory-Collective-Action-Clause-use-eurozone-sovereign-bonds-1January2013/Pages/Index.aspx; Marieclaire Colaiacomo, *Eurozone Collective Action Clauses and Specialised Agencies of the United Nations as International Organizations: Do CACs Constitute an Expropriation under International Law?*, 2 INT'L L. RES. 174 (2013) (arguing that, notwithstanding the unclear environment within which CACs have been imposed on Eurozone Member States, there is sufficient evidence that this conflicts with general principles of international law, the law of treaties, and the principles and mandate of the EU).

supermajority, of creditors accepts the terms of the restructuring.

The recent unprecedented usage of "retrofit" collective action clauses—the retroactive insertion of collective action clauses into existing bonds that did not contain them—was introduced (though not actively used) by the Greek government in January 2012 in an attempt to get the nation's deficit under control.[118] Despite such retroactive action receiving heavy criticism from those who consider it to be government expropriation of private creditors[119] or a threat to the voluntary nature of restructuring,[120] their inception is likely to provide a desperate measure for fellow troubled European sovereign countries to take to deal with default or imminent default.[121]

These "exogenous factors" aptly explain the lack of reaction of sovereign debt issuers, legislatures, and courts to *NML Capital*. The *pari passu* clause and whatever interpretation is given of it has limited significance given the commonplace usage of modified, aggregated, or even retrofit collective action clauses in debt contracts, limiting the probability of holdout litigation in the first place. This is why most sovereign issuers are relying on risk factor disclosures instead of actually changing their *pari passu* clauses[122]—the clause has become an anachronistic formality and is no longer a useful form of protection for the holdout creditor.[123]

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118. Nomos (2012: 4050) ΕΦΗΜΕΡΙΣ ΤΗΣ ΚΥΒΕΡΝΗΣΕΩΣ [Rules of amendment of titles issued or guaranteed by the Hellenic Republic with the Bondholder's agreement], ΤΗΣ ΕΛΛΗΝΙΚΗΣ ΔΗΜΟΚΡΑΤΙΑΣ 2012, A:5 (Greece).

119. *See* Melissa A. Boudreau, *Restructuring Sovereign Debt Under Local Law: Are Retrofit Collective Action Clauses Expropriatory?*, 2 HARV. BUS. L. REV. ONLINE 164 (May 8, 2012), http://www.hblr.org/2012/05/retrofit-collective-action-clauses/.

120. Matina Stevis, *UPDATE: Greece to Introduce Retroactive Collective Action Clauses-Source*, WALL ST. J., Jan. 9, 2012, http://online.wsj.com/article/BT-CO-20120109-706698.html; *see also* Kenneth Anderson, *Sovereign Debt and Collective Action Clauses*, OPINIO JURIS (Feb. 24, 2012), http://opiniojuris.org/2012/02/24/sovereign-debt-and-collective-action-clauses/.

121. Richard Milne, *Deal Over Greek Bonds to Set Template*, FIN. TIMES, Nov. 21, 2011, *available at* http://www.ft.com/intl/cms/s/0/ff8b3d14-1463-11e1-85c7-00144feabdc0.html?siteedi tion=in tl#ixzz1gS4gtsVP.

122. *See supra* Part II.

123. *But see* Anna Gelpern, *Sovereign Restructuring after* NML v. Argentina*: CACs Don't Make* Pari Passu *Go Away*, CREDIT SLIPS (May 3, 2012, 10:38 AM), http://www.creditslips.org/creditslips/2012/05/sovereign-restructuring-after-nml-v-argentina-cacs-dont-make-pari-passu-go-away.html (arguing that not all sovereign debt is in the form of CAC-ed or CAC-able bonds, and that not all CACs contain an aggregation feature, and therefore a holdout can obtain an obscure instrument that is not even syndicated nor bonded and "sue to her heart's content").

C. *Conclusion:* NML Capital *Explained Through Exogenous Reasoning*

On closer examination, the court's justification of increased prevalence of collective action clauses in *NML Capital* does not hold water. By adopting Professor Varottil's theory of exogenous reasoning, it can be said that three linked exogenous factors—the norm of collective action clauses, their combined usage with modification or aggregation devices, and finally the development of "retrofit" collective action clauses—explain why the "interpretative shock" of NML Capital did not result in a change in the status quo of *pari passu* drafting in bond contracts.

