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.

EMBASSY OF THE
ARGENTINE REPUBLIC
WASHINGTON, D. C.

AMBASSADOR'S OFFICE

Washington D.C., 29 de septiembre de 2014

Señor Secretario de Estado:

Tengo el honor de dirigirme a usted en relación a la causa *NML Capital Ltd. et al. v. Republic of Argentina* en trámite ante la justicia de su país, en el marco de la cual el más alto Tribunal de los Estados Unidos de América decidió no revisar la sentencia de la Corte de Distrito Sur de Nueva York, confirmada por la Corte de Apelaciones de ese Distrito y cuya aplicación obstaculiza el proceso de reestructuración de la deuda soberana de la República Argentina.

Como es de público conocimiento, la República Argentina, tras la declaración de suspensión de pagos de su deuda pública en el año 2001, inició un proceso de regularización financiera que le demandó inmensos esfuerzos al Gobierno y al Pueblo argentinos. Uno de los ejes de este proceso fue la reestructuración de la deuda que existía con miles de tenedores de bonos, cuyos títulos equivalían a aproximadamente 81 mil millones de dólares estadounidenses. Esto último se concretó a través de Ofertas de Canje realizadas en los años 2005 y 2010. Tal proceso alcanzó exitosamente una adhesión del 92,4% de la deuda en diferimiento de pagos.

A pesar de esta encomiable labor, un grupo reducido de tenedores de bonos decidió voluntariamente no llegar a un acuerdo con la Argentina y, por consiguiente, quedó afuera de la reestructuración de la deuda. Entre ellos, se encuentran los demandantes que han obtenido órdenes que obstaculizan el proceso de reestructuración de la deuda soberana de la República Argentina, cuya tenencia de títulos representa menos del 1% de la deuda total original. Estas entidades adquirieron en el mercado secundario bonos soberanos argentinos emitidos bajo el *Fiscal Agency Agreement* de 1994 (FAA), a precios significativamente inferiores a su valor nominal, la mayor parte de ellos comprados con posterioridad a dicha suspensión, e incluso con posterioridad a la

reestructuración del año 2005. El objetivo de tal adquisición fue intentar, posteriormente, mediante litigios, embargo de activos o presiones políticas, cobrar el 100% del título de deuda, junto con intereses.

Los numerosos intentos de embargo de bienes soberanos e inmunes del Estado argentino, en su gran mayoría con resultado negativo para estos acreedores, comprendieron, entre otros, bonos globales de propiedad de la Argentina, patentes y regalías, bienes culturales, fondos destinados al pago de jubilados, el avión presidencial, un satélite y partes de otro, reservas del Banco Central de la República Argentina, bienes de representaciones diplomáticas y hasta bienes militares. Entre estos últimos se destaca el insólito caso de la Fragata Libertad, un buque militar de la Armada argentina detenido en el puerto de Tema (República de Ghana) cuya inmediata liberación fue ordenada por el Tribunal Internacional del Derecho del Mar.

Finalmente, frustrados por la inmunidad de ejecución de la que gozan los bienes soberanos, los demandantes diseñaron una nueva estrategia: impedir que la Argentina continúe pagando su deuda reestructurada al resto de sus acreedores. En efecto, el acoso judicial y la extorsión de los litigantes a la República Argentina ahora también se extendieron a recursos cuyos dueños legales y legítimos son el 92,4% de los acreedores que aceptaron voluntariamente los canjes propuestos.

