

Mandates of the Special Rapporteur on extreme poverty and human rights and the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

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Dear Mr. Cohen,

We have the honour to address you in our capacity as Special Rapporteur on extreme poverty and human rights and Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights pursuant to Human Rights Council resolutions 26/3 and 25/16.

In this connection, we would like to bring to your attention information we have received concerning the **court orders secured by NML Capital Limited which may have the effect of limiting the ability of the Argentinian authorities to fully respect and ensure the enjoyment of human rights by the country's population.** In addition to this letter we have sent separate communications related to this matter to the Government of the United States of America and the Government of the Argentine Republic.

According to the information received:

NML Capital sued Argentina on the basis of debts arising from the country's defaulted bonds, which were the object of bond swaps in 2005 and 2010. Reportedly, about 93 per cent of the investors holding bonds participated in these debt swaps, but a few creditors refused to accept the conditions of the swaps. These creditors include those specializing in distressed debt, which purchase the defaulted debt at significant discounts, hold out for other creditors to cancel their debts and then pursue repayments that are vastly in excess of the amount that they paid for the debt. In your case, NML Capital allegedly purchased the majority of their Argentinian bonds from June to November 2008, paying roughly 20 per cent of face value.

Reportedly, after failed legal efforts to seize Argentinian assets directly, holdout bond holders like NML Capital took out lawsuits based on the *pari passu* or equal treatment clause in bond contracts, which would deny any future payments on restructured bonds until payment in full to holdout bond holders took place. On

23 August 2013, the United States Second Circuit Court of Appeals upheld the District Court of New York's ruling in favor of your company.¹ Argentina appealed the ruling to the United States Supreme Court. By denying *certiorari* in June 2014, the Supreme Court has affirmed a precedent which may result in exorbitant awards for holdout creditors and potentially penalize creditors who participated in a debt restructuring.²

We wish to express our concern that the reported actions and decisions could represent a significant threat to the ability of States to respect and fulfill their human rights obligations.

In this respect, we would like to note that Argentina successfully reduced its public debt from about 160 percent of Gross Domestic Product (GDP) by settling with the majority of creditors for a repayment of 30 percent of its sovereign debt, enabling the country to recover economically. The total public debt currently stands at around 40 percent of the country's GDP. Argentina reached an agreement with almost 93 per cent of its creditors, who have been paid in timely fashion since the agreement reached on the bond swap. The District Court of New York in its decision has ruled that a few holdout creditors not only have the right to get 100 per cent of their claim, but also the power to block the ongoing payments to the restructured bondholders. Under this ruling, all creditors are denied their repayments. This may trigger serious consequences to Argentina and pose difficulties for debt restructurings for other countries in the future.

Impeding Argentina from repaying its restructured bondholders and pushing the country into a debt crisis poses risks for the enjoyment of economic, social and cultural rights by its population. The recent report of the Independent Expert on foreign debt and human rights on his visit to Argentina (UN Document A/HRC/25/50/Add.3) describes the profound impact of Argentina's 2001 debt crisis. GDP shrank in the period from 1999 to 2002 by 25 per cent, official unemployment peaked at over 21.5 per cent in May 2002, savings and pensions were devaluated, and inflation of up to 41 per cent contributed to a drop in real wages by 23.2 per cent in 2002. According to the World Bank, 53 per cent of the population lived in poverty and 24.8 per cent faced extreme poverty. The crisis also severely affected the public health system, with hospitals suffering a serious shortage of basic supplies and prices of medicines soaring. In addition, the drastic drop in employment left roughly 60 per cent of the population outside the social health insurance system.

Argentina's debt restructurings and settlement of International Monetary Fund obligations has enabled the Government to significantly increase its social spending, including on education, health and social security. Social spending for health, education,

¹ *NML Capital Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013). See as well earlier decisions of the Court of Appeals, *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) from 28 October 2012 and amended injunctions by the Southern District Court of New York, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012).

² Opinion of the US Supreme Court, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842, from 16 June 2014, available at: http://www.supremecourt.gov/opinions/13pdf/12-842_5hdk.pdf

social security and housing in the national budget increased from 9.5 per cent of GDP in 2003 to 15.5 per cent of GDP in 2013. Overall social spending (by the national, provincial and municipal governments) rose to around 27.7 per cent of GDP by 2009. Data from the National Statistics and Census Institute show that the poverty and extreme poverty levels have constantly declined since 2003, from 47.8 and 20.5 per cent to about 4.7 and 1.4 per cent respectively in 2013.

