

Enforceability of judgments against sovereign States: critical analysis of the NML vs. Argentina injunction

EXECUTABILIDADE DAS SENTENÇAS DE CONDENAÇÃO DE ESTADOS SOBERANOS: ANÁLISE
CRÍTICA DA INJUNCTION DO CASO NML VS. ARGENTINA

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Abstract

Sentences against sovereign States are difficult to enforce in courts. The Court of New York, in “NML Capital Ltd. vs. Argentina” (NML), tried to solve this situation with an *injunction* that blocked the payments of Argentina’s sovereign debt. The specialized literature has theoretically predicted that this *injunction* would cause harm to third parties and problems with other States. This article empirically corroborates these predictions with the analysis of a trial derived from NML: the “Citibank Argentina” case. The analysis of this case confirms the restraints presented by the literature about the lack of proper consideration of the requirements that the American legal system imposes for the applicability of an *injunction* that affects third parties and operates extraterritorially. Similarly, this paper argues that there are solid legal reasons for the authorities of third countries to declare inadmissible the extraterritorial effects of an *injunction*, such as the one obtained by NML, when those effects fall on assets and agents located in these authorities jurisdiction.

Keywords

Sovereign debt; vulture funds; *injunction*; sovereign immunity; enforceability.

Resumo

As sentenças contra Estados soberanos são difíceis de executar judicialmente. O Tribunal de Nova York, no processo NML Capital Ltd. v. Argentina (NML), tentou modificar esta situação por meio de uma *injunction*, que bloqueou os pagamentos da dívida soberana argentina. A literatura especializada previu teoricamente que esta *injunction* causaria danos a terceiros inocentes e problemas com outros Estados. Este artigo corrobora empiricamente essas previsões através da análise de um processo derivado do NML: o caso Citibank Argentina. Sua análise confirma a validade das reservas oportunamente apresentadas pela literatura sobre a falta de uma avaliação adequada pelo Tribunal indicado dos requisitos que o sistema jurídico dos Estados Unidos impõe para que seja válida uma *injunction* que afeta terceiros e opera extraterritorialmente. O artigo também argumenta que existem razões jurídicas de peso para que as autoridades de terceiros países declarem improcedentes os efeitos extraterritoriais de uma *injunction*, como a obtida pelo NML, quando esses efeitos recaem sobre ativos e agentes localizados na jurisdição dessas autoridades.

Palavras-chave

Dívida soberana; fundos oportunistas; *injunction*; imunidade soberana; extraterritorialidade.

INTRODUCTION

Until the 1980s, sentences against sovereign States were virtually nonexistent. In the United States (US), in the mid-twentieth century, legal actions of creditors were rejected by the principle of sovereign immunity from suit. Although this principle became eroded in the following years, the principle of sovereign immunity from execution did not suffer erosion. At the beginning of the 21st century, in US courts a paradoxical situation emerged: creditors sued Debtor States, their actions were accepted, they obtained favorable sentences in many cases, but they did not have effective remedies to enforce them in courts (GELPERN, 2013, p. 132; WEIDEMAIER, 2013, p. 123).

The case “NML Capital Ltd. vs. Republic of Argentina” (NML; the press called it the “trial of the century”)¹ modified this statement. Judge Griesa implemented a judicial relief which *a priori* appears as the most powerful tool given to a creditor to execute a court judgment against a sovereign State (WEIDEMAIER; GELPERN, 2013). The core of this relief was a judicial order (*injunction*) which prevented agents that were part of the chain of payments of Argentina’s sovereign debt from actually making these payments, until Argentina canceled its debt with NML. This order, enforceable since June 2014, meant to leave Argentina with two options: it either pays NML or defaults on the rest of its debt (WEIDEMAIER; GELPERN, 2013).

This judicial relief has been broadly studied in the literature. There are widespread consensus among the authors who analyzed it, over three issues: (a) its novel and radical character;² (b) the opening to different questions about its scope, operationalization and degree of validity;³ (c) the possibility it may generate damage to third parties and reactions of other countries (CROSS, 2015; WEIDEMAIER; GELPERN, 2013; ZAMOUR, 2013; RANIERI, 2015; MONTELEONE, 2013; SAMPLES, 2014; OLIVARES-CAMINAL, 2011).

This article intends to problematize this latter issue. Weidemaier and Gelpert (2013) predicted in 2013 that if Argentina refused to pay NML, Judge Griesa would have to increase its pressure on third parties, which actually happened.⁴ The US government⁵ in court warned,

1 See Cross (2015, p. 113).

2 See, for instance, the reactions of many well-known authors to the second circuit’s decision (October 26, 2012) confirming the district court’s *injunction* in Zamour (2013, p. 59).

3 See, for example, Weidemaier “Into uncharted territory”, “The district court’s decision raises a number of difficult questions” (WEIDEMAIER, 2013, p. 127).

4 Once the US Supreme Court declined to intervene in NML, since June 16, 2014, Judge Griesa has progressively included in the *injunction* third parties involved in the payment chain of English and Argentine Law bonds; he also considered whether or not new Argentine bonds (Bonar 24) should be reached by it.

5 See US *amicus curiae* in Cross (2015, p. 139).

in 2012 and 2014, that this order would cause reactions from other States, which also actually happened.⁶

This is due to the extraterritorial nature of *injunction*: the referred *injunction* goes against a payment system that operates globally. Indeed, it was designed to obstruct not only the payments that Argentina should make to bondholders through the US territory, but also other payments that should not pass through this territory. Thus, the *injunction* ordered actions to agents who were no part in the trial and whose legal relations were governed by other laws, because they had not agreed to submit possible litigations to the New York jurisdiction. In such circumstances, British⁷, Belgian⁸ and Argentine⁹ courts, in three different judicial processes, questioned the reach of the *injunction* effects in their territories.

This article analyzes the arguments used by the Argentine Judiciary in one of said processes – the “Citibank Argentina” case (Citibank A.) – in order to support its judgment.¹⁰ This process was chosen over the other two (British and Belgian processes), because it is the only one which has brought about concrete consequences to date. In fact, in its attempt to avoid contempt sanctions by the New York Court, which had ordered Citibank A. not to pay some of the Argentine bondholders, Citibank A. incurred in actions understood by the Argentine authorities as contrary to its legal system. Therefore, administrative sanctions followed, and a different agent was appointed as the custody of such bonds.¹¹

The article argues that there are solid legal reasons for the authorities of third countries to declare an *injunction* – such as the one obtained by NML – as inadmissible, as it orders courses of action and causes effects on assets and agents located in their territories. Similarly, as this paper confirms, with the analysis of a particular empirical case, the validity of the reservations opportunely stated in the literature – in particular by Weidemaier and Gelpern (2013) and Cross (2015) – about the lack of proper consideration by the New York Court in

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6 The reaction of the international community to NML was intense. For instance, NML was the catalyst event for the implementation or acceleration of two processes aimed at reforming sovereign debt restructuring frameworks: one in the IMF and the other at the UN (GELPERN, 2016; BOHOSLAVSKY, 2016).

7 *Knighthood Master Fund LP vs. The Bank of New York Mellon* (2014), HC-2014-000704, English High Court of Justice, Chancery Division, London.

8 *Knighthood Capital Mgmt. LLC et al. vs. The Bank of New York Mellon* (2015), 10th Chamber, R.G. 5650/13, Sept. 7, Commercial Court of Brussels.

9 *EN-M Economía y FP c/Citibank y otros s/proceso de conocimiento*, Juzgado Contencioso Administrativo Federal N° 12, fallo 15.400/2015, Buenos Aires.