Esta estrategia se basó en una interpretación irrazonable de la cláusula *pari passu*, que tiene como único objetivo impedir a la Argentina pagar los vencimientos de intereses a los acreedores que de buena fe aceptaron las reestructuraciones propuestas, sin pagarle en simultáneo a los demandantes la totalidad de lo que reclaman (esto es, el valor nominal original de la deuda, más sus intereses y punitorios, en forma acelerada). Esto no sólo les concedería una ganancia usuraria superior al 1608 por ciento, sino que además resulta de imposible cumplimiento para la República Argentina: primero, porque si se le suma a este reclamo el de los restantes *holdouts*, muchos de los cuales ya han realizado presentaciones de *me too* ante los mismos tribunales de los Estados Unidos de América solicitando el mismo remedio bajo la cláusula *pari passu*, los montos involucrados superarían la mitad de las reservas de la República Argentina; y, segundo, porque si la República le realizara una mejor oferta a dichos *holdouts* correría el riesgo de incumplir una de las cláusulas contractuales conocida bajo el nombre *Rights Upon Future Offers* (RUFO), poniendo en riesgo así la reestructuración de su deuda soberana.

A pesar de la pacífica interpretación internacional de la cláusula *pari passu*, el ilógico e inequitativo entendimiento propuesto por los litigantes ha sido avalado por los tribunales de los Estados Unidos de América, incluida su Corte Suprema, que se ha negado a revisar el caso. De hecho, en las propias Audiencias de este litigio, el Juez Griesa reconoció expresamente que sus sentencias fueron un "*medio*" (curiosa definición de una orden judicial) para "*compeler*" al Estado argentino a pagar a los litigantes el 100 por ciento de su reclamo, vulnerando de este modo el principio de equidad y de buena fe entre los acreedores, las reestructuraciones de deuda de la República Argentina y su inmunidad soberana.

Estas decisiones de la justicia estadounidense son contrarias al apoyo que han brindado la comunidad internacional a la posición argentina y el mismo Poder Ejecutivo de los Estados Unidos de América a través de las presentaciones como *Amicus Curiae* ante sus propios tribunales. Es altamente significativa la manifestación que allí realizó sobre el compromiso de los Estados Unidos de América con la promoción de los esfuerzos por reestructurar voluntaria y ordenadamente las deudas soberanas en un marco de certeza contractual, así como la expresión de su disenso con la interpretación de la cláusula *pari passu* sustentada por la justicia de su país, en los siguientes términos:

> "*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]

En el marco del acoso judicial desmedido del que mi país es víctima a través de una orden judicial de cumplimiento imposible,[2] ahora se suma un nuevo y mayor disparate jurídico por parte de los demandantes, quienes el pasado 24 de septiembre solicitaron que se declare en desacato a la República Argentina y se le apliquen sanciones en virtud del alegado incumplimiento de las órdenes judiciales. El Juez de Distrito,

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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] Obsérvese que la Corte del Distrito Sur de Nueva York retiene el pago realizado por la República Argentina por una suma de 539 millones de dólares pero sin el dictado de una orden de embargo. Tampoco ejecuta la *injunction* de fecha 23 de febrero de 2012, al no ordenar la distribución de los fondos de acuerdo a su peculiar interpretación de la cláusula *pari passu*. De este modo, con una orden del 27 de junio de 2014, bloqueó el pago efectuado, dejando en un verdadero limbo jurídico los recursos de los tenedores de bonos reestructurados.

Thomas Griesa, convocó a las partes a una audiencia para el día de la fecha en la que evaluará si hace lugar a lo solicitado.

Las sanciones solicitadas por los litigantes incluyen, entre otras cosas, el pago de la suma de 50.000 dólares diarios hasta tanto no cese el supuesto incumplimiento de las mencionadas órdenes judiciales. Asimismo, en la solicitud de los demandantes se deja expresamente abierta la posibilidad de aplicar otras sanciones no monetarias (¿?).

Los litigantes fundamentan esta insólita pretensión en *(i)* la actuación de órganos políticos de un Estado soberano, que han actuado de conformidad con atribuciones y facultades conferidas por la Constitución Nacional; por lo tanto, como a continuación se explica, no pueden, de ninguna manera, estar sujetos al escrutinio de un juez extranjero, y *(ii)* en el supuesto incumplimiento de una orden judicial que, como la República ha demostrado, es de imposible cumplimiento.[3]

La República Argentina advierte que es total y absolutamente inconcebible que los litigantes hayan considerado que un juez local pueda declarar a un Estado extranjero "*en desacato*". Esa pretensión sólo puede responder al desconocimiento o a una percepción alterada de las normas básicas del derecho internacional vigente y la convivencia pacífica del orden global.

