ENJOINING FOREIGN CONDUCT OF FOREIGN NON-PARTIES: NML CAPITAL, LTD. V. REPUBLIC OF ARGENTINA

*By Andrew Pomager**

I. INTRODUCTION

In December 2001 Argentina defaulted on approximately $132 billion worth of bonds.[1] At the time, it was the largest sovereign bond default in history.[2] The story of this default, particularly its legal significance, reached a watershed moment in September 2011. At that point, U.S. District Judge for the Southern District of New York, Thomas Griesa, ruled in favor of holders of those defaulted bonds in *NML Capital, Ltd. v. Republic of Argentina*;[3] instead of accepting a new bond offer in exchange, these bondholders continued to pursue their rights under the original bonds.[4] That ruling and the subsequent orders clarifying and enforcing an injunction against Argentina (and others) were based on a seemingly novel interpretation that a boilerplate contractual clause, *pari passu*, required Argentina to pay these "holdout" bondholders if it paid any of the "exchange" bondholders who had agreed to the restructured bond offer after the 2001 default.[5] However, the story does not end there. The parties continue to negotiate, litigate, and dispute the result, while the holdout bondholders remain unpaid.[6]

The wide reach of the injunction affects an array of parties, including foreign businesses acting outside of the United States who were not parties to the litigation.[7] This note proposes that the use of an injunction by a court over the foreign conduct of foreign non-parties implicates the traditional concepts of equity, Federal Rule of Civil Procedure 65(d),[8] and international law concepts of extraterritorial reach of courts. The *NML Capital, Ltd*. courts failed to fully analyze how these concepts define the inherent power of the court and thus, (a)

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1. Clifford Krauss, *Argentine Leader Declares Default on Billions in Debt*, N.Y. TIMES (Dec. 24, 2001), http://www.nytimes.com/2001/12/24/world/argentine-leader-declares-default-on-billions-in-debt.html.

2. Todd Benson, *Argentina Starting Drive to Emerge from Default*, N.Y. TIMES (Jan. 12, 2005), http://www.nytimes.com/2005/01/12/business/worldbusiness/12debt.html.

3. No. 08 CV 6978 (TPG), (S.D.N.Y. Sept. 30, 2011).

4. *See generally* Transcript of Oral Argument, NML Capital, Ltd. v. Republic of Argentina, No. 08 CV 6978 (TPG), (S.D.N.Y. Sept. 30, 2011).

5. *See* NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230, 237 (2d Cir. 2013) (summarizing the lower court's holding).

6. *See infra* notes 53–61 and accompanying text.

7. *See infra* notes 211–13 and accompanying text.

8. FED. R. CIV. P. 65(d).

overextended the injunction to reach parties over which they did not have power and, (b) missed an opportunity to better define the limits on equitable power over such non-parties.

This note is structured as follows: Part II discusses the history of the dispute between bond investors and Argentina, Part III analyzes the Second Circuit opinions that followed Judge Griesa's ruling, and Part IV analyzes the traditional concepts of equity, Rule 65(d) jurisprudence, and the extraterritorial reach of courts from an international law perspective. This note then draws on these concepts to assess the injunction issued in *NML Capital, Ltd*. and seeks to determine whether the court's analysis conforms to the inherent power of the court to reach the types of non-parties at issue.

II. HISTORY OF BOND DISPUTE

A. 2001 default and subsequent exchange offerings

Argentina began issuing the bonds subject to litigation in 1994 under a Fiscal Agency Agreement (FAA).[9] In December 2001, interim president Adolfo Rodriguez Saá announced a default on $132 billion of debt.[10] About $45 billion of the debt, including FAA bonds, was held by foreign debtors.[11] This event was the largest sovereign debt default in history at the time.[12] After several setbacks,[13] most holders of the FAA bonds agreed to a deal in 2005, namely, an exchange offering allowing them to swap their defaulted bonds for fresh ones with rates favoring Argentina.[14] This was followed by another exchange offering in 2010, after which 91% of Argentina's defaulted debt from 2001 had been restructured.[15]

