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Sovereign Debt: Materials for Class on Monday April 8

States finance their activities through a mix of taxation and borrowing in the financial markets, often by issuing debt securities in their domestic markets.[2] The investors who buy government securities may be domestic or foreign. US Treasury securities have been particularly attractive to foreign investors,[3] partly because the US dollar is the reserve currency, and investors want to hold US dollar denominated securities. US government securities have also attracted investors because of the strength of the US economy and the unlikeliness of a US default - US Treasuries seemed to be risk-free assets. However, it is now clear that sovereign debt is not a risk free asset.[4] And it can be risky for a government to rely on foreign owners of its securities, because , even if those investors have overcome their initial home bias to make the investment they may be more nervous about holding those securities in the face of adverse economic conditions.[5]

Despite the risks associated with having foreign investors, countries often want to make the securities they issue attractive to foreign investors. Countries other than the US have made their own debt securities more attractive to foreign investors than they would otherwise be by issuing US dollar denominated securities.[6] Issuing foreign currency denominated securities also

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[2] *Cf.* Kate Duguid, Nikou Asgari & Costas Mourselas, the Radical Changes Coming to the World's Biggest Bond Market, Financial Times, Mar. 4, 2024) ("The most consequential of the rules, passed in December, will remodel the Treasury market's plumbing by forcing more trades through a clearing house. Having a third party behind every deal promises greater oversight and protection for investors and ensures that trades are backed by cash. This collateral aims to prevent cascading defaults during a crisis.").

[3] For information on foreign holdings of US assets, including Treasuries, *see, e.g.*, Department of the Treasury, Federal Reserve Bank of New York, and Board of Governors of the Federal Reserve System, Foreign Portfolio Holdings of U.S. Securities as of June 30, 2022 (Apr. 2023) at 7 ("The proportion of U.S. Treasuries owned by foreigners is higher than other types of securities largely because foreign official institutions (FOIs) hold a substantial quantity of U.S. Treasuries...The foreign ownership shares of both marketable Treasuries and agency securities have trended down since 2008, as foreign net purchases of Treasuries and agencies have not kept pace with issuance. When measured in dollar terms, however, foreign investors' holdings of both U.S. Treasuries and agencies were roughly unchanged relative to 2021.")

[4] *See, e.g.*, BIS, *Sovereign Risk: a World Without Risk-free Assets?*, BIS Papers No. 72 (Jul. 2013) at http://www.bis.org/publ/bppdf/bispap72.htm .

[5] *See, e.g.*, Serge Jeanneau & Carlos Pérez Verdia, *Reducing Financial Vulnerability: the Development of the Domestic Government Bond Market in Mexico*, BIS Quarterly Review 95 (December 2005).

[6] International organizations may also issue US$ denominated securities. The IBRD stated "To raise funds, IBRD issues debt securities in a variety of currencies to both institutional and retail investors. During FY 2012,

allows countries to build their foreign exchange reserves.[7]

For many years, debt has been building up in developing countries, including the least developed countries, and during the Covid pandemic debt levels increased further.[8] Rising interest rates increase the debt burden. And many countries have recently defaulted on their debt or restructured or begun the process of restructuring their debts. Historically, debt crises have not only happened in developing economies, however, and the EU sovereign debt crisis is a recent example,[9] although no eurozone country missed payments on debt and only Greece and Cyprus restructured their debt.[10] The eurozone crisis did, however, involve a doom loop where sovereign debt problems became issues for eurozone banks.[11]

Sovereign debtors benefit from sovereign immunity, which can impede creditors in their attempts to recover monies owing to them, but they do not benefit, as corporate debtors do, from access to an insolvency regime. Sovereign debt must be managed through contract, although the IMF and the G20 have worked to create mechanisms for managing unsustainable sovereign

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IBRD raised medium- and long-term debt of $38,406 million, an increase of $9,616 million from FY 2011, in part reflecting Management's decision to bolster IBRD's liquidity levels. IBRD raised debt in FY 2012 in 23 different currencies." Information Statement (Sep. 2012) at p. 8. *Cf.* Final Terms dated January 9, 2013, International Bank for Reconstruction and Development Issue of USD 1,500,000,000 Floating Rate Notes due January 14, 2015 under the Global Debt Issuance Facility . Foreign corporates issue dollar denominated debt securities. Sovereigns outside the euro area, such as Venezuela and China, have issued euro denominated debt. *See, e.g.*, European Central Bank, Review of the International Role of the Euro, 15-16 (December 2005). But issuance of euro-denominated securities has sometimes been less attractive. European Central Bank, The International Role of the Euro (Jul. 2012).

[7] Countries may use foreign exchange reserves for different purposes, including buying their own currency in the international financial markets, and thus increasing the price of their own currency. See generally Christopher J Neely, *Are Changes in Foreign Exchange Reserves Well Correlated with Official Intervention?*, Federal Reserve Bank of St. Louis, 17, 18 Sept/Oct 2000. *See also*, *e.g.*, Y V Reddy, Deputy Governor of the Reserve Bank of India, *India's Foreign Exchange Reserves - Policy, Status and Issues*, available at http://www.bis.org/review/r020510f.pdf

[8] *See, e.g.*, Soaring Debt Burden Jeopardizes Recovery of Least Developed Countries, at https://unctad.org/topic/least-developed-countries/chart-march-2022.

[9] *See, e.g.*, Kris James Mitchener & Christoph Trebesch, *Sovereign Debt in the Twenty-first Century*, 61 J. Econ. Lit. 565, 567 (2023) ("The eurozone debt crisis reminds us of two recurrent features from history: (i) debt crises happen relatively frequently, and (ii) they happen in high- income or "advanced economies" as well as in lower or middle- income economies (often referred to as emerging markets). Indeed, history is replete with examples of defaults in the leading economies of the time—England with Edward III's default on debts owed to Italian bankers (the Peruzzi and the Bardi), France in the wake of the Napoleonic wars, Argentina during the Belle Epoque, and the United States when it abrogated the gold clause in the 1930s.")

[10] *Id.* at 568.

[11] *Id.*

debt.[12] These mechanisms include criteria for eligibility and provisions for debt reduction, although critics argue that the mechanisms have not worked well.[13]

The fact that there is no insolvency regime for sovereign debtors has created opportunities for firms to buy distressed sovereign debt which trades at a discount in order to try to obtain more money through litigation. This is known as the problem of holdout creditors or vulture funds.[14] Ideally, sovereign debtors faced with challenges in servicing and repaying the debt want to restructure their debt. And sovereigns typically have a mix of creditors, including institutions such as the IMF and Regional Development Banks (multilateral creditors), government lenders from other states (bilateral creditors), and commercial creditors. And the debt will generally involve a mix of loans and bonds, issued at different times and with different terms. In order to achieve a restructuring, which might involve rescheduling the debt (extending the maturity of the debt, perhaps with a reduction in applicable interest rates) or a reduction in the face value of the debt. Both options involve losses to creditors, known as "haircuts".