Los principios sobre los que descansa la convivencia internacional están reflejados en la Carta de las Naciones Unidas. Uno de ellos consagra la igualdad soberana entre los Estados y está recogido expresamente en el artículo 2, párrafo 1 de ese instrumento. Es un principio fundamental a la hora de establecer qué está permitido y qué está prohibido a un Estado respecto de sus pares. Cuando cualquiera de los poderes de un Estado desconoce la condición de "*igual*" de otro país no sólo viola en forma manifiesta el derecho internacional, sino que además arriesga estar sentando el precedente para que igual apartamiento del derecho internacional sea cometido en su perjuicio.

[3] La República Argentina hoy ha presentado ante el Juez Griesa un escrito donde una vez más se reiteran los motivos y argumentos acerca de la imposibilidad de cumplir con sus órdenes, cuya copia se acompaña. Como es de público conocimiento, la República Argentina ha expresado reiteradamente su voluntad y capacidad para honrar sus deudas con el 100 por ciento de sus acreedores en condiciones justas, equitativas, legales y sustentables, tal como lo reconoce la sanción y promulgación de la reciente Ley de Pago Soberano No. 26.984.

Así lo reconoció el propio Gobierno de los Estados Unidos de América en el *Amicus Curiae* presentado en la causa *NML Capital Ltd. et. al. v. Republic of Argentina* con fecha 4 de abril de 2012:

> *"Finally, an order by a U.S. court authorizing execution against foreign state property could have adverse consequences for the treatment of the United States and its property abroad under principles of reciprocity."*[4]

En igual sentido, se ha expresado la Comisión de Derecho Internacional cuando señaló:

> "*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]

La Convención de las Naciones Unidas sobre Inmunidad de los Estados y sus Bienes (United Nations Convention on Jurisdictional Immunities of States and Their Property), adoptada en Nueva York el 2 de diciembre de 2004 dispone en su artículo 24 que:

> "*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.*"

Esta cláusula establece, en primer término, la imposibilidad de imponer penalidades a un Estado en razón de su conducta procesal, entre las que se encuentra una declaración de desacato.

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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.I (Part 2) (1991), p. 56.

En segundo término, la norma transcripta prevé que una negativa o imposibilidad de cumplimiento no podrá dar origen a sanciones, entre las que menciona en particular, sin que ello agote las modalidades de sanciones que quedan excluidas de la facultad del juez interviniente, las multas o penalidades pecuniarias de cualquier tipo. Por otra parte, en el inciso 2 del artículo transcripto se dispone que no se puede requerir a un Estado disponer la previsión de fondos para el pago de costas u otro tipo de gastos judiciales.

La mera solicitud de imponer una medida que en sí misma es ilícita por ser contraria al derecho internacional es, además, lesiva a la dignidad del Estado. Una petición semejante sólo puede ser rechazada *in límine* por ser ilícito su objeto mismo.

La Convención de las Naciones Unidas sobre Inmunidad de los Estados y sus Bienes refleja, en las normas transcriptas, el derecho internacional consuetudinario en la materia. En particular, con relación al artículo 24, cabe recordar que, en su presentación como *Amicus Curiae* en el caso *AF-CAP, INC v. Republic of Congo*, los Estados Unidos de América afirmaron que:

> "[...] *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]

En el último escrito de *Amicus Curiae* presentado por los Estados Unidos de América en el caso *SerVaas Incorporated v. the Republic of Iraq*, el Gobierno explicó:

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

Por otra parte, la medida sometida a consideración del juez Griesa no sólo resulta contraria al derecho y la práctica internacional, los cuales prohíben la adopción de medidas contra un Estado con motivo de la negativa o incumplimiento de una orden judicial, sino que también es contraria a la propia normativa interna de diversos

[6] Brief for the United States of America as Amicus Curiae in Support of Defendant-Appelant, 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).

