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Pari passu: The Nazi Gambit

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PARI PASSU: THE NAZI GAMBIT

By Sung Hui Kim*

Abstract

As the ongoing court battle between the Republic of Argentina and NML Capital, Ltd. illustrates, the meaning of *pari passu* in sovereign debt contracts remains highly contested. This article presents what might be the clearest historical evidence of what the *pari passu* clause was understood to mean in the pre-war period. It examines Nazi Germany's defaults of the Dawes and Young Loans during the 1930s. According to this historical evidence, the parties believed that the clause promised parity in payment across different creditor groups (in this context, the various tranches representing nationals of different countries) considered to be part of the same general undertaking. This article reports no evidence to support what may be the most commonly offered interpretation for the clause today—that the *pari passu* clause was intended to prohibit the sovereign from passing laws that would have the effect of involuntarily subordinating certain creditors. This article also finds no evidence to suggest that the *pari passu* clause was understood as entitling the aggrieved creditor to a unilateral right to block payments to bondholders who assented to a government's restructuring proposal.

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Introduction

[1] As the ongoing court battle between the Republic of Argentina and NML Capital, Ltd.¹ reminds us, one of the most debated issues in international finance over the past few years has been the meaning of a single, previously obscure, contract term—the *pari passu* clause. This clause has inhabited sovereign debt contracts for over a century,² but there seems to be very little agreement on its meaning. While everyone can concur that *pari passu* (Latin for “in equal step”) promises that the debt contract in question will be on equal footing with some other debt contracts of the sovereign, there is no consensus about what equal footing means or what remedy is afforded the aggrieved creditor of unequal treatment.³ Although the *pari passu* clause makes sense in bankruptcy as a principle to guide how the assets of a private debtor are to be distributed among creditors of the same class, its role in sovereign bonds remains unclear. Unlike private debtors, sovereigns cannot go bankrupt and their assets cannot be seized, pooled and distributed to a fixed group of claimants at a single moment of reckoning. As a result, over the years, dramatically different theories about the meaning of *pari passu* in sovereign debt contracts have emerged.⁴

[2] The controversy over the meaning of *pari passu* was triggered by a cluster of court decisions, beginning with *Elliott v. Peru* in 2000⁵ and culminating in *NML Capital v. Argentina*⁶ in 2012. The courts in these cases advanced an interpretation of *pari passu* that threatened to complicate, if not impede, future sovereign debt restructurings. They held the view that the *pari passu* clause required a debtor who was unable to pay all its creditors in full to pay each creditor proportionately or “ratably.” Hence, the sovereign debtor could not be permitted to stiff creditors who had refused to restructure their debts while paying the other creditors who had assented to the restructuring. To do so would violate the promise of equal treatment under the *pari passu* clause. Additionally,

¹ On April 21, 2014, oral arguments for *Argentina v. NML Capital* took place before the US Supreme Court. See <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-842.htm>.

² M Gulati & R Scott, *The 3½ Minute Transaction: Boilerplate and the Limits of Contract Design* (2012).

³ A Gelpern, ‘Sovereign Damage Control’ [May 2013], Peterson Institute for International Economics Brief, PB13-12, 3.

⁴ M Weidemaier, R Scott & M Gulati, ‘Origin Myths, Contracts, and the Hunt for *Pari passu*,’ 38 L. & Soc. Inquiry (2013) 72.

⁵ For an account of this litigation, which took place in a commercial court in Brussels, see note 7 *infra*.

⁶ 699 F.3d 246 (2d Cir. 2012).

by granting injunctions against third party financial intermediaries responsible for transferring payments to the restructured creditors, these courts gave the *pari passu* clause not only meaning but also teeth—a concrete remedy that could be used by the hold-out creditor to induce sovereign debtors to pay its debt. As of this writing, the *NML Capital* case is being appealed to the US Supreme Court; thus, the meaning of *pari passu* remains far from settled.