10 Ibid.

11 See order N° 17.634, March 27, 2015, of Argentina’s National Securities Commission, and order N° 102, April 1, 2015, of Argentina’s Central Bank.

NML of the admissibility requirements imposed by the American legal system for an *injunction* that affects third parties and operates extraterritorially.

Finally, this article goes back on the analyzed ideas and considers the structural limits of local jurisdictions to solve problems beyond their scale. When a court of a particular country intervenes in a sovereign debt dispute, it is inherently limited by its jurisdictional scope and its position as a State at the time of judging another equally sovereign State. It is understood that the awareness of these limits, which are also strengths in the current international governance, is essential to avoid the temptation of constructing legal shortcuts – in terms of Samples (2014) – which could put its own credibility at risk by denaturalizing institutes created for other purposes.

Accordingly, the article is divided into three sections. Firstly, it shows the particular characteristics that an *injunction* acquires when applied to a sovereign State, taking into particular consideration the issues related to third parties and extraterritoriality. Secondly, it traces the origin of the Citibank A. case as derived from NML, outlining its role in the payment of Argentina's sovereign debt and presenting the main events of the conflict. Finally, it analyzes how the Argentine Court interpreted, in the Citibank A. case, the validity of an order issued by a foreign judge with the intention of affecting assets and agents located in its territory while stressing the conflict of jurisdictions.

I CONSIDERATIONS ABOUT *INJUNCTIONS* APPLIED AGAINST SOVEREIGN STATES:

THIRD PARTIES AND EXTRATERRITORIALITY

The degree of protection of sovereign property is wide in the US. Most of the assets that States have in the US territory are reached by the principle of sovereign immunity and, therefore, remain outside the range of a possible embargo or similar related to a sentence condemning them to make payments to their creditors. The effectiveness of traditional reliefs (monetary remedies) that creditors have to legally enforce this kind of judgments has, consequently, proven to be limited (GELPERN, 2013).

In ordinary judicial processes, these reliefs are not the only remedies that the law offers plaintiffs in their attempt to enforce judgments. Courts could order private defendants to perform a particular course of action with the aim of remedying or preventing damage derived from their actions (WEIDEMAIER; GELPERN, 2013). *Injunction*, in the terms of Section 65 of the US Federal Rule of Civil Procedure (FRCP), is a judicial remedy that does not directly apply to objects but to subjects (RANIERI, 2015).

Injunctions, Weidemaier and Gelpert (2013) explain, are equitable remedies, to be granted only when the plaintiff has no adequate judicial remedy and only when the remedy is, broadly speaking, consistent with the equitable exercise execution of the court's power: "Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice reconciliation between the public interest

and private needs as well as between competing private claims (WEIDEMAIER; GELPERN, 2013, p. 13)”.

Could a judge of New York, in a patrimonial litigation, impose an *injunction* against a State? This question is debated in the literature. Generally speaking, the existing opinions can be polarized into two positions. Those who are against this possibility argue that the Foreign Sovereign Immunities Act (FSIA) of 1976 is organized following a broad conception of the principle of sovereign immunity, having exhaustively listed its exceptions. Then, the silence surrounding regulation must be interpreted restrictively. The FSIA does not expressly admit *injunction* as a judicial relief aimed to enforce monetary judgments against States and, consequently, it should not be admitted in court decisions (CROSS, 2015; ARAYA; TUCULET, 2014; MONTELEONE, 2013). The opposite position considers that *injunction* is appropriate since the FSIA equates States to private agents to such effects. They base their position on Section 1606 which declares that “[a]s to any claim for relief with respect to which a foreign State is not entitled to immunity,” under the Act, “the foreign State shall be liable in the same manner and to the same extent as a private individual under like circumstances (WEIDEMAIER, 2013, p. 135)’.”

Even those who join the latter position understand that, if the defendant is a State, judges must quite considerably assess the possible implications of *injunction* in light of the principles of comity and reciprocity; in particular, when *injunction* is extended to third parties (WEIDEMAIER; GELPERN, 2013).

1.1 INJUNCTIONS AND THIRD PARTIES

There is nothing in the nature of monetary remedies that *a priori* makes them more effective than *injunctions* to enforce a sentence. In fact, the opposite may be the case: *injunctions* would have greater enforceability than monetary remedies depending on the particular characteristics of a concrete case.

Much of the enforcement power of an *injunction* obeys the fact that it may be extended to agents who are not directly involved in the dispute. This is so according to Section 65 (d) (2) of the US FRCP, which specifically declares that the judicial order could be extended to those agents who act “in active concert or participation with” the defendant. It can be seen that the legislation gives judges a broad discretionary power, so that they may have the flexibility to adapt their decisions to particular circumstances. The breadth of their discretionary power justifies the demand of a rigorous analysis of its admissibility requirements: an *injunction* is a measure of *ultima ratio*, to be applied only when there is no other available legal remedy and when the plaintiff is at risk of suffering irreparable damage if *injunction* is not actually applied (ARAYA; TUCULET, 2014).

The coercion of this relief lies in the menace of contempt sanctions. As Weidemaier and Gelpert (2013) explain, this kind of coercion introduces two differences between *injunctions* and monetary remedies, which must be taken into account at the moment of analyzing the Citibank A. case.

In the first place, the honor of the court is not directly involved in monetary remedies. If the plaintiff fails to gather assets enough to obtain credit, the problem lies principally with the plaintiff and not with the court. In an *injunction*, the court itself is involved in the dispute; or, differently stated, the court's reputation gets involved in the conflict. A challenge by the defendant or by third parties reached by its order is considered a challenge to its own authority and, thus, it should be punished due to contempt *to the court*. Consequently, the nature of the assets at stake is modified: in a monetary conflict, the monetary remedies relate assets of economic nature to assets of economic nature, while in an *injunction* such assets are put in relation to the honor of the Court (WEIDEMAIER; GELPERN, 2013). Then, it follows that there are good reasons to assume that, if the defendant of a particular case remains defiant, the judge will widen the scope of the injunction until the order is effectively complied with.

Secondly, both monetary remedies and *injunctions* affect third parties; with the former, there may be side effects, while with the latter third parties could be significantly affected. Such is the case when the defendant is a sovereign State. The principle of sovereign equality prevents a State from being declared in contempt or if it actually were (as indeed happened in the case of Argentina), the declaration does not affect it the same way it would affect private agents. Therefore, courts cannot enforce *injunctions* in their traditional way. In such cases, the threat of harm to third parties goes from the periphery to the center of the judicial relief, becoming virtually the only mechanism of legal coercion. The possibility of sanctioning third parties loses its incidental character and becomes a deliberate gamble for ensuring the court's authority: following Weidemaier and Gelpert, "if an *injunction* is a judicial gamble in which the court stakes its credibility on compliance, the *NML injunction* [that is, an *injunction* against a State] is a gamble with other people's money (WEIDEMAIER; GELPERN, 2013, p. 7)".

However, for an *injunction* to be valid, it should avoid damage to third parties as much as possible. The conciliation of a legal remedy, whatever it may be, with the public interest consists primarily in assessing to what extent this remedy benefits or harms third parties. The court, at the moment of ordering an *injunction*, should quite especially explain the gain for the community that could justify possible harm to agents who are outside the main object of the dispute (WEIDEMAIER; GELPERN, 2013). In the particular case of sovereign debt litigations, this general principle acquires specificity to the extent that the intermediary agents that are part of an international payment system are *a priori* covered by Article 4 of the US Uniform Commercial Code (UCC) and by Title VIII of the Dodd-Frank Act (DFA), which describe said activities as systemically relevant (CROSS, 2015).

