

July 19, 2013

VIA HAND DELIVERY & ELECTRONIC MAIL

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Re: *Republic of Argentina v. NML Capital Ltd., et al.*, No. 12-1494

Dear Madams and Sirs:

By letter of July 16, I was informed that the Managing Director and the International Monetary Fund may file an *amicus curiae* brief in the Supreme Court of the United States in *Republic of Argentina v. NML Capital, Ltd., et al.*, No. 12-1494. I represent NML Capital, Ltd. in that case and I write to urge that the IMF not intervene in this private lawsuit. I respectfully request of the Secretary that copies of this letter be distributed to the members of Fund's Executive Board and Board of Governors.

Argentina has petitioned the Supreme Court to review the decision by the Second Circuit in *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012). That decision enforced Argentina's contractual obligation to "rank" "equally" its payment

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obligations to its creditors. The Second Circuit reached this decision only after almost a decade of Argentina's wholly unique and unprecedented willful defiance of court orders and judgments, coupled with an obdurate and unyielding refusal to negotiate in good faith to resolve its debts. And, anticipating the potential objection of multilateral lenders, the Second Circuit explicitly stated that the case did not apply to obligations to the IMF. 699 F.3d at 260.

The IMF's intervention in this case would flagrantly violate the IMF's strict and long-standing duty of neutrality, threaten the IMF's immunity, undermine mutual and fair settlement of sovereign debt disputes, and encourage Argentina to continue its violation of legal and international norms of conduct. Any attempt by the IMF to support Argentina's petition—an attempt to undo previous court rulings in this litigation—should be abandoned.

For decades, the IMF has adhered to its duty of remaining neutral in debt disputes, a policy that has operated as a legal limitation on the IMF's authority to take sides in debt disputes. *See* International Monetary Fund, *The Role of the Fund in the Settlement of Disputes Between members relating to External Financial Obligations* 2-4, SM/84/89 (April 25, 1984); *see also* International Monetary Fund, *Summing Up by the Acting Chairman—Settlement of Disputes Between Members Relating to External Financial Obligations—Role of the Fund*, Executive Board Meeting 84/99 (June 22, 1984), *reprinted in* International Monetary Fund, *Selected Decisions & Selected Documents of the International Monetary Fund* 118 (Dec. 31, 2011). As the IMF has explained, “it has been the understanding and practice of staff not to involve the Fund in disputes between a member and its private debtors or creditors.” International Development Association & International Monetary Fund, *Enhanced HIPC Initiative—Creditor Participation Issues* 6 n.5 (Apr. 8, 2003). Bound by this legal duty of neutrality, the IMF has uniformly rejected requests to intervene in litigation between member states and their creditors.

As you doubtless are aware, the only recognized exceptions to the IMF's duty of neutrality are: (1) where *both* sides of the dispute ask the IMF to facilitate a resolution, or (2) where involvement is necessary to protect payments to the IMF. Neither exception applies here: The creditors in the litigation to enforce Argentina's debt obligations have not requested that the IMF facilitate a resolution. Nor is the IMF's involvement warranted to protect payments to the IMF. Argentina repaid the IMF years ago, and, looking forward, the Second Circuit made clear that its interpretation of the so-called “*pari passu* clause” could not be read to undermine “preferential payments to multilateral organizations like the IMF.” 699 F.3d at 260 (emphasis added).

To the extent that, despite the Second Circuit's reservation of the IMF's rights to “preferential payments,” the IMF remains concerned about the Second Circuit's interpretation of the so-called “*pari passu* clause,” it is noteworthy that Argentina has not



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requested the Supreme Court to review the meaning of that clause. Nor would the Supreme Court consider such an issue, since the meaning of the clause is governed by state law—not federal law—and the Supreme Court generally does not adjudicate issues of state law. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983). This case thus is an entirely inappropriate vehicle for the Fund to air whatever disagreements it might have with a New York court’s interpretation of a contractual provision governed by New York law.

If the IMF abandons its long-standing legal duty of neutrality and supports Argentina’s position in its long-running litigation against its creditors, the consequences for both the Fund and the consensual system for resolution of sovereign debt could be substantial.