As part of Argentina's efforts to motivate bondholders to accept a restructuring, Argentina's legislature passed the "Lock Law"[16] ahead of the 2005 exchange offering.[17] The law prohibited the country from repaying the original FAA bonds or settling them outside of the offering.[18] Argentina towed a hard line

9. Richard J. Corbi & Oscar N. Pinkas, *Argentina Bondholders Are 2-0 Enforcing Their Contractual Rights*, 33 AM. BANKR. INST. J. 26, 26 (2014).

10. Krauss, *supra* note 1.

11. *Id*.

12. Benson, *supra* note 2.

13. *See, e.g*., Tony Smith, *Holders of Argentine Bonds Reject 25% Redemption Offer*, N.Y. TIMES (Sept. 23, 2003), http://www.nytimes.com/2003/09/23/business/holders-of-argentine-bonds-reject-25-redemption-offer.html.

14. *See* NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 252 (2d Cir. 2012) (putting the participation rate in the 2005 exchange at 76%).

15. *Id*. at 253.

16. Law No. 26017, Feb. 10, 2005, [CXIII-30.590] B.O. 1.

17. *See NML Capital, Ltd*., 699 F.3d at 252 (characterizing the law as a method to exert additional pressure on bondholders).

18. *See id*. (discussing the legislature's involvement in legally facilitating the 2010 offering by enacting legislation temporarily suspending the Lock Law); Law No. 26547, Dec. 9, 2009, [CXIII-30.590] B.O. 1 (temporarily suspending the Lock Law).

against holdout bondholders who did not accept the restricted offerings.[19]

The hedge fund NML Capital, Ltd., a subsidiary of Elliott Capital, and other investors were among the holdouts who rebuffed the 2005 and 2010 exchange offers.[20] These holdout bondholders—or, as Argentina and others might characterize them, "vulture funds"—had largely purchased the FAA bonds on the secondary market[21] for pennies on the dollar.[22]

B. Holdout bondholder court victories

The FAA stipulated that New York law governed the contract and the bonds.[23] The holdout bondholders then sued Argentina in New York and obtained money judgments.[24] However, as is common in sovereign debt defaults, Argentina has been mostly judgment-proof.[25] That is, attempts to enforce these judgments were largely unsuccessful because Argentine courts have held that they are prevented from recognizing New York judgments regarding the FAA due to the Lock Law and the moratoria on payments.[26] The holdout bondholders led by NML Capital, Ltd. made some minor gains—including, notoriously, briefly detaining an Argentine warship in Ghana by winning an injunction in a Ghanaian High Court to hold the ship in the Ghanaian port of Tema.[27] Nonetheless, without voluntary payment, any recovery using reachable assets would fall short of the value held on the bonds.[28]

In 2011, the holdout bondholders employed a new strategy.[29] They sought

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19. *See Argentina Offers Past-Due Bond Interest*, N.Y. TIMES (June 2, 2004), http://www.nytimes.com/2004/06/02/business/argentina-offers-past-due-bond-interest.html (emphasizing Argentina's form offering by quoting Roberto Lavagna, Argentina's Economy Minister, "Obviously, this is our final offer.").

20. *See generally NML Capital, Ltd*., 699 F.3d. 246.

21. *See id*. at 251 (describing both the initial purchases and secondary market purchases, together ranging from 1998 to 2010).

22. Agustino Fontevecchia, *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/afontevecchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane/print/.

23. *NML Capital, Ltd*., 699 F.3d at 253–54.

24. *See id*. at 253 n.5 (describing judgments held by the investors).

25. *See id*. (stating that judgments held against Argentina have not been honored by its courts).

26. *See id*. (citing the Foreign Sovereign Immunities Act and reluctance of Argentine courts to honor the judgments as bars to enforcement).