One issue in the sovereign debt context is the extent to which sovereign debtors ought to be able to move on from financial difficulties. Should the sovereign debt landscape be one in which we tend to hold borrowers to their commitments, or should we facilitate restructuring or debt forgiveness?[15] Ecuador announced in December 2008 that it planned to default on debt which it regarded as immoral.[16] Some argue that such defaults should sometimes be regarded as

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[12] *See, e.g.*, G20 Common Framework for Debt Treatments beyond the DSSI (Nov. 2020) at https://www.imf.org/-/media/Files/News/news-articles/english-extraordinary-g20-fmcbg-statement-november-13.ashx.

[13] *See, e.g.*, Andrew Thurston, The World Is Going Bust: What Is the Sovereign Debt Crisis and Can We Solve It? (Aug. 7, 2023) at https://www.bu.edu/articles/2023/what-is-the-sovereign-debt-crisis-and-can-we-solve-it/ ("Gallagher says it's not working, arguing it's hobbled by a couple of critical flaws: not every country can use it (Sri Lanka, for example, was considered too well off to qualify); it doesn't have a way to get all creditors, especially private ones and those beyond the G20 countries, to the negotiating table; and the debt relief, he says, is "really just how can we get a country back to the anemic levels of spending and revenue mobilization they had in 2019.""") Cf. The Paris Club Reaches Consensus on a Debt Cancellation for Somalia under the Enhanced Heavily Indebted Poor Countries Initiative (Mar. 13, 2024).

[14] *Cf.* The Center for Popular Democracy et al, Vulture Fund Power Players: the Lawyers, Lobbyists & Trade Groups Fueling Wall Street Predation, at https://www.populardemocracy.org/sites/default/files/%5BENGLISH%5D%20Vulture%20Fund%20Power%20Players%20Hedge%20Clippers%20Report%20Feb%202023%20FINAL_1.pdf.

[15] *See, e.g.*, Michael Pettis, *Why Foreign Debt Forgiveness Would Cost Americans Very Little*, (Oct. 19, 2020) at https://carnegieendowment.org/chinafinancialmarkets/82991.

[16] Ecuador defaults on foreign debt, BBC (Dec. 13, 2008) at http://news.bbc.co.uk/2/hi/business/7780984.stm .

legitimate, and there is a literature on "odious debt".[17] And there is a connection between the material we looked at in week one on corruption and sovereign debt problems as countries may be striped of resources by government officials.[18] A paper on the problems of debt incurred by authoritarian governments by Gulati and Panizza, focusing on Venezuela, but also making a more general argument, suggests that "if opposition parties in countries with despotic governments today were to monitor and make public the potential problems with debt issuances by their despotic rulers under their own local laws, it would raise the cost of capital for those despots.[19]

An informal group of government creditors, known as the Paris Club, is involved in working to achieve co-ordinated and sustainable solutions to sovereign debt problems.[20] In order to reach agreement the bilateral lenders want to be sure that all creditors are being treated comparably.[21] In recent years China has become a very significant lender to other countries, but has also wanted to negotiate restructuring of its own claims independently.[22] China's assistance to developing countries has primarily involved " loans at or near market rates with requirements for collateral," rather than grants.[23] A recent assessment of China's attitude to debt restructuring states:

> To resolve previous systemic financial breakdowns in the developing world, Western nations and their large commercial banks, in cooperation with the Bretton

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[17] *See, e.g.*, Seema Jayachandran & Michael Kremer , Odious Debt, 96 Am. Econ. Rev. 82 (2006); Robert Browne, The Concept of Odious Debt in Public International Law, UNCTAD Discussion Papers No. 185 (Jul. 2007). *Cf.* Committee for the Abolition of Illegitimate Debt at https://www.cadtm.org/English.

[18] *See, e.g.*, Africa: The Debt Trap and How to Get out of it: The Impacts of the Covid-19 Pandemic On the External Debt of African Countries, CADTM & The Left Group in the European Parliament (Mar. 27, 2023) at https://www.cadtm.org/Africa-the-debt-trap-and-how-to-get-out-of-it .

[19] Mitu Gulati & Ugo Panizza, *Maduro Bonds* at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6594&context=faculty_scholarship.

[20] *See* https://clubdeparis.org/. You can access videos on the work of this group here: https://clubdeparis.org/en/communications/press-release/how-the-paris-club-works-and-has-evolved-over-the-past-70-years-30-06.

[21] Information sharing around restructurings may be complicated. *Cf.* IMF, *Staff Guidance Note on Information Sharing in the Context of Sovereign Debt Restructurings* (Jun. 2023).

[22] *See, e.g.*, The ABCs of Sovereign Debt Relief, at https://www.cgdev.org/publication/abcs-sovereign-debt-relief.

[23] David Malpass, Thomas J. Duesterberg & Joshua Meservey, China Is Winning the Belt and Road Debt Battles, (Mar. 21, 2024) at https://www.hudson.org/economics/china-winning-belt-road-debt-battles-david-malpass-joshua-meservey-thomas-duesterberg.

> Woods multilateral development banks (MDBs), were at the forefront of negotiations to reduce and restructure non-performing external debt. Developed nations and aid providers have agreed on the Paris Club as the venue to formally organize comprehensive relief packages. But China has not been a willing partner in Paris Club negotiations. Beijing has consistently required contractual clauses in its loan and foreign aid packages that explicitly bar the use of the Paris Club process. China's unwillingness to take write-downs or outright reductions in its development assistance contracts is likely a result of its large domestic debts as well as its weak domestic economy, which renders Beijing unable to service these debts easily. China has held out from comprehensive agreements until Western commercial banks, sovereign lenders, and MDBs take write-downs or write-offs. MDBs are normally unable to take these actions, especially before other creditors do. In effect, China is asking Western institutions to bail out its bad loans. China may hope that these practices will undermine the Bretton Woods system in some part.[24]

In order to make debt restructuring work it has to be binding on all creditors, and holdout creditors can prevent a restructuring from succeeding. Unless the debt includes contractual mechanisms, known as collective action clauses, which provide for restructuring of the debt through processes which require majority creditor approval, unanimous approval is the default for novation of the debt contracts.