*First*, by abandoning the neutrality principle that governs its conduct, the IMF would venture beyond its impartial role in the international financial system, thus jeopardizing the immunity the IMF normally enjoys, and potentially exposing the IMF to litigation. *Cf.* Minute Order, *Nyambal v. Int’l Monetary Fund*, No. 12-cv-1037 (D.D.C. July 9, 2013); Order, *Vila v. Inter-American Investment Corp.*, No. 06-cv-2143-RBW (D.D.C. Apr. 5, 2013). Indeed, abandoning neutrality in this instance also would make the Fund susceptible to incessant lobbying from members and third parties who regularly would seek IMF intervention in future lawsuits involving creditors and debtors of member nations. If the Fund is willing to intervene on behalf of Argentina, universally acknowledged as one of the worst-behaving sovereign debtors in modern history, in a case that involves (at most, at this point) questions about the powers of U.S. federal courts to grant certain types of injunctive relief, then there are scarce limits on the number of future lawsuits that arguably would warrant IMF intervention.<sup>1</sup>

*Second*, the IMF’s involvement in this dispute would undermine its mission of fostering settlement of sovereign debtor and creditor disputes fairly and consensually. *See*

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<sup>1</sup> Nor can it plausibly be maintained that an *amicus* brief that explicitly supports Argentina’s petition for Supreme Court review somehow would retain neutrality merely by declining to take a position on the particular questions Argentina presents. Such a brief inescapably would support Argentina’s immediate objectives in its litigation against its creditors—relief from the Second Circuit’s ruling—which is unattainable unless the Supreme Court first grants Argentina’s petition that the Fund is being urged to support. To call such a brief “neutral” is simply disingenuous. And the precedent the Fund would be setting for itself would render its legal duty of neutrality categorically inapplicable with respect to any petition for discretionary review in U.S. federal courts of which nearly 10,000 are filed each year in the U.S. Supreme Court, and many thousands more in the federal courts of appeals.

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International Monetary Fund, *Progress Report to the International Monetary and Financial Committee on Crisis Resolution* 11 (Apr. 12, 2005). For years, the creditors in this legal dispute repeatedly have urged Argentina to engage in good-faith negotiations to amicably resolve Argentina's obligations. On each occasion (including in recent months), Argentina has adamantly refused. To this point, "Argentina was and remains unique in its unilateral and coercive approach to the debt restructuring." Elena Dugger, Moody's Investors Service, *Sovereign Defaults Series: The Role of Holdout Creditors and CACs in Sovereign Debt Restructurings* 2 (Apr. 10, 2013). It is Argentina's uniquely "coercive approach" that led to its case being the only one out of "34 sovereign bond exchanges" that yielded "persistent litigation." *Id.* Official support for Argentina's restructuring paradigm, however, undoubtedly will encourage other nations to follow its path—a result leading to fewer rather than more successful consensual restructurings. Indeed, it is antithetical to the IMF's core mission to lend legal support to a sovereign debtor that rejects dialogue with its creditors.

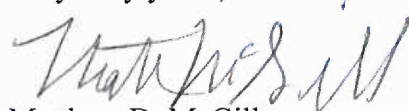
*Third*, the IMF's support for Argentina also would muddle the IMF's stern and consistent message condemning Argentina's misconduct. Just this year, the IMF took the rare and serious step of censuring Argentina for "blatantly inaccurate inflation statistics." International Monetary Fund, Statement by the IMF Executive Board on Argentina, Press Rel. No. 13.33 (Feb. 1, 2013); *see also* The Economist, *Motion of Censure* (Feb. 9th 2013). Argentina's recent misconduct—including expropriating the oil company YPF and flouting hundreds of judgments issued by courts and the International Centre for the Settlement of Investment Disputes—has drawn widespread criticism from the international community. *See* Joshua Chaffin, EU Condemns Argentinian seizure of YPF, *Financial Times* (Apr. 18, 2012); Proclamation 8788 of March 26, 2012, 77 Fed. Reg. 18,889 (Mar. 28, 2012) (removing Argentina from the Generalized System of Preferences). A decision by the IMF to violate its own duty of neutrality in order to support Argentina would undermine the clear message that the international community has been sending to Argentina: Come back into compliance with the law and international norms.

*Finally*, a decision by the IMF to support Argentina would bolster Argentina's ongoing scheme to avoid honoring its debt obligations to creditors. Argentina is a prosperous, G-20 country, which has ample financial resources to honor all of its debt obligations. *See* Banco Central de la Republica Argentina, Statistics and Indicators, Main Variables, at [http://www.bcra.gov.ar/index\\_i.htm](http://www.bcra.gov.ar/index_i.htm) (last accessed July 19, 2013) (Argentina has over \$37 billion in international reserves). The IMF's core mission would be undermined by signaling support for Argentina's attempts to repudiate debts that it has ample resources to repay.

For all of these reasons, we urge the Fund to not take the unprecedented and counterproductive step of filing a brief to support Argentina's position in its litigation with its creditors. I look forward to your response.

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Very truly yours,

A handwritten signature in dark ink, appearing to read "Matthew D. McGill". The signature is written in a cursive, flowing style with a prominent initial "M".

Matthew D. McGill

cc: James Kerr, Esq.