Unofficial translation

Washington DC, September 29th 2014

Mr. Secretary of State,

I have the honor of writing to you in relation to the case *NML Capital Ltd. et al. v. Republic of Argentina* pending before the courts of your country, in which the highest Court of the United States of America decided not to review an injunction, delivered by the District Court for the Southern District of New York and affirmed by the Court of Appeals for the Second Circuit, whose application hinders the restructuring of Argentina's sovereign debt.

As is publicly known, the Argentine Republic, after declaring the default on its public debt in the year 2001, began a financial regularization process that required significant efforts from its Government and its people. One of the main components of this process was the restructuring of the existing debt owed to thousands of bondholders that totalled approximately USD 81 billion. That restructuring was achieved by means of Exchange Offers made in 2005 and 2010, which resulted in the successful restructuring of 92.4% of the debt affected by the default.

In spite of this commendable work, a small group of bondholders voluntarily decided not to reach an agreement with Argentina and, as a consequence, declined to participate in the debt restructuring process. That group included certain plaintiffs, whose bonds represent less than 1% of the total original debt, that have obtained *pari passu* injunctions against the Republic that interfere with its sovereign debt restructuring process. These entities acquired in the secondary market Argentine sovereign bonds issued under the 1994 Fiscal Agency Agreement (FAA), at significantly lower prices than their nominal value. Most of their bonds were purchased after the 2001 default, and even after the 2005 restructuring. The purpose of their

acquisition was to subsequently attempt —through legal actions, attachments and political pressure— to be paid the full value of the bond, plus interest.

The myriad of attempts by these plaintiffs to attach the sovereign and immune property of the Argentine State — most of which have failed— included, *inter alia*, global bonds owned by Argentina, patents and royalties, cultural assets, pension funds to be used for payments to retired people, the presidential airplane, a satellite (and the parts of another satellite), reserves of the Central Bank of the Argentine Republic, property belonging to diplomatic representations, and even military property. The latter includes the striking case of the Frigate Libertad, a military vessel belonging to the Argentine navy that was held at the Tema Port (Republic of Ghana) and whose immediate release was ordered by the International Tribunal for the Law of the Sea.

Finally, as their goal was frustrated by the immunity from execution applicable to sovereign property, the plaintiffs devised a new strategy: to prevent Argentina from continuing to make payments to other creditors on its restructured debt. Indeed, the judicial harassment and the acts of extortion carried out by the plaintiffs against the Argentine Republic have now extended to assets which are lawfully and legitimately owned by 92.4% of the creditors who voluntarily accepted the proposed exchanges.

This strategy was based upon an unreasonable interpretation of the *pari passu* clause, the sole purpose of which is to prevent Argentina from paying the interest due to creditors who accepted the proposed restructurings in good faith, if it does not simultaneously pay to the plaintiffs the total amount claimed by them (that is, the original nominal value of the debt, plus interest and late payment charges, in an accelerated fashion). This would not only enable them to make an usurious profit amounting to more than 1608 per cent, but it would also be impossible for Argentina to carry out. First, if the claims of the remaining holdouts — many of which have already filed “me too” claims with the same courts of the United States of America asking for the same remedy under the *pari passu* clause — were to be added to plaintiffs’ claim, the resulting amounts would represent more than half of the reserves of the Argentine Republic. Second, if the Republic were to make a better offer to those holdouts, it would run the risk of breaching a contract provision known as “Rights Upon Future Offers” (RUFO), thus jeopardizing the restructuring of its sovereign debt.

In spite of the uniform international interpretation of the *pari passu* clause, the illogical and inequitable construction suggested by the plaintiffs has been backed by the courts of the United States of America, including its Supreme Court, which has refused to review the case. As a matter of fact, at the hearings held in the case, Judge Griesa expressly recognized that his injunctions were a "*means*" (a rather odd definition for an injunction) for "*compelling*" the Argentine State to pay the plaintiffs 100 per cent of their claim, thus violating the principle of equality and good faith among creditors and the sovereign immunity of the Argentine Republic, as well as disrupting its debt restructurings.