One response to the holdout creditor issue has been the enactment of legislation to block recovery by vulture funds.[25] The UK enacted the Debt Recovery (Developing Countries) Act in 2010,[26] initially for a 1 year term, which was then extended.[27] The statute is designed to prevent creditors of countries within the IMF's Heavily Indebted Poor Countries (HIPC) Initiative from obtaining an amount in eexcess of the amount they should receive under the HIPC Initiative, and was a response to litigation against Zambia and Liberia. Legislation to counteract vulture funds has been considered in New York,[28] and a new bill, the Sovereign Debt Stability Act, was

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[24] *Id.* The authors note that leaders of Paris Club members have recently been distracted by other issues, including the fallout from Covid and war in Ukraine and the Middle East.

[25] *See, e.g.*, Lucas Wozny, *National Anti-Vulture Funds Legislation: Belgium's Turn*, COLUM. BUS. L. REV. 697 (2017).

[26] Debt Relief (Developing Countries) Act 2010 c.22.

[27] The Debt Relief (Developing Countries) Act 2010 (Permanent Effect) Order 2011, SI 2011 No. 1336.

[28] *See, e.g.*, Rafael Bernal, *New York Democrats Push Bills to Stop Sovereign Debt 'Vulture Funds*,' The Hill (May 3, 2023); Alexander Gladstone, *New York Lawmakers Float Crackdown on Hedge Funds' Sovereign-Debt Tactics*, Wall Street Journal (Feb. 8, 2021).

recently introduced.[29] Opponents of the legislation, which would, if enacted, have a broader reach than the UK legislation, argue that it will make it harder and more expensive for developing countries to borrow money.[30]

Where litigation has been initiated by holdout creditors in courts in the UK and the US,[31] sovereign debtors have tried to raise arguments that the holdout creditors should not be able to succeed. One strategy involved arguing that the idea of buying up distressed sovereign debt in order to litigate to recover the full face amount of the debt violated New York rules prohibiting champerty. In **Elliott Associates, L.P. v Banco De La Nacion**[32] the Second Circuit, holding that Elliott's actions did not violate Section 489 of the New York Judiciary Law because Elliott was trying to enforce valid debts and only sued because it was unable to get satisfaction otherwise, also commented on policy issues involved in the case:

"As is often the case in complex and well-argued appeals such as this, there are competing policy interests at stake. However, in Pravin Banker Associates, Ltd. v. Banco Popular del Peru, 109 F.3d 850 (2d Cir. 1997), another appeal involving an enforcement action on Peruvian sovereign debt, this court set forth and reconciled those differing interests. Although the Pravin Banker analysis was made in the context of a comity determination and so examined the interests of the United States rather than New York, those interests are equally applicable to New York's interests as a global financial center in the context of interpreting Section 489. As the court reasoned:

> First, the United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures under the Brady Plan. Second, the United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of

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[29] https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S05542&term=&Text=Y.

[30] *See, e.g.*, Kate Duguid & Joseph Cotterill, *New York Moves to Rewrite Law on Sovereign Debt Default Recovery*, Financial Times (Mar. 6, 2024).

[31] Much sovereign debt is governed by English law or New York law.

[32] 194 F.3d 363 (2d. Cir, 1999). The Court noted: "The continuing vitality of the distinction drawn in Moses between cases involving an impermissible "primary" purpose of bringing suit and those where the intent to sue is merely "secondary and contingent" is confirmed by the post-Moses case law.... The Moses court made clear that where the debt instrument is acquired for the primary purpose of enforcing it, with intent to resort to litigation to the extent necessary to accomplish the enforcement, the intent to litigate is "merely incidental and contingent" and does not violate the statute. Indeed, the Moses court made precisely this point when it explained that "the object of the statute . . . was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right of the assignee." ... Elsewhere, the Court of Appeals in Moses specifically stated that conduct not prohibited by the statute included where "the plaintiff bought the bond as an investment, but with the intention of collecting it by suit if compelled to resort to that means for obtaining payment." ... While Moses does not set forth a complete taxonomy of conduct prohibited by Section 489 (and neither do we), it plainly sets forth certain conduct that is not made unlawful by Section 489."

> foreign debts owed to United States lenders. This second interest limits the first so that, although the United States advocates negotiations to effect debt reduction and continued lending to defaulting foreign sovereigns, it maintains that creditor participation in such negotiations should be on a strictly voluntary basis. It also requires that debts remain enforceable throughout the negotiations...

The district court's statutory interpretation here would appear to be inconsistent with this analysis. Rather than furthering the reconciled goal of voluntary creditor participation and the enforcement of valid debts, the district court's interpretation of Section 489 effectively forces creditors such as Elliott to participate in an involuntary "cram-down" procedure and makes the debt instruments unenforceable in the courts once the Bank Advisory Committee has reached an "agreement in principle" in the Brady negotiations. Undermining the voluntary nature of Brady Plan participation and rendering otherwise valid debts unenforceable cannot be considered to be in New York's interest, as made plain by this court in Pravin Banker.

Given the mandate that "whenever possible, statutes should be interpreted to avoid unreasonable results," ... we also take note of the unreasonable results that might ensue were we to accept the district court's interpretation of Section 489. While the district court's rule might benefit the Debtors in the short run, the long term effect would be to cause significant harm to Peru and other developing nations and their institutions seeking to borrow capital in New York. The district court's interpretation would mean that holders of debt instruments would have substantial difficulty selling those instruments if payment were not voluntarily forthcoming. This would therefore add significantly to the risk of making loans to developing nations with poor credit ratings. The additional risk would naturally be reflected in higher borrowing costs to such nations. It could even make loans to some of them unobtainable in New York. A well-developed market of secondary purchasers of defaulted sovereign debt would thereby be disrupted and perhaps destroyed even though its existence provides incentives for primary lenders to continue to lend to high-risk countries.

The interpretation posited by the district court would also create "a perverse result" because it "would permit defendants to create a champerty defense by refusing to honor their loan obligations."... An obligor could simply declare unwillingness to pay, thereby making it plain that no payment would be received without suit. Under such circumstances, prospective purchasers would not be able to acquire the debt instruments without opening themselves up to the defense that their purchase or assignment necessarily was made "with the intent and for the purpose of bringing an action or proceeding thereon," as barred by Section 489. The risk that a debtor might seek to manufacture such a defense by making such a public pronouncement could be expected to add significantly to the cost of borrowing in New York.