27. Fontevecchia, *supra* note 22; *see* The Republic v. High Court (Comm. Div.) Accra, No. J5/10/2013 (2013) (Ghana) (ruling the detention exceeded the lower court's power, after the vessel had already sailed without resistance from Ghanaian officials).

28. *See* W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. ON REG. 189, 195 (2014) ("[F]rom the creditor's perspective, asset seizure is not really the point . . . .The point is to induce the sovereign to pay voluntarily by disrupting its international activities . . . .").

29. *See NML Capital, Ltd*., 699 F.3d at 253 (discussing the bondholders seeking injunctive relief).

equitable relief on the basis of the *pari passu* clause in the original FAA, which provides that the bonds

> will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness . . . .[30]

NML Capital argued that Argentina's payment to the exchange bondholders, along with Argentina's particular actions toward holdout bondholders, represented the kind of "subordination" the clause was intended to protect against.[31] Though this interpretation—which could potentially threaten a sovereign's ability to restructure its debt—was not generally accepted in the industry,[32] Argentina's defiant behavior toward the investors played a role in the court's decisions.[33] Argentine officials made public statements demonstrating their determination to avoid payment.[34] Particularly damning though, was the Lock Law, since it was a legislative act specifically forbidding repayment of the debt.[35] The district court found these actions significant enough to have violated the protection of the clause.[36]

The court provided injunctive relief for the holdout bondholders in the form of a ratable payment.[37] This means that if Argentina pays the exchange bondholders a portion of an amount due them, Argentina must also pay the holdout bondholders the same portion of their amount due.[38] Argentina's original 2001 default triggered the acceleration of full payment of the debt to the holdout bondholders.[39] Therefore, anytime it makes a periodic payment to the exchange bondholders, it must pay the outstanding fully accelerated $1.33 billion to the

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30. *Id*. at 255.

31. *Id*. at 251–52. This is a novel interpretation of the clause, but the argument had been made before in a separate 2001 case involving the same investors. *See generally* MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION (2013).

32. *See* GULATI & SCOTT, *supra* note 31, at 25 (". . . [R]egardless of what the clause means, if anything, virtually all commentators and market participants took pains to explain that it did *not* mean that a sovereign in distress was restricted from discriminating among creditors either in a restructuring or in other ways.").

33. *See NML Capital, Ltd*., 699 F.3d at 254 (addressing Argentina's disregard for honoring the judgments regarding payment obligations).

34. *Id*.

35. *See id*. (determining that Argentina "lowered the rank" of the bonds by enacting the Lock Law).

36. *Id*. Part of the problem with the court's ruling is that, in narrowly applying its interpretation to the situation, it fails to define the outlines of that territory—at what point did Argentina's behavior move from acceptable under the *pari passu* protection to a violation? Weidemaier & Gelpern, *supra* note 28, at 197 n.43.

37. NML Capital, Ltd. v. Republic of Argentina, Nos. 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2012 WL 5895786, at *1 (S.D.N.Y. Nov. 21, 2012).

38. *See id*. at *2 (explaining how "ratable payments" will function).

39. *See id*. at *3 (discussing the debts Argentina currently owes).

holdout bondholders.[40]

The extent of the injunctions is critical.[41] The injunction binds third parties involved in the complicated payment process, as they are deemed to be in active concert or participation with Argentina.[42] This involves a number of banks and clearinghouses that facilitate the payment process,[43] including The Bank of New York Mellon (BNY), to whom Argentina transfers its bond payments for further distribution.[44] In the words of the trial court, "these third parties should properly be held responsible for making sure that their actions are not steps to carry out a law violation, and they should avoid taking such steps."[45] If these third parties facilitate a payment to exchange bondholders, and there has been no payment to holdout bondholders, they are in violation of the order.[46]