An *injunction* against a challenging State (probably "all" States to whom it is applied, considering that an *injunction* appears only when other legal remedies have failed) may push a judge of a given litigation into a dilemma by having to choose between two contradictory courses of action: on the one hand, increasing the extent of an *injunction* over to third parties

with the purpose of pressuring the defendant to serve the order; on the other hand, preventing the cost of the measure to innocent third parties from going beyond the expected benefits. This consideration acquires a new dimension if the relief exceeds the limits of the court jurisdiction.

1.2 INJUNCTIONS, THIRD PARTIES AND EXTRATERRITORIALITY

The sovereign debt market has been globalized. Since the 1970s, this market has suffered a rapid transformation in two interrelated aspects: the nature of the creditors and the type of debt. With respect to the first aspect, this market, from being in the 80's, a relatively small and homogeneous universe of creditors, became particularly large and heterogeneous at the beginning of the 21st century. For example, after the debt crisis of 1982, the Mexican government had to negotiate with little over 500 commercial banks with headquarters in G7 countries – (BOUGHTON, 2001) – while, after the crisis of 2001, the Argentine government had to do it with hundreds of thousands of bondholders spread all around the world (RANIERI, 2015, p. 266). In relation to the second aspect, it should be noted that in the 80's, States borrowed debt mainly through direct and syndicated agreements with commercial banks, while in the early 21st century they did so mostly through the issuance of securities, which are fungible and freely transferable in capital and complementary markets, and which resulted in the emergence of a global network of specialized financial agents that assist States in custody and payment of such securities (RANIERI, 2015).

There are basically two legal forms in which a State can be related to those agents: by means of a “fiscal agent agreement” or a “trust indenture”. The main difference between these two forms, as Olivares-Caminal (2011) observes, is that, in the first case, the fiscal agent acts as a representative of the sovereign issuer, while in the second the trustee is a representative agent of bondholders. This distinction is not a minor issue: as soon as the funds are deposited in the trustee's account, they are not the sovereign's funds anymore (they are held by the trustee acting on behalf of the bondholders), since the funds held in a fiscal agent's account belong to the sovereign until they are deposited to each creditor's accounts. In this process, the place of payment is relevant: in fact, if the trustee's account is within the territory of the issuer State, the State completes the transfer of property of the fund entirely within its own jurisdiction, which *a priori* contributes to protect these funds against possible embargoes or similar dictated by foreign judges (OLIVARES-CAMINAL, 2011, p. 42).

The rights and obligations of the fiscal agent or trustee are stated in the fiscal agent agreement or trust indenture. However, their actions are also regulated by the law of the jurisdiction in which they are licensed. For example, Euroclear Bank, a financial institution that helps Argentina with the payment of its European bondholders, is subject to Belgian Law as a financial institution authorized by the competent authority of said country (National Bank of Belgium and Financial Services and Markets Authority) to operate in its market. If the fiscal agent or trustee is a branch of an international financial institution with headquarters located in the

territory of another State, for legal purposes it is considered as a separate entity of this institution (Separate Entity Doctrine and Rule).¹²

The fiscal agreement or trust indenture not only rules the relationship between the State and the fiscal agent or trustee but also that relationship generated between them and the holders of debt securities (bondholders). It is common that these contracts foresee, in case of conflict, that the parties submit the dispute to the Law and jurisdiction of a particular State. In effect, there are Argentine bonds governed by, for example, England, Argentina and the State of New York legislation, as was the case of the bonds held by the NML fund.¹³

Can a judge of New York set an *injunction* which prescribes a course of action to a payment system agent located outside the territory of its jurisdiction, with the aim of forcing a sovereign State to comply with its judgment?

Those who answer affirmatively justify their position in the transfer of jurisdiction that the Debtor State has made in favor of this Court. Their arguments are quite simple. The *injunction* falls on the State; extending it to third parties is a consequence of its resistance to comply with an order of a court to which the State has voluntarily submitted, authorized by Section 65 (d) (2) of the US FRCP. The principle of comity does not apply to this case precisely because of the State's attitude, which is contrary to American Law, expressed by the Court in its resolutions. The threat of damaging third parties, including those located outside the US territory, arises from the need to ensure compliance with the court's orders, taking into account the circumstances of a concrete case.¹⁴

The arguments of the opposite position are more solid. The presumption against extraterritoriality is an interpretative principle of US Law that has been in practice for two centuries. The stated purpose behind this presumption, as observed by Cross (2015), is to protect against unintended clashes between US laws and those of other nations. US courts traditionally are careful when issuing *injunctions* against sovereigns and have invoked this presumption as the basis for limiting extension of the courts to the US territory.

Moreover, the US Supreme Court has applied this presumption against extraterritoriality over the past two decades, starting in 1991 with its adoption in the *Aramco* case, in different opportunities (CROSS, 2015). Cross also gathers the reasons given by the US Supreme Court in favor of the respect for this presumption around four axes. First, customary international

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12 See Cross (2015) and NML: Memorandum of law in support of Citibank, N.A.'s renewed motion by order to show cause for clarification, June 19, 2014.

13 See FAA 1994, <shearman.com/en/services/key-issues/argentine-sovereign-debt?section=related-source-materials>, visited January 10, 2017.

14 These arguments are a synthesis of those presented by Judge Griesa and the US Court of Appeal in NML. See, Weidemaier and Gelpern (2013).

law sets limits to a State's authority to apply its Law to activity occurring outside its borders. An act of Congress should be interpreted in a manner that is consistent with international law. Second, the presumption is grounded in consideration of international comity. Third, the presumption follows the separation of powers concerns –specifically, concerns related to the determination of whether US legislation should be applied abroad and how it could be done, which raises difficult and sensitive policy considerations falling outside both the institutional competence and constitutional prerogatives of the judiciary. Fourth, the presumption protects US interests in the long term because it discourages other countries from imposing their laws extraterritorially on US agents (CROSS, 2015).

The rationale for limiting court decisions to its jurisdictional territory makes sense when the issue is visualized from the point of view of the foreign agents reached by its orders.

From the standpoint of a payment system agent that operates, for instance, in Europe, the legitimacy of the order of a court, whose jurisdiction said agent has not been contractually tied to, is very difficult to justify; it becomes more difficult when compliance with it can cause conflicts with the agent's customers or the competent authority in the territory where the agent is licensed.

From the standpoint of a Japanese bondholder, for example, the argumentation is even clearer. He could rightly ask: which is the legitimacy of a New York judge to set an order to retain money directed to pay me and based on a trial I am no part of, under a legal system I do not belong in, and with the aim of paying another creditor? Who will pay for the damage I may support if the Debtor State deposited said funds to the corresponding payment agents, and a judicial order prevents these funds from effectively being deposited to my account?

Finally, from the position of the authorities of another State, this issue also makes sense: Why the Italian government, for example, should accept that a New York judge set an order with the intention of producing effects on the payment system agents located in Italian territory and harming its citizens (Italian bondholders)? This article is focused on this point of view. The Citibank A. case shows the clash of jurisdictions that follows the implementation of the *injunction* ordered by Judge Griesa and the authorities of the Argentine government. This case is also significant if it is noted that the Argentine government, in fact, had transferred the jurisdiction of the bonds held by NML to the Court of New York following the Fiscal Agent Agreement (FAA) of 1994. Is this transfer of jurisdiction sufficient for a New York judge to prescribe actions with the intention of being implemented in Argentine territory?

2 THE CITIBANK A. AS A CASE DERIVED FROM NML: PRINCIPAL EVENTS

To understand the judicial process substantiated in Argentina, firstly, it is necessary to explain the role that the Citibank A. played in relation to certain bonds issued by Argentina and, secondly, to sum up its participation in the NML case.