Although all debt purchases would be affected by the district court's expansive reading of Section 489, high-risk debt purchases would be particularly affected because of the increased likelihood of non-payment in such transactions leading to the likely necessity of legal action to obtain payment. As ably pointed out by Elliott and the various amici curiae, such increased risks could be expected to increase the costs of trading in high-risk debt under New York law and thereby encourage potential parties to such transactions to conduct their business elsewhere. Moreover, the increased risks are particularly onerous because they premise the validity of the transaction on no more than the buyer's subjective intent, which intent is not always readily ascertainable by the

seller, and can only be conclusively resolved by ex post facto litigation."[33]

An entity related to Elliott Associates, NML Capital, was involved in litigation over Argentinean debt after one of the many Argentine debt crises in recent years, and achieved dramatic success in arguing that it should be able to recover on its claims on the basis of a "pari passu" clause in the relevant debt.[34] Here is an excerpt from the court's decision in NML Capital v. Republic of Argentina :

"The district court held that Argentina violated the Provision when it made payments currently due under the Exchange Bonds while persisting in its refusal to satisfy its payment obligations to plaintiffs and when it enacted the Lock Law and the Lock Law Suspension.
"In New York, a bond is a contract.".. Thus, the parties' dispute over the meaning of the Equal Treatment Provision presents a "simple question of contract interpretation.".. Argentina argues that the Pari Passu Clause is a boilerplate provision that, in the sovereign context, "has been universally understood for over 50 years . to provide protection from legal subordination or other discriminatory legal ranking by preventing the creation of legal priorities by the sovereign in favor of creditors holding particular classes of debt."..
We are unpersuaded that the clause has this well settled meaning. Argentina's selective recitation of context-specific quotations from arguably biased commentators and institutions notwithstanding, the preferred construction of pari passu clauses in the sovereign debt context is far from "general, uniform and unvarying," Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 466 (2d Cir.2010) (quotation marks omitted). Argentina's primary authorities and Argentina itself appear to concede as much. See Appellant's Reply Br. 21 n. 9 ("[N]o one knows what the clause really means" (emphasis in Appellant's Reply Br.)); Lee C. Buchheit, The Pari Passu Clause Sub Specie Aeternitatis, 10 Int'l Fin. L.Rev. 11, 11 (1991) ("[N]o one seems quite sure what the clause really means, at least in the context of a loan to a sovereign borrower."); G. Mitu Gulati & Kenneth N. Klee, Sovereign Piracy, 56 Bus. Law 635, 646 (2001) ("[I]n the sovereign context there is at least disagreement about the meaning of the clause."); Stephen Choi & G. Mitu Gulati, Contract As Statute, 104 Mich. L.Rev. 1129, 1134 (2006) ("The leading commentators on sovereign contracts acknowledged that there exists ambiguity as to the meaning of this clause."); Philip R. Wood, Project Finance, Subordinated Debt and State Loans 165 (1995) ("In the state context, the meaning of the clause is uncertain because there is no hierarchy of payments which is legally enforced under a bankruptcy

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[33] For an example of a decision finding that the question whether a violation of the New York champerty statute had occurred, not in the context of sovereign debt and where there were unusual facts, could not be determined on a motion for summary judgment but involved issues of fact, *see* Justinian Capital v. Westlb, 28 N.Y.3d 160 (2016), 65 N.E.3d 1253, 43 N.Y.S.3d 218 (NY CA 2016).

[34] NML Capital v. Republic of Argentina 699 F. 3d 246 (2d Cir. 2012). Paragraph 1(c) of the Fiscal Agency Agreement provided: "[t]he Securities will constitute direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness"

regime.”). In short, the record reveals that Argentina's interpretation of the Pari Passu Clause is neither well settled nor uniformly acted upon.

Once we dispense with Argentina's customary usage argument, it becomes clear that the real dispute is over what constitutes subordination under the Pari Passu Clause. Argentina contends the clause refers only to legal subordination and that none occurred here because “any claims that may arise from the Republic's restructured debt have no priority in any court of law over claims arising out of the Republic's unrestructured debt.”... Plaintiffs, on the other hand, argue that there was “de facto” subordination because Argentina reduced the rank of plaintiffs' bonds to a permanent non-performing status by passing legislation barring payments on them while continuing to pay on the restructured debt and by repeatedly asserting that it has no intention of making payments on plaintiffs' bonds.

We disagree with Argentina because its interpretation fails to give effect to the differences between the two sentences of the Pari Passu Clause...

Instead, we conclude that in pairing the two sentences of its Pari Passu Clause, the FAA manifested an intention to protect bondholders from more than just formal subordination. .. The first sentence (“[t]he Securities will constitute . direct, unconditional, unsecured, and unsobrdinated obligations .”) prohibits Argentina, as bond issuer, from formally subordinating the bonds by issuing superior debt. The second sentence (“[t]he payment obligations . shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.”) prohibits Argentina, as bond payor, from paying on other bonds without paying on the FAA Bonds. Thus, the two sentences of the Pari Passu Clause protect against different forms of discrimination: the issuance of other superior debt (first sentence) and the giving of priority to other payment obligations (second sentence).

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

The record amply supports a finding that Argentina effectively has ranked its payment obligations to the plaintiffs below those of the exchange bondholders. After declaring a moratorium on its outstanding debt in 2001, Argentina made no payments for six years on plaintiffs' bonds while simultaneously timely servicing the Exchange Bonds. Argentina has renewed that moratorium in its budget laws each year since then. It declared in the prospectuses associated with the exchange offers that it has no intention of resuming payments on the FAA Bonds... It stated in SEC filings that it had “classified the [FAA Bonds] as a separate category from its regular debt” and is “not in a legal . position to pay” them.... 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. By contrast, were Argentina to default on the Exchange Bonds, and were those bondholders to obtain New York judgments against Argentina, there would be no barrier to the Republic's courts recognizing those judgments. Thus, even under Argentina's interpretation of the Equal Treatment Provision as preventing only “legal subordination” of the FAA Bonds to others, the Republic breached the

Provision...
In short, the combination of Argentina's executive declarations and legislative enactments have ensured that plaintiffs' beneficial interests do not remain direct, unconditional, unsecured and unsubordinated obligations of the Republic and that any claims that may arise from the Republic's restructured debt do have priority in Argentinian courts over claims arising out of the Republic's unstructured debt. Thus we have little difficulty concluding that Argentina breached the Pari Passu Clause of the FAA.
We are not called upon to decide whether policies favoring preferential payments to multilateral organizations like the IMF would breach pari passu clauses like the one at issue here. Indeed, plaintiffs have never used Argentina's preferential payments to the IMF as grounds for seeking ratable payments. Far from it; they contend that “a sovereign's de jure or de facto policy [of subordinating] obligations to commercial unsecured creditors beneath obligations to multilateral institutions like the IMF would not violate the Equal Treatment Provision for the simple reason that commercial creditors never were nor could be on equal footing with the multilateral organizations.”..

