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Injunctions in Sovereign Debt Litigation

W. Mark C. Weidemaier and Anna Gelpern*

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*Injunctions against foreign sovereigns have come under criticism on comity and enforcement grounds. We argue that these objections are overstated. Comity considerations are important but not dispositive. Enforcement objections assign too much significance to the court's inability to impose meaningful contempt sanctions, overlooking the fact that, when a foreign sovereign is involved, both money judgments and injunctions are enforced through what amounts to a court-imposed embargo. This embargo discourages third parties from dealing with the sovereign and, if sufficiently costly, can induce the sovereign to comply. Nevertheless, we are skeptical about injunctions in sovereign debt litigation. They are prone to dramatic spillover effects precisely because they cannot reach their primary target, the sovereign government. Recent decisions in *NML v. Argentina* illustrate the way in which a court's inability to compel compliance by the sovereign may lead it to impose dramatic and potentially unwarranted costs on third parties, turning traditional equitable analysis on its head.*

INTRODUCTION

Foreign governments that default on their debts can be hauled into national courts just like private debtors.¹ Substantive defenses paying deference to sovereignty no longer stop

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¹ Many sovereigns waive sovereign immunity when issuing bonds in foreign capital markets. See W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, ILL. L. REV. (forthcoming 2014), <http://ssrn.com/abstract=2180228>. Even without a waiver, national courts may have jurisdiction to hear claims arising out of sovereign loans. See *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992) (holding that issuance of bonds was a commercial activity for which a foreign state might be sued in U.S. courts); State Immunity Act, 1978 c. 33, § 3(3)(b) (U.K.) (defining non-immune commercial transactions to include “any loan or other transaction for the provision of finance”).

litigation in its tracks.² And, in theory, sovereign defaulters risk the seizure and sale of assets through the usual court-supervised procedures for enforcing money judgments. It is here that sovereign and private debtors part ways. Many sovereign assets are immune from attachment and execution, and sovereigns can easily (if not cheaply) keep the rest away from creditors. Courts can inconvenience sovereigns; they cannot make them pay.

But money damages are not the only remedy in the judicial toolkit. Courts can enjoin private defendants—require or forbid them to do things—to remedy or prevent harm from their behavior. At first blush, it seems that sovereigns should be no different from private debtors in this regard. Why should telling a government to perform a ministerial task (for example, to file a piece of paper) upset it any more than a judgment to pay a billion dollars? On the other hand, the idea of one government commanding another seems to strike at the heart of sovereign equality. Worse, national courts cannot impose meaningful contempt sanctions on other governments or their officials and thus cannot enforce injunctions in the usual way. The imperative of maintaining comity among equal sovereigns and the apparently insurmountable enforcement challenge often are invoked to reject the use of injunctions against foreign sovereigns, or to argue that injunctions should be reserved for extraordinary cases.

Yet U.S. law clearly leaves room for determined creditors to press for injunctive relief. The latest example, *NML v. Argentina*, has produced the most potent remedy against a foreign government in recent memory. The case arises out of Argentina's 2001 default on some \$80

² See *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985) (finding the Act of State doctrine inapplicable for denying enforcement to promissory notes issued by state-owned banks).

billion in foreign debt.³ So far, the Argentine government has restructured over ninety percent of this debt through exchanges in which bondholders traded old bonds for new ones, initially worth about one-third of the old. The *NML* plaintiffs are a coalition of distressed debt funds and retail investors who sat out the restructurings, sued, and launched a largely fruitless global search for Argentine assets. (We refer to this coalition in the singular and simply as “NML,” after the lead plaintiff, an affiliate of hedge fund Elliott Associates).

Anticipating difficulty enforcing money judgments, NML also pursued an alternative strategy. It had held some Argentine bonds in reserve, and returned to federal court in New York to demand specific performance of the underlying bond covenants. In 2012, NML convinced the district judge, and later a panel of the U.S. Court of Appeals for the Second Circuit, to approve an injunction designed to pressure Argentina into paying.⁴ Under the terms of the injunction, Argentina may no longer pay the holders of its restructured bonds (the “exchange bondholders”) unless it pays NML in full, an amount now estimated at around \$1.4 billion. Put differently, the injunction allows Argentina to keep stiffing NML, but only if it also

³ Anna Gelpern, *After Argentina*, PETERSON INST. FOR INT’L ECON. 1, Sept. 2005, <http://www.iie.com/publications/pb/pb05-2.pdf>. The crisis has been the subject of many journalistic, policy, and academic accounts, including PAUL BLUSTEIN, *AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA* (2005); MICHAEL MUSSA, *ARGENTINA AND THE FUND: FROM TRIUMPH TO TRAGEDY* 41-52 (2002); and Eric Helleiner, *The Strange Story of Bush and the Argentine Debt Crisis*, 26 *THIRD WORLD Q.* 951 (2005).

⁴ The district court entered the injunction on February 23, 2012. *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08-cv-6978(TPG), 09-cv-1707 (TPG), 09-cv-1708 (TPG) (S.D.N.Y. Feb. 23, 2012). The U.S. Court of Appeals for the Second Circuit affirmed the injunction but remanded for further proceedings with respect to (1) the amount Argentina must pay plaintiffs and (2) the identities of the third parties subject to the injunction and, potentially, to contempt sanctions. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012). The district court issued an amended injunction addressing these issues on November 21, 2012. *See NML Capital, Ltd. v. Republic of Argentina*, Nos. 08-cv-6978(TPG), 09-cv-1707(TPG), 09-cv-1708(TPG), 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012) (herein, “Amended Injunction”). The Second Circuit affirmed that order on August 23, 2013. *See NML Capital, Ltd. v. Republic of Argentina*, 2013 WL 4487563 (2d Cir. Aug. 23, 2013). For convenience, we refer to the various orders simply as “the injunction.”

stiffs the exchange bondholders. Rerouting payments beyond the court's jurisdiction would violate the injunction.

The injunction is remarkable in many respects, not least for treating massive government debt default as a form of compliance.⁵ It bans Argentina from using its money anywhere in the world to pay the exchange bondholders.⁶ In response, Argentina has publicly vowed to keep paying the new debt.⁷ Anticipating defiance, the injunction tries to coerce compliance indirectly by threatening a wide range of legal and financial intermediaries with contempt if they help Argentina.⁸

It is too early to predict the long-term consequences of *NML*. But it would be a mistake to dismiss the case as completely *sui generis*. The precise contract formula that was the basis of *NML*'s successful claim has grown in popularity in recent years.⁹ Sovereign debt litigation has also increased in frequency, led by well-resourced specialists able to invest in long-term and novel legal strategies.¹⁰ The copycat lawsuit brought by Taiwan to collect on Grenada's

⁵ See *infra* text accompanying notes 32-42.

⁶ This raises important questions of sovereign immunity: the court imposed conditions on Argentina's use of property located outside the United States, despite the fact that the Foreign Sovereign Immunities Act of 1976 (FSIA) makes such property immune from attachment and execution. 28 U.S.C. § 1602-11 (2006). Nevertheless, it seems unlikely there will be further judicial review of these matters. The Supreme Court denied Argentina's first petition for certiorari, filed after the Second Circuit's first opinion affirming the injunction, although Argentina is expected to raise these issues again in a second petition for certiorari. Many documents related to the case are available at <http://www.shearman.com/argentine-sovereign-debt>.

⁷ On Argentina's defiant litigation posture and the role this may have had in producing the injunction, see W. Mark C. Weidemaier & Ryan McCarl, *Creditors' Remedies at the Border of Law and Politics*, in SOVEREIGN DEBT MANAGEMENT (forthcoming 2014).

⁸ See Anna Gelpern, *Contract Hope and Sovereign Redemption*, 8 CAP. MKTS. L.J. 132 (2013).

⁹ Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 LAW & SOC. INQUIRY 72 (2013).

¹⁰ See Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010* (Apr. 15, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2189997>. Concern over holdout litigation partly explains the official sector's unwillingness to impose losses on holders of Cypriot bonds and the continued service of much of Greece's English-law debt. On the subject generally, see Lee C. Buchheit, G. Mitu Gulati & Ignacio Tirado, *The Problem of Holdout Creditors in Eurozone Sovereign Debt Restructurings* (Jan. 22, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2205704>.

defaulted debt less than six months after the Second Circuit’s NML ruling may be a sign of things to come.¹¹ Private claimants also have pressed for injunctions or similar relief against foreign sovereigns outside the debt context.¹² As long as creditors have trouble satisfying money judgments, we expect courts to hear requests for injunctive relief in sovereign debt cases and in other lawsuits against foreign sovereigns.

This Feature uses *NML v. Argentina* to explore the use of injunctions in sovereign debt litigation. We share the widespread skepticism of injunctions against foreign sovereigns, but we also question the prevailing objections to this remedy. Part I describes *NML*; Part II turns to these objections, grounded in comity and unenforceability. We argue that comity concerns are important but rarely dispositive, and that enforcement concerns assign too much significance to the court’s inability to impose contempt sanctions. As a practical matter, both injunctions and money judgments are enforced indirectly, by denying the sovereign beneficial trade or other relationships with third parties.¹³ We loosely refer to this enforcement dynamic as a “court-imposed embargo.” A court’s order is “enforced” when the costs of the embargo induce the sovereign to comply voluntarily. Money judgments and injunctions implement this

¹¹ See *Exp.-Imp. Bank of the Republic of China v. Grenada*, No. 13 Civ. 1450 (S.D.N.Y. Mar. 13, 2013) (order on consent).

¹² See, e.g., *In re Estate of Marcos Human Rights Litig.*, 94 F.3d 539 (9th Cir. 1996) (reversing, on sovereign immunity grounds, an injunction preventing the Republic of the Philippines from disposing of assets collected from the estate of Ferdinand Marcos); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 80-81 (3d Cir. 1995) (reversing injunction forbidding the Republic of the Philippines to interfere with potential witnesses and implicitly limiting the Republic’s ability to pursue tax evasion charges against witnesses); *Chabad v. Russian Federation*, 915 F.Supp.2d 198 (D.D.C. 2013) (imposing contempt sanctions of \$50,000 per day against the Russian Federation for defying court order requiring it to turn over to plaintiffs religious texts and artifacts); *Belize Telecom, Ltd. v. Belize*, No. 05-20470-CIV (S.D. Fla., June 6, 2005) (granting, but later vacating, a preliminary injunction purporting to overturn Government of Belize’s decision removing directors from the board of a company jointly owned with the plaintiff); *Superior Provincial Court (Oberlandesgericht) of Linz, Decision of Mar. 2, 1989, Nuclear Power Plant Injunction Case (No. 2)*, 86 ILR 578 (Austria) (denying request by Austrian citizen for injunction against the construction of a nuclear power plant in then-Czechoslovakia).

¹³ See Part II.D *infra*.

embargo in different ways and thus impose different costs on the sovereign. As a result, an injunction will sometimes be more enforceable than a money judgment.