[3] Disagreement over the meaning of *pari passu* has spurred a number of eminent scholars to search for the origins of the clause to unearth its original meaning.⁷ Some fascinating clues have been found, but no clear statement of its meaning has surfaced. In this Article, I do not claim to say anything about the original meaning of *pari passu*. However, I do present what might be the clearest historical evidence of what the clause was understood to mean in the pre-war period. I discovered this evidence while studying the protests lodged against the German government when Germany first defaulted on two international loans entered into by it during the aftermath of the First World War. The first was the the German External Loan of 1924, or “Dawes Loan,” which was issued in separate tranches denominated in dollars, sterling, lire, Swedish crowns and Swiss francs. The second was the German Government International 5½ % Loan 1930, or “Young Loan,” which was issued in tranches denominated in reichsmarks, dollars, belgas, French francs, sterling, florins, lire, Swedish crowns and Swiss francs.⁸ The General Bond securing both the Dawes and Young Loans contained the same *pari passu* clause (albeit different from the variant at issue in *NML Capital*), providing that all bonds of the loan “shall rank *pari passu* irrespective of date or place of issue or otherwise.”⁹

[4] When Germany, in response to its financial crisis, selectively defaulted on the American tranches of the Dawes and Young Loans, parties defending the interest of

⁷ LC Buchheit & J Pam, ‘The *Pari passu* Clause in Sovereign Debt Instruments,’ 53 Emory L.J. (2004) 913; B Chabot & M Gulati, ‘Santa Anna and his Black Eagle: The Origins of *Pari passu*?’ ___ Cap. Mkts. L. J. (___ 2014).

⁸ Piet Clement, “The touchstone of German credit’: Nazi Germany and the service of the Dawes and Young Loans,” 11.1 Finan. Hist. Rev. 34-35 (2004).

⁹ The *pari passu* clause relevant to the Dawes and Young Loans differs from the *pari passu* clause that was litigated in *NML v. Argentina*, which expressly promises equality with respect to *the right of payment*. For purposes of this Article, the difference is not especially important, as Germany seems to have acquiesced in the protesters’ interpretation.

American bondholders invoked *pari passu* in their protests against Germany's discriminatory practices. In claiming that Germany violated the *pari passu* clause, the protesters adopted the meaning that the clause promised parity in servicing across the various tranches of the Dawes and Young Loans. Although it is not clear how the protesters came to this interpretation, it is clear that they believed that the *pari passu* language captured the nature of the violation they were experiencing.

^[5] If there were a clear modern understanding of the meaning of the *pari passu* clause today, what parties believed about its meaning eighty years ago might not be very relevant. But perhaps the single defining characteristic of the current litigation over *pari passu* has been that there is little agreement over its contemporary meaning. And that, in turn, has sent many in search of historical understandings. On that score, the records of international negotiations relating to the Nazi government's default on its foreign debts may present the best evidence that we have.

The Defaults And The Protests

^[6] In 1931, a financial crisis gripped the world, resulting in a massive capital flight from Germany, the collapse of the German banking system, and a severe shortage of the Reichsbank's gold and foreign exchange reserves.¹⁰ This shortage made it difficult for Germany to continue to service its long-term external debts, the vast bulk of which (including the Dawes and Young Loans) was denominated in foreign currency.¹¹ To conserve its scarce reserves, Germany progressively implemented a system of bureaucratic controls over imports and foreign currency. By January 1933, when the Nazis came to power, the state of the Reichsbank's reserve position was dire. On March 17, 1933, Hitler appointed Hjalmar Schacht to (once again) head the Reichsbank and guide Germany's monetary policy. Schacht promptly pushed through sweeping legislation aimed at alleviating the nagging foreign exchange problem. The primary casualty of Schacht's policy would be the American bondholders.

^[7] On June 14, 1934, Germany announced that, beginning on July 1, 1934, foreign currency payments on *all* of Germany's medium- and long-term debts, including the

¹⁰ D Williams, 'The 1931 Financial Crisis,' (2007) 15 Bull. Econ. Res., 92, 107.

¹¹ A Tooze, *The Wages of Destruction: The Making and Breaking of the Nazi Economy* (2006), 21.