II. We turn now to Argentina's challenges to the Injunctions and their requirement that it specifically perform its obligations under the FAA. Specific performance may be ordered where no adequate monetary remedy is available and that relief is favored by the balance of equities, which may include the public interest...
Once the district court determined that Argentina had breached the FAA and that injunctive relief was warranted, the court had considerable latitude in fashioning the relief. The performance required by a decree need not, for example, be identical with that promised in the contract... Where “the most desirable solution” is not possible, this Court may affirm an order of specific performance so long as it achieves a “fair result” under the “totality of the circumstances.” ..
Argentina's first contention is that, even assuming it breached the Pari Passu Clause, plaintiffs are limited to the “contractually agreed upon remedy of acceleration.”.. This argument is easily dispensed with. While paragraph 12 of the FAA specifies acceleration as one remedy available for a breach of the Equal Treatment Provision, the FAA does not contain a clause limiting the remedies available for a breach of the agreement. Nor does the FAA contain a provision precluding specific performance or injunctive relief. Under New York law the absence of the parties' express intention in the FAA to restrict the remedies available for breach of the agreement means that the full panoply of appropriate remedies remains available. ..
Moreover, it is clear to us that monetary damages are an ineffective remedy for the harm plaintiffs have suffered as a result of Argentina's breach. Argentina will simply refuse to pay any judgments. It has done so in this case by, in effect, closing the doors of its courts to judgment creditors. In light of Argentina's continual disregard for the rights of its FAA creditors and the judgments of our courts to whose jurisdiction it has submitted, its contention that bondholders are limited to acceleration is unpersuasive. Insofar as Argentina argues that a party's persistent efforts to frustrate the collection of money judgments cannot suffice to establish the inadequacy of a monetary relief, the law is to the contrary... In this context, the district court properly ordered specific performance.
Next, we conclude that because compliance with the Injunctions would not deprive Argentina of

control over any of its property, they do not operate as attachments of foreign property prohibited by the FSIA. Section 1609 of the FSIA establishes that "the property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. § 1609. Each of these three terms refers to a court's seizure and control over specific property.13 However, courts are also barred from granting "by injunction, relief which they may not provide by attachment." ...

The Injunctions at issue here are not barred by § 1609. They do not attach, arrest, or execute upon any property. They direct Argentina to comply with its contractual obligations not to alter the rank of its payment obligations. They affect Argentina's property only incidentally to the extent that the order prohibits Argentina from transferring money to some bondholders and not others. The Injunctions can be complied with without the court's ever exercising dominion over sovereign property. For example, Argentina can pay all amounts owed to its exchange bondholders provided it does the same for its defaulted bondholders. Or it can decide to make partial payments to its exchange bondholders as long as it pays a proportionate amount to holders of the defaulted bonds. Neither of these options would violate the Injunctions. The Injunctions do not require Argentina to pay any bondholder any amount of money; nor do they limit the other uses to which Argentina may put its fiscal reserves. In other words, the Injunctions do not transfer any dominion or control over sovereign property to the court. Accordingly, the district court's Injunctions do not violate § 1609.14

Nor does the FSIA create any other impediment to the injunctive relief ordered by the district court. Argentina voluntarily waived its immunity from the jurisdiction of the district court, and the FSIA imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign, at least where the district court's use of its equitable powers does not conflict with the separate execution immunities created by § 1609. A "federal court sitting as a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere." ..

Turning to Argentina's argument that the balance of equities and the public interest tilt in its favor, we see no abuse of discretion in the district court's conclusion to the contrary. The FAA bondholders contend with good reasons that Argentina's disregard of its legal obligations exceeds any affront to its sovereign powers resulting from the Injunctions.

Moreover, nothing in the record supports Argentina's blanket assertion that the Injunctions will "plunge the Republic into a new financial and economic crisis." ... The district court found that the Republic had sufficient funds, including over $40 billion in foreign currency reserves, to pay plaintiffs the judgments they are due. ... Aside from merely observing that these funds are dedicated to maintaining its currency, Argentina makes no real argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court's finding to the contrary was clearly erroneous.

Nor will the district's court's judgment have the practical effect of enabling "a single creditor to thwart the implementation of an internationally supported restructuring plan," as the United States contends... It is up to the sovereign—not any "single creditor"—whether it will repudiate that creditor's debt in a manner that violates a pari passu clause. In any event, it is highly unlikely that in the future sovereigns will find themselves in Argentina's predicament. Collective action clauses—which effectively eliminate the possibility of "holdout" litigation—have been included

in 99% of the aggregate value of New York-law bonds issued since January 2005, including Argentina's 2005 and 2010 Exchange Bonds. Only 5 of 211 issuances under New York law during that period did not include collective action clauses, and all of those issuances came from a single nation, Jamaica..Moreover, none of the bonds issued by Greece, Portugal, or Spain—nations identified by Argentina as the next in line for restructuring—are governed by New York law.
However, we do have concerns about the Injunctions' application to banks acting as pure intermediaries in the process of sending money from Argentina to the holders of the Exchange Bonds. Under Article 4–A of the U.C.C., intermediary banks, which have no obligations to any party with whom they do not deal directly, are not subject to injunctions relating to payment orders.... Any system that seeks to force intermediary banks to stop payments by a particular entity for a particular purpose imposes significant costs on intermediary banks and risks delays in payments unrelated to the targeted Exchange Bond payments... Plaintiffs claim that the Injunctions do not encompass intermediaries, but they fail to offer a satisfactory explanation for why intermediary banks would not be considered "indirect[ ] . facilitat[ors]" apparently covered by the Injunctions...
Our concerns about the Injunctions' application to third parties do not end here. Oral argument and, to an extent, the briefs revealed some confusion as to how the challenged order will apply to third parties generally. Consequently, we believe the district court should more precisely determine the third parties to which the Injunctions will apply before we can decide whether the Injunctions' application to them is reasonable. Accordingly, we remand the Injunctions to the district court... for such further proceedings as are necessary to address the Injunctions' application to third parties including intermediary banks and to address the operation of their payment formula."

Mark Weidemaier says this decision:

> caused turmoil in the sovereign debt markets, raising fears that Argentina will default on its restructured debt and prompting the US government, the exchange bondholders, and a number of financial institutions to ask the court to change course and to overturn or limit the injunction. Remedies of the sort approved in NML v. Argentina may also have broader systemic consequences for the sovereign debt markets. Most notably, if made broadly available to creditors, injunctions of this sort would increase bondholders' incentives to hold out from a debt restructuring and complicate efforts to provide debt relief to financially distressed sovereigns.[35]

[35] Mark C Weidemaier, S*overeign Debt after NML v. Argentina* (January 11, 2013) UNC Legal Studies Research Paper No. 2199655. Available at SSRN: http://ssrn.com/abstract=2199655. Published at 8:2 Capital Markets Law Journal 123 (2013).