Nevertheless, we remain deeply skeptical of injunctions against foreign sovereigns, both in general and in the *NML* case in particular. Part III explains the reason for our skepticism. Courts face a structural predicament that makes it difficult to balance the costs and benefits of injunctive relief. Our starting premise is that judges do not want to look feckless and seldom will issue injunctions unless they believe that the sovereign will feel significant pressure to comply. But without meaningful contempt powers, courts can apply pressure only by doubling down on the embargo strategy we elaborate in Part II. To be reasonably sure of compliance, the court must craft the injunction so as to inflict significant pain or risk on third parties, thus enlisting them in the enforcement effort. This turns traditional injunction practice, in which the threat of harm to nonparties weighs against the grant of an injunction, on its head.

NML v. Argentina illustrates the potential effect of this dynamic. The injunction tries to leave Argentina only two options: pay NML or default on a sizeable part of its public debt. The latter would inflict losses on the exchange bondholders and have serious social and economic consequences within Argentina.¹⁴ To ensure that default is the only alternative, the injunction also imposes the risk of contempt sanctions on trustees, securities clearing houses, and payment systems around the world. The impact of the injunction on third parties around the world is not an unfortunate byproduct of the remedy, nor a natural consequence of

¹⁴ In 2005, the Second Circuit professed concern for the effect that judicial remedies might have on the “economic health of a nation.” See *infra* note 141 and accompanying text. Years of continued public defiance by Argentina may have changed the court’s view, along with changes in Argentina’s economic position.

ordinary procedural rules against aiders and abettors. It is a deliberate choice, made in light of the fact that the injunction cannot reach its primary target, to induce third parties to pressure Argentina to comply.¹⁵ 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.

I. *NML*: Building a Better Remedy

The *NML* story has attracted much attention in the financial press and elsewhere.¹⁶ For that reason, we describe the case only briefly and focus our discussion on the case's injunctive remedy.¹⁷ After defaulting in 2001, Argentina restructured its debt through two exchanges, in 2005 and 2010. *NML* and the other plaintiffs did not participate in the exchanges and seek to recover the principal and accrued interest due under the old bonds. *NML* initially pursued its claims against Argentina in the usual ways, by obtaining and trying to enforce money judgments. Its collection efforts have been innovative but mostly unsuccessful. At various times, *NML* has tried to seize defaulted bonds tendered in the 2005 debt exchange,¹⁸

¹⁵ Federal Rule of Civil Procedure 65 extends the effect of an injunction to certain third parties but does not mandate that the injunction reach as far as the plaintiffs and the courts have extended it. *See infra* notes 130-139 and accompanying text.

¹⁶ For extensive discussion, see *Pari Passu Saga*, FT ALPHAVILLE, <http://ftalphaville.ft.com/tag/pari-passu-saga> (last visited Oct. 1, 2013); and CREDIT SLIPS, <http://www.creditslips.org/creditslips/sovereign-debt> (last visited Oct. 1, 2013). *See also* Gelpert, *supra* note 8; Theresa A. Monteleone, *A Vulture's Gamble: High-Stakes Interpretation of Sovereign Debt Contracts in NML Capital, Ltd. v. Republic of Argentina*, 8 CAP. MKTS. L.J. 149 (2013); Rodrigo Olivares-Caminal, *The Pari Passu Interpretation in the Elliott Case: A Brilliant Strategy but an Awful (Mid-Long Term) Outcome?*, 40 HOFSTRA L. REV. 39 (2011); W. Mark C. Weidemaier, *Sovereign Debt After NML v. Argentina*, 8 CAP. MKTS. L. J. 123 (2013).

¹⁷ Readers familiar with the recent history of sovereign debt litigation will recall a similar injunction issued in 2000 by a court in Brussels, which blocked the Euroclear System from processing payments to holders of Peru's Brady Bonds. *See Elliott Assocs., L.P., General Docket No. 2000/QR/92, Cour d'Appel [CA] [Court of Appeal] Bruxelles, 8^{ème} ch., Sept. 26, 2000 (Belg.)*. That injunction was issued ex parte and by a court in Brussels, and was quickly addressed by legislation in Belgium insulating Euroclear from such litigation. For criticism of that earlier decision, see Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869 (2004); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635 (2001); and *Pari Passu Clauses: Analysis of the Role, Use and Meaning of Pari Passu Clauses in Sovereign Debt Obligations as a Matter of English Law*, FIN. MKTS. L. COMM. (2005), http://ftalphaville.ft.com/files/2012/11/fmlc79mar_2005.pdf.

¹⁸ *See EM Ltd. v. Rep. of Argentina*, 131 F. App'x 745 (2d Cir. 2005).

central bank funds on deposit at the Federal Reserve Bank of New York¹⁹ and the Bank for International Settlements,²⁰ taxes and revenues owed by French companies to Argentina,²¹ the presidential airplane,²² and a military ship docked in Ghana.²³

As a practical matter, NML cannot seize enough assets to satisfy its judgments in full. Sovereign immunity shields military, diplomatic, and central bank assets abroad.²⁴ Argentina can keep most non-immune assets safe within its own borders.²⁵ But from the creditor's perspective, asset seizure is not really the point—NML's most audacious attempt to date involved an Argentine naval vessel by all accounts worth under \$20 million, as against a debt of over \$1 billion. The point is to induce the sovereign to pay voluntarily by disrupting its international activities, preferably by cutting off its access to trade and financial markets.²⁶ If

¹⁹ See *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172 (2d Cir. 2011); *EM Ltd v Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007).

²⁰ See *Gauchos and Gadflies*, THE ECONOMIST, Oct. 22, 2011, <http://www.economist.com/node/21533453>.

²¹ For discussion, see Giles Cuniberti, *French Supreme Court Upholds Argentina's Immunity Despite Waiver*, CONFLICT OF LAWS (Apr. 2, 2013), <http://conflictoflaws.net/2013/french-supreme-court-upholds-argentinass-immunity-despite-waiver>.

²² Camila Russo, *Evading Singer's Dragnet Means \$800,000 Flight*, BLOOMBERG (Jan. 10, 2013, 12:58 PM), <http://www.bloomberg.com/news/2013-01-10/evading-singer-s-drag-net-means-880-000-flight-argentina-credit.html>.

²³ See *NML Capital Limited v. Republic of Argentina*, Accra High Ct., Commercial Div., Oct. 11, 2012, No. RPC/343/12 (Ghana), [http://www.creditslips.org/creditslips/Ruling%2011-Oct-12%201%20\(3\).pdf](http://www.creditslips.org/creditslips/Ruling%2011-Oct-12%201%20(3).pdf).

²⁴ See, e.g., 28 U.S.C. § 1609-1611 (2006) (governing the immunity of sovereign assets from attachment, arrest, and execution).

²⁵ On the evolution of sovereign immunity law in the United States, see Weidemaier, *supra* note 1. For evidence from other jurisdictions, see Pierre-Hugues Verdier and Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity* (Jan. 24, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2106627>.

²⁶ See Jeremy Bulow & Kenneth Rogoff, *A Constant Recontracting Model of Sovereign Debt*, 97 J. POL. ECON. 155, 158-59 (1989); Mark Gersovitz, *Trade, Capital Mobility, and Sovereign Immunity* 1-3 (Princeton Univ. Research Program in Dev. Stud., Discussion Paper No. 108, 1983), http://www.princeton.edu/rpds/papers/WP_108.pdf.

the enforcement action causes political or diplomatic embarrassment, all the better.²⁷ Yet so far, traditional judgment enforcement tools have not prompted Argentina to pay.²⁸

NML's claims for injunctive relief represent a different approach to recovery. These claims allege that Argentina breached a covenant—the *pari passu* clause—in which it promised that NML's bonds would rank *pari passu* (in equal step) and that the payment obligations under the bonds would rank “at least equally” with the rest of Argentina's foreign debt stock. In NML's reading, the second part of the clause forbids Argentina to pay exchange bondholders unless it also pays holdout creditors like NML *pro rata*.²⁹

The district judge accepted this interpretation, as did a panel of the U.S. Court of Appeals for the Second Circuit.³⁰ Crucially, the courts also embraced NML's proposed remedy. If Argentina's covenant violation had triggered acceleration and another unenforceable money judgment, NML's gambit would have failed. Instead, the district court granted, and the appeals court affirmed, an injunction providing that, “[w]henver the

²⁷ This may explain why NML would bother trying to seize a navy ship and the presidential plane. See Agustino Fontevicchia, *The Real Story of How a Hedge Fund Detained a Vessel in Ghana and Even Went for Argentina's 'Air Force One'*, FORBES, Oct. 5, 2012, <http://www.forbes.com/sites/afontevicchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane>. The latter attempt, for example, required President Kirchner to make diplomatic visits in a chartered plane. See Russo, *supra* note 22.

²⁸ Nor have they resulted in the seizure of substantial assets. For rare exceptions, see *NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254 (2d Cir. 2012) (affirming attachment and restraining orders against bank account of a subunit of Argentina's Ministry of Science, Technology, and Productive Innovation); *EM Ltd. v. Republic of Argentina*, 2009 WL 2568433, at *9 (S.D.N.Y., Aug. 18, 2009), *aff'd*, 389 F. App'x. 38 (2d Cir. 2010) (confirming prejudgment attachment orders against funds held in trust).

²⁹ The *pari passu* clause has attracted extensive scrutiny over the years, much of which has focused on the uncertain origins and meaning of the clause. See, e.g., MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION* (2013); Buchheit & Pam, *supra* note 17; Olivares-Caminal, *supra* note 16.; Weidemaier, Scott & Gulati, *supra* note 9.

³⁰ As interpreted by the Court of Appeals, the clause prohibits “Argentina, as bond issuer, from formally subordinating the bonds by issuing superior debt” and also prohibits Argentina “as bond payor, from paying on other bonds without paying on the [holdouts'] bonds.” *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 259 (2d Cir. 2012). Although the Second Circuit's interpretation of the clause is contestable, we do not revisit that issue. For discussion and criticism of the court's interpretation of the *pari passu* clause, see Gelpern, *supra* note 8; Weidemaier, *supra* 16.

Republic pays any amount due [the exchange bondholders] . . . the Republic shall concurrently or in advance make a ‘Ratable Payment’ . . . to NML.”³¹ The court of appeals remanded, however, for the district court to clarify the details of the injunction.

The injunction operates in an unusual manner. It does not require Argentina to pay anyone at all.³² To the contrary, it contemplates two alternative ways to comply: paying everyone ratably or defaulting on everyone at the same time.³³ As subsequently clarified by the district court, staying current on the new bonds would require Argentina to pay its debt to NML in full.³⁴ Mindful of Argentina’s record of defiance,³⁵ the district court threatened to sanction financial market utilities, trustees, advisors, and anyone else deemed to act “in active concert or participation” with Argentina if the country paid exchange bondholders without paying NML.³⁶

³¹ See Amended Injunction, 2012 WL 5895784, at *2.