This ruling was made from the bench in September of 2011,[47] and the injunction order was entered in February 2012.[48] In October 2012, the U.S. Court of Appeals for the Second Circuit affirmed the ruling but requested clarification on the order,[49] which was given in November.[50] The amended injunctions were appealed and also affirmed in August of 2013.[51] Finally, in June of 2014, the U.S. Supreme Court denied the writ of certiorari to hear the case, leaving the lower decisions and injunctions standing.[52]

C. Developments post-June 2014 certiorari denial

The parties continued to maneuver and negotiate following the Supreme Court's denial of certiorari.[53] Argentina intended to make payments in defiance of the injunction.[54] Argentina had an interest payment due July 30, 2014 to exchange bondholders.[55] Funds for that payment were placed with BNY in June 2014,[56] but

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40. *Id*.

41. *See id*. at *4 (discussing the necessity of third parties to be covered by the injunctions).

42. *Id*.

43. *NML Capital, Ltd*., 2012 WL 5895786, at *5 (discussing the parties involved in making the payments).

44. *Id*.

45. *Id*.

46. *Id*.

47. Transcript of Oral Argument, *supra* note 3.

48. *NML Capital, Ltd*., 2012 WL 5895786, at *1.

49. *NML Capital, Ltd*., 699 F.3d at 246.

50. *NML Capital, Ltd*., 2012 WL 5895786, at *1.

51. *NML Capital, Ltd*., 727 F.3d at 230.

52. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2819 (2014).

53. *See generally* Katia Porzecanski & Camila Russo, *Argentina's Griesa-Proof Bondholders Unfazed by Sale Halt*, BLOOMBERGBUSINESS (Mar. 4, 2015), http://www.bloomberg.com/news/articles/2015-03-05/griesa-proof-bondholders-unfazed-by-sale-halt-argentina-credit.

54. *See id*. (discussing refusal by Argentina's president to comply with ruling).

55. Alexandra Stevenson & Irene Caselli, *Argentina Is in Default, and Also Maybe in Denial*, INT'L N.Y. TIMES (July 31, 2014), http://dealbook.nytimes.com/2014/07/31/argentina-is-in-default-and-also-maybe-in-denial/.

because the financial intermediaries were restrained, the payment was not made.[57] Therefore, the ruling on *pari passu* concerning a minority of the original FAA bondholders led to a second Argentine default on all of the exchange bonds.[58]

As of early January 2015, Argentina and the holdout bondholders continued to try to negotiate a settlement, albeit unsuccessfully.[59] The expiration of a Rights Upon Future Offers ("RUFO") clause in Argentina's agreement with the exchange bondholders did not seem to affect the negotiations.[60] Argentina previously characterized its RUFO obligation to the exchange bondholders as a legal bar to offering the holdout bondholders a more favorable settlement.[61]

The legal reach of the order also continued to be analyzed into 2015.[62] In March 2015, Judge Griesa decided that Citigroup could not process interest payments on exchange bonds issued in Argentina under local Argentine laws—payments he had temporarily been permitting.[63] Meanwhile, in February 2015, an English judge confirmed that some of the exchange bonds were governed by English law, but did not go so far as to say that the non-party banks were free to process payments to them.[64] The next opportunity for progress may be the October election, when Kirchner will be out of office and some candidates are pursuing a platform that includes settlement with the holdout bondholders.[65]

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56. Peter Eavis & Alexandra Stevenson, *Argentina Finds Relentless Foe in Paul Singer's Hedge Fund*, INT'L N.Y. TIMES (July 30, 2014), http://dealbook.nytimes.com/2014/07/30/in-hedge-fund-argentina-finds-relentless-foe/.

57. Stevenson & Caselli, *supra* note 55.

58. *See* Porzecanski & Russo, *supra* note 53 (discussing Argentina's second default in July triggered by the order).

59. Jonathon Gilbert, *Debt Dispute Between Hedge Funds and Argentina at Impasse*, INT'L N.Y. TIMES (Jan. 5, 2015), http://dealbook.nytimes.com/2015/01/05/debtdisputebetweenargentinaandhedgefundsatimpasse/.