These decisions made by the US courts are contrary to the support lent to Argentina's position by the international community and the Executive Branch of the United States of America itself, through the *Amicus Curiae* briefs it submitted to its own courts. Special attention should be given to the statement contained in those briefs regarding the commitment of the United States of America to the promotion of the efforts to achieve the voluntary and orderly restructuring of sovereign debt within a framework of contractual certainty, as well as its disagreement with the interpretation of the *pari passu* clause made by its courts, which was expressed in the following terms:

> "*Voluntary sovereign debt restructuring will become substantially more difficult, if not impossible, if holdout creditors are allowed to use novel interpretations of boilerplate bond provisions to interfere with the performance of a restructuring plan accepted by most creditors and to dramatically tilt the incentives away from consensual, negotiated restructuring in the first place*".[1]

Within the context of the excessive judicial harassment to which my country is subjected by means of an injunction than cannot possibly be complied with,[2] plaintiffs have now asked the court for a new and even greater legal absurdity: on 24 September, the plaintiffs requested that the Argentine Republic be held in contempt of court and that sanctions be imposed on it on account of the alleged failure to comply with court orders. The District Judge, Thomas Griesa, summoned the parties to appear at a hearing on this date where he will consider whether to grant that request.

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[1] Brief for the United States of America as *Amicus Curiae* in Support of Reversal, case 12-105-cv(L) (2nd Cir. Apr. 4, 2012), p. 17.

[2] It bears noting that the US District Court for the Southern District of New York ordered that the payment made by the Argentine Republic —amounting to USD 539 million— be retained, but has not issued a writ of attachment. Furthermore, it has not enforced the injunction of 23 February 2012, as it has not ordered the distribution of the funds in line with its peculiar interpretation of the *pari passu* clause. In this respect, through an order issued on 27 June 2014, it blocked the payment made, thus leaving the assets belonging to restructured bondholders in actual legal limbo.

The sanctions requested by the plaintiffs include, *inter alia*, the payment of USD 50,000 per day, until the alleged failure to comply with the abovementioned court orders stops. Furthermore, in their motion, the plaintiffs expressly leave the door open to the possibility of imposing other non-monetary sanctions (?).

The plaintiffs base this preposterous claim on *(i)* the actions taken by the political organs of a sovereign State which have acted in accordance with the rights and powers granted by the Argentine Constitution and, therefore, as will be explained below, cannot in any way be subject to the scrutiny of a foreign judge, and *(ii)* the alleged failure to comply with a court order which, as demonstrated by the Republic, cannot possibly be carried out.[3]

The Argentine Republic notes that it is completely absurd for plaintiffs to argue that a local judge can hold a foreign State "*in contempt*". This position can only arise from ignorance or a distorted view of the fundamental rules of international law currently in force and the peaceful coexistence of global order.

The principles on which international coexistence rests are reflected in the Charter of the United Nations. One of these principles refers to sovereign equality of all States and is expressly embodied in Article 2(1) of that Charter. This is a fundamental principle when it comes to determining what a State can or cannot do in relation to other States. When any branch of government of a State denies "*equal*" status to another State, it not only manifestly violates international law but it also risks setting a precedent for the commission of similar violations of international law to its own detriment.

Such was the approach taken by the Government of the United States of America in the Amicus Curiae brief filed in *NML Capital Ltd. et. al. v. Republic of Argentina*, on 4 April 2012:

> *"Finally, an order by a U.S. court authorizing execution against foreign state property could have adverse consequences for the treatment of*

[3] On this date, the Argentine Republic has submitted a letter to Judge Griesa reiterating once again the reasons and arguments concerning the impossibility of carrying out its orders. A copy of such letter is attached hereto. As is well known, the Argentine Republic has repeatedly expressed its intention and ability to pay its debts to 100 per cent of its creditors under fair, equitable, lawful and sustainable conditions, as evidenced by the recent enactment and promulgation of Law No. 26,984 on Sovereign Payment.

> *the United States and its property abroad under principles of reciprocity".*[4]

Along the same lines, the International Law Commission stated that:

> *Immunity from execution may be viewed, therefore, as the last bastion of State immunity. If it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State (par in parem imperium non habet), it follows a fortiori that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property.*[5]

Article 24 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, signed in New York on 2 December 2004, provides that:

> "*1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.*
>
> *2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a respondent party before a court of another State*".

In the first place, that provision states that no penalties may be imposed on a State owing to its procedural conduct, including holding the State in contempt.

In the second place, the foregoing provision establishes that a State's refusal or inability to comply with an order cannot give rise to any sanction, including, in particular, — among other types of sanctions which fall outside the scope of authority of the judge hearing the case — fines or monetary penalties of any kind. Moreover, Article 24(2) of the aforementioned Convention provides that no State may be required to provide any security, bond or deposit for the payment of judicial costs or expenses.

In addition, a request for the imposition of a measure that is, in itself, unlawful due to its being contrary to international law undermines the dignity of the State. There is no choice but to reject such a request outright in view of the unlawful nature of its purpose.