³² See *NML*, 699 F.3d at 263 (“The Injunctions do not require Argentina to pay any bondholder any amount of money.”).

³³ As the Second Circuit panel put it, the injunction allows Argentina to “pay all amounts owed to its exchange bondholders provided it does the same for its defaulted bondholders. Or it can decide to make partial payments to its exchange bondholders as long as it pays a proportionate amount to holders of the defaulted bonds.” *Id.* It is not clear what the court had in mind by suggesting that Argentina might make “partial payments” to exchange bondholders, but payment of anything less than “all amounts owed” at that time would constitute default on the new bonds, as, of course, would paying nothing at all.

³⁴ See *NML*, Nov. 21, 2012 Order. Total principal and interest due on the plaintiffs’ bonds at this writing is about \$1.33 billion.

³⁵ See, e.g., Transcript of Hearing at 15, *NML v. Argentina*, Nos. 08-CV-6978 and 09-CV-1708 (S.D.N.Y. Nov. 9, 2012) (“[A]ny order of this court affirmed by the Court of Appeals is binding on the Republic and the Republic has the duty to comply. Now as the Court of Appeals itself noted, the Republic doesn’t seem to respect that duty”); see also Weidemaier & McCarl, *supra* note 7; Matt Levine, *Argentina Looking Forward to Reading, Ignoring U.S. Court’s Opinion*, DEALBREAKER (Feb. 28, 2013, 5:37 p.m.), <http://dealbreaker.com/2013/02/argentina-looking-forward-to-reading-ignoring-u-s-courts-opinion>.

³⁶ FED. R. CIV. P. 65(d)(2)(c). The amended injunction is available at <http://www.shearman.com/files/upload/Arg5-Order-112112.pdf>. The relevant paragraph, 2(f), extends the injunction to “(1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York); (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York

On appeal, the Second Circuit again affirmed.³⁷ Argentine political officials have publicly vowed never to pay NML, and its counsel stated in open court that the country would not comply with the injunction.³⁸ Nevertheless, the court dismissed arguments that the injunction impermissibly exposed exchange bondholders to the risk of default.³⁹ The court declared itself “unwilling to permit Argentina’s threats to punish third parties to dictate the availability or terms of relief.”⁴⁰ The court also declined, on procedural grounds, to reach many of the arguments raised by payment system participants. These included arguments by entities such as Euroclear, which is located in a foreign country and governed by foreign law. The court explained that payment system participants could raise these arguments “if and when they are summoned to answer for assisting in a violation of the district court’s injunctions.”⁴¹ These arguments will probably never be addressed on the merits, as payment system participants are likely to stop processing payments to exchange bondholders rather than risk contempt.⁴²

Mellon (including but not limited to the Bank of New York Mellon (London)); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.”

³⁷ *NML Capital, Ltd. v. Republic of Argentina*, 2013 WL 4487563, at *4 (2d Cir. Aug. 23, 2013). With respect to the amount due NML, the court concluded that the injunction “does no more than hold Argentina to its contractual obligation of equal treatment.” In other words, if Argentina pays exchange bondholders “even a single installment of interest,” it must pay the full amount it owes NML. *Id.* at *4.

³⁸ See *infra* notes 125-126 and accompanying text.

³⁹ The court also noted that the disclosure documents accompanying the exchange bonds had warned that holdouts might attempt to “interfere with payments.” *NML*, 2013 WL 4487563, at *5. The court did not explain, however, the relevance of this fact in light of the court’s earlier refusal to allow NML to block the restructuring. See *infra* note 141 (noting that the terms of the exchange bonds squarely contradict the *pari passu* clause as the court later interpreted it).

⁴⁰ *Id.* at *5.

⁴¹ *Id.* See also *id.* at *6-7 (noting that objections based on the asserted lack of personal jurisdiction could be raised in contempt proceedings, as could arguments that an alleged contemnor was an “intermediary bank” excluded from the injunction).

⁴² The court also rejected arguments that the injunction was contrary to the public interest, asserting that “Argentina has been a uniquely recalcitrant debtor,” *id.* at *10, and that the case had little significance as a precedent. We do not dwell on this conclusion here, although we think it rests more on wishful thinking than on any coherent, administrable distinction between Argentina and other sovereign debtors. As just one example, the court interpreted Argentina’s *pari passu* clause to allow the country to refuse to pay holdouts, but not when the refusal amounted to “extraordinary

If nothing else, NML's legal strategy is ingenious. The apparent goal is to make Argentina choose between paying NML in full and defaulting on obligations potentially exceeding \$50 billion.⁴³ The strategy works only if Argentina can be credibly prevented from paying the exchange bondholders. Thus, the injunction prevents Bank of New York Mellon, the trustee under exchange bonds governed by New York law, from passing on any funds it receives from Argentina.⁴⁴ The injunction forbids clearing houses and payment systems to process payments under the exchange bonds or any others Argentina might issue to circumvent the injunction. It specifically names entities located in Belgium, Luxembourg, and the United Kingdom as potentially subject to sanction.⁴⁵ And it prevents Argentina's legal and financial advisers from helping the country devise a payment method that does not involve the enjoined financial intermediaries.⁴⁶ Thus, the injunction enlists much of the global financial system in the court's effort to make Argentina pay and holds the exchange bond holders hostage to Argentina's unwillingness to pay NML in full.⁴⁷

behavior." *Id.* at *10. Even if we knew the difference between "ordinary" and "extraordinary" selective non-payment, it is not clear to us why the difference would matter to investors.

⁴³ The amount is more than half of Argentine public debt held by private creditors. (Source: J.P. Morgan based on "Informe de Deuda Publica" and financial data, both published by the Secretariate of Finance of Argentina.)

⁴⁴ For holders of bonds governed by New York law, Argentina initiates the payment process by transferring funds to Bank of New York Mellon, the indenture trustee. *See* NML Capital, Ltd. v. Republic of Argentina, 2012 WL 5895786, at *5 (S.D.N.Y. Nov. 21, 2012). If the injunction extends to it, Bank of New York Mellon cannot forward the funds without risking contempt sanctions. Argentina, moreover, cannot unilaterally change this payment mechanism.

⁴⁵ *See supra* note 36.

⁴⁶ For possible payment scenarios and the risks they pose to payment system participants and other intermediaries, see Vladimir Werning, *Argentina: Fade the Price Rebound Following the Court's "RSVP" Order to Holdouts*, J.P. MORGAN, <https://markets.jpmorgan.com/research/EmailPubServlet?action=open&hashCode=-hto1qfg&doc=GPS-1090512-0.html> (last visited Sept. 21, 2013).

⁴⁷ NML and the courts have strenuously resisted this characterization, suggesting variously that Argentina is responsible for the exchange bondholders' plight and that the bondholders knowingly took the risk of a "hostage" injunction by lending to a debtor with Argentina's *pari passu* clause. This strikes us as a matter of semantics: the plaintiffs designed and the courts sanctioned a remedy that hinges on a credible threat of dramatic losses to the exchange bondholders and massive economic dislocation in Argentina. No threat, no remedy. Who pulls the trigger in the end is secondary. As we note below, moreover, the argument is puzzling after the courts refused to allow NML to stop the exchange from happening in the first place, precisely out of concern for "the economic health of a nation." *See infra* note 141 and accompanying text.

In other work, we each have expressed reservations about the injunction and the interpretation of the *pari passu* clause adopted by the district court and the Second Circuit.⁴⁸ We do not repeat those arguments here, nor do we speculate on the ultimate outcome of the case, or the as-yet uncertain consequences of *NML* for future debt restructurings. The injunction merits special attention at this stage, because *NML* makes clear already that injunctive relief can be an unusually potent weapon in a creditor’s fight against a foreign sovereign.

II. The Incomplete Case against Injunctions

Injunctions are equitable remedies, to be granted only when the plaintiff has no adequate remedy at law and only when the remedy is, broadly speaking, consistent with the equitable exercise of the court’s power.⁴⁹ The judge must “consider the effect on each party of the granting or withholding of the requested relief”⁵⁰ and also take into account the extent to which an injunction would serve or undermine the public interest:

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.⁵¹

⁴⁸ See Gelpern, *supra* note 8; Weidemaier & McCarl, *supra* note 7; Weidemaier, *supra* note 16; Anna Gelpern, *Sovereign Damage Control*, PETERSON INST. FOR INT’L ECON., May 2013, <http://www.piie.com/publications/pb/pb13-12.pdf>.

⁴⁹ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313 (1982).

⁵⁰ *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

⁵¹ *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944); *see also City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933) (“Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.”).

Whether an injunction can be reconciled with the public interest depends primarily on the extent to which the injunction benefits or harms third parties.⁵² “Specific relief sometimes costs more than it is worth”⁵³; the costs are especially apparent when they fall on third parties that derive no benefit from the remedy.

Additional considerations come into play when the party to be enjoined is a foreign sovereign entitled to immunity under the FSIA.⁵⁴ In the following discussion, we assume with the courts that the FSIA does not categorically forbid injunctions, a conclusion buttressed by some of the statute’s legislative history.⁵⁵ We also avoid some complexities unique to the *NML* injunction, such as whether it amounts to a disguised (and prohibited) attachment of immune assets.⁵⁶ We focus instead on the dominant policy objections to national courts enjoining foreign sovereigns.

A. The Comity Objection

Requests for injunctive relief are commonly met with the objection that such remedies impair comity, the “elusive doctrine . . . which attempts to mediate the frictions inherent in a

⁵² *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 594 (7th Cir. 1986).

⁵³ Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 749 (1990).

⁵⁴ Similar considerations might apply in other contexts, including injunctions by federal courts against government actors in U.S. states. *See, e.g.*, *Hoover v. Wagner*, 47 F.3d 845, 850 (7th Cir. 1995) (referencing comity as a basis for refusing to enjoin state and local public officials).

⁵⁵ 28 U.S.C. § 1606 provides, with exceptions not relevant here: “As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.” Explaining this section, the relevant House Report noted that, “a court could, when circumstances were clearly appropriate, order an injunction or specific performance.” House Report (Judiciary Committee) No. 94-1487 at 6621 (Sept. 9, 1976). This does not necessarily mean that courts can impose meaningful penalties for violation of such an order. *See id.* (continuing that, “this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt . . . Also a fine for violation of an injunction may be unenforceable if immunity [from attachment and execution] exists . . .”).