60. *Id*.; *see* Hugh Bronstein, *Argentina in No Rush to Re-Start Debt Restructuring Talks*, REUTERS (Feb. 23, 2015), http://www.reuters.com/article/2015/02/23/uk-argentina-debt-idUSKBN0LR1CX20150223 ("The clause expired at the end of 2014 but Argentina has shown little interest in returning to restructuring talks with holders . . . .").

61. Gilbert, *supra* note 59.

62. Porzecanski & Russo, *supra* note 53.

63. *See id*. (discussing that Citigroup is proposing the argument to Griesa that his order only applies to "external indebtedness" and if Griesa approves, Argentina may have a way to monetarily finance itself). The primary argument considered was not the inherent ability of the court to reach these payments, but whether these bonds constitute "external indebtedness" at all and thereby fall within the contractual restrictions of the *Pari Passu* Clause in the first place. NML Capital, Ltd. v. Republic of Argentina, 2015 WL 1087488 (S.D.N.Y. Mar. 12, 2015). Judge Griesa finds they do, but also states that his injunction does not rest on the terms of the contract. *Id*.

64. Peter Eavis, *Argentine Debt Dispute Remains Murky Even as London Court Sheds Some Light*, INT'L N.Y. TIMES (Feb. 13, 2015), http://dealbook.nytimes.com/2015/02/13/argentine-debt-dispute-remains-murky-even-as-london-court-sheds-some-light/.

65. *See* Hugh Bronstein, *Argentine Front-Runner Scioli Would Seek Bond Holdout Deal: Advisor*, REUTERS (Aug. 12, 2015), http://www.reuters.com/article/2015/08/13/us-argentina-election-idUSKCN0QH2ST20150813 (examining the presidential frontrunner's potential to enhance economy).

III. NML CAPITAL, LTD. V. REPUBLIC OF ARGENTINA

A. October 2012 Second Circuit Opinion

The U.S. Court of Appeals for the Second Circuit, on the initial appeal in its October 2012 opinion,[66] addressed a number of issues. First, Argentina argued that it did not "subordinate" its obligation to the holdout bondholders by making payment to the exchange bondholders in violation of the terms of the *pari passu* clause.[67] Second, it claimed the holdout bondholders were barred from raising the *pari passu* argument by laches.[68] Third, it claimed the permanent injunctions were inappropriate because the FAA limited the remedies for breach to acceleration of the debt.[69] Fourth, it argued the injunctions were inappropriate because monetary remedies would have been adequate.[70] Fifth, it claimed the Foreign Sovereign Immunities Act of 1976 (FSIA)[71] barred the injunctions.[72] Sixth, it argued that the balance of equities and public interest weighed against imposing these injunctions on Argentina.[73] Finally, Argentina claimed the injunctions were inappropriate to the extent they apply to third parties.[74]

1. Interpretation and violation of the *pari passu* clause

The substantive question of the meaning of the *pari passu* clause was particularly important not only because it triggered the breach of contract, but also because most commentators and industry participants assumed it to be, at a practical level, largely inert.[75] Argentina argued that the provision was an industry-standard boilerplate term that was violated when the legal ranking of the bond was discriminated against or subordinated to create legal priorities favoring other creditors.[76] Since a claim against the exchange bonds has no such priority that would be recognized by a court, they had not been legally subordinated.[77] NML Capital, on the other hand, argued Argentina violated the clause through de facto subordination, which it accomplished with the Lock Law and public statements announcing their intention not to pay.[78]

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66. NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 246 (2d Cir. 2012).

67. *Id*. at 257–58. The court refers to the entire clause as the "*Pari Passu* Clause" and the second sentence of it as the "Equal Treatment Provision." *Id*. at 251.

68. *Id*. at 260.

69. *Id*. at 261.

70. *Id*. at 262.

71. 28 U.S.C.A. §§ 1330, 1602–11 (2014).

72. *NML Capital, Ltd*., 699 F.3d at 257.