Estados, entre ellos la República Argentina, Canadá, Reino Unido, Singapur, Pakistán, Australia y los propios Estados Unidos de América. En efecto, de acuerdo con la interpretación dada a la *Foreign Sovereign Immunities Act* (FSIA) por los órganos competentes de los Estados Unidos de América, el hecho de que un Estado extranjero haya renunciado a su inmunidad soberana de jurisdicción de acuerdo a la Sección 1605 (a) (1) de la FSIA –la base sobre la que la Corte del Distrito Sur de Nueva York ejerce jurisdicción sobre la República Argentina en el presente caso– no establece que el Estado pueda estar sujeto a la aplicación de sanciones monetarias por desacato bajo la Sección 1609 y 1610 (a).

La preeminencia de la norma de derecho internacional que impide declarar en desacato a un Estado frente a los tribunales locales de otro Estado e imponerle sanciones en consecuencia, y la evidencia de que dicha norma es generalmente aceptada como derecho que surge de su reiteración en los ordenamientos internos de los Estados, ha sido reconocida por los Estados Unidos de América, tal como lo expresaran en sus presentaciones como *Amicus Curiae* en el referido caso *AF-CAP, INC v. Republic of Congo* y *Belize Telecom Ltd. v. Government of Belize*.[8] En estas presentaciones, los Estados Unidos de América han requerido a sus tribunales rechazar la existencia de facultades por parte de los jueces intervinientes para ejercer coerción contra Estados soberanos con miras a asegurar el cumplimiento de decisiones dictadas por tales tribunales, con base en los mismos argumentos anteriormente descriptos.

En particular, en su presentación como *Amicus Curiae* en el caso *AF-CAP, INC v. Republic of Congo*, los Estados Unidos de América afirmaron que:

> *"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***

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

district court errs and abuses its discretion when it orders monetary contempt sanctions against a foreign state."[9]

En línea con lo expresado por los Estados Unidos de América en el *Amicus Brief* precedentemente citado, la República Argentina estima que la mera consideración de la adopción de una orden judicial semejante constituye una afrenta a la dignidad y a la soberanía de nuestro país, siendo además inconsistente con el derecho y la práctica nacional e internacional y con las leyes de otros países en esta misma materia.

En la presente causa, el Gobierno de los Estados Unidos de América ya advirtió, en el citado *Amicus Curiae*, que:

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

Asimismo, el Gobierno de los Estados Unidos de América argumentó en dicha presentación que:

> "*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].

La situación que ahora se presenta podría resultar en una nueva y sorprendente decisión del Poder Judicial estadounidense atentatoria de la dignidad y la soberanía de la Argentina. La pretensión de los litigantes agrava aún más esta situación, pues intenta fundamentarse en la actuación de los principales órganos políticos de la Nación (declaraciones de la titular del Poder Ejecutivo Nacional y de funcionarios de su Gabinete y leyes sancionadas por el Poder Legislativo); cuestiones ajenas a la jurisdicción del Tribunal.

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[9] Brief for the United States of America as Amicus Curiae in Support of Defendant-Appelant, case 05-51168 (5th Cir., 2006), p. 21.
[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.

Una declaración de desacato implicaría una escalada sin precedentes y aún muy superior, inclusive, a la decisión de retener o impedir el cobro por parte de los bonistas reestructurados. No se trata solamente de la afectación de derechos de terceras personas, sino de vulnerar aún más la soberanía de la República Argentina. Todo ello se sumaría a aquellas decisiones ya dictadas en esta misma causa, cuya aplicación impide el cobro por parte de acreedores de la Argentina del pago efectuado por ésta, y, a su vez, procura aniquilar la reestructuración de la deuda soberana de la Nación.