⁵⁶ *See supra* note 6. *See also* Petition for Writ of Certiorari at 19-27, *Republic of Argentina v. NML Capital, Ltd.*, 111 S.Ct. 1855 (June 24, 2013) (No. 12-842); Brief for the United States of America as Amicus Curiae in Support of the Republic of Argentina’s Petition for Panel Rehearing and Rehearing *En Banc* at 1, No. 12-105-cv(L) (2d Cir. Dec. 28, 2012).

community of sovereign states.”⁵⁷ It is not hard to see why. The “community of sovereign states” is a community of equals. It is rather presumptuous for a national court of one sovereign to attempt to dictate the behavior of another,⁵⁸ especially when the behavior takes place in the enjoined sovereign’s own territory.⁵⁹ To take an extreme example, a plaintiff might request an injunction that interferes with a foreign sovereign’s ability to conduct energy policy, such as an injunction against the construction of a nuclear power plant.⁶⁰ Whatever its legal merits, an injunction of this nature would prompt outrage and defiance from the enjoined government. By cautioning against unwarranted intrusion into a foreign sovereign’s affairs, notions of comity help to mitigate “the risks of intersovereign conflict.”⁶¹

⁵⁷ *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994); *Hoover v. Wagner*, 47 F.3d 845, 850 (7th Cir. 1995) (stating, in rejecting request for federal injunction against state and local officials, that “[e]quitable remedies are powerful . . . and when . . . they are sought to be applied to officials of one sovereign by the courts of another, they can impair comity . . .”).

Similar concerns can arise in litigation between private parties. Most notably, courts take into account considerations of comity when deciding whether to enjoin litigation in foreign courts. *See, e.g.,* *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 120-27 (2d Cir. 2007) (affirming antisuit injunction against state-owned entity only after concluding that “comity concerns do not weigh against entry of an anti-suit injunction”); *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004) (adopting the “conservative approach,” which questions “whether the foreign action either imperils the jurisdiction of the forum court or threatens some strong national policy” and “accords appreciably greater weight to considerations of international comity”); *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 161 (3d Cir. 2001) (agreeing with “restrictive” approach in which courts enjoin foreign litigation “only to protect jurisdiction or an important public policy”). The concerns are only heightened when the injunction runs against a sovereign or its officials. *See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 432 (7th Cir. 1993) (comparing conservative and “laxer” injunction standards and noting that, if plaintiff “were seeking an order that would run against a [French] official or agency . . . there would be no need for evidence that the antisuit injunction would ruffle the smooth surface of our relations with France”).

⁵⁸ *See* Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT’L L.J. 1, 94 (1998) (noting the “serious issues of sovereign offense that would be raised” by an injunction against a foreign government, although speculating that “these claims are unlikely to be directly pursued or seriously contemplated in the context of international investment”).

⁵⁹ *Westinghouse Elec. Corp.*, 43 F.3d at 79 n.18 (noting that even when a foreign sovereign has subjected itself to the jurisdiction of U.S. courts, it does not “give[] up its essential attributes of sovereignty, including in particular its authority to administer in its sole discretion its own laws respecting its own citizens within its own territory”).

⁶⁰ *See* Superior Provincial Court (Oberlandesgericht) of Linz, Decision of Mar. 2, 1989, Nuclear Power Plant Injunction Case (No. 2), 86 ILR 578 (Austria).

⁶¹ Peter B. Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 VA. J. INT’L L. 181, 184-85 (2012). Similar considerations animate the Act of State doctrine, as does the concern that courts might “encroach upon the executive branch’s constitutional responsibility to conduct foreign relations.” Paul B. Stephan III, *International Law in the Supreme Court*, 1990 SUP. CT. REV. 133, 138. The Act of State defense, however, is unavailable when the

These risks are heightened if an injunction requires extended judicial supervision or management of the foreign sovereign's affairs. Even in litigation between private parties, courts hesitate to issue injunctions that require extensive or extended supervision of the defendant.⁶² The hesitancy may reflect a mix of doubts as to judicial competency and concerns over the efficient use of scarce judicial resources.⁶³ In the sovereign context, supervisory injunctions have additional and serious implications for comity, as they purport to constitute U.S. courts as "ad hoc regulatory agenc[ies]" with jurisdiction over foreign governments.⁶⁴

In *Republic of the Philippines v. Westinghouse Electric Corp.*, for example, the Court of Appeals for the Third Circuit vacated an injunction directing the Philippines to stop harassing witnesses who had testified against it and to "renounce and abandon" retaliatory legal and disciplinary proceedings underway in the Philippines.⁶⁵ Despite upholding the district court's finding that the Republic had engaged in harassment, the Court of Appeals deemed the injunction an unprecedented intrusion in "the internal law enforcement activities of a foreign

sovereign has agreed to pay its debts in the United States. *See Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985).

⁶² *See* 11 A.C. WRIGHT ET AL., FED. PRACTICE & PROC. § 2942 (2d ed. 1955). *See, e.g., In re Diet Drugs Products Liability Litig.*, 369 F.3d 293, 315 (3d Cir. 2004) (noting that "injunctions must be enforceable, workable, and capable of court supervision"); *Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 276 (7th Cir. 1992) ("Many injunctions require continuing supervision by the court, and that is costly."); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161–66 (1948) (vacating injunction that would not be effective unless the courts became involved "heavily in the details of business management").

⁶³ *See, e.g., Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 277 (7th Cir. 1992) (asserting that supervisory injunctions "can be a drain on scarce judicial resources" and that courts hesitate to issue "injunctions that constitute the issuing court an ad hoc regulatory agency to supervise the activities of the parties"). Compare with the Restatement of Contracts, which counsels against specific enforcement of promises where it would "impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and the harm to be suffered from its denial." RESTATEMENT (SECOND) OF CONTRACTS § 366 (1981).

⁶⁴ *Chocolate Chip Cookie*, 970 F.2d 273, 277 (7th Cir. 1992) (referring to the general hesitancy to issue supervisory injunctions in the non-sovereign context).

⁶⁵ *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 78 (3d Cir. 1994).

sovereign.”⁶⁶ As the court read the injunction, it instructed the Republic to grant two witnesses “immunity from prosecution for past tax law violations” and might require the district judge to examine the government’s motive if any witness in the Philippines “received a traffic citation, or was involved in a tax fraud investigation, or had any other scrape with the law.”⁶⁷ Principles of international comity prevented U.S. courts from undertaking extensive supervision of such core government functions as law enforcement.⁶⁸

B. The Comity Shortfall

We are convinced by the comity objection inasmuch as injunctions against foreign sovereigns can complicate relations between governments or undermine international institutions or governance regimes. When a court order would create a foreign affairs problem, for example, judges appropriately tend to hold back so as not to intrude on the domain of actors in the political branches.⁶⁹ But not all injunctions against sovereigns raise these concerns.⁷⁰

⁶⁶ *Id.* at 79.

⁶⁷ *Id.* at 78.

⁶⁸ *Id.* at 75-79.

⁶⁹ Thus, in the *Allied Bank* decisions (which involved claims for money damages rather than injunctive relief against a sovereign debtor), the Second Circuit’s application of comity principles changed in accordance with its understanding of the U.S. government’s international debt restructuring policy. *See Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985).

⁷⁰ Lawsuits that do not involve claims for injunctive relief can have serious comity implications, although these are not treated as categorical bars to relief. Courts applying *forum non conveniens* doctrine, for example, might publicly declare that a foreign judicial system is too corrupt to fairly resolve a dispute. *See, e.g., Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085 (S.D. Fla. 1997) (refusing to dismiss on *forum non conveniens* grounds after overcoming “[w]hatever inhibitions the Court may feel about declaring the Bolivian justice system too corrupt to permit fair adjudication of plaintiffs’ claims”). Such cases are rare, but the inquiry itself can ruffle sovereign feathers. *See* GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 439-40 (2011) (describing *forum non conveniens* cases and querying the propriety of U.S. courts passing judgment on foreign judicial systems); *see also* Rutledge, *supra* note 61, at 185-91 (reviewing doctrines that require courts to evaluate the conduct or institutions of foreign sovereigns).

The injunction in *NML*, for example, restricts Argentina’s use of foreign exchange reserves and imposes conditions on the country’s decisions with respect to debt service. Few countries would welcome the intrusion of foreign courts into these matters.⁷¹ Other considerations, however, suggest that the injunction implicates principles of comity to a lesser degree. The injunction purports only to enforce a promise made by Argentina. Such an order seems less likely to offend sovereign dignity and disrupt international relations than one imposing obligations that the sovereign did not assume voluntarily.⁷² The injunction does not require particularly intrusive supervision by U.S. courts: it is easy to figure out whether Argentina has paid NML as required; similarly, a payment to the exchange bondholders will not go unnoticed. Judges sitting in New York need not peer inside Argentina’s borders to know whether their orders have been obeyed.

Moreover, Argentina seems to have gone out of its way to subject itself to the will of New York courts. It agreed to pay its debts in New York, in U.S. currency. It expansively waived sovereign immunity, expressly submitted to the jurisdiction of the very federal courts whose orders it has since vowed to ignore, and consented “to the giving of any relief or the issue of any process” to enforce the debt.⁷³ All of these factors support NML’s

⁷¹ Cf. Ramsey, *supra* note 58, at 82 (noting the “political sensitivity” of enforcement litigation with respect to a country’s external debt).

⁷² This is not to say that Argentina *knowingly* assumed the obligations imposed by the *pari passu* clause as interpreted by the district court and Second Circuit. Again, we disagree with that interpretation but do not repeat our objections here. See *supra* note 42. Nevertheless, the issuance of bonds was a voluntary act, and the bonds explicitly allow bondholders to ask New York courts to resolve disagreements about Argentina’s obligations.

⁷³ See Form of Registered Security, at A-17 to A-18, attached to the Fiscal Agency Agreement between the Republic of Argentina and Bankers Trust Company (Oct. 19, 1994).

characterization of the transaction as one in which Argentina voluntarily ceded many of the sovereign prerogatives it might reasonably expect in a wholly-domestic matter.⁷⁴

Nor is the injunction sure to cause new diplomatic troubles between the United States and Argentina. Although the U.S. government has intervened on Argentina's side in this and related cases, it has expressed relatively muted concerns about comity. Three-quarters into its first *amicus* brief, the United States observes that the injunction "is particularly likely to raise foreign relations tensions."⁷⁵ The same brief opens with apparent dismay at Argentina's "failure to honor its obligations or to engage with international institutions."⁷⁶ Beyond its statements in *NML*, the United States has withdrawn bilateral trade benefits and supported sanctions against Argentina at the International Monetary Fund.⁷⁷

We do not mean to imply that an inquiry into comity requires only that domestic courts consider whether an injunction will impair relations with the state targeted by the injunction. Default on a sovereign's public debt necessarily implicates the interests of many governments.

⁷⁴ See *Allied Bank*, 757 F.2d at 521-22 (applying act of state doctrine); see also Ramsey, *supra* note 58 at 82 ("[O]nce the foreign sovereign has agreed to the role of the United States court and to a set of legal principles, the sovereign will not be seriously upset, even in a politically sensitive matter, if the court fulfills that role and applies those principles."). Professor Ramsey is discussing lawsuits seeking money judgments and seems to view injunctions in categorically different terms. *Id.* at 92, 95. As discussed in the text, we agree that injunctions are more injurious to sovereign dignity, and more potentially intrusive on executive branch prerogatives, than money judgments, but we do not see them as categorically different.