The litigation came back to the Second Circuit again in 2013 after Judge Griesa in the District Court had clarified the injunctions. Here is an excerpt from the Second Circuit's decision in NML Capital v. Argentina (2013):[36]

"In its opinion, the district court first explained that its "ratable payment" requirement meant that whenever Argentina pays a percentage of what is due on the Exchange Bonds, it must pay plaintiffs the same percentage of what is then due on the FAA Bonds.Under the express terms of the FAA, as negotiated and agreed to by Argentina, the amount currently due on the FAA Bonds, as a consequence of its default, is the outstanding principal and accrued interest... Thus, as the district court explained, if Argentina pays Exchange Bondholders 100% of what has come due on their bonds at a given time, it must also pay plaintiffs 100% of the roughly $1.33 billion of principal and accrued interest that they are currently due....
Second, the district court explained how its injunctions would prevent third parties from assisting Argentina in evading the injunctions. Though the amended (and original) injunctions directly bind only Argentina, the district court correctly explained that, through the automatic operation of Federal Rule of Civil Procedure 65(d), they also bind Argentina's "agents" and "other persons who are in active concert or participation" with Argentina... Those bound under the operation of Rule 65(d) would include certain entities involved in the system through which Argentina pays Exchange Bondholders.... the amended injunctions cover Argentina, the indenture trustee(s), the 28 registered owners, and the clearing systems.... The amended injunctions explicitly exempt intermediary banks, which enjoy protection under Article 4A of New York's Uniform Commercial Code (U.C.C.), and financial institutions receiving funds from the DTC...
Argentina argues that the amended injunctions unjustly injure it in two ways. First, Argentina argues that the amended injunctions violate the Foreign Sovereign Immunities Act ("FSIA") by forcing Argentina to use resources that the statute protects. As discussed in our October opinion, the original injunctions—and now the amended injunctions—do not violate the FSIA because "[t]hey do not attach, arrest, or execute upon any property" as proscribed by the statute.... Rather, the injunctions allow Argentina to pay its FAA debts with whatever resources it likes. Absent further guidance from the Supreme Court, we remain convinced that the amended injunctions are consistent with the FSIA.
Second, Argentina argues that the injunctions' ratable payment remedy is inequitable because it calls for plaintiffs to receive their full principal and all accrued interest when Exchange Bondholders receive even a single installment of interest on their bonds. However, the undisputed reason that plaintiffs are entitled immediately to 100% of the principal and interest on their debt is that the FAA guarantees acceleration of principal and interest in the event of default.... As the district court concluded, the amount currently owed to plaintiffs by Argentina as a result of its persistent defaults is the accelerated principal plus interest. We believe that it is equitable for one creditor to receive what it bargained for, and is therefore entitled to, even if other creditors, when receiving what they bargained for, do not receive the same thing. The reason is obvious: the first creditor is differently situated from other creditors in terms of what is currently due to it under its contract... Because the district court's decision does no more than

[36] 727 F. 3d 230 (2d Cir. 2013).

hold Argentina to its contractual obligation of equal treatment, we see no abuse of discretion.... Argentina, BNY, Euro Bondholders, and ICE Canyon raise additional issues concerning the amended injunctions and their effects on the international financial system through which Argentina pays Exchange Bondholders. The arguments include that (1) the district court lacks personal jurisdiction over payment system participants and therefore cannot bind them with the amended injunctions, (2) the amended injunctions cannot apply extraterritorially, (3) payment system participants are improperly bound because they were denied due process, and (4) the amended injunctions' application to financial system participants would violate the U.C.C.'s protections for intermediary banks. None of these arguments, numerous as they are, has merit.
First, BNY and Euro Bondholders argue that the district court erred by purporting to enjoin payment system participants over which it lacks personal jurisdiction. But the district court has issued injunctions against no one except Argentina. Every injunction issued by a district court automatically forbids others—who are not directly enjoined but who act "in active concert or participation" with an enjoined party—from assisting in a violation of the injunction...
Euro Bondholders and ICE Canyon next argue that the amended injunctions are improper or at a minimum violate comity where they extraterritorially enjoin payment systems that deliver funds to Exchange Bondholders. But a "federal court sitting as a court of equity having personal jurisdiction over a party [here, Argentina] has power to enjoin him from committing acts elsewhere."... And federal courts can enjoin conduct that "has or is intended to have a substantial effect within the United States."...
If ICE Canyon and the Euro Bondholders are correct in stating that the payment process for their securities takes place entirely outside the United States, then the district court misstated that, with the possible exception of Argentina's initial transfer of funds to BNY, the Exchange Bond payment "process, without question takes place in the United States." ... But this possible misstatement is of no moment because, again, the amended injunctions enjoin no one but Argentina, a party that has voluntarily submitted to the jurisdiction of the district court....
Argentina and the Euro Bondholders warn that Argentina may not be able to pay or that paying will cause problems in the Argentine economy, which could affect the global economy. But as we observed in our last opinion, other than this speculation, "Argentina makes no real argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court's finding to the contrary was clearly erroneous."...
Argentina and amici next assert that, by forcing financial institutions and clearing systems to scour all of their transactions for payments to Exchange Bondholders, the amended injunctions will delay many unrelated payments to third parties. But the financial institutions in question are already called on to navigate U.S. laws forbidding participation in various international transactions...
Argentina and various amici assert that the amended injunctions will imperil future sovereign debt restructurings. They argue essentially that success by holdout creditors in this case will encourage other bondholders to refuse future exchange offers from other sovereigns. They warn that rather than submitting to restructuring, bondholders will hold out for the possibility of full recovery on their bonds at a later time, in turn causing second- and third-order effects detrimental to the global economy and especially to developing countries. ..

But this case is an exceptional one with little apparent bearing on transactions that can be expected in the future. Our decision here 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. As we explicitly stated in our last opinion, we 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...

We further observed that cases like this one are unlikely to occur in the future because Argentina has been a uniquely recalcitrant debtor and because newer bonds almost universally include collective action clauses ("CACs") which permit a super-majority of bondholders to impose a restructuring on potential holdouts. ... Argentina and amici respond that, even with CACs, enough bondholders may nonetheless be motivated to refuse restructurings and hold out for full payment—or that holdouts could buy up enough bonds of a single series to defeat restructuring of that series. But a restructuring failure on one series would still allow restructuring of the remainder of a sovereign's debt. And, as one amicus notes, "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 proposed restructuring is likely to fail under any circumstances." ..