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[4] Brief for the United States of America as *Amicus Curiae* in Support of Reversal, case 12-105-cv(L) (2nd Cir. Apr. 4, 2012), p. 30

[5] International Law Commission, Yearbook of the ILC, vol. II, A/CN.4/SER.A/1991/Add.l (Part 2) (1991), p. 56

The provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property which have been transcribed above reflect customary international law on this matter. With specific regard to Article 24, it bears noting that, in its brief filed as *Amicus Curiae* in *AF-CAP, INC v. Republic of Congo*, the United States held that:

> "[…] *The United Nations Convention* [on Jurisdictional Immunities of States and Their Properties] *is not yet in force, and the United States is not a signatory to the Convention. Nevertheless, a number of its provisions, including Article 24(1), generally reflect current international norms and practices regarding foreign state immunity. Notably, the principle reflected in Article 24 of the Convention was uniformly supported by member states, which disagreed only about whether to extend even further a state's immunity from coercion.* […]"[6]

In the last *Amicus Curiae* Brief submitted by the United States of America in *SerVaas Incorporated v. the Republic of Iraq,* the US Government explained that:

> "[…] *it is generally inappropriate for courts to impose unenforceable orders of monetary contempt sanctions against a foreign state* […]"[7]

In addition, the measure submitted to Judge Griesa for consideration is not only contrary to international law and practice, which preclude the adoption of measures against a State owing to its failure or refusal to comply with a court order, but it is also at odds with the domestic provisions of various States, including the Argentine Republic, Canada, United Kingdom, Singapore, Pakistan, Australia and the United States of America itself. Indeed, in accordance with the interpretation of the *Foreign Sovereign Immunities Act* (FSIA) made by the competent authorities of the United States, the fact that a foreign State has waived its sovereign immunity from jurisdiction under Section 1605 (a)(1) of the FSIA —the sole basis for the District Court for the Southern District of New York's jurisdiction over the Argentine Republic in this case — does not mean that such State may be subject to monetary sanctions for contempt under FSIA Sections 1609 and 1610 (a).

The pre-eminence of the rule of international law preventing a State from being held in contempt by the local courts of another State and from being subject to contempt sanctions, as well as the evidence that such rule is generally accepted as law — which arises from its inclusion in the legal systems of the different States — have been

[6] Brief for the United States of America as Amicus Curiae in Support of Defendant-Appellant, case 05-51168 (5th Cir., 2006), p. 15.
[7] Brief for the United States of America as Amicus Curiae, case 14-385 (2nd Cir. Sept. 9, 2014).

recognized by the United States of America, as shown by its submissions as *Amicus Curiae* in the cases *AF-CAP, INC v. Republic of Congo* and *Belize Telecom Ltd. v. Government of Belize*.[8] In those briefs, the United States requested its courts to reject the existence of the power of competent judges to exercise coercion against sovereign States with a view to ensuring compliance with orders issued by them, on the basis of the same arguments as those described above.

In particular, in its brief as *Amicus Curiae* in *AF-CAP, INC v. Republic of Congo*, the United States noted that:

> *"The United States urges this Court to reject monetary sanctions as a means for coercing compliance with a U.S. court order against a foreign state. An order of monetary contempt sanctions such as that entered by the district court in this case has the potential to harm our foreign relations and to open the door to the imposition of sanctions upon our Government by foreign courts. Imposing contempt sanctions on a foreign state is at odds with the practice of the international community and the treatment of our own Government by courts here and abroad. Stacked against those compelling policy considerations are nonexistent benefits from an award that is, as we have shown, unenforceable under the FSIA.* ***Under these circumstances, a district court errs and abuses its discretion when it orders monetary contempt sanctions against a foreign state***".[9]

In line with the statements made by the United States in the abovementioned *Amicus Brief*, the Argentine Republic believes that the mere consideration of the possibility of issuing such a judicial order is an affront to the dignity and sovereignty of our country, and is also inconsistent with national and international law and practice as well as with the laws of other countries.

With respect to these proceedings, the Government of the United States of America has already noted, in its *Amicus Curiae* brief, that:

> "[…] *the laws of many foreign nations do not even permit a court to enter an injunction against a foreign state, and the foreign state may expect the United States to extend to it the same respect and courtesy. It is important to recognize in this regard the strongly held view of many foreign states that they are not subject to coercive orders of U.S. courts.* See *Fox,* supra*, at 371* ('Nor may an injunction or order for

[8] Brief for the United States of America as Amicus Curiae in Support of Defendant-Appellant, case 05-12641-CC (11th Cir., 2005), available at http://www.state.gov/s/l/2005/87217.htm, last entry, Sep. 27, 2014.
[9] Brief for the United States of America as Amicus Curiae in Support of Defendant-Appellant, case 05-51168 (5th Cir., 2006), p. 21.