⁷⁵ Brief for the United States of America as Amicus Curiae in Support of Reversal at 29, *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. Apr. 4, 2012) (No. 12-105-cv(L)); see also Brief for the United States of America as Amicus Curiae in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing En Banc, at 7-8, *NML* (No. 12-105-cv(L)). Compare this to the government's more vocal expression of foreign trade and foreign affairs concerns in other cases. See, e.g., Brief for the United States Government as Amicus Curiae Supporting Petitioners at 28-34, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2010) (No. 10-97), 2010 WL 4735597.

⁷⁶ Brief of the United States of America as Amicus Curiae in Support of Reversal at 4, *NML* (No. 12-105-cv(L)).

⁷⁷ See Tom Barkley & Ken Parks, *U.S. Cuts Trade Preferences to Argentina*, WALL ST. J., Mar. 26, 2012, <http://online.wsj.com/article/SB10001424052702304177104577305652479085184.html>; Sandrine Rastello & Ian Katz, *Argentina is First Nation Censured by IMF for Economic Data*, BLOOMBERG (Feb. 2, 2013, 11:43 AM), <http://www.bloomberg.com/news/2013-02-01/argentina-becomes-first-nation-censured-by-imf-on-inflation-data.html>.

In the ensuing litigation, a domestic court's choice of remedy has serious potential implications for international comity.⁷⁸ Before the Second Circuit, the U.S. government suggested as much by arguing, unsuccessfully, that the *NML* injunction could complicate future debt restructurings and imperil timely repayment of debts to international financial institutions.⁷⁹ Our broader point, instead, is that not comity considerations are not dispositive and, indeed, are not always more serious in cases involving injunctive relief than in cases involving money judgments.⁸⁰

C. The Enforcement Objection

Whether or not the case involves a sovereign, courts are reluctant to issue injunctions when the prospect of compliance is low.⁸¹ The classic case is one where the defendant is not subject to the court's jurisdiction and thus cannot be enjoined.⁸² This includes cases in which a foreign sovereign is immune from suit under the FSIA.⁸³ Argentina, like most defendants in sovereign debt cases, has broadly waived its immunity from suit and execution under the FSIA.⁸⁴ Even in such cases, however, courts cannot impose meaningful sanctions directly

⁷⁸ In this, the decision about remedies is no different than the choice between domestic and foreign (or international) law, the decision whether to give extraterritorial effect to domestic law, or a host of other decisions faced by domestic courts. For an analysis of the global governance functions performed by domestic courts, see Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67 (2009).

⁷⁹ Brief for the United States of America as Amicus Curiae in Support of Reversal at 17-20, *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. Apr. 4, 2012) (No. 12-105-cv(L)).

⁸⁰ See *infra* note 70.

⁸¹ See, e.g., *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956) (the power to grant an injunction “should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country”).

⁸² See WRIGHT ET AL., *supra* note 62.

⁸³ *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 545 (9th Cir. 1996).

⁸⁴ See *Form of Registered Security*, *supra* note 73, at A-18.

against sovereign defendants or their public officials.⁸⁵ Foreign diplomats cannot be jailed if their government defies a court order.⁸⁶

As we read the cases, U.S. courts can enforce injunctions and other orders against foreign sovereigns, if at all, only by imposing litigation-related penalties (such as adverse inferences) or by levying monetary fines that will likely go uncollected.⁸⁷ Although we focus on the law in the United States, courts elsewhere may have even fewer tools to enjoin sovereigns and compel compliance.⁸⁸ These limitations on the court's enforcement power raise

⁸⁵ Because it is irrelevant to our main argument, we ignore the distinction between civil and criminal contempt. *See, e.g., Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 823-34 (1994) (discussing the distinction). Thus, we refer to contempt "sanctions," and occasionally contempt "penalties," without meaning to imply that violation of an injunction necessarily results in criminal contempt proceedings and without considering whether there might be a difference between these forms of contempt in the sovereign context.

⁸⁶ *See* H.R. REP. NO. 94-1487, at 6621 (1976); *see also* HAZEL FOX, *THE LAW OF STATE IMMUNITY* 618-19 (2008).

⁸⁷ The U.S. government has argued that the FSIA does not allow courts to enforce a monetary fine without an explicit waiver of the sovereign's "immunity from enforcement of punitive, quasi-criminal sanctions." *See* Brief of the United States as Amicus Curiae at 10, *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417 (5th Cir. Mar 10., 2006) (No. 05-51168). Whatever the legal merit of this argument, a sovereign defendant may not have attachable U.S. assets that could be seized to collect the fine. Despite these uncertainties, courts have approved the imposition of fines and other penalties in response to a sovereign's violation of discovery orders, litigation misconduct, or disregard of a final order directing the turnover of property. *See, e.g., FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011) (affirming monetary fine imposed as contempt sanction for violation of discovery orders, but leaving open the question whether such an order could be enforced); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737 (7th Cir. 2007) (reversing contempt sanction but rejecting argument that federal courts lack contempt power absent an explicit waiver of immunity from contempt); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 80 (3d Cir. 1994) (reversing injunction against witness intimidation but noting that the court could have imposed monetary sanctions or dismissed the sovereign's claims); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992) (affirming monetary fine against foreign instrumentality for failing to comply with discovery orders in aid of execution); *Chabad v. Russian Federation*, No. 05-cv-1548(RCL), 2013 WL 164071 (D.D.C. Jan. 16, 2013) (imposing monetary fine as contempt sanction for non-compliance with final order requiring sovereign defendant to turn over religious texts and artifacts). *But see Af-Cap* 462 F.3d at 428-29 (reversing contempt order imposing monetary sanctions for failure to comply with turnover order, stating that FSIA sections 1610 and 1611 "describe the available methods of attachment and execution against property of foreign states. Monetary sanctions are not included").

⁸⁸ Although not yet in force, the United Nations Convention on Jurisdictional Immunities of States and Their Property provides, in Article 24(1):

Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation on the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

The Convention has twenty-eight signatories. *See* United Nations Treaty Collection website, at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en. For a broader survey of state practices, *see* FOX, *supra* note 86, at 618-20.

the question of whether courts should enter injunctions against foreign sovereigns at all.⁸⁹ In a series of amicus briefs filed in cases involving sovereign litigants, the U.S. government has implied that the answer is “no.”⁹⁰

D. The Embargo Alternative

The argument that an injunction cannot be enforced against a foreign sovereign looks for enforcement in the wrong place, and measures it by the wrong standard. True, a court cannot impose meaningful penalties on the sovereign itself.⁹¹ But the holder of a money judgment against a sovereign often faces an analogous barrier: most or all sovereign assets will be immune from seizure.⁹² *NML* is a poster child for this problem, having scoured the world for attachable assets for over a decade. Nevertheless, it is a mistake to dismiss a court’s order as unenforceable against a sovereign merely because the court lacks the direct enforcement tools used against *non*-sovereigns: asset seizure (in the case of money judgments) and contempt (in the case of injunctions). The mistake comes from assuming that these direct methods of enforcement are equally relevant when the defendant is a sovereign. They are not. Injunctions

⁸⁹ See *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 545 (9th Cir. 1996) (“A court should not issue an unenforceable injunction.”).

⁹⁰ The U.S. government has typically gotten involved at a somewhat later stage, after the imposition of monetary sanctions. Often this is because the relevant order involved discovery matters and, but for the fine, would not have attracted much attention from executive branch officials. But the argument against monetary sanctions also applies to the decision as to whether to issue an injunction in the first place. For relevant amicus briefs, see Brief of United States as Amicus Curiae in Support of Appellant, *FG Hemisphere Assocs.* (No. 10-7046) (arguing that the court could not enforce an award of monetary sanctions, then asserting that a “court should not issue an unenforceable order against a foreign state) (internal quotation marks omitted); Brief of the United States as Amicus Curiae, *Belize Telecom, Ltd. v. Gov’t of Belize*, 528 F.3d 1298 (11th Cir. 2005) (No. 05-12641-CC) (same); Brief of the United States as Amicus Curiae in Support of Appellant at 10-11, *Af-Cap* (No. 05-51168) (same). The U.S. government appeared as an amicus in *NML* but focused its arguments on whether the injunction constituted a disguised attachment of immune assets and (briefly) on comity considerations. See *supra* note 75.

⁹¹ See *supra* note 87 and accompanying text.

⁹² FEDERICO STURZENEGGER & JEROMIN ZETTELMEYER, *DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES* 55-56 (2007); William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 *VAND. L. REV.* 1, 11 (2004).

against sovereigns may be harder to enforce than injunctions against private parties, but this does not make them unenforceable. In the sovereign context, they can be more enforceable than money judgments.

When a plaintiff seeks money damages against a foreign sovereign, courts acknowledge the enforcement difficulty but grant relief anyway. The usual explanation for this practice is that Congress contemplated cases in which the FSIA would give a “right without a remedy.”⁹³ It would be more accurate to say that the FSIA gives plaintiffs few direct remedies against the sovereign or its assets.⁹⁴ But this does not end the enforcement inquiry. When viewed functionally, money judgments and injunctions are enforced in the same way, indirectly, by disrupting the sovereign’s relations with third parties. We loosely refer to this disruption as a “court-imposed embargo.”

For example, with certain exceptions, the holder of a money judgment may enforce it by seizing the sovereign’s commercial assets in the United States.⁹⁵ In practice, sovereigns often move these assets out of the reach of U.S. courts.⁹⁶ Likewise, sovereigns keep assets

⁹³ *De Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984); *see also* *FG Hemisphere Assocs., LLC v. Democratic Rep. of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) (“The FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution.”); *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 429 (5th Cir. 2006) (“The FSIA Allows Rights Without Remedies.”).

⁹⁴ Given the size of the claims involved, this is true in essentially *all* sovereign debt cases. As noted, NML has seized very little in the way of actual sovereign assets. *See supra* notes 24-28 and accompanying text. It is unlikely to seize enough even to keep pace with the accrual of post-judgment interest on its claims.

⁹⁵ *See* 28 U.S.C. § 1610-11 (2006).

⁹⁶ If the sovereign has not waived immunity from execution—and not all do, *see* Weidemaier, *supra* note 1, at 25-28—it may not have to remove assets from the United States. As relevant here, without such a waiver, a creditor can seize a sovereign’s U.S. commercial assets only if “used for the commercial activity upon which the claim is based” (i.e., in the sovereign debt context, “used for” borrowing money). 28 U.S.C. § 1610(a)(2) (2006). It is not clear that any assets will meet this description. A risk-averse sovereign, however, will not take the risk.

away from jurisdictions where a creditor might seek to have the judgment recognized and enforced.⁹⁷

The need to protect assets impedes the sovereign's trade and other relations with third parties.⁹⁸ The government may have to forego transactions that pose a substantial risk of asset seizure. One example is the purchase of commercial goods from a U.S. seller. Officials can attempt to conduct such transactions through state-owned or controlled enterprises, but this too imposes costs and does not eliminate the risk of seizure.⁹⁹ Even if the government is willing to take the risk, money judgments impose costs on third parties (not least the cost of complying with or fighting asset seizures) that may lead them to refuse to deal with the sovereign or to charge it a premium.¹⁰⁰ The effect is that the sovereign must conduct external transactions in roundabout, less efficient ways, if it can conduct them at all.