Litigation such as that undertaken by your company threatens preventing heavily indebted countries from using resources freed up by debt relief for their development and poverty reduction programmes, and therefore diminishes the capacity of these countries to create the conditions necessary for the realization of human rights for their people. Thus money that is earmarked for poverty reduction and basic social services, such as health and education, may be diverted to settling substantial claims from hold out financial companies and the financial liabilities they can additionally trigger. In short, litigation like the one you have undertaken threatens eroding the gains from debt relief for poor countries and may jeopardize the fulfilment of these countries' human rights obligations.

The 2010 report of the previous Independent Expert on the effects of foreign debt to the Human Rights Council (UN Document A/HRC/14/21) provides case studies on the impact of such “vulture funds” on debt relief and human rights. The report provides recommendations on how the problem created by the tactics of such corporations could be tackled through multilateral initiatives or at the national level, including through enacting national legislation designed to protect highly indebted countries from the excessive claims of such actors.

If the approach created by the recent court rulings were to prevail in the United States of America or is adopted in other international financial contexts, collective action problems of future sovereign debt restructurings will be indeed exacerbated. Holdout creditor litigation and the freezing of assets of debtor countries in the course of such litigation jeopardize the servicing of debt obligations by the affected countries. Thus, your activities risk not only diluting the gains from debt relief, they also risk complicating the debt restructuring process and undermining other creditors by forcing debtor countries to grant corporations such as yours preferential treatment at the expense of more responsible creditors. Responsible secondary debt participants should not acquire sovereign debt for the sole purpose of enforcing payment that amounts to usurious interest rates from impoverished countries. Lenders must be aware of the credit risk at the time they purchase the debt.

Sovereign debtors have binding international human rights obligations that may also apply to bilateral, multilateral and private lenders. NML Capital, like any other corporate actor, has human rights responsibilities, as set out by the United Nations Guiding Principles on Business and Human Rights (UN document A/HRC/17/31) and the Guiding Principles on Foreign Debt and Human Rights (UN document A/HRC/20/23), both of which were endorsed by Member States at the Human Rights Council through resolutions 17/4 and 20/10 in 2011 and 2012. . Respect for human rights does not amount

to denying the validity of contractual commitments, but suggests that some contract clauses or their interpretation should be seen as unconscionable. More specifically, respect for human rights may limit the ability of debtor states to service their debt. That means that creditors cannot deny responsibility by pointing to the fact that it is the government which ultimately has to cut the funding for purposes relevant for economic, social and cultural rights if their action leaves the government only little choice.

It is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters:

1. Are the facts summarized above accurate?
2. How has NML Capital sought to meet its responsibility to respect human rights as detailed in the Guiding Principle 16 of the United Nations Guiding Principles on Business and Human Rights? More specifically, has NML Capital's committed to comply with international human rights standards in its operational policies and procedures?
3. What actions has NML Capital carried out to meet its responsibilities under Guiding Principles 20 and 21 of the UN Guiding Principles on Business and Human Rights? Specifically, how does the company track the effectiveness of any measures taken to prevent and mitigate any adverse human rights impacts, including through consultation with affected stakeholders?
4. How has NML Capital carried out its responsibilities under Guiding Principle 19 of the United Nations Guiding Principles on Business and Human Rights and Guiding Principle 9 of the Guiding Principles on Foreign Debt and Human Rights? Has NML Capital taken appropriate action, such as due diligence (Foreign Debt Principles 23-24) or any form of human rights impact assessment (Foreign Debt Principles 40-41), to prevent and mitigate against any adverse human rights impacts that may arise as a result of their lawsuit? Has it considered the potential impact of its position on the enjoyment of human rights in Argentina during its negotiations with the Government? If so, how?
5. Has NML has taken any step in order to fulfill the obligation of sharing responsibility between debtor and creditors in debt restructurings as outlined in Foreign Debt Principles 23-24 and the UNCTAD Principles on Responsible Sovereign Lending and Borrowing 7 and 15?

We would appreciate a response within 60 days.

While awaiting with interest a detailed response to the above questions, we would like to inform you of our intention to issue a news release in the near future as we are of the view that the information upon which the press release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention.

Your response will be made available in a report to be presented to the Human Rights Council for its consideration.

Yours sincerely,

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Special Rapporteur on extreme poverty and human rights

Juan Pablo Bohoslavsky
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