> specific performance be directed by a national court against a foreign State on pain of penalty if not obeyed.')"[10]

In addition, in that brief, the Government of the United States also stated that:

> "The issues raised in this appeal regarding the appropriate scope of an injunction issued against a foreign sovereign could affect all foreign sovereigns in U.S. courts, and have a significant, detrimental impact on our foreign relations, as well as on the reciprocal treatment of the United States and its extensive property holdings."[11]

The current situation could result in a new and shocking decision by the US Judiciary that could threaten the dignity and sovereignty of Argentina. The plaintiffs' claim further aggravates the situation, since they attempt to ground it on decisions of the main political organs of the Argentine State (statements by the head of the Argentine Executive Branch and by members of her Cabinet, as well as laws enacted by the Legislative Branch) which are not under the jurisdiction of the Court.

A declaration of contempt would result in an unprecedented escalation in the conflict and would be even more serious than the decision to interfere with the collection of payments made to restructured bondholders. Indeed, such a declaration would not only affect the rights of third parties, but also further violate the sovereignty of the Argentine Republic. All of this adds to the decisions already taken in the abovementioned case, the implementation of which currently prevents Argentina's creditors from receiving the payments made by the country with the aim of destroying the restructuring process of Argentina's sovereign debt.

Such decisions are against the obligation to respect the sovereignty and immunities of States; the obligation to refrain from applying or promoting the implementation of coercive measures of an economic nature against other States; and the obligation to act in good faith in the exercise of judicial powers. All of the foregoing has led our country to resort to the International Court of Justice, in order to find an amicable solution to the dispute arising therefrom. To date, no reply from the Government of the United States has been received.

Nevertheless, the Argentine Republic would like to remember – and reiterate – that, in its request for the institution of proceedings, it had stated that, in the event the United

[10] Brief for the United States of America as *Amicus Curiae* in Support of Reversal, case 12-105-cv(L) (2nd Cir. Apr. 4, 2012), p. 29.
[11] *Ibid.*, p. 6.

States of America did not agree to submit to the jurisdiction of the Court, notice of such request should be deemed a demand for an alternative means to resolve this dispute. In this respect, it is hereby reminded that in no case can the United States of America be released from its international responsibility by the decisions of its Judiciary. Indeed, in accordance with the principles of international law, a State has the obligation to answer for the acts or omissions of any of its organs.

The fact that a foreign court is attempting to force a sovereign State to appear before it in order to offer explanations for lawful and legitimate acts and decisions adopted through said State's constitutional devices in the exercise of its sovereignty represents an affront that has motivated this submission, considering the impact of this case on foreign relations, as has already been noted by the Government of the United States of America itself in its *Amicus Curiae* briefs.

The sovereign equality of States is one of the most fundamental principles of international law, which is evidenced by its inclusion in the Charter of the United Nations. The well-known "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" not only sets forth this principle, but also establishes, among other basic principles, that all States are judicially equal and enjoy the rights inherent in full sovereignty, as well as that the integrity and political independence of the State are inviolable.[12] The General Assembly of the United Nations has declared that these are basic principles, which is why each State has the right to freely choose and implement its own political, social, economic and cultural system.[13]

Based on these principles, the Argentine Republic has adopted a system of government which is substantially similar to that of the United States of America, establishing a representative, republican and federal democracy.[14] Its organs of political representation enjoy democratic legitimacy, grounded in the principle of the sovereignty of the people of the Argentine Republic.

[12] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625 XXV (Oct. 24, 1970).
[13] Ibid.
[14] Article 1 of the Argentine Constitution.

As a consequence, the acts of these political organs are subject only to the sovereignty of the people and the rest of the principles set forth in the Argentine Constitution. In no case can they be questioned by the organs of any foreign State.

Specifically in connection with the power to address sovereignty debt restructuring, Article 75(7) of the Argentine Constitution provides that the Argentine Congress is empowered "to settle the payment of the domestic and foreign debt of the Nation."

In conclusion, any decision adopted by the courts of the United States that may frustrate the restructuring of Argentina's sovereign debt or that may challenge the acts of the political organs of the Argentine Republic would not only fall outside the jurisdiction of said courts, but also be an unlawful interference in the domestic affairs of the Argentine Republic, triggering the international liability of the United States of America.

For this reason, a copy of today's submission by Argentina before the District Court for the Southern District of New York is attached hereto.

Sincerely,

Enclosed

THE HONORABLE JOHN FORBES KERRY
SECRETARY OF STATE OF THE
UNITED STATES OF AMERICA
WASHINGTON D.C.