If the costs imposed by this embargo exceed the benefits of non-compliance, a rational sovereign will pay the judgment. This description is illustrative; we do not intend it as a formal or complete model of the sovereign's compliance decision. For example, compliance with a

⁹⁷ For discussion of practices concerning recognition and enforcement of U.S. judgments abroad, see BORN & RUTLEDGE, *supra* note 70, at 184-86; and Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173 (2008).

⁹⁸ See STURZENEGGER & ZETTELMEYER, *supra* note 92, at 33-34; Bulow & Rogoff, *supra* note 26 at 158-59; Gersovitz, *supra* note 26, at 1-3.

⁹⁹ See *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629-30 (1983) (state instrumentalities and state-owned entities are treated as legally separate, except when "so extensively controlled . . . that a relationship of principal and agent is created" or when separate treatment "would work fraud or injustice"); see also *EM Ltd. v. Republic of Argentina*, 2009 WL 2568433, at *9 (S.D.N.Y., Aug. 18, 2009), *aff'd*, 389 F. App'x 38 (2d Cir. August 3, 2010), (confirming prejudgment attachment orders against funds held in trust after concluding that trusts were not entitled to protection as legally separate entities).

¹⁰⁰ In extreme cases, for example, a third party might find itself on the hook for satisfying some or all of the plaintiff's claim. This might happen, for example, to a party that holds non-immune sovereign assets and does not turn them over in response to a garnishment order. See, e.g., N.Y. C.P.L.R. 5225 & 5227 (McKinney). Third parties who do business with the sovereign also can expect to find themselves on the receiving end of discovery requests and other judicial process—backed, as is an injunction, by the court's contempt authority—designed to ferret out where the sovereign keeps its assets. See, e.g., *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012).

foreign court's order may entail positive or negative domestic political consequences for public officials quite apart from the immediate economic cost of the embargo.¹⁰¹

An injunction has a similar effect. It binds the enjoined party and also certain third parties with actual notice of the injunction, including the enjoined party's "officers, agents, servants, employees, and attorneys" and others who act "in active concert or participation" with an enjoined person.¹⁰² The purpose of extending the reach of the injunction to third parties is to ensure that the enjoined party does not "nullify a decree by carrying out prohibited acts through aiders and abettors."¹⁰³ In most cases, the court may impose contempt penalties on the party who disobeys an injunction and on third parties who knowingly assist in the violation.¹⁰⁴

When the enjoined party is a sovereign, the risk of contempt falls mainly on third parties. Thus, Argentina cannot be penalized directly for violating the *NML* injunction, but anyone who is part of the payment chain between Argentina and the exchange bondholders is at risk of being deemed "in active concert or participation" and held in contempt. As noted, this includes the bondholders' trustee, payment systems and clearing house operators.¹⁰⁵

¹⁰¹ Non-compliance also may yield political as well as economic benefits. *See, e.g., Cristina Kirchner Triumphant as Seized Argentine Tall Ship Returns Home*, TELEGRAPH (LON.), Jan. 10, 2013, <http://www.telegraph.co.uk/news/worldnews/southamerica/argentina/9792483/Cristina-Kirchner-triumphant-as-seized-Argentine-tall-ship-returns-home.html>. We do not mean to suggest that this court-imposed embargo is the only reason to comply. For example, a sovereign might honor a court judgment to avoid injury to its reputation and to preserve its ability to engage in future transactions (i.e., transactions unaffected by the embargo). Again, however, this supports the point that injunctions need not be less enforceable than money judgments. Surely a sovereign that defies a direct court order suffers no less reputational harm than one that refuses to pay a money judgment.

¹⁰² FED. R. CIV. P. 65(d)(2).

¹⁰³ *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945).

¹⁰⁴ *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930) (defining court's contempt power as extending to third parties who "either abet the defendant, or [are] . . . legally identified with him").

¹⁰⁵ *See supra* note 36 for the relevant text of the injunction.

Money judgments can disrupt a wider range of relationships between the sovereign and third parties. If courts in the relevant jurisdiction will enforce the judgment, any person who holds the sovereign's assets or owes the sovereign money can become embroiled in proceedings to enforce a money judgment.¹⁰⁶ By contrast, to risk contempt sanctions, a third party "must either abet the defendant, or must be legally identified with him," in a violation of the injunction.¹⁰⁷ The risk of contempt sanctions, however, will make affected third parties hesitant to deal with a sovereign. As with a money judgment, the resulting disruption may induce the sovereign to comply.

The primary difference between injunctions and money judgments is that they impair different transactions between the sovereign and third parties. For creditors, these are features rather than bugs, and they may lead to the conclusion that a sovereign is more likely to comply with an injunction. *NML v. Argentina* illustrates the point. The outstanding money judgments against Argentina commit it to a constant stream of legal fees and evasive maneuvers to accomplish the most basic external diplomatic, military, and commercial objectives. The judgments also prevent it from borrowing money in major financial markets. So far, however, Argentina has been willing to pay the price of its partial isolation, including the higher borrowing costs in domestic capital markets, attorneys' fees in far-flung jurisdictions, and airplane chartering fees for its president.¹⁰⁸ The *NML* injunction does nothing to prevent

¹⁰⁶ See *supra* note 104 and accompanying text.

¹⁰⁷ *Alemite Mfg.*, 42 F.2d at 833.

¹⁰⁸ See The "ARA Libertad Case" (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, ITLOS, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf; Fontevecchia, *supra* note 27. In other cases, the costs imposed by a money judgment may prove more substantial. For example, Peru and Congo settled soon after the courts ruled against them. See Jonathan I. Blackman & Rahul Mukhi, *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna*, 73 LAW & CONTEMP. PROBS. 47, 56 (2010) (explaining Congo's settlement); Michael Bradley et al., *The Market Reaction to*

Argentina from borrowing money or from engaging in commercial transactions. On the other hand, the injunction impairs Argentina's ability to service its existing debt.¹⁰⁹ This may prove more costly, and, if so, it could tip the calculus in favor of compliance.

The dynamic we have described is not unique to sovereign debt litigation in national courts. Court judgments impose similar embargos on private defendants,¹¹⁰ although asset seizure and the threat of contempt play a much larger role when sovereignty is not a factor.¹¹¹ Likewise, it is well-recognized that international legal regimes sometimes enforce their rules through similar embargos.¹¹² Whatever the context, a remedy might be justified notwithstanding the burdens it imposes on third parties.¹¹³ Then again, it might not.

III. The Perils of Injunctions, Revisited

Although we have argued that comity-based objections can be overstated and that enforcement-based objections are misdirected, there are inevitable problems with the issuance

Legal Shocks and Their Antidotes: Lessons from the Sovereign Debt Market, 39 J. LEGAL STUD. 289, 290 (2010) (explaining Peru's settlement);

¹⁰⁹ The money judgments do not have this effect, because money passing through New York to exchange bondholders belongs to them.

¹¹⁰ See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 259 (2011) ("A dominant mode of enforcement in domestic legal systems for the past two millennia and one still actively in use in our own federal system today has involved various forms of externalization and outcasting. The law has routinely used private parties to exile, excommunicate, outlaw, pillory, and shun those who break the rules.").

¹¹¹ This is true even though private defendants often have the tools to render themselves judgment proof. See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996).

¹¹² Cf. Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179-S180 (2002) ("The treaty creating the [WTO] replaced the [GATT] dispute resolution system . . . with a system that results in centrally authorized sanctions against recalcitrant violators of WTO trade policy.").

¹¹³ See, e.g., Hathaway & Shapiro, *supra* note 110, at 271-72 (describing secondary rules as those that "require or permit others to act in ways deemed costly to the conduct rule violator or not to act in ways deemed beneficial"); Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 MICH. L. REV. 243, 274 (2011) (referring to countermeasures under international law and noting that, "unfortunately, the only available retaliation may entail substantial collateral costs, yet may be preferable to inaction"); Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005) (noting deadweight costs of trade sanctions).

of injunctions against foreign sovereigns. The comity and enforcement objections compare injunctions against private litigants to injunctions against sovereigns, inevitably finding problems with the latter. As a matter of fact, getting redress of any kind from sovereigns remains a hard and uncertain business, restrictive immunity notwithstanding. Whatever remedy the plaintiff seeks, the process also will ruffle sovereign feathers and threaten to unsettle diplomatic relations. But in the sovereign context, concerns over comity and enforceability do not support radically different approaches to money judgments and injunctions.

Nevertheless, we remain convinced that injunctions against sovereigns present distinct and more serious problems. This is true whether we compare them to money judgments against sovereigns or to injunctions against private parties. First, courts arguably have more riding on compliance with injunctions than with money judgments. This holds true whether or not the case involves a sovereign. Second, courts will make non-compliance more costly than compliance for sovereigns primarily by way of the embargo described in Part II.¹¹⁴

NML offers a stark illustration of this dynamic. The district court issued the injunction for the express purpose of giving the plaintiffs “leverage” against an intransigent debtor that had consistently evaded efforts to enforce money judgments.¹¹⁵ But as the plaintiffs and the courts sought to raise the stakes, they ran up against two inconvenient facts. First, Argentina

¹¹⁴ Again, we recognize there may be other costs to non-compliance, such as concerns for the reputational consequences of non-compliance. *See supra* note 101.

¹¹⁵ *See* Transcript of Oral Argument at 32, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. Feb. 23, 2012) (No. 03CV8845(TPG)); Transcript of Oral Argument at 40, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. Sept. 28, 2011) (No. 08CV6978 (TPG)).

did not intend to comply with any injunction.¹¹⁶ Second, Argentina could defy an order without fear of direct penalty. Any hope of compliance, then, rested on the injunction's effect on third parties.¹¹⁷ Acknowledging that it was necessary to show that "our courts are not helpless,"¹¹⁸ the district judge named a long list of third parties in multiple jurisdictions as subject to potential contempt sanctions if Argentina pays exchange bond holders without paying NML.¹¹⁹

Argentina and NML are each exceptional in their own way; few debtors or creditors have the stomach for a decade-long chase. Nevertheless, the case illustrates a broader, structural problem with injunctions against foreign sovereigns. In the battle for compliance, courts have every reason to impose dramatic spillover effects on third parties.