Ultimately, though, our role is not to craft a resolution that will solve all the problems that might arise in hypothetical future litigation involving other bonds and other nations. The particular language of the FAA's pari passu clause dictated a certain result in this case, but going forward, sovereigns and lenders are free to devise various mechanisms to avoid holdout litigation if that is what they wish to do. They may also draft different pari passu clauses that support the goal of avoiding holdout creditors. If, in the future, parties intend to bar preferential payment, they may adopt language like that included in the FAA. If they mean only that subsequently issued securities may not explicitly declare subordination of the earlier bonds, they are free to say so. But none of this establishes why the plaintiffs should be barred from vindicating their rights under the FAA.

For the same reason, we do not believe the outcome of this case threatens to steer bond issuers away from the New York marketplace. On the contrary, our decision affirms a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to those terms. We believe that the interest—one widely shared in the financial community—in maintaining New York's status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts."

Here is one reaction to the decision:

"In the end, it appears that a primary driver of Judge Griesa's ruling, and the Second Circuit's affirmance, were the unique equitable factors at play in NML. Indeed, a number of commentators have argued that equitable considerations likely had a significant, if not determinant, role in the outcome of the Argentina litigation. The Second Circuit court noted that Argentina had been a

'uniquely recalcitrant' debtor, failing to abide by international norms governing sovereign restructuring negotiations and instead adopting a unilateral and coercive approach. Judge Griesa's holding, affirmed by the Second Circuit, detailed that Argentina breached its contract with bondholders by its course of conduct and 'extraordinary behavior', stating that '[t]here is no adequate remedy at law [emphasis added] for the Republic's ongoing violations . . . of the FAA because the Republic has made clear—indeed, it has codified [the Lock Law]— its intention to defy any money judgment issued by this Court'. Accordingly, Judge Griesa's interpretation of the pari passu clause in the Argentina litigation was viewed widely as a novel way to provide a powerful injunctive remedy. This reading appears consistent with the view of the Second Circuit to affirm a limited, unique, injunctive remedy, holding that '[w]e 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'. Said differently, if the rulings are about equitable remedies —which by definition are specific to the facts in front of the court—the general applicability of the Argentine case may be quite limited."[37]

A sovereign immunity issue in this litigation went to the Supreme Court in Republic of Argentina v NML Capital.[38] In order to execute the judgments in its favor, MNML Capital served subpoenas on banks not party to the litigation for records relating to international financial transactions. Argentina argued that the Foreign Sovereign Immunities Act provided for sovereign immunity in these circumstances. Here is an excerpt from Justice Scalia's opinion:

"Foreign sovereign immunity is, and always has been, "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486... Accordingly, this Court's practice has been to "defe[r] to the decisions of the political branches" about whether and when to exercise judicial power over foreign states... For the better part of the last two centuries, the political branch making the determination was the Executive, which typically requested immunity in all suits against friendly foreign states... But then, in 1952, the State Department embraced (in the so-called Tate Letter) the "restrictive" theory of sovereign immunity, which holds that immunity shields only a foreign sovereign's public, noncommercial acts...The Tate Letter "thr[ew] immunity determinations into some disarray," since "political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory." Republic of Austria v. Altmann, 541 U.S. 677, 690... (2004)... Further muddling matters, when in particular cases the State Department did not suggest immunity, courts made immunity determinations "generally by reference to prior State Department decisions.".. Hence it was that "sovereign immunity decisions were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly

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[37] Sergio Galvis, *Solving the Pari Passu Puzzle: the Market Still Knows Best*, 12 Capital Markets Law Journal 204, 209 (2017)

[38] 573 US 134 (S.Ct. 2014).

applied."...

Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."... The key word there — which goes a long way toward deciding this case — is comprehensive. We have used that term often and advisedly to describe the Act's sweep: "Congress established [in the FSIA] a comprehensive framework for resolving any claim of sovereign immunity."... The Act "comprehensively regulat[es] the amenability of foreign nations to suit in the United States."... This means that "[a]fter the enactment of the FSIA, the Act — and not the pre-existing common law — indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." ... As the Act itself instructs, "[c]laims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles set forth in this [Act]." 28 U.S.C. § 1602... Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.

The text of the Act confers on foreign states two kinds of immunity. First and most significant, "a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607." § 1604. That provision is of no help to Argentina here: A foreign state may waive jurisdictional immunity, § 1605(a)(1), and in this case Argentina did so, see 695 F.3d, at 203. Consequently, the Act makes Argentina "liable in the same manner and to the same extent as a private individual under like circumstances." § 1606.

The Act's second immunity-conferring provision states that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter." § 1609. The exceptions to this immunity defense (we will call it "execution immunity") are narrower. "The property in the United States of a foreign state" is subject to attachment, arrest, or execution if (1) it is "used for a commercial activity in the United States," § 1610(a), and (2) some other enumerated exception to immunity applies, such as the one allowing for waiver, see § 1610(a)(1)-(7). The Act goes on to confer a more robust execution immunity on designated international-organization property, § 1611(a), property of a foreign central bank, § 1611(b)(1), and "property of a foreign state . . . [that] is, or is intended to be, used in connection with a military activity" and is either "of a military character" or "under the control of a military authority or defense agency," § 1611(b)(2).

That is the last of the Act's immunity-granting sections. There is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets. Argentina concedes that no part of the Act "expressly address[es] [postjudgment] discovery." .... Quite right. The Act speaks of discovery only once, in a subsection requiring courts to stay discovery requests directed to the United States that would interfere with criminal or national-security matters, § 1605(g)(1). And that section explicitly suspends certain Federal Rules of Civil Procedure when such a stay is entered, see § 1605(g)(4). Elsewhere, it is clear when the Act's provisions specifically applicable to suits against sovereigns displace their general federal-rule counterparts. See, e.g., § 1608(d). Far from containing the "plain statement" necessary to preclude application of federal discovery rules ... the Act says not a word on the subject.

Argentina would have us draw meaning from this silence. Its argument has several parts.

First, it asserts that, before and after the Tate Letter, the State Department and American courts routinely accorded absolute execution immunity to foreign-state property. If a thing belonged to a foreign sovereign, then, no matter where it was found, it was immune from execution. And absolute immunity from execution necessarily entailed immunity from discovery in aid of execution. Second, by codifying execution immunity with only a small set of exceptions, Congress merely "partially lowered the previously unconditional barrier to post-judgment relief."... Because the Act gives "no indication that it was authorizing courts to inquire into state property beyond the court's limited enforcement authority,"... Argentina contends, discovery of assets that do not fall within an exception to execution immunity (plainly true of a foreign state's extraterritorial assets) is forbidden.