Dawes and Young Loans, would be suspended until further notice. Also, for the Dawes and Young Loans, the reichsmark equivalent of the loan service would be paid into a Reichsbank account for the disposal of the Trustees of the Dawes and Young Loans.¹² In announcing the moratorium, the German Finance Ministry blamed the Reichsbank's insufficient levels of reserves on creditor nations, which—through trade restrictions and quotas—prevented Germany from realizing its full export potential.¹³

[8] A chorus of protests followed. The Bank for International Settlements (BIS) (the Trustee of the Young Loan and the Fiscal Agent of the Trustees of the Dawes Loan), the Trustees of the Dawes Loan, and J.P. Morgan (the US Paying Agent for the Trustees under the General Bond) immediately protested. J.P. Morgan reminded Germany that these loans were “the most solemn external obligations of the German Reich” and that the “mere deposit of reichsmarks in the Reichsbank does not satisfy the terms of the Bonds, and the Bonds will be in default unless they are duly served in the appropriate foreign currencies.”¹⁴

[9] The US Secretary of State, Cordell Hull, expressed his “grave regret . . . that the losses already being borne by American investors in German securities are thus to be augmented.” Hull raised concerns that Germany was poised to discriminate against American holders of the Dawes and Young Loans, as Germany had recently and controversially done with regard to the non-Reich debt.¹⁵ Although Hull failed to explicitly refer to the *pari passu* clause in his communication, Hull clearly believed that any inferior treatment of Americans would violate the express guaranty of equality promised in those loans. He wrote:

[10] Under the terms of the agreements controlling the issue of German loans the obligations taken toward investors of all nationalities are in virtually all cases

¹² Press Communique of the Bank for International Settlements Trustee of the German Government International 5 ½% Loan 1930, dated June 14, 1934. Archives of the Foreign Bondholders Protective Council, Inc., Department of Special Collections, Stanford University Libraries (hereinafter, “FBPC Archives”), Call No. M1287, Box 64, Page 440-b.

¹³ The Finance Minister wrote: “Germany wants to pay her debts. This is only possible to the extent to which foreign countries, that is . . . the creditor countries, open additional markets. If the creditor countries will not or cannot do this, they cannot, at the same time, make the impossible demand for unchanged debt transfers.” Clement, *supra* note 8, at 42.

¹⁴ Cablegram of Protest, dated June 29, 1934, dispatched to the Minister of Finance of the German Reich by J.P. Morgan & Co. FBPC Archives, Call No. M1287, Box 64, Page 440-b.

¹⁵ The non-Reich debt consisted of the provincial and municipal loans, the loans of private industrial institutions, and other private loans.

identical and, in fact, part of one general pledge. In the case of the Dawes and Young loans the credit of the German Government is pledged on terms of unconditional equality to investors in all parts of these issues.¹⁶

[11] On July 12, 1934, the Foreign Bondholders Protective Council, Inc. (FBPC), a private non-profit organization established to assist US citizens and creditors in collecting on defaulted foreign sovereign bonds, protested the anticipated discrimination, referring to Germany's "highest legal and moral obligation to provide that American holders shall receive the same treatment accorded to the most favoured holder of such bonds in other countries."¹⁷ Similarly, the US Ambassador to Germany, William E. Dodd, wrote:

[12] Furthermore, in the opinion of the American Government, there can be no justification for differentiation between creditors having exactly the same unequivocal pledge from the German Government, and in whose favor exactly the same revenues were hypothecated with a clear absence of reservations, written or implied, at the time the obligations were contracted.¹⁸

[13] After its initial protest, J.P. Morgan, too, addressed the discriminatory treatment:

[14] The action of the German Government in discriminating against American bondholders, while at the same time providing by agreement for the service of other tranches, is a flagrant violation of the terms of the bonds of both Loans and of the General Bonds securing them. We insist on equality of treatment for American bondholders for both the Dawes and Young Loans, and expect that the German Government will promptly take the necessary measures to this end.¹⁹

[15] In response to these protests, the German government simply replayed the pattern that it had established with respect to the servicing of the non-Reich debt. Germany

¹⁶ Text of the Note, dated June 27, 1934, delivered by the Honorable Cordell Hull, Secretary of State of the United States, to Rudolf Leitner, German Charge D'Affaires, as published June 29, 1934. FBPC Archives, Call No. M1287, Box 64, Page 440-b.