¹¹⁶ As one Second Circuit judge would eventually summarize Argentina's position, "[D]espite the district court's order, and despite the possibility that we might affirm it, [Argentina] would not obey any order, other than the one you've just proposed." Transcript of Oral Argument at 14-15, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d. Cir Feb. 27, 2013) (No. 12-105-CV(L)).

¹¹⁷ NML's counsel candidly acknowledged as much during the second oral argument before the Second Circuit:

THE COURT: So but we're really here hearing is that this is an injunction that's sought so that you can then seek to perhaps get relief from banks or entities in the United States that you would charge with facilitating the contempt?

MR. OLSON: Yes. If we can prove that...

THE COURT: [Interposing] You know, I'm not sure that courts enter injunctions primarily for the purpose of taking action against such third parties... [A]m I hearing you correctly that there is no remedy against Argentina for its own contempt beyond being labeled a contemnor?

MR. OLSON [after suggesting that noncompliance might harm Argentina's reputation]: The fact that Argentina would hold itself deliberately in contempt of a United States court order would have significance and consequences. We expect and Argentina has said that it would comply... However, my caveat to that is that Argentina has tried everything possible.

Id.

¹¹⁸ Transcript of Oral Argument at 14-15, *NML*, (No. 08-CV-6978 (TPG)).

¹¹⁹ *NML*, 2012 WL 5895786, at 4 (Nov. 21, 2012).

A. The Stakes of Compliance

We begin by noting that injunctions may involve higher stakes for the court.¹²⁰ A plaintiff who has won a money judgment may use judicial and other government resources in an effort to collect from the defendant, but these government actors have a limited reputational stake in the success of the effort. If the cash till is empty when the sheriff comes to levy, neither the court nor the sheriff is embarrassed; collection is ultimately the plaintiff's problem. Thus, although money judgments often go unenforced, this does not seriously call into question the legitimacy or credibility of courts. By contrast, defiance of an injunction is a direct challenge to the court's authority—contempt *of court*. A court that issues an injunction inserts itself into the relationship between the litigants, raising the stakes on compliance. Whether or not the case involves a sovereign, judges may hesitate to take such gambles.¹²¹ This understandable caution underlies the rule that courts should grant injunctions “with great reluctance when it will be difficult to secure compliance with any resulting decree.”¹²²

Our argument does not depend on the claim that defiance of an injunction imposes a greater reputational harm on the court. Even if this is not so, the court will presumably want to secure compliance with its decree. When the case involves a sovereign, the court will usually

¹²⁰ The consequences for the courts of granting remedies against immune sovereigns have preoccupied judges and scholars for some time. In the domestic context, sovereign immunity has even been interpreted as a court-protective doctrine, saving judges the embarrassment of issuing orders that would be ignored. *See, e.g.,* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 608 (2003) (discussing the history of, and arguing against, immunity as court-protection). We do not need to go this far because in our view, elaborated in Part II, both money judgments and injunctions against sovereigns are in fact both potentially enforceable, albeit indirectly.

¹²¹ *See, e.g.,* DAN B. DOBBS, *Introduction to Equity and Equitable Remedies*, in HANDBOOK ON THE LAW OF REMEDIES § 2.1, at 27 (1973) (“[T]he chancellor must take into account practical questions, whether he can enforce any remedy he grants, since he does not wish to issue a personal command and have it flouted.”).

¹²² *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956); *see also supra* notes 81-83 and accompanying text.

understand that the prospect of compliance is low. This is especially true when the injunction seeks specific performance of a debt contract covenant (as in the *pari passu* clause). An injunction cannot be awarded if money damages will suffice,¹²³ but money damages will *always* suffice—if the sovereign will pay them—because the payment of money is the entire point of a debt contract. Except in extraordinary (and likely temporary) situations of illiquidity, a money judgment is inadequate only because the sovereign refuses to pay.¹²⁴ Calling the remedy an “injunction” will rarely lead to a change of heart.

For this reason, a court contemplating enjoining a foreign sovereign is engaged in a metaphorical game of chicken.¹²⁵ The sovereign is not passive in this game and can take steps to make threats of defiance credible. To wit, Argentina’s lawyers have stated in open court that the country will not comply,¹²⁶ and its president has publicly vowed never to pay NML.¹²⁷ Faced with such defiance, a court has few options other than to try to design an airtight embargo. This means that to ratchet up the pressure on the sovereign, it will have to increase the burdens on third parties. Again, *NML* illustrates the point.

¹²³ RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981).

¹²⁴ Thus, the district and appellate courts agreed that Argentina’s unwillingness to pay and its ability to put its assets beyond NML’s reach make money damages unattainable, and therefore inadequate. *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246, 255, 262 (2d Cir. 2012).

¹²⁵ See Weidemaier & McCarl, *supra* note 7, at ¶ 12.41.

¹²⁶ See Transcript of Oral Argument at 17, *NML Capital Ltd. v. Republic of Argentina* (2d Cir., Nov. 9, 2012) (No. 08-CV-6978 (TPG)) (“Now, all I’m trying to say is that Argentina has a public policy. It is not going to and cannot prefer [NML]. And so, if that’s the confrontation that the Court seeks through an injunction, that’s the Court’s decision.”).

¹²⁷ See, e.g., *Argentina to Blast ‘Vulture Funds’ at the G20 Ministerial Meeting in Mexico*, MERCOPRESS (Nov. 4, 2012, 6:24 AM), <http://en.mercopress.com/2012/11/04/argentina-to-blast-vulture-funds-at-the-g20-ministerial-meeting-in-mexico>. Such public statements may make it politically difficult for political leaders to change course and thus can lend credibility to threats of defiance.

B. The Super-Embargo

As a conceptual matter, it may help to distinguish among the third parties affected by the NML injunction. The first group consists of legal and financial advisors, payment intermediaries, and other institutions that risk contempt sanctions if they are found to have assisted Argentina in violating the injunction.¹²⁸ These third parties must incur logistics and monitoring costs to avoid contempt sanctions. For example, financial intermediaries must determine whether a particular funds transfer represents a payment by Argentina in violation of the order. If Argentina tries to service the new bonds without paying \$1.4 billion to NML, then any entity that receives and knowingly passes on the funds from Argentina to the new bond holders is at risk.¹²⁹

Every injunction imposes costs of this nature; that is the design of Federal Rule of Civil Procedure 65.¹³⁰ But this injunction is remarkable in scope. Some of the institutions listed by name in the amended injunction as potentially “in active concert and participation” with Argentina have been designated as systemically important financial market utilities under Title VIII of the Dodd-Frank Act; the general reference to payment and clearing systems captures most of the rest.¹³¹ As one U.S. utility points out, the injunction for the benefit of NML would require participating banks to deploy elaborate systems of the sort used to implement federal antiterrorism sanctions, and could interfere with netting and settlement finality, expressly

¹²⁸ An injunction binds not only the litigants but also third parties with actual notice of the injunction, including parties who act “in active concert or participation” with a litigant in violating the order. FED. R. CIV. P. 65(d)(2).

¹²⁹ See *supra* note 36 for relevant text of the Injunction of February 23, 2012.

¹³⁰ See FED. R. CIV. P. 65(D)(2).

¹³¹ Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) § 805-06, 810, 12 U.S.C. 5464-65 & 5469) (2010).

protected by federal statutes.¹³² Such costs and risks may be justified by the imperative of fighting terrorism and drug trading, as expressed in statutes such as the International Emergency Economic Powers Act and the mandates of implementing agencies, such as the Office of Foreign Assets Control. It hardly follows that market utilities are to be commandeered for ordinary debt collection by private plaintiffs.

Moreover, many of the named institutions are located outside the United States and have raised jurisdiction, conflicts of laws, and comity concerns. For example, the injunction names Euroclear as potentially subject to sanctions despite Belgian law that on its face appears to immunize it from court orders like the one in *NML*.¹³³ Absent public consensus to the contrary, preferably expressed in legislation, courts should hesitate to burden systemically important market utilities with the risk of contempt sanctions to enforce ordinary private debts.¹³⁴ This concern is even more pronounced when it comes to foreign institutions governed by foreign law that rejects this very remedy.

Because of its extra-territorial reach, the *NML* injunction also implicates the interests of foreign governments that have decided to shield financial intermediaries from creditors' efforts to recover debts. The injunction purports to regulate the conduct of Euroclear despite

¹³² Brief for The Clearing House Association L.L.C. Supporting Appellant as Amicus Curiae, at 19-22, *NML Capital, Ltd. v. Argentina*, 699 F.3d 246 (2d Cir. Jan. 4, 2013) (No. 12-105-cv(L)) (citing 12 U.S.C. § 4405, protecting netting, among other provisions).

¹³³ The Belgian law was enacted in 2005, in response to an earlier set of sovereign debt injunctions entered by courts in Belgium. For Euroclear's argument, see *Letter for Euroclear Bank SA/NV as Amicus Curiae, NML* (2d Cir. Jan. 3, 2013), available at <http://www.shearman.com/files/upload/NML-Capital-v-Argentina-2013-1-4-Proposed-Euroclear-Letter.pdf>. It does not matter whether the injunction's extra-territorial ambition is a fatal legal flaw. See Brief of Plaintiffs-Appellants Aurelius Capital Master, Ltd. et al. at 32-36, *NML* (2d Cir. Jan. 25, 2013) (No. 12-1050cv(L)) (responding to arguments made by Euroclear). An injunction can be lawful but ill-advised.

¹³⁴ See e.g., Comm. on Payment and Settlement Sys., *Principles for Financial Market Infrastructures* 11, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/publ/cpss101a.pdf> (Apr. 2012); MARC LABONTE, CONG. RESEARCH SERV., R41529, SUPERVISION OF U.S. PAYMENT, CLEARING, AND SETTLEMENT SYSTEMS: DESIGNATION OF FINANCIAL MARKET UTILITIES (FMUS) 9-12 (2012).

Belgian legislation enacted precisely to insulate Euroclear from injunctions of this sort.¹³⁵ To be sure, U.S. courts do have the power to enjoin conduct that occurs in foreign territory. For example, a court may enjoin a party from pursuing litigation in foreign courts.¹³⁶ Likewise, it is not uncommon for litigants to target private parties in an effort to influence the behavior of foreign governments and government institutions.¹³⁷ In such cases, however, courts have some obligation to take the interests of the foreign government seriously. In *NML*, by contrast, 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.¹³⁸ To the contrary, the court of appeals dodged such questions on procedural grounds even though the practical effect of its decision is that third parties will likely comply without having ever these arguments considered.¹³⁹

In addition to legal and financial intermediaries and foreign governments, the injunction burdens a third group of non-parties. This group includes exchange bondholders,

¹³⁵ See generally Olivares-Caminal, *supra* note 16, at 52-53 (2011). The injunction also arguably conflicts with the result reached in a similar case in the United Kingdom. See *Kensington Int'l Ltd. v. Republic of Congo*, [2003] EWHC (Comm) 2331 [96] (Apr. 16, 2003) (Eng.) (rejecting an *NML*-style injunction: “I do not regard it as an appropriate exercise of my discretion . . . to make an order compliance with which can only realistically be achieved by coercion of third parties. I view with disquiet . . . a situation in which third parties are potentially exposed to penal consequences which could never be visited upon the defendant to whom the order is actually directed.”).