2.1 CITIBANK A. AND ITS ROLE IN THE PAYMENT CHAIN OF ARGENTINA'S SOVEREIGN DEBT

Citibank A. is a branch of Citibank N.A., located in Buenos Aires and licensed by the Central Bank (“BCRA”) and the National Securities Commission (“CNV”), both of Argentina, to conduct banking business in this country.¹⁵

In 2001, Argentina defaulted on its sovereign debt. In 2005 and 2010, Argentina offered holders of its defaulted debt the option to exchange their bonds for new bonds (the “Exchange Bonds”). The restructuring process closed with almost 93% adherence of the total universe of bondholders in it (KUPELIAN; RIVAS, 2014).

NML, a vulture fund,¹⁶ is part of the remaining 7% (holdouts). NML holds Argentine bonds regulated by the FAA of 1994. Concerning these bonds, NML triggered numerous lawsuits against Argentina in New York, obtaining favorable judgments in several of them. Despite its many attempts, NML could not execute these judgments because the assets they meant to embargo were considered as included in the principle of sovereign immunity. In 2010, NML changed its strategy and brought the case against Argentina, requesting a statement of violation of the *pari passu* clause and the implementation of measures directed to ensure that Argentina effectively comply with court orders (“specific performance”) (ARAYA; TUCULET, 2014).

Citibank A. is not a fiscal agent of Argentina. Citibank is a trustee acting as local custodian for certain holders of the Exchange Bonds issued in 2005 and 2010: those who hold Peso and US Dollar-denominated bonds governed by Argentine Law (the “Argentine Law Bonds”).¹⁷

The relationship between Argentina, Citibank A. and these said bondholders was defined in a trust indenture. This indenture was annexed to the two decrees (N° 1735/04 and 563/10) by means of which the Argentine government ordered the issuance of all Exchange Bonds, including the Argentine Law Bonds.¹⁸

Sections 3.1, 3.3 and 3.5 of Article 3 of the trust indenture and the conditions of the Argentine Law Bonds define the payment procedure. Initially, Argentina transfers funds to the account of “*Central de Registro y Liquidación de Instrumentos de Endeudamiento Público*” (“CRYL”) in the Central Bank (BCRA). Then, CRYL transfers an equal sum to *Caja de Valores S.A.* (“Caja”). *Caja*, the next step, forwards the payments to Citibank A. Finally, Citibank A. transfers the payments to its customers, including the clearing houses Euroclear and Clearstream, which distribute their portion of the interest payments to bondholders. Citibank A.’s obligation to

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¹⁵ Citibank’s motion for clarification, *above* 12.

¹⁶ See definition of vulture fund in Kupelian-Rivas (2014).

¹⁷ See decrees N° 1735/04 and 563/10.

¹⁸ *Ibid.*

its Custody Account Customers is completed when the cash accounts of those customers have been credited.¹⁹

Consequently, in this process, the transfer of property of these funds by Argentina is conducted entirely in Argentina's territory, without connection to the US territory at all. The terms of the trust indenture are clear in this regard. The funds held by Citibank A. are funds that the entity retains on behalf of its customers. Once received by the trustee, the funds are held by those trusts and Argentina has no interest in them.²⁰

Finally, it should be noted that Citibank A., in its role as trustee of Argentine Law Bonds, is not submitted to the Law or to the jurisdiction of the State of New York, because Citibank A., to all legal purposes, constitutes a separate entity of Citibank N.A, with headquarters in New York.²¹ Also, because bonds in its custody are ruled by the laws and the jurisdiction of Argentina, laws to which Citibank A. is also submitted as an entity licensed to operate in the financial and capital markets of Argentina.²²

2.2 CITIBANK A. IN THE NML LITIGATION: PAYMENT AUTHORIZATIONS

The first relevant intervention²³ of Citibank A. in the NML case took place June 19, 2014.²⁴ The day before, it was warned, in a hearing, that if Argentina did not comply with Judge Griesa's order of February 23, 2012, (*injunction*) Argentina would default on its debt June 30, 2014.²⁵ The Citibank A. intervention, therefore, sought to clarify whether the Argentine Law Bonds were or not reached by this order.²⁶

The *injunction* became enforceable on June 16, 2014, when the US Supreme Court declined to intervene in the NML case.²⁷ Its contents had been defined by Judge Griesa on

19 Ibid; Citibank's motion for clarification, *above* 12; NML: District Court's order of March 12, 2015 Case 1:08-cv-06978-TPG Document 762.

20 See decrees N° 1735/04 and 563/10; Justice David Richards' Decision, *Knighthood* (...), HC-2014-000704, English High Court of Justice, February 13, 2015.

21 This location is not incidental. Section 5.9 of the trust indenture requires that the trustee of Argentine Bonds have offices in Manhattan.

22 See decrees N° 1735/04 and 563/10.

23 On May 22, 2013, Citibank A. requested the November 21, 2012 District Orders (*injunction*) to be made clear. Judge Griesa declined to entertain the motion. See Citibank A.'s motion for clarification, *above* 12.

24 Ibid.

25 NML: Order, February 23, 2012, US District Court of New York, Case 1:08-cv-06978-TPG, Doc. 371.

26 Citibank's motion for clarification, *above* 12.

27 NML: Decision of the US Supreme Court, June 16, 2014, *Certiorari*, No. 12-842.

November 21, 2012, at the request of the Court of Appeals for the Second Circuit.²⁸ On that occasion, Judge Griesa basically stated that Argentina had to pay principal and interests to NML, before paying off the rest of its exchange bondholders. Anticipating a possible noncompliance of Argentina, the Judge ordered the payment system agents to refrain from collaborating in the sovereign debt payments under penalty of contempt.²⁹ This addendum was also confirmed by the Court of Appeals on August 23, 2013.³⁰

None of the documents mentioned Citibank A., so the entity assumed it was not reached by the *injunction*.³¹ This assumption was confirmed by Judge Griesa. On June 27, 2014, the Judge authorized Citibank A. the June 30 payment of Argentine Law Bonds.³² Days later, he extended this authorization to Euroclear and Clearstream.³³

Argentina understood the *injunction* as an order of impossible compliance – (KUPELIAN; RIVAS, 2014) – and paid the bonds that were due on June 30. While the payment of Exchange Bonds governed by New York and English Law was, because of the *injunction*, retained in the Bank of New York (BNY), account of Buenos Aires, the payments related to Argentine Law Bonds followed their course without difficulty and reached the bondholders' accounts.³⁴

Observing this scenario, on July 11, 2014 plaintiffs presented a motion for reconsideration of the order that authorized the payment of Argentine Law Bonds (order of June 27). In general terms, they argued that Judge Griesa should differentiate between Argentine Law Bonds in dollars and in pesos. The former, they noted, are not domestic but external debt and, therefore, should be reached by the *injunction*.³⁵

The Judge accepted the reconsideration. From this moment until its final resolution (March 12, 2015), a transition period started in which the Judge authorized Citibank A. three times “just for one-time” to make the payments of July 30, September 30 and December 31,

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28 NML: Decision of the US Court of Appeals for the Second Circuit, October 26, 2012, 12-105(L)

29 NML: Amend to the February 23, 2012 Orders; November 21, 2012, US District Court of New York, Case 1:08-cv-06978-TPG.

30 NML: Decision of the US Court of Appeals for the Second Circuit Affirming the District Court' *Injunction*, August 23, 2013, 12-105(L).

31 Citibank's motion for clarification, *above* 12.

32 NML: Order Clarifying Amended February 23, 2012, Orders, March 27, 2014, US District Court of New York.

33 See Judge Griesa's authorizations of July 2 and 7, 2014, in <shearman.com/en/services/key-issues/argentine-sovereign-debt?section=related-source-materials>, visited January 10, 2017.