¹⁷ Cablegram of Protest dispatched on July 12, 1934, by the Foreign Bondholders Protective Council, Inc. to Dr. Hjalmar Schacht, President of Reichsbank (Reproduced from the Council's Official Press Release of July 14, 1934). FBPC Archives, Call No. M1287, Box 64, Page 512-b.

¹⁸ Text of Memorandum delivered on July 16, 1934, to the German Foreign Office by William E. Dodd, Esq., United States Ambassador to Germany (reproduced from the *New York Times* of July 17, 1934). FBPC Archives, Call No. M1287, Box 64, Page 512-b.

¹⁹ Cablegram of Protest dispatched on July 19, 1934, to the Minister of Finance of the German Reich by J.P. Morgan & Co. in reply to the German Consul General's Letter dated July 14, 1934. FBPC Archives, Call No. M1287, Box 64, Page 512-b.

maintained that the problem was not willingness to pay but inability to transfer due to the lack of foreign currency, noting that the Reichsbank's reserves of gold and foreign exchange had fallen to a mere 78.4 million reichsmarks.²⁰ From July 1934 to April 1935, Germany concluded bilateral agreements with the United Kingdom, Switzerland, France, Belgium, Sweden, the Netherlands and Italy. Under these arrangements, interest payment on the Reich loans would resume on the condition that the creditor nation would relax import restrictions on German goods, enabling Germany to expand its trade surplus.²¹ The increase in German exports would not only generate foreign exchange for debt repayment but also enable Germany to pay for much-needed imports of fats, animal feed, cotton and wool to sustain the German economy.²² Only the US, which boasted a favorable balance of trade with Germany, stubbornly refused to link debt repayment with the balance of trade. Consequently, only the American tranches of the Dawes and Young Loans would not enjoy the full servicing of their interest coupons.

[16] In sum, Americans anticipated the inferior treatment of the American tranches of the Dawes and Young Loans, viewing it as intrinsically unfair and violative of the terms of the loans. These initial protests were vague and failed to expressly refer to the *pari passu* clause. Upon reflection, this initial failure to invoke *pari passu* is understandable. After all, in the 1930s, there was little that an aggrieved creditor could do to redress a default by a foreign sovereign nation. Highlighting a specific provision would have added practically little to a creditor's limited arsenal of solutions. Also, American bondholders had just experienced discrimination at the hands of the Germans with respect to the servicing of the non-Reich loans. In that context, the *pari passu* clause was generally not invoked,²³ probably because many of the multiple non-Reich bonds

²⁰ Letter dated July 14, 1934, from the German Consul General in New York to J.P. Morgan & Co. in reply to their Cablegram of Protest dated June 29, 1934. FBPC Archives, Call No. M1287, Box 64, Page 512-b.

²¹ Clement, *supra* note 8, at 44. These agreements were similar in principle to prior bilateral clearing agreements concluded with Switzerland and Holland with respect to the non-Reich debt. See Incoming cable, dated October 6, 1933, sent from Sullivan & Cromwell, New York, New York. FBPC Archives, Call No. M1287, Box 63, Page 3.

²² Tooze, *supra* note 11, at 50.