¹³⁶ See *supra* note 57.

¹³⁷ For example, antisuit injunctions seek to influence the behavior of foreign courts, and lawsuits under the Alien Tort Statute target private commercial actors in an effort to influence the behavior of foreign governments. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

¹³⁸ As noted, the district court’s reasoning was simple: the injunction needed extra-territorial scope in order to force Argentina to comply. The court of appeals embraced this reasoning and also declined to address the merits of the arguments raised by foreign entities. See *supra* notes 35-42 and accompanying text.

¹³⁹ See *supra* notes 40-41 and accompanying text. The district court left little doubt that it viewed Euroclear as a target for contempt sanctions. The injunction expressly provides that “Participants shall be bound” and defines the term to include Euroclear. See *NML Capital Ltd. v. Republic of Argentina*, Nos. 08-cv-06978(TPG), 09-cv-1707(TPG), 09-cv-1708(TPG) at 5-6 (S.D.N.Y. Nov. 21, 2012). As the court explained its reasoning, to prevent Argentina from defying the injunction, “it is necessary that the process for making payments on the Exchange Bonds be covered.” *Id.* at 9. The court further explained that financial intermediaries and clearing systems “surely are ‘in active concert or participation’ with Argentina.” *Id.* at 11.

residents of Argentina, and others who will suffer if the court, having miscalculating in its game of chicken, fails to induce Argentina to pay NML. Recall that Argentina has two methods of compliance: pay everyone in full, or default on everyone “ratably.”¹⁴⁰ If Argentina pays NML the \$1.4 billion it owes them, no one will be hurt, although its decision may validate NML’s litigation strategy and complicate future restructurings. If it defaults, the pain will be felt by the holders of over \$50 billion in its new bonds and by its residents (the latter on the reasonable assumption that defaulting on a large subset of public debt would harm “the economic health of a nation”).¹⁴¹

If Argentina chooses default, the proximate cause of the pain will be actions by its political leadership.¹⁴² But it is not a stretch to say that the injunction exploits the dramatic cost of default. Indeed, the injunction transparently seeks to make default a condition of Argentina’s unwillingness to pay NML.¹⁴³ In effect, the injunction puts a \$50 billion price tag on Argentina’s policy against paying holdouts; the \$50 billion is other people’s money. We do not think such an injunction can be justified simply by asserting that the courts are holding Argentina to its promise to pay bondholders in a nondiscriminatory manner.¹⁴⁴ It is a separate

¹⁴⁰ See *supra* text accompanying notes 32-33.

¹⁴¹ The Second Circuit referenced this concern when it upheld the district court’s refusal to let NML block the 2005 debt exchange. See *EM Ltd. v. Rep. of Argentina*, 131 F. App’x 745, 747 (2d Cir. 2005). The exchange offer that the courts refused to block contained a clause in which Argentina promised that it would never voluntarily pay holdouts more than exchange bondholders were to receive. That promise squarely contradicts the *pari passu* clause as the courts interpret it now.

¹⁴² The courts have concluded, albeit without any formal evidence-taking, that Argentina can pay NML while servicing its existing debt. See *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 263 (2d Cir. 2012). Thus, the injunction does not *require* default.

¹⁴³ We express no view on whether the injunction will have its desired effect, whether Argentina will successfully re-route payments around the United States, or whether its efforts to re-route payment might themselves constitute a default.

¹⁴⁴ See Amended February 23, 2012 Order at ¶ 1(c), *NML Capital Ltd. v. Republic of Argentina*, 2012 WL 5895784, at *1 (S.D.N.Y. Nov. 21, 2012); *NML*, 699 F.3d at 263.

question whether U.S. courts should use their equitable powers to dare a foreign sovereign's political leadership to commit so destructive an act.

We doubt that U.S. courts would approve an injunction like this against an intransigent private debtor. To collect \$1.4 billion, the injunction threatens a breathtaking array of third parties with contempt and challenges Argentine officials to inflict the pain of default on its people and its creditors, to make good on their public refusal to pay NML. But the calculus shifts when the case involves a foreign sovereign. Indeed, injunctions like the one in *NML* have a perverse logic given the elevated risk of non-compliance and the lack of direct enforcement tools. These are injunctions with a hollow core, which cannot reach their primary targets, and therefore double down on those around them.

With respect to the injunction's scope, it is precisely because sovereigns can roam the world in search of alternative counterparties and payment scenarios that courts must reach around the world, sealing every crack and crevice that could serve as an escape route. Moreover, that sovereign non-compliance will cause extraordinary harm to third parties actually weighs in favor of the injunction. It is a reason to call the sovereign's bluff, especially when the third parties (like lenders and voters) can punish the sovereign's political leadership. If an injunction is broad and harsh enough to foreclose low-cost means of defiance, then a court can be reasonably confident that its order will be obeyed. But if the court guesses wrong, it will lose face and may be implicated in substantial harm resulting from the foreign

sovereign's defiance.¹⁴⁵ These risks, distinct from comity and contempt, justify skepticism about injunctions.

A court considering whether to grant injunctive relief should seriously weigh the likelihood of compliance and the impact of its efforts to implement an effective embargo. To date in *NML*, this has not happened. The various opinions devote little attention to weighing the public interest factors involved, and the Second Circuit's recent opinion invokes procedural grounds to dodge many of the arguments made by foreign parties.¹⁴⁶ Cursory references to "the public interest of enforcing contracts and upholding the rule of law,"¹⁴⁷ cannot explain how these interests are served by an injunction that allows the sovereign to comply by breaching its contracts *en masse*. Nor have the courts explained how the effort to collect ordinary debt claims on behalf of a subset of Argentina's holdouts justifies the sure impact of the injunction on financial market utilities in and outside the United States or the risks of default to exchange bond holders and Argentina's economy.¹⁴⁸

¹⁴⁵ Here, we refer to default as "defiance," even though default is technically permissible under the injunction. This is because the injunction is transparently designed to force Argentina to pay. But whichever characterization we choose, the courts will plainly be implicated if Argentina defaults on some or all of its obligations to exchange bondholders. Argentina may choose its path, and thereby determine whether and what harm will result from its actions, but the plaintiffs and the courts meticulously charted all available paths and specified the consequences of taking them.

¹⁴⁶ As noted, the threat of contempt sanctions will likely deter payment system participants from processing payments to exchange bondholders. *See supra* notes 41-42. For that reason, the court's suggestion that third parties will receive a full hearing when they are "summoned to answer" for alleged contempt rings hollow. As a practical matter, this procedural disposition is little different from a decision on the merits.

¹⁴⁷ Order, at 3, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. Feb. 23, 2012). In its two opinions, the Second Circuit has referenced the public interest standard but has not engaged in much discussion beyond dismissing Argentina's arguments that the injunction would provoke another debt crisis and interfere with international debt restructuring policy. *See NML*, 699 F.3d at 261, 263-64; *NML*, 2013 WL 4487563, at *8-10. In its most recent opinion, the court devoted much of its discussion to arguing that the case would have little impact as a precedent. *Id.* at *10. Whether or not that is true, a discussion of *NML*'s precedential value tells us little about whether the injunction in *this* case is consistent with the public interest.

¹⁴⁸ The courts also discount the policy impact of their remedy on other sovereigns and sovereign debt markets going forward, highlighted in the briefs submitted by the United States and later raised by the government of France in support of Argentina's petition for Supreme Court review. *See* Brief of the United States of America as Amicus Curiae in Support of Reversal at 5, *NML* (2d Cir. Apr. 4, 2012) (No. 12-105-cv(L)); Brief for the Republic of France as

Perhaps the courts have assumed these impacts to be trivial, or have seen the third parties as too-closely affiliated with Argentina. But they have not elaborated on any such assumptions.

The public interest is a touchy subject for a court contemplating an injunction against a foreign sovereign. Ordinarily, injunctions that impose significant costs and risk on third parties are seen as contrary to the public interest. On the other hand, only by imposing such burdens can the court hope to induce sovereign compliance. If it takes the public interest seriously, the court must ask whether the injunction furthers a public interest compelling enough to justify imposing these burdens, and to justify the court in assuming the associated reputational risks of non-compliance. The inquiry cannot be settled by vaguely incanting the interest in “enforcing contracts.”

We do not rule out the possibility that an honest and rigorous balancing test could tip in favor of NML, although we doubt it. 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. We speculate that this may be in part because they simply have too much riding on the outcome.

Amicus Curiae in Support of the Republic of Argentina’s Petition for a Writ of Certiorari at 7-10, *NML, petition for cert. filed*, 2013 WL 3225966 (July 26, 2013).

CONCLUSION

Ever since Judge Thomas P. Griesa issued the injunction, hearings at the district court and court of appeals have been packed with journalists, analysts, gawkers, and lawyers for the litigants and the dozens of interested third parties. The hearings make for good theatre, a never-ending drama about the existential predicament of judging a sovereign. The judges, quite understandably, seem tired of their roles. They are fed up and want Argentina to pay. At one hearing, quoting Argentine press reports of the government's latest evasion plan, the district judge raised his voice: "And steps can be taken, which I will not try to discuss now, but steps can be taken to sanction any misconduct by the Republic . . . which will not simply amount to allowing the Republic to disobey judgments and rulings. There will be means of dealing with that."¹⁴⁹

A year on, Judge Griesa's secret weapon to force compliance remains secret: Argentina has not paid. Petitions for Supreme Court review have pushed the likely resolution of the case back, possibly into late 2014 or even 2015—when Argentina's president faces an uphill battle for re-election. The rumor mill has it that her successor just might pay up, even before the case is finally resolved. NML's strategy would prove a success, though perhaps more psychic than financial, considering a decade of worldwide litigation costs. *NML v. Argentina* might fizzle out without settling the fundamental issues it has raised.

The problems inherent in injunctions against foreign sovereigns are among these. In this Feature, we have argued that, in order to secure compliance, courts have little choice but

¹⁴⁹ Transcript of Oral Argument at 18, *NML Capital Ltd. v. Republic of Argentina* (S.D.N.Y. Nov. 9, 2012) (No. 08-CV-6978(TPG)).

to target third parties when they grant injunctions in sovereign debt cases. To our minds, the temptation to ignore or minimize the public interest in the gamble to induce compliance is at least as problematic as the traditional concern rooted in comity. This does not amount to categorical opposition to injunctions in sovereign debt. But it is an argument in favor of restraint, and for explicit acknowledgement that a sovereign may not comply unless the injunction imposes substantial burdens on third parties. A court that plans to enjoin a foreign sovereign needs to explain why the gamble is worth it.