CONCLUSION

In conclusion, an analysis of the historical development of the *pari passu* clause from its origins in legal subordination to the court's interpretation of ratable payment in *NML Capital* demonstrates a radicalization of the original meaning and should have triggered a radical legislative, judicial, or market reaction. Yet this has not been the case, with most sovereigns opting to maintain the status quo in their *pari passu* clauses that are dangerously similar to Argentina's problematic one, a few mentioning *NML Capital* in risk factor disclosures. Exceptionally, Italy redrafted its *pari passu* clause and Belize added a "clarification" in its Official Memorandum. Similarly, the recent decision of the District Court in *Export-Import Bank of China v. Grenada* demonstrates a desire to restrict *NML Capital* to the exceptional circumstances of Argentina's recalcitrance as a "bad debtor". This Note argues that the reason for this lack of market reaction is largely due to the existence of exogenous factors—the norm of collective action clauses, their combined usage with modification or aggregation devices, and finally the development of "retrofit" collective action clauses—which explain why the "interpretative shock" of NML Capital did not result in a change in the status quo of *pari passu* drafting in bond contracts.

This hypothesis has great implications for future developments in the sovereign debt restructuring world. In particular, the International Monetary Fund (IMF) has proposed the development of a treaty-enshrined Sovereign Debt Restructuring Mechanism that would play the same role as a judge in corporate bankruptcies[124] and, more recently, the Committee on International

124. *See* Anne O. Krueger, *A New Approach to Sovereign Debt Restructuring*,

Economic Policy and Reform has proposed a Sovereign Debt Adjustment Facility under the aegis of the IMF which would combine fund lending with debt restructuring under clearly defined criteria.[125] If this hypothesis is correct, it would imply that such overarching mechanisms are not necessary because market forces—namely the symbiotic relationship between *pari passu* and collective action/modification/aggregation clauses—can adequately resolve the issue of holdout litigation.

Although this Note focuses predominantly on the exogenous factors explaining the lack of reaction to *NML Capital*, it does not discount the possibility that there are existing endogenous factors that could have contributed to these observations. For instance, there is market inertia towards drafting changes, and firms representing issuers that are less likely to default in the first place would rather add a risk factor into prospectuses than change the wording of their *pari passu* clauses.[126]

In any event, it appears that the final chapter of *NML Capital* has concluded. In February 2014, Argentina petitioned the Supreme Court for a writ of certiorari regarding the *pari passu* issue,[127] and multiple parties filed amicus briefs supporting the petition.[128] However, four months later, the Supreme Court implicitly accepted the Second Circuit's interpretation of the clause by refusing to grant certiorari on the issue.[129] It chose to address instead another question

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INTERNATIONAL MONETARY FUND (Apr. 16, 2002), http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/; *see also Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework*, INTERNATIONAL MONETARY FUND (Apr. 26, 2013), https://www.imf.org/external/np/pp/eng/2013/042613.pdf.

125. *See* Robin Wigglesworth, *Think-Tank Raises Heat in IMF Sovereign Debt Debate*, FIN. TIMES, Jan. 16, 2014, *available at* http://www.ft.com/intl/cms/s/0/19a993fc-7ec1-11e3-8642-00144feabdc0.html#axzz3IKeLERs9; *see also* COMM. ON INTERNATIONAL ECONOMIC POLICY AND REFORM, REVISITING SOVEREIGN BANKRUPTCY (Oct. 2013), http://www.brookings.edu/~/media/research/files/reports/2013/10/sovereign%20bankruptcy/ciepr_2013_revisitingsovereignbankruptcyreport.pdf.

126. *See* GULATI & SCOTT, *supra* note 15.

127. *See* Steven Davidoff Solomon, *Argentina Takes Its Debt Case to the U.S. Supreme Court*, N.Y. TIMES DEALBOOK (Feb. 25, 2014, 6:06 PM), http://dealbook.nytimes.com/2014/02/25/argentina-takes-its-debt-case-to-the-u-s-supreme-court/; *see also* Greg Stohr, *Argentina Seeks U.S. Supreme Court Review in Debt Case*, BLOOMBERG (Feb. 18, 2014, 6:20 AM), http://www.bloomberg.com/news/2014-02-18/argentina-seeks-u-s-supreme-court-review-in-debt-case.html.

128. Anna Gelpern, Pari Passu *VIPs and Mexico's CAC Gravitas*, CREDIT SLIPS (Mar. 24, 2014, 7:39 PM), http://www.creditslips.org/creditslips/2014/03/mexicos-cac-gravitas.html.

129. *See* NML Capital, Ltd. v. Argentina, Notice of Denial of Certiorari (June 16,

the case raised—whether the Foreign Sovereign Immunities Act of 1976 provides a foreign-sovereign debtor with immunity from post-judgment discovery of information concerning its extraterritorial assets—which it answered in the negative.[130] It might therefore take another case, or even another defaulting sovereign, for the *pari passu* clause to be reopened for judicial examination.

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2014), *available at* http://www.shearman.com/~/media/Files/Services/Argentine-Sovereign-Debt/2014/Arg7712105-Letter-2-061614.pdf.

130. *See* Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

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