²³ For example, when Americans first learned about Germany negotiating clearing agreements with the Swiss and the Dutch, covering the non-Reich loans, John Foster Dulles, who represented the American issue houses, protested that such arrangements would violate the "principle of equality of treatment as between national groups of creditors which was implicit in announcement of Reichsbank following May-June debt discussions." Outgoing cable, dated October 5, 1933 sent from Downey, Esplanade Hotel, Berlin. FBPC Archives, Call No. M1287, Box 63, Page 3.

lacked the *pari passu* language. Thus, it is possible that the *pari passu* clause of the Dawes and Young Loans simply escaped the initial attention of the American protesters in light of their recent experiences. Finally, some Americans seemed more concerned about the immorality of the discrimination rather than the fact that an express term had been breached. For example, in a subsequent cable, J.P. Morgan remarked that the anticipated discrimination constituted “not merely a violation of the express terms of the Loan but also grave discrimination against American holders of the bonds.”²⁴

^[17] Nevertheless, perhaps in the sober realization that the Germans weren’t especially sympathetic to Americans’ moral outrage, Americans eventually adopted the *pari passu* language in their protests, as it effectively captured the nature of their objection. In October 1934, Americans learned that the German government had arranged to pay in full in foreign exchange Dawes Loan coupons, maturing on October 15, 1934, of all the European tranches, while servicing only 50% of the coupons of the American tranche in foreign exchange,²⁵ with the remaining 50% to be paid in blocked reichsmarks, the use of which was highly restricted by the Reichsbank.²⁶ Ambassador Dodd loudly objected, stating that “the government of the United States is unwilling to believe that, having made provision for the full payment of all other bondholders, the German Government will either overtly fail to honor its written obligation to treat all tranches of the loan *pari passu*”²⁷

^[18] In a publicized note, Secretary Hull officially protested the discrimination:

^[19] The discrimination against American bondholders is aggravated by the fact that the general bond entered into October 10, 1924, between the German Government and trustee for the bondholders contains a provision that all bonds issued by the German Government in respect of the loan shall rank *pari passu*

²⁴ Cablegram dispatched on October 18, 1934, to the Minister of Finance of the German Reich by J.P. Morgan & Co. FBPC Archives, Call No. M1287, Box 64, Page 512-b.

²⁵ Cablegram dispatched on October 11, 1934, to the Minister of Finance of the German Reich by J.P. Morgan & Co. FBPC Archives, Call No. M1287, Box 64, Page 512-b.

²⁶ As later specified, these reichsmarks, which were credited to the holder’s account, could generally be used for the purchase of German securities on the German Exchanges, investment in German long term loans, purchase of real estate approved by the Reichsbank, and payment of travel expenses during visits to Germany. *See, e.g.*, Press Release given out by the German Consulate General in New York on December 2, 1934. FBPC Archives, Call No. M1287, Box 64, Page 745-b.

²⁷ Statement issued on October 13, 1934, by the United States Department of State Regarding the Aide-Memoire delivered to the German Government (Reproduced from the New York Times of October 14, 1934). FBPC Archives, Call No. M1287, Box 64, Page 512-b.

irrespective of date or place of issue or otherwise.²⁸

^[20] With respect to the imminent discrimination against American holders of Young Loan coupons, maturing on December 1, 1934, Hull similarly noted that the *pari passu* clause contained in the 1930 general bond for the Young Loan entitled American holders to full payment of their coupons.²⁹ Thus, it seems clear that Hull regarded Germany's selective, tranche-by-tranche non-compliance of the servicing requirements of the loans as violating the *pari passu* clauses.

^[21] Interestingly, based on available sources, the German government appears not to have publicly contested or quibbled with this characterization. This would be entirely consistent with past German conduct vis-à-vis the non-Reich bonds. In that context, Germany took the position that full debt repayment was impossible unless an increase in German exports to the creditor nation generated the foreign exchange needed for transfer.³⁰ To Germany, the situation was simply a matter of economics.

^[22] With respect to the anticipated December 1, 1934 default on the Young Loan coupons, the BIS would liberally use the *pari passu* language in a communication to J.P. Morgan:

^[23] We have repeatedly made protest to the German Government because of the continuing non-compliance with the provisions of the General Bond securing the Young Loan, and we have repeatedly asked for full payment of the accruing interest in such a manner that no discrimination will occur as regards any coupon holder. We have protested against the special agreements reported to have been made in some markets, basing our protest, inter alia, upon the provision of the General Bond to the effect that all bonds of the Loan "shall rank

²⁸ Note delivered to the German Foreign Office on November 23, 1934, by the American Ambassador to Germany, Mr. William E. Dodd, on Instruction of the Secretary of State (Confidential Release for Publication in Morning Newspapers of Sunday, November 25, 1934). FBPC Archives, Call No. M1287, Box 64, Page 538-1.