34 Ibid.

35 NML: Plaintiffs' Motion for Partial Reconsideration of the June 27, 2014 Order; July 11, 2014, Case 1:08-cv-06978-TPG Document 586.

2014, respectively.³⁶ Among the reasons the Judge wielded to justify his decision, he stressed his desire of not affecting, with the *injunction*, the settlement recently signed by Argentina and Repsol.³⁷

Although the orders authorized the payments, it was clear that Argentine Law Bonds denominated in dollars were actually reached by the *injunction*. Consequently, Citibank A. appealed the first order (July 28 order). The Court of Appeals denied the appeal on jurisdictional grounds, but noted that “nothing in this Court’s order is intended to preclude Citibank from seeking further relief from the District Court.”³⁸ Thus, on September 22, 2014, Citibank A. filed a new motion against the July 28 order. Judge Griesa accepted to consider this motion and established a new schedule for the parties to present their arguments.³⁹

They did so mid-February 2015. Plaintiffs presented documents with the aim of proving that the Argentine Law Bonds denominated in dollars were not offered exclusively in Argentina but in other jurisdictions; thus – they argued – these Bonds should be considered as external debt.⁴⁰ Citibank A. opposed this consideration and reiterated its reasons about the absence of a jurisdiction of the New York Court and the unnecessary harm that the extension of the *injunction* would cause.⁴¹

March 12, 2015, Judge Griesa ruled against the motion of Citibank A., arguing that those Bonds were in their vast majority “external debt” and that Citibank A. was a “participant” under the terms of its *injunction*. Similarly, the Judge rejected the defense arguments about the absence of jurisdiction observing that “Citibank’s global headquarters are located in New York. Citibank N. A. merely maintains a branch in Argentina. Moreover [...] this Court’s *injunction* is not directed at Citibank but at a defendant, The Republic of Argentina.”⁴²

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³⁶ NML: Order, July 28, 2014, US District Court New York, Case 1:08-cv-06978-TPG Document 613; NML (...): Order, September 26, 2014, US District Court (...), Case (...) Document 683; NML (...): Order, November 10, 2014, US District Court (...), Case (...) Document 714.

³⁷ Argentina issued bonds pursuant to a settlement with Repsol YPF, S.A. (the “Repsol bonds”), which hold the same International Securities Identification Number (“ISIN”) as the dollar denominated exchange bonds paid through Citibank A.. As a result, Citibank A. cannot distinguish between the Repsol bonds and the dollar-denominated exchange bonds. See US District’ Order, July 28, 2014, *above* 36.

³⁸ See NML: Order, March 12, 2015, US District Court of New York, Case 1:08-cv-06978-TPG Document 762, p. 5.

³⁹ See US District Order, November 10, 2014, *above* 36.

⁴⁰ NML: Plaintiffs’ Motion in Opposition to Citibank’s Motion to Modify the *Injunction*, February 17, 2015, Case 1:08-cv-06978-TPG Document 745.

⁴¹ NML: Citibank’s Motion in Opposition to Any *Injunction* against Payment of Argentine Law Bonds, February 17, 2015, Case 1:08-cv-06978-TPG Document 740.

⁴² See US District Order, March 12, 2015, *above* 38, p. 12.

2.3 TRIGGERING OFF THE CITIBANK A. CASE: THE AGREEMENT OF MARCH 20, 2015

The order of March 12, 2015 left Citibank A. in a difficult position. Some days before, the head office of the entity had informed Judge Griesa that “Argentina has a legitimate interest in applying its banking laws”⁴³ and “if Citibank A. does not remit to its customers the funds it receives, as will all other custodians, it will be in violation of Argentine banking law. The Republic could revoke Citibank A.’s license and even impose criminal liability on its employees.”⁴⁴ This way, Citibank A. was caught between two irreconcilable obligations: violating the *injunction* would expose it to sanctions in New York; obeying it would do so in Argentina.

For this reason, the very March 12, Citibank A. requested Judge Griesa a stay to delay the implementation of the *injunction*, allowing it to order the payment due March 31. The risk of sanctions in Argentina, the bank observed, is not hypothetical: “Officials of The Republic with authority over Citibank A. have “demand[ed] that [Citibank A.] continue acting to further and to protect the interests of the holders of the Argentine [Law] Bonds””.⁴⁵

On March 16, the Judge denied the requested stay.⁴⁶ Simultaneously, Argentine authorities ordered Citibank A. to inform, in a 48 hour period, which would be the position of the bank concerning the distribution of the referred payments.⁴⁷ The next day, the entity informed the Judge about its intention to renounce as custodian of Argentine Law Bonds, the reason why the bank renewed its stay request.⁴⁸

The process took an unexpected twist. On March 20, Citibank A. presented to the Judge an agreement reached with the plaintiffs. The Judge accepted it and homologated it. In practice, this meant that the Judge granted the requested stay in exchange for a series of obligations which the entity was committed to.⁴⁹ Among the arguments given by the Judge, he stressed his desire not to sanction Citibank A., “a major international branch of Citibank with thousands of employees and banking operations in Argentina.”⁵⁰ The authorities of Argentina denounced a

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⁴³ NML: Hearing, March 3, 2015, US District Court of New York.

⁴⁴ NML: Citibank’s Letter, March 3, 2015, US District Court of New York.

⁴⁵ See NML: Citibank’s Letter, March 12, 2015, US District Court of New York, p. 2.

⁴⁶ NML: Order, March 16, 2015, US District Court of New York, Case 1:08-cv-06978-TPG, Document 765.

⁴⁷ See NML: Citibank’s Letter, March 17, 2015, US District Court of New York, p 2.

⁴⁸ Ibid.

⁴⁹ NML: Stipulation and Order, March 20, 2015, US District Court of New York, Case 1:08-cv-06978-TPG Document 770.

⁵⁰ Ibid p. 1.

shift in the Judge's line of argumentation and his partial attitude for leaving key issues in the hands of plaintiffs of the operationalization of his *injunction*.⁵¹

The agreement was basically about the resignation of Citibank A. to the role of custodian; it stipulated deadlines and procedures to make the resignation effective. Similarly, according to the agreement the entity agreed to waive any and all rights to: (a) appealing the Court's orders related to Argentine Law Bonds; (b) seeking a stay without the consent of plaintiffs of any of these orders or of the *injunction* itself.⁵²

Immediately, Argentine authorities activated an investigation in relation to Citibank A. performance and concluded, firstly, that bondholders ran serious risk of not collecting their payments due to March 31 and, secondly, that the entity had violated the national legislation. Therefore, the *CNV* decided, by Resolution N° 17.634 of March 27, 2015, to preventively stop Citibank A. from operating on capital markets, and replace it as custodian of the Argentine Law Bonds of *Caja de Valores*. Also, the *BCRA*, by Resolution N° 102 of April 1, 2015, revoked the authorization granted to Ribisich to serve as director of Citibank A. Ribisich filed legal action requesting to be taken back, which was denied by the *Juzgado Contencioso Administrativo N° 3* of Buenos Aires.⁵³

In addition, the Argentine government informed Judge Griesa, on April 6, 2015, that it would appeal his March 12 Order before the Court of Appeals for the Second Circuit,⁵⁴ something which actually happened on August 11.⁵⁵

Finally, Argentina's Ministry of Economics (*MECON*) asked Argentina's National Court to declare the ordered agreement unconstitutional and, thereby, to annul its effects. For this purpose, *MECON* argued that the agreement: (1) was signed with neither the participation of Argentina nor the affected bondholders; (2) prevents payments from effectively reaching a certain percentage of its bondholders, because it only authorizes Citibank A., and not the rest of the involved agents in the payment chain, to transfer them; (3) precludes a future custodian agent from paying its bondholders since the referred authorization is exclusively granted to

51 See for instance, Argentine Minister of Economics, Kicillov, statements, in <<http://www.ambito.com/noticia.asp?id=784049>>, visited January 15, 2016.