73. *Id*. at 257.

74. *Id*. at 260.

75. *See* GULATI & SCOTT, *supra* note 31, at 2 (suggesting possible meanings and origins of the clause in sovereign contexts, but contending that no observers considered it a bar to discrimination among bondholders).

76. *NML Capital Ltd*., 699 F.3d at 258 (quoting Argentina's brief).

77. *Id*.

78. *Id*.

The court agreed that Argentina had violated the clause.[79] Argentina's reference to the boilerplate nature of the *pari passu* clause amounted to an attempt to bring industry-standard custom and usage into a contract interpretation analysis.[80] The standard for reviewing custom and usage, based on *Law Debenture Trust Co. v. Maverick Tube Corp.*,[81] is that the supposedly understood meaning be "general, uniform, and unvarying."[82] Since even Argentina's own authorities agreed the clause has an unsettled and ambiguous meaning, Argentina's reliance on customary usage failed this standard and was ignored.[83]

Additionally, the court found that the clause's prohibition was not limited to legal subordination, but "manifested an intention to protect bondholders from more than just formal subordination."[84] First, Argentina's interpretation would make redundant the two separate sentences of the *pari passu* clause itself, since under Argentina's construction both, presumably, would refer to legal subordination.[85] The court instead read both sentences differently.[86] The first protects bondholders from *issuance* of superior debt; whereas the second protects bondholders from *payment* of other bonds ahead of the FAA bonds.[87] Second, the restriction on payment discrimination makes sense because it creates a real protection in the sovereign debt context that might not otherwise exist.[88] As bankruptcy proceedings do not take place when a sovereign defaults, legal rank would afford a creditor no protection.[89] On the other hand, a contractual payment restriction like this would control the sovereign's otherwise free reign in paying defaulted creditors.[90] The court appeared to parse the two sentences not as each serving a legal subordination purpose and ad hoc subordination purpose, respectively, but instead as serving an issuance restraint purpose and a payment restraint purpose, respectively.[91]

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79. *Id*. at 260.

80. *See id*. at 257–58 (analyzing the consistency of commentators' *pari passu* definitions to determine how to treat Argentina's assertion in a contractual interpretation context).

81. 595 F.3d 458, 466 (2d Cir. 2010).

82. *NML Capital Ltd*., 699 F.3d at 258 (quoting *Law Debenture Trust Co*., 595 F.3d at 466).

83. *See id*. at 258 (demonstrating the ambiguity acknowledged by a number of authorities otherwise relied on by Argentina).

84. *Id*. at 258–59.

85. *See id*. at 258 (disputing Argentina's interpretation because it conflicts with rule that an interpretation should not leave a provision substantially without effect).

86. *See id*. at 259 (noting that the restriction makes good sense in this context).

87. *Id*. at 259. The first sentence reads that the bonds "will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* without any preference among themselves." *Id*. at 251. The second sentence reads that "[t]he payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness . . . ." *Id*.

88. *See NML Capital, Ltd*., 699 F.3d at 259 (noting that the restriction makes good sense in this context).

89. *Id*.

90. *Id*.

91. *Id*.

However, whether analyzed under the court's payment obligation interpretation or Argentina's legal subordination interpretation, the court found sufficient evidence that Argentina had violated the clause.[92] The court referenced four pieces of evidence in making this conclusion.[93] First, Argentina enacted a moratorium on payment of the FAA bonds and made payment on the exchange bondholders without paying the holdout bondholders.[94] Additionally, the exchange bond prospectus stated Argentina had no intention of paying any holdout bondholders.[95] Further, it classified the bonds in SEC filings as a separate category, which it had no intention of paying.[96] Finally, its legislature barred payment to holdout bondholders via the Lock Law.[97] Since this last act would prevent an Argentine court from enforcing a judgment on the FAA bonds, but no such statutory bar exists on the exchange bonds, the court found the clause was violated under Argentina's legal subordination interpretation as well.[98]