²⁹ *Id.*

³⁰ For example, in defending discriminatory practices with respect to the non-Reich bonds, one observed noted:

Dr. Schacht [President of Reichsbank] willing to make similar arrangement any other country. Recognizes action amounts to discrimination among national groups bondholders based on their ability or inability on political economic and other grounds to secure absorption additional German goods by their countries but maintains this principle not open discussion since it only another form his original thesis that he can pay only with goods.

Incoming cable, dated October 6, 1933, sent from Sullivan & Cromwell, New York, New York.

pari passu in all respects, irrespective of date or place of issue or otherwise.” So far our efforts have been unavailing, and we are consequently obliged to distribute *pari passu* such sums in foreign devisen [foreign exchange] as we have or shall have in hand on December 1st.³¹

[24] The last sentence of the above quotation suggests that the financial intermediary responsible for distributing the payments (BIS) did not believe that it had grounds to withhold the preferential payments that Germany allocated to the favoured, European creditors. Thus, while all parties, including Germany, seemed to acknowledge a *pari passu* violation, no one believed that a concrete remedy in the form of a right to block payments to favoured creditors (à la *NML Capital*) was available. But perhaps this shared understanding simply reflects the more mundane fact that legal redress of sovereign debt defaults was highly unlikely in the 1930s.

[25] For the Dawes Loan coupons falling due on April 15, 1935, the German government provided *no* foreign exchange funds for the American tranche, while paying all other holders in full. The Trustees of the Dawes Loan protested “against the failure to make . . . full payment in foreign currencies to all bondholders” but also noted that, with respect to the previous Dawes Loan coupons, they were at least “able to pay 50 per cent thereof to all holders, *pari passu*, from moneys then in hand.”³² This language, echoing the BIS language excerpted above, suggests that the Trustees of the Dawes Loan, too, believed that they could not rightfully withhold the preferential payments to the favoured creditors. This evidence further supports the proposition that the financial intermediaries in question did not believe that an inter-creditor remedy was available.

[26] Without mentioning the *pari passu* clause, the FBPC formally objected to “this new and confiscatory invasion of the rights of American citizens” and pleaded that “Americans be given at least most favoured nation treatment.”³³ J.P. Morgan protested that “With respect to the April 15th coupon, however, this discrimination operates as to

³¹ Cablegram dated November 28, 1934, from the Bank for International Settlements to J.P. Morgan & Co. FBPC Archives, Call No. M1287, Box 65, Page 994D.

³² Press Communique issued at Basle on April 16, 1935, by the Trustees of the German External Loan 1924. FBPC Archives, Call No. M1287, Box 64, Page 745-b.

³³ Cablegram of Protest dispatched on April 25, 1935, by the Foreign Bondholders Protective Council, Inc., to Hjalmar Schacht, President of the Reichsbank. FBPC Archives, Call No. M1287, Box 65, Page 994E.

the entire coupon and constitutes an even more conspicuous violation of the German Government's solemn promise that all Bonds of the Loan shall rank *pari passu* in all respects."³⁴ Similar points were raised regarding the subsequent default on the Young Loan coupons maturing on June 1, 1935.³⁵

[27] As the above discussion reveals, the parties involved in this historical episode believed that *pari passu* required the equal servicing of the different tranches of the loan. This equal treatment obligation was viewed as covering the form requirements of the loan (specifically, as to how the payments would be denominated). Perhaps the clearest statement of the purpose of the *pari passu* clause in the Dawes and Young Loans is found in the 1937 Annual Report of the FBPC:

[28] As to Reich bonds, the Council very much regrets that despite the protests of the United States Government, of the Paying Agent of the Dawes and Young loans (Messrs. J.P. Morgan & Co.) and of the Council, the German Government persists in its discrimination against American holders of these bonds by making payments for the regular service of the interest on the British, Dutch, and French tranches of the Dawes and Young loans while paying the American tranche at a reduced rate. The general bond securing these loans states "all bonds issued by the German Government in respect of the loan shall rank *pari passu* irrespective of the date of place of issue or otherwise." The Central Banks of the Allied Governments used their good offices to facilitate the placing of the tranches of these loans in their respective countries. The American tranche was issued at the request of the Governments of Great Britain, France and Belgium. The Council regrets to have to record that when the German Government defaulted on these bonds the British and French Governments, by either threatened or actual coercive measures, secured arrangements by which the coupons on the tranches of these loans held in those countries were paid in full, without heeding the request of the American Fiscal Agents to have those governments which had requested the issuance of these bonds in the United States, live up to the provision in the general bond above quoted which was *designed to prevent any such discrimination in the service and treatment of the various tranches of the loan.*³⁶

³⁴ Cablegram of Protest dispatched on April 19, 1935, to the Minister of Finance of the German Reich by J.P. Morgan & Co. FBPC Archives, Call No. M1287, Box 65, Page 994E.

³⁵ Cablegram of Protest dispatched on June 3, 1935, to the Minister of Finance of the German Reich by J.P. Morgan & Co. FBPC Archives, Call No. M1287, Box 65, Page 994E.

³⁶ FBPC Annual Report for Nineteen Thirty-Six, Germany (emphasis added). FBPC Archives, Call No. M1287, Box 182, Page 406.

[29] In short, the FBPC, while citing no evidence or precedent, maintained the position that the clause promised parity across the various tranches of the Dawes and Young Loans and thus prohibited the discrimination against the American bondholders.

Conclusion

[30] As noted in the Introduction, various theories about the meaning of *pari passu* have been posited. Among practitioners today, the most popular explanation appears to be that the clause was intended to prohibit sovereigns from passing laws that would have the effect of involuntarily subordinating certain creditors, e.g., by earmarking streams of revenues for new creditors (thereby subordinating prior creditors).³⁷ My research suggests that, at least in the 1930s, there was an alternative understanding of *pari passu*.

[31] In claiming that Germany violated the *pari passu* clause, the protesters seemed to have adopted the meaning, which not even the German government contradicted, that the clause required parity in payment across different creditor groups (here, the various tranches representing nationals of different countries) considered to be part of the same general undertaking. Admittedly, we do not know if this interpretation was widely held prior to the defaults. Indeed, the protesters initially emphasized the *immorality*, rather than the unlawfulness, of Germany's breach and only explicitly referred to *pari passu* in later correspondence. Also, the fact that the conduct in question happened to involve nationality, rather than some other, less controversial characteristic, must have been an important driver of the moral outrage.³⁸ Still, as the protesters gradually seemed to have realized, the *pari passu* clause offered an intuitively attractive and convenient device to voice their objection about what they perceived to be as both inherently unfair and contrary to the spirit of the loans.

[32] I should hasten to note that there is also no evidence to suggest that the *pari passu* clause was understood as entitling the aggrieved creditor to a unilateral right to block payments to bondholders who assented to a government's restructuring proposal.³⁹ In

³⁷ Rodrigo Olivares-Caminal, 'To Rank *Pari passu* or Not to Rank *Pari passu*: That is the Question,' 15 L & Bus. Rev. of the Americas (2009) 746,776.

³⁸ See LC Buchheit, 'A Note on Contractual Paleontology,' ___ Cap. Mkts. L. J. (___ 2014).

³⁹ M Weidemaier, 'Indiana Jones, Contracts Originalist,' ___ Cap. Mkts. L. J. (___ 2014).

fact, neither the investors nor BIS seemed to have interpreted the clause as a tool by which one investor could interfere with payments to another. That said, the failure to invoke an inter-creditor remedy may simply reflect the more mundane fact that legal redress of sovereign debt defaults was highly unlikely in this period.