52 See Stipulation and Order, March 20, 2015, *above* 49.

53 "Citibank NA vs. BCRA y otros s/ Amparo Ley 16.986", *Juzgado Contencioso Administrativo N° 3*, Causa N° 14698/2015, 16 de abril, Buenos Aires.

54 NML: Notice of Appeal, April 6, 2015, US District Court of New York, Case 1:08-cv-06978-TPG Document 776.

55 NML: Brief of Defendant-Appellant of the Republic of Argentina, April 11, 2015, USA Court of Appeals for the Second Circuit, Case 15-1060, Document 149.

Citibank A.; (4) goes against bondholders' interests because it provides a waiver to the right to appeal judicial decisions which harm or could harm them.⁵⁶

MECON completed its legal action by demanding a cautionary measure. The objective of this measure was the immediate suspension of the effects and implementation actions of the agreement until the principal object of the action was resolved.⁵⁷ About this demand, the Argentine Federal Court N° 4 in charge of Judge Marra Giménez – as can be seen below – pronounced judgment in the referred Citibank A. case.⁵⁸

3 EXTRATERRITORIALITY OF FOREIGN JUDGES' ORDERS IN ARGENTINA'S JURISPRUDENCE: THE CITIBANK A. CASE

In Argentina, as is also common in other jurisdictions, the admissibility of a cautionary measure as the requested one depends on two requirements (Art. 230 of the Argentinean Proceedings Code; *CPCCN.*): the risk of irreparable harm because of the delay (*periculum in mora*) and the credibility of the alleged right (*fumus bonis iuris*). In this case, the intervening Court held that both requirements had effectively been set.⁵⁹

The first requirement was set since the agreement had already been implemented, since the time when Citibank A. had advised Euroclear and Clearstream about its desire to leave the custodian business. The *periculum in mora*, the Judge considered, existed because the delay could cause irreparable harm: (a) to the National State, to the extent that the agreement could interfere in its essential right to pay its sovereign debt; and, (b) to the bondholders who could not collect their credits.⁶⁰

The second requirement was set since the involved bonds are governed by Argentine Law (Decreets N° 1735/04 and 563/2010); then, the Judge concluded the agreement violates a number of rights protected by the Argentine legal system.⁶¹

Initially, the agreement violates the national jurisdiction to which are subjected the parties involved in these Bonds. This is so, the Judge considered, because Citibank A. homologated the agreement in a foreign court. The Argentine Law Bonds did not prescribe a transfer

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⁵⁶ *MECON*, "Demanda contra Citibank A.", <<http://www.economia.gob.ar/soberaniaeconomica/contenidos/wp-content/uploads/2015/04/Demanda-Citibank-Escaneada-con-cargo.pdf>>, visited January 16, 2017.

⁵⁷ *Ibid.*

⁵⁸ EN-M Economía y FP c/Citibank A, *above* 9.

⁵⁹ EN-M Economía y FP c/Citibank A: *sentencia*, May 15, 2015, case 15.400/2015.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

of jurisdiction in favor of a foreign court. Hence, the conclusion was, in the Citibank A. case, that there occurred an illegal transfer of Argentina's jurisdiction to the benefit of a foreign court.⁶²

The agreement, the Judge noted, constitutes a US "judgment", in terms of Rule N° 54 (a) of the US FRCP. In effect, an agreement, initially signed only between private agents (NML and Citibank A.), became a judgment according to US Law since it was ordered by Judge Griesa.⁶³

However, a foreign judgment cannot produce direct effects on Argentine territory; to do so (or more technically, to become an executable title in the country), it must follow a procedure called *exequatur* (Art. 517 CPCCN). Argentina's Supreme Court (CSJN), in the Claren Corporation case of 2014,⁶⁴ stated that the *exequatur* is not just a bureaucratic procedure but a real procedure of constitutional review. During this procedure, judges must evaluate, among other issues, whether the foreign order was pronounced by a competent judge, whether there was a fair trial and that it did not affect the public order of Argentine Legislation (Art. 517 CPCCN). This type of control, the CSJN stated, is not a peculiarity of the Argentine legal system; on the contrary, it is recognized in an overwhelming number of international conventions and domestic legislations.⁶⁵

It is worth mentioning that the named Claren Corporation case is a direct judicial precedent of the Citibank A. case. This is so because this case showed the attempt of this corporation to turn in its favor, via *exequatur*, another of Judge Griesa's judgments on an executable title in Argentina. As in NML, the fiscal agent agreement (FAA-1994) of the bonds held by Claren Corporation explicitly prescribed an extension of Argentine jurisdiction in favor of the Court of New York. The extension, the CSJN stated, does not prevent the possibility of an *a posteriori* constitutional review of the foreign judgment by an Argentine Court; if said extension is not understood as a relationship between two legal systems, then it may be said to be like a shot in the dark. Its acceptance does not mean giving up those aspects of the sovereign immunity principle that protect *iure imperii* acts, the acts which distinguish sovereign States from colonial regimes. In particular, this kind of extension does not prevent the recognition that the enforceability of a foreign judgment depends on the respect for the domestic public order – Art. 517 (4) CPCCN.⁶⁶

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⁶² Ibid p. 11.

⁶³ Ibid p. 5.

⁶⁴ Claren Corporation e/ E.N - arts.517/518 CPCC*exequaturs*/ *varios*, CSJN, C. 462. XLVII. R.O.

⁶⁵ Ibid.

⁶⁶ Ibid.

In the Citibank A. case, the Judge concluded that Citibank A. violated the national jurisdiction since the entity did not even activate the referred *exequatur* to enforce the agreement ordered by Judge Griesa in Argentina.⁶⁷

Judge Marra Giménez observed that the agreement, by obstructing the restructuring of the Argentine sovereign debt, violates norms of national public order.⁶⁸ To properly understand this statement it is necessary to refer again to the Claren Corporation case. In this case, the *CSJN* observed that the Bonds held by the plaintiff, originally regulated by the FAA of 1994, were subject – like other similar public securities – to the norms dictated by the State during the crisis of 2001. These norms declared a default because of the extreme emergency situation, and instructed the national government to conduct a sovereign debt restructuring (Acts N° 25.561 and 25.565). In the light of this instruction, the government conducted two processes, supported by the National Congress (Acts N° 26.017 and N° 26.547), which obtained the adherence of more than 90% of its creditors. In this context, the *CSJN* stated that admitting the claim of Claren Corporation “would imply to validate that the plaintiff, by way of an individual action conducted on a foreign court, circumvents the restructuring realized by the Argentine government in correspondence with the emergency norms issued by competent authorities in accordance with the National Constitution”.⁶⁹

In a previous procedure, the Galli case of 2005,⁷⁰ creditors of the Argentine State had precisely questioned the constitutionality of these norms. The *CSJN*, in this case and taking into account the precedent “Brunicardi”,⁷¹ considered constitutional the faculties of the State with respect to its power to suspend payments of its sovereign debt and to restructure it in contexts of extreme economic crisis. Those powers, the *CSJN* stated, constitute a State’s essential powers relative to its sovereign nature, and the norms by which such powers are exercised are part – of the public order in the Argentine legislation – such as the Judge in the Citibank A. case concluded. Both issues (the State powers to restructure its debt in times of extreme crisis and the *iure imperii* character of the acts through which those powers are actualized), the *CSJN* stated, are principles of the Law of Nations.⁷²

Finally, Judge Marra Giménez decided that Citibank A. had violated the Argentine Law because it did not follow the regulatory regime that establishes the legal procedure for

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⁶⁷ See EN-M Economía: *sentencia*, above 59, p. 11.