2. Laches

Argentina argued that the claims were barred by laches.[99] It claimed that despite Argentina's attempt to resolve the meaning of the *pari passu* clause in 2003, NML Capital delayed in bringing the claims until after Argentina restructured its debt and exchange bondholders had come to rely on payment of the exchange bonds.[100] Use of laches under New York law requires

> (1) conduct giving rise to the situation complained of, (2) delay in asserting a claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert the claim, and (4) injury or prejudice to the offending party as a consequence relief [sic] granted on the delayed claim.[101]

Argentina was lacking on multiple elements.[102] The conduct complained of—discriminatory conduct in violation of the *pari passu* clause—had not occurred in 2003.[103] Additionally, Argentina was on notice of the risk of NML Capital asserting

92. *Id*. at 259–60.

93. The court does not indicate if one, or a combination of some, of these factors would constitute a breach. *Id*. This potentially leaves the interpretative analysis lacking, since these actions and their effects range from discretionary payment of one bond and not the other, stated intentions not to pay, a classification in U.S. regulatory filing, Argentine legislation prohibiting payment, and an inability of Argentine courts to honor judgments or to enforce payment of one bond over another. Weidemaier & Gelpern, *supra* note 28, at 197.

94. *NML Capital, Ltd*., 699 F.3d at 260.

95. *Id*.

96. *Id*.

97. *Id*.

98. *Id*.

99. *Id*. at 257.

100. *NML Capital, Ltd*., 699 F.3d at 260.

101. *Id*. at 261.

102. *Id*.

103. *Id*.

the *pari passu* claim.[104] Furthermore, the injunctions were issued in 2012, after the exchange offerings were issued.[105]

3. Initial challenges to the injunctions

Argentina challenged the appropriateness of the injunctions themselves.[106] It argued the contract limited remedies for breach to acceleration of the debt.[107] The court, citing *Vacold LLC v. Cerami*,[108] observed that a contract only limits the availability of remedies if it contains the parties' express intention to do so.[109] The FAA contained an acceleration clause, but it is not identified as the sole remedy, and no other limits were made on the types of relief available.[110] Thus, this theory was "easily dispensed with."[111]

Drawing on another case, the court also observed that once a court invokes its equitable powers it need not fashion specific performance identical to the performance required by the contract.[112] However, the court did not specifically rely on this reasoning in dispensing with Argentina's "sole remedy" argument.[113] This suggests the court can go outside the terms of the contract in designing equitable orders.[114] Here, even if the acceleration clause was the contractual remedy, it did not need to be used.[115] This rule would have alternatively supported the court's conclusion on this point.[116]

Argentina also argued that monetary damages were an adequate remedy, so injunctive relief was not warranted.[117] In New York, "specific performance may be ordered where no adequate monetary remedy is available and that relief is favored by the balance of equities, which may include the public interest."[118] Relying on

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104. *Id*.

105. *Id*.

106. *NML Capital, Ltd*., 699 F.3d at 260.

107. *Id*.

108. 545 F.3d 114 (2d Cir. 2008).

109. *NML Capital, Ltd*., 699 F.3d at 262.

110. *Id*. at 261–62.

111. *Id*. at 261.

112. *Id*. at 261 (citing Greenspahn v. Joseph E. Seagram & Sons, Inc., 186 F.2d 616, 620 (2d Cir. 1951)).

113. *Id*.

114. *See id*. ("The performance required by a decree need not, for example, be identical with that promised in the contract.").

115. *See NML Capital, Ltd*., 699 F.3d at 262 ("While paragraph 12 of the FAA specifies acceleration as one remedy available for a breach of the Equal Treatment Provision, the FAA does not contain a clause limiting the remedies available for a breach of the agreement.").

116. *See id*. ("Under New York law the absence of the parties' express intention in the FAA to restrict the remedies available for breach of the agreement means that the full panoply of appropriate remedies remains available.")