The argument founders at each step. To begin with, Argentina cites no case holding that, before the Act, a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States courts. No surprise there. Our courts generally lack authority in the first place to execute against property in other countries, so how could the question ever have arisen? See Wright & Miller § 3013, at 156 ("[A] writ of execution . . . can be served anywhere within the state in which the district court is held"). More importantly, even if Argentina were right about the scope of the common-law executionimmunity rule, then it would be obvious that the terms of § 1609 execution immunity are narrower, since the text of that provision immunizes only foreign-state property "in the United States." So even if Argentina were correct that § 1609 execution immunity implies coextensive discovery-in-aid-of-execution immunity, the latter would not shield from discovery a foreign sovereign's extraterritorial assets.

But what of foreign-state property that would enjoy execution immunity under the Act, such as Argentina's diplomatic or military property? Argentina maintains that, if a judgment creditor could not ultimately execute a judgment against certain property, then it has no business pursuing discovery of information pertaining to that property. But the reason for these subpoenas is that NML does not yet know what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law. If, bizarrely, NML's subpoenas had sought only "information that could not lead to executable assets in the United States or abroad," then Argentina likely would be correct to say that the subpoenas were unenforceable — not because information about nonexecutable assets enjoys a penumbral "discovery immunity" under the Act, but because information that could not possibly lead to executable assets is simply not "relevant" to execution in the first place ... But of course that is not what the subpoenas seek. They ask for information about Argentina's worldwide assets generally, so that NML can identify where Argentina may be holding property that is subject to execution. To be sure, that request is bound to turn up information about property that Argentina regards as immune. But NML may think the same property not immune. In which case, Argentina's self-serving legal assertion will not automatically prevail; the District Court will have to settle the matter...

Today's decision leaves open what Argentina thinks is a gap in the statute. Could the 1976 Congress really have meant not to protect foreign states from postjudgment discovery "clearinghouses"? The riddle is not ours to solve (if it can be solved at all). It is of course possible that, had Congress anticipated the rather unusual circumstances of this case (foreign sovereign waives immunity; foreign sovereign owes money under valid judgments; foreign sovereign does not pay and apparently has no executable assets in the United States), it would

have added to the Act a sentence conferring categorical discovery-in-aid-of-execution immunity on a foreign state's extraterritorial assets. Or, just as possible, it would have done no such thing. Either way, "[t]he question. . . is not what Congress `would have wanted but what Congress enacted in the FSIA." ...

Nonetheless, Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause "a substantial invasion of [foreign states'] sovereignty," ... and will "[u]ndermin[e] international comity,"... Worse, such orders might provoke "reciprocal adverse treatment of the United States in foreign courts," ... and will "threaten harm to the United States' foreign relations more generally," ... These apprehensions are better directed to that branch of government with authority to amend the Act — which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago."

Although the issuance of sovereign bonds and entering into loan agreements are commercial transactions to which sovereign immunity does not apply,[39] loan agreements and bond documentation will include waivers of sovereign immunity and provisions for submission to the jurisdiction of particular courts. A waiver of immunity from suit will not constitute a waiver with respect to execution.

Even where the state does not benefit from sovereign immunity with respect to the debt it may be difficult to obtain payment from a sovereign debtor. Courts may sometimes express disapproval of this fact.[40] The sovereign may decline to satisfy the judgment, and judgment creditors may have difficulty locating assets as illustrated by the litigation involving Argentina. Creditors sought to attach a building Argentina listed for sale and then withdrew from the market

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[39] Republic of Argentina v Weltover 504 US 607 (1992)("the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce," .... Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts to acquire goods...")
In some cases, courts may decline to hear cases involving foreign sovereigns under the political question doctrine if the US government has decided to resolve issues through international agreements rather than through litigation. See, e.g., Whiteman v Dorotheum GmbH & Co. 431 F.3d 57(2d. Cir. 2006) (claims against the Republic of Austria relating to assets confiscated by the Nazi regime). Courts may also decline to review acts of foreign sovereigns under the act of state doctrine.

[40] *See, e.g.*, Kensington Int'l, Ltd. v. Republic of Congo, 2005 U.S. Dist. LEXIS 4331 (SDNY 2005) ("The Court may take judicial notice of the fact that the Congo is a oil-rich nation with more than sufficient assets to pay its debts but one of the world's most notorious debtors...Congo has repeatedly refused to honor court judgments, not only the judgments entered in London, but judgments entered in New York courts as well.")

after the creditor sought attachment.[41]

There is a commercial exception to sovereign immunity with respect to enforcement of judgments, and moneys intended to pay other creditors, such as investors in restructured bonds, do not benefit from sovereign immunity. But assets such as embassy premises, which are not commercial assets, are not available for enforcement. An attempt by creditors of Argentina to seize an Argentinean naval training ship, ARA Libertad, in Ghana was impeded by the International Tribunal for the Law of the Sea (ITLOS) in December 2012.[42] A warship is " an expression of the sovereignty of the State whose flag it flies" and, as such, benefits from sovereign immunity.

Argentina faced a very significant amount of litigation over its early 2000s debt restructuring actions, involving hundreds of lawsuits for the benefit of thousands of investors, which Gregory Makoff and Mark Weidemaier have characterized as the first mass sovereign debt litigation.[43] They write:

"Sovereign immunity is not an insuperable barrier. It lets creditors impose substantial penalties on foreign states. Over time, the desire to escape these penalties may induce the sovereign to pay. 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...
It is no surprise that hedge funds are associated with the rise of sovereign debt litigation. Many of these firms are well-positioned to overcome the hurdles involved in suing a foreign state, and one firm played an outsized role in the earliest sovereign debt cases. Yet largescale, complex litigation does not require the presence of hedge funds. In fact, the forces that let disaggregated plaintiffs finance other highstakes 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....
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.

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[41] TIG Insurance Co. v. Republic of Argentina, 967 F. 3d 778 (DC Cir. 2020)(whether property is used for commercial purposes depends on totality of the circumstances). The judgment the plaintiffs were seeking to enforce was subseqently held to be null and void on the basis that Argentina had not waived sovereign immunity. TIG Insurance Co. v. Republic of Argentina (DDC 2022).

[42] The "ARA Libertad" Case (Argentina v Ghana), ITLOS, Case No. 20, Order (Dec. 15, 2012).

[43] Gregory Makoff & W. Mark C. Weidemaier, *Mass Sovereign Debt Litigation: A Computer-Assisted Analysis of the Argentina Bond Litigation in the U.S. Federal Courts 2002–2016*, 56 U.C. DAVIS L. REV. 1233 (2023).

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. Yet in practice, sovereigns tend to keep attachable assets hidden away. 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. 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. 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. The threat of attachment can deny the sovereign access to foreign capital markets and disrupt commercial transactions outside its borders. This can lead countries in default to rely on less efficient forms of finance and to engage middlemen to carry out day-to-day international trade, both of which entail a significant incremental cost."[44]

[44] *Id*. at 1237-8, 1239-40, 1251-