⁶⁸ Ibid. p. 10.

⁶⁹ See Claren Corporation, above 64, point 8.

⁷⁰ Galli, Hugo Gabriel y otro c/P.E.N. *s/amparo sobre ley 25.561*, *CSJN*, 05/04/2005, Fallos: 328:690.

⁷¹ Brunicardi, Caredio c/ Estado Nacional (B.C.R.A.) *s/ cobro.*, *S.C.*, *CSJN*, B.592.XXIV, Fallos: 319:2886.

⁷² Galli c/P.E.N, above 70.

abandoning the role of custodian of Argentine bonds,⁷³ violation for which Citibank A. was sanctioned by the *CNV* and the *BCRA*.⁷⁴

In the light of these arguments, the Judge decided to grant the cautionary measure requested by *MECON* and, therefore, ordered Citibank A. to abstain from any action to implement the referred agreement.⁷⁵

CONCLUSIONS

There is nothing such as a bankruptcy international court or similar. Consequently, the international community has found in key financial jurisdictions a pragmatic solution to have judges who can intervene in the settlement of conflicts in which a State and its creditors cannot reach a harmonious resolution to a dispute related to sovereign debt.

However, the intervention of these jurisdictions is inherently limited given, on the one hand, the national character with respect to a global dispute and, on the other hand, the State nature at the time of judging another State equally sovereign. The Court of New York in the NML case aimed to circumvent these structural limits by setting up an *ad hoc* solution.

Since the beginning, the literature has shown reservations whether the US Law requirements to order an *injunction* were actually set in this case (WEIDEMAIER, 2013; CROSS, 2015; WEIDEMAIER; GELPERN, 2013; SAMPLES; 2014; MONTELEONE; 2013; ZAMOUR; 2013). Of all these reservations, this article has focused on two interrelated issues: “third party damage” and “extraterritoriality”.

Damage to third parties, as a general principle for setting an *injunction*, cannot exceed the expected benefits. This requirement was not set in NML, or, at least, the judges have not to date adequately explained the existing balance between these two extremes.⁷⁶ They didn’t satisfactorily explained why the payment system agents reached by the *injunction* were not covered by Title VIII of the DFA and Art. 4 of the UCC: “neither the District Court nor the Court of Appeals made any effort to explain why the interest in obtaining relief for NML trumped foreign government policies designed to protect financial intermediaries. To the contrary, the

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73 See EN-M Economía: *sentencia*, above 59, p. 11.

74 Ibid, p. 4.

75 Ibid p. 12.

76 “To show that the injunction enhances social welfare, the Courts might explain why its remedy increases the likelihood of compliance by Argentina, fosters respect for the courts, and creates appropriate incentives for future sovereign borrowers, creditors, and intermediaries, and also why these benefits outweigh the costs potentially falling on market utilities, bondholders, Argentine citizens, and future debtors and creditors. So far, the courts have shied away from such analysis” (WEIDEMAIER; GELPERN, 2013, p. 38).

Court of Appeals dodged such questions on procedural grounds (WEIDEMAIER; GELPERN, 2013, p. 34)”.

The analysis empirically confirms the reservations theoretically stated by Weidemaier and Gelpert in 2013: an *injunction* against a State tends to become extensive over to third parties when the State remains in a defiance attitude (WEIDEMAIER; GELPERN, 2013). Nine months passed between the moment when the *injunction* became enforceable (June 16, 2014) and the moment when the Judge defined the Argentine Law Bonds situation (March 12, 2015). In this period, Argentina refused to pay NML and was declared in contempt without concrete effects. There are good reasons for assuming that the actual ideas which justified the March 12 Order are related to the Judge’s attempt at increasing pressure on Argentina.

Similarly, the analyzed case shows that the damage to third parties was not hypothetical but concrete. There are, in this sense, two types of third parties affected by the *injunction* in NML.

Firstly, there are the payment system agents. As mentioned above, the *injunction* placed Citibank A. in a tight position: the entity should evaluate its course of action, knowing that one way or another the Law would be violated, depending on which would be the best possible option. Citibank A. chose to leave its custody of the Argentine Law Bonds (something which is a damage itself) to avoid contempt sanctions in New York. The way it did so (following the agreement of March 20, 2015) effectively violated the Argentine legislation and implied penalties.

In this case, the *injunction* should be inadmissible for requiring an agent to violate the Law of the jurisdiction in which it is licensed. Recently, the principles that protect bank branches have been strongly reaffirmed by New York courts.⁷⁷ The position of Citibank A. was not an isolated case in NML. The rest of the intermediary agents reached by the *injunction* are subject to possible sanctions in the foreign jurisdictions where they operate, something which was repeatedly informed to the Judge.⁷⁸

Secondly, there are the remaining bondholders, those who were not paid because the *injunction* prevented the transfer to their accounts of the funds deposited by Argentina. The words of Weidemaier and Gelpert again make sense: “If an *injunction* is a judicial gamble in which the court stakes its credibility on compliance, the *NML injunction* is a gamble with other people’s money” (WEIDEMAIER; GELPERN, 2013, p. 7). The analyzed case helped to see that the global character of the *injunction* affected thousands of bondholders all around the world.

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⁷⁷ See Citibank’s motion for clarification, *above* 12.

⁷⁸ In this sense, the Euroclear case is significant since the Belgian Law was enacted precisely to protect clearinghouses from *injunctions* of this sort. See Olivares-Caminal (2011, p. 53).

For the *injunction* to be admissible – it must be repeated – the Judge should explain why the benefits of paying NML were greater than the costs suffered by third parties as a result of implementing the *injunction*, something which has not occurred yet. The question remains open about how and whom the affected bondholders could claim for damage compensation, considering that the Court of Appeal of New York⁷⁹ and the Court of England⁸⁰ confirmed that the funds frozen by the *injunction* (in some cases since June, 2014, to April, 2016) no longer belong to Argentina.

The extraterritoriality of the *injunction* existed, as was reflected in the studied case, as from the moment of the ordered courses of action to agents (among others, Citibank A. and Euro-clear) located outside the US territory, and produced effects on assets (the funds directed to pay Argentine bonds) and other agents (bondholders) located outside the US territory, too.

The arguments used by the District Court to justify its decision in this regard have been fundamentally pragmatic: the *injunction* had to transcend the US borders so that the pressure on Argentina was significant enough as to force payment to NML.⁸¹ The Court of Appeals embraced this argument and refused considering the reasons presented by foreign entities (WEIDEMAIER; GELPERN, 2013, p. 34). Even though the US Law grants judges a large flexibility to adapt the content of an *injunction* to the particular circumstances of a case, it does not mean that by doing so they can undermine general principles of the US Law itself (a judge could not, for example, order a subject to violate a law).

Judge Griesa noted that the *injunction* fell only on Argentina, which had voluntarily transferred its jurisdiction; the extension of this *injunction* to third parties was a possibility provided by Section 65 of the US FRCP. Nevertheless, although said section makes such extension to third parties possible, it has no implication concerning extraterritoriality. Section 65 in no way is an instrument aimed to extend a court jurisdiction beyond its territory or to transfer the jurisdiction of the State which has transferred it to those agents which participate in it, nor anything similar. In other words, and following the same logic of the preceding paragraph, the judge, at the time of determining the content of an *injunction*, is subject to the general principles that inform its Law. In this sense, it is a general basic principle in any legal system that judges limit their orders to the territory over which they have jurisdiction; a principle which, as was noted, has historically been respected by the US jurisprudence and, in particular, reaffirmed by the US Supreme Court in recent decisions.⁸²

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⁷⁹ NML: “Dussault v. Republic of Argentina”, Summary Order, October 5, 2015, US Court of Appeals for the Second Circuit, N° 14-4235.