Tales decisiones resultan violatorias de la obligación de respetar la soberanía y las inmunidades de los Estados; de la obligación de no aplicar o estimular medidas coercitivas de carácter económico contra otro Estado; y de la obligación de obrar de buena fe en el ejercicio de las funciones judiciales. Todo ello motivó que nuestro país recurriera a la Corte Internacional de Justicia a efectos de solucionar pacíficamente la controversia allí planteada, sin haber obtenido hasta la fecha una respuesta por parte del Gobierno de los Estados Unidos de América.

Sin perjuicio de ello, la República Argentina desea recordar –y reiterar– que, en su escrito de introducción de instancia, advirtió que, de no mediar la conformidad de los Estados Unidos de América respecto de la competencia de la Corte, la notificación de dicha demanda debía ser tenida como una intimación a ofrecer un medio alternativo de solución a la presente controversia. En tal sentido, se recuerda que la responsabilidad internacional de los Estados Unidos de América en ningún modo puede eximirse por el actuar de su Poder Judicial, dado que, según los principios del derecho internacional, un Estado debe responder por los actos u omisiones cometidos por cualquiera de sus órganos.

La afrenta que representa que un tribunal extranjero pretenda hacer comparecer a un Estado soberano ante sus estrados para dar explicaciones sobre actos y decisiones legales y legítimos adoptados por sus poderes constitucionales en ejercicio de su soberanía, motiva la presentación de esta comunicación, toda vez que el presente caso acarrea consecuencias para las relaciones exteriores, tal como lo ha indicado el propio Gobierno de los Estados Unidos de América en sus presentaciones como *Amicus Curiae*.

La igualdad soberana de los Estados constituye una de las nociones más fundamentales del derecho internacional, a punto tal que, como se dijo, se encuentra

plasmada en la propia Carta de las Naciones Unidas. La célebre "Declaración sobre los principios de Derecho Internacional referentes a las relaciones de amistad y a la cooperación entre los Estados de conformidad con la Carta de las Naciones Unidas" no sólo recepta este principio sino que, además, consagra, entre otros principios básicos, que todos los Estados son jurídicamente iguales, que gozan de todos los elementos inherentes a su propia soberanía y que su integridad e independencia política es inviolable.[12] La Asamblea General de las Naciones Unidas ha calificado a estos principios como básicos, razón por la cual cada estado tiene el derecho a elegir y a llevar adelante libremente su sistema político, social, económico y cultural.[13]

Sobre la base de dichos principios, la República Argentina ha adoptado un sistema de gobierno sustancialmente similar al de los Estados Unidos de América, consagrando un sistema representativo, republicano y federal de gobierno.[14] Sus órganos de representación política gozan así de la legitimidad democrática que emana de la Soberanía del Pueblo de la República Argentina.

En consecuencia, la actuación de dichos órganos políticos se encuentra únicamente sometida a la Soberanía Popular y a los demás principios de la Constitución Nacional Argentina, y no puede de ningún modo ser cuestionada por ningún órgano de un Estado extranjero.

En particular, en lo que hace a la facultad de entender en los asuntos relativos a la reestructuración de la deuda soberana, el artículo 75 inciso 7 de la Constitución Nacional dispone que es facultad del Congreso de la Nación "[a]*rreglar el pago de la deuda interior y exterior de la Nación*".

En conclusión, cualquier decisión que adopten los tribunales de los Estados Unidos de América que pueda frustrar dicha reestructuración de deuda soberana o cuestionar la actuación de los órganos políticos de la República Argentina, no sólo estaría fuera del alcance de su jurisdicción, sino que constituiría además una ilegítima injerencia en los

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[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] Artículo 1 de la Constitución Nacional.

asuntos internos del Estado argentino, que comprometería la responsabilidad internacional de los Estados Unidos de América.

Por tal motivo, junto a la presente, se acompaña copia de la presentación del día de la fecha de la República Argentina ante la Corte del Distrito Sur de Nueva York.

Atentamente,

Cecilia Nahón
Ambassador

ADJUNTO: Lo mencionado.

AL SEÑOR SECRETARIO DE ESTADO
DE LOS ESTADOS UNIDOS DE AMÉRICA
D. JOHN FORBES KERRY
WASHINGTON D.C.