⁸⁰ See Mr. Justice David Richards’ Decision, February 13, 2015, *above* 20.

⁸¹ See Amend to the February 23th, 2012, Order, *above* 29.

⁸² Weidemaier and Gelpert (2013) observe that U.S.A. courts can act extraterritoriality, but in an accurate form. This is not the case of the NML *injunction*, whose scope is enormous.

Extraterritoriality has tangentially been discussed in the NML litigation in relation to the principle of sovereign immunity from execution (Section 1609 of FSIA). During the judicial process, the Court of Appeals understood that the *injunction* issued by Judge Griesa did not: (a) attack, retain or execute any property; (b) affect the free management of any Argentine property, except incidentally, since the order prohibits transferring funds to some bondholders and not to others; (c) transfer any domain or control of sovereign property to the Court.⁸³

Following the performed analysis, these arguments appear as limited and quite formal. Although the *injunction* was directed to subjects, the action they were required to perform relates to objects; in other words, subjects were only the means to prevent the Argentine funds directed to pay the sovereign debt from reaching their recipients. In practice, the *injunction*: (a) retained funds that Argentina, as owner of said funds, had decided to transfer to its bondholders; (b) limited the free use of its assets not only incidentally, because it affected the normal exercise of an essential function of a State as is the power to pay its sovereign debt; (c) transferred the control of these assets to the Court, since the Court was the authority that could order the payment system agents to act. The issue of extraterritoriality makes sense in this context, given that Argentina transferred the property of its funds entirely to Buenos Aires, and only about a third of the funds directed to pay Argentine Exchange Bonds required passing through the US territory to reach their recipients. In this sense, Cross considers that the NML *injunction*, since it affects property located outside of US territory, should be inadmissible by the principle of sovereign immunity from execution; this *injunction* “defies the purpose of the FSIA, ignores the context in which the statute was adopted, and contravenes the spirit, if not the letter, of the presumption against extraterritoriality” (CROSS, 2015, p. 132).

The studied Citibank A. case goes a step further and helps to evaluate the extraterritoriality of the *injunction* from a foreign perspective to the US. Four conclusions can be drawn from the performed analysis which *a priori* can be extended beyond the interpretation made by the Argentine Court in this particular case.⁸⁴

Firstly, a judge of a third country is competent to review, at the request of an interested party, an *injunction* similar to the one of NML in relation to the effects that this *injunction* means to produce in his/her territory. A judge’s competence or jurisdiction may be held: (a) because the bonds in dispute were issued under the judge’s Law or (b) because the *injunction orders* courses of action to agents who are subject to the Law the judges belong in since those agents have been licensed to operate in the judges’ country.

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⁸³ Decision of the US Court of Appeals, October 26, 2012, *above* 28, p. 25.

⁸⁴ See EN-M Economía: *sentencia*, *above* 59.

Secondly and from a strictly legal perspective,⁸⁵ an *injunction* of this sort could not automatically produce effects on agents or assets located in foreign territories; that is to say, without an interested agent initiating judicial proceedings in this regard, before a competent court of such territory. In such proceedings, the court would have the opportunity to analyze, among other things, whether the *injunction* was prescribed by a competent foreign judge or whether it affects the public order in its country.

Thirdly, if in such procedure the court arrives at the conclusion that the foreign judge has no jurisdiction to order courses of action to agents located in the territory of said court (a conclusion which is certainly probable), an *injunction* could be declared invalid in the mentioned territory. The consequences would not be minor. This is so to the extent that it would enable the subjects who consider themselves affected by the *injunction* to request the payment system agents to meet their payment obligations in accordance with the agreement that governed their relationship; the authorities of the country in which these agents are licensed could sanction them if they actually did not do so.

Finally, the transfer of jurisdiction by a State to the court of another State does not imply an unlimited benefit in favor of the latter. Citizens or authorities of the transfer or State can object the validity of a judgment of a foreign court; they can proceed not only before a superior instance of this court in its judicial system, but also before international courts when they understand that the judgment violates International Law.⁸⁶ They can proceed even before judges of their own State when the judgment is intended to produce effects in their territory and they believe it contravenes public order.⁸⁷

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⁸⁵ In practice, the NML *injunction* produced effects beyond the US territory. The reasons to explain this situation, we understand, are extra-legal reasons, related mainly to the different power position that Argentina and U.S. hold in global governance.

⁸⁶ Argentina effectively sued U.S.A before the International Court of Justice (ICJ) on August 7, 2014.

⁸⁷ See EN-M Economía: *sentencia*, above 59.

REFERENCES

ARAYA, Tomás M.; TUCULET, María Victoria. El principio de inmunidad estatal y los procesos de reestructuración de deuda soberana. *La ley*, v. 153 (2014 D), p. 1-8, 2014.

BOHOSLAVSKY, Juan Pablo. Economic inequality, debt crises and human rights. *Yale Journal of International Law*, v. 41, n. 2, p. 177-200, 2016.

BOUGHTON, James M. *Silent revolution: the International Monetary Fund 1979–1989*. Washington: IMF, 2001.

CROSS, Karen Halverson. The extraterritorial reach of sovereign debt enforcement. *Berkeley Business Law Journal*, v. 12, n. 1, p. 111-143, 2015.

GELPERN, Anna. Contract hope and sovereign redemption. *Capital Markets Law Journal*, v. 8, n. 2, p. 132-148, 2013.

_____. Sovereign debt: now what? *The Yale Journal of International Law*, v. 41, n. 2, p. 44-95, 2016.

KUPELIAN, Romina; RIVAS, María Sol. *Vulture funds: the lawsuit against Argentina and the challenge they pose to the world economy*. Buenos Aires, 2014.

MONTELEONE, Theresa. A vulture's gamble: high-stakes interpretation of sovereign debt contracts in *NML Capital, Ltd v Republic of Argentina*. *Capital Markets Law Journal*, v. 8, n. 2, p. 149-165, 2013.

OLIVARES-CAMINAL, Rodrigo. The *pari passu* interpretation in the *Elliott* case: a brilliant strategy but an awful (mid-long term) outcome? *Hofstra Law Review*, v. 40, n. 1, p. 39-63, 2011.

RANIERI, Agustina María. Deuda soberana: problemas y soluciones en la encrucijada. *Pensar en Derecho*, UBA, v. 6, p. 245-304, 2015.

SAMPLES, Tim R. Rogue trends in sovereign debt: Argentina, vulture funds, and *pari passu* under New York Law. *Northwestern Journal of International Law & Business*, v. 35, n. 1, p.49-87, Fall 2014.

WEIDEMAIER, Mark C.; GELPERN, Anna. *Injunctions in Sovereign Debt Litigation*. Georgetown University Law Center, 2013. draft. Available at: <<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2328&context=facpub>>. Access: June 12, 2018.

WEIDEMAIER, Mark C. Sovereign debt after *NML v Argentina*. *Capital Markets Law Journal*, v. 8, n. 2, p. 123-131, 2013.

ZAMOUR, Romain. NML v. Argentina and the Ratable Payment Interpretation of the Pari Passu Clause. *The Yale Journal of International Law*, v. 38, p. 55-66, Spring 2013.

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