117. *See id*. at 257 ("[B]ecause the only harm plaintiffs suffer is monetary, Argentina argues that the district court incorrectly concluded that such harm was irreparable").

118. *NML Capital, Ltd*., 699 F.3d at 261 (citing Guiness-Harp Corp. v. Jos. Schlitz Brewing Co., 613 F.2d 468 (2d Cir. 1980); Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp., 992 F.2d

Pashaian v. Eccelston Properties, Ltd.,[119] the court further observed that the likely inability to enforce a monetary judgment is relevant to the analysis of adequacy of such a judgment.[120] Put differently, the adequacy of a remedy lies not only with whether it can be acknowledged via judgment, but also with its enforcement.[121] The court expected Argentina to refuse to pay any awarded monetary damages based on its failure to satisfy prior judgments and the limitations set on Argentine courts by the Lock Law.[122] Accordingly, monetary damages were inadequate and specific performance was appropriate.[123]

4. Injunctions as breach of sovereign immunity as provided under the FSIA

Argentina also argued the injunctions were barred by the sovereign immunity codified under the FSIA because they mandate that NML Capital be paid with sovereign property that is otherwise immune.[124] Argentina cited *S&S Machinery Co. v. Masinexportimport*[125] for the premise that the court cannot grant by injunction that which they may not provide by attachment.[126] The FSIA makes property of a foreign state in the United States immune from "attachment arrest and execution," subject to exceptions.[127] The court found that the injunctions had not achieved attachment, arrest, or execution since these terms refer to the court's seizure and control of property.[128] Rather, the injunctions require compliance with a contractual obligation.[129] That obligation has an incidental effect on Argentina's property by prohibiting one use of their funds—the transfer of funds to the exchange bondholders but not to the holdout bondholders.[130] The court did not exercise dominion over the property since Argentina still has control over its funds and can comply with the injunctions by using the funds in various ways.[131] As the court puts it, "[t]he Injunctions do not require Argentina to pay any bondholder any amount of money, nor do they limit the other uses to which Argentina may put its

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430 (2d Cir. 1993); Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008)).

119. 88 F.3d 77, 87 (2d Cir. 1996).

120. *See NML Capital Ltd*., 699 F.3d at 262 (noting an argument that a parties' efforts to frustrate a judgment is insufficient to show adequacy fails). The court also finds support in comment d of the Restatement (Second) of Contracts § 360. *Id*.

121. *NML Capital Ltd*., 699 F.3d at 262.

122. *Id*.

123. *Id*.

124. *Id*. at 257.

125. 706 F.2d 411, 418 (2d Cir. 1983).

126. *NML Capital, Ltd*., 699 F.3d at 257.

127. Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1609 (2014).

128. *NML Capital, Ltd*., 699 F.3d at 262.

129. *Id*.

130. *Id*.

131. *Id*. at 263. Argentina can (a) pay the holdout bondholders in full, and continue paying the exchange bondholders 100% of what is due; (b) pay the holdout bondholders a partial amount due, but pay the exchange bondholders a portion of what is due them; or (c) continue paying the holdout bondholders nothing, but cease paying the exchange bondholders. *Id*.

fiscal reserves."[132]

Further, a foreign state is immune from a court's jurisdiction,[133] but can waive such immunity.[134] Argentina's submission to New York jurisdiction under the FAA has subjected it to the court's equitable powers, which are not restrained under the FSIA.[135]

5. Balance of equities and public interest

Argentina also contended the district court abused its discretion in finding the balance of equities and public interest weighed in favor of NML Capital.[136] The Second Circuit Court of Appeals disagreed.[137] First, Argentina's disregard for its legal obligations under the FAA outweighed any harm against its sovereignty created by the injunctions.[138] In addition, the court was not convinced that this would cause a financial crisis in Argentina.[139] Argentina's cash reserves can cover payment to all of its creditors.[140] Aside from protecting the strength of its currency—which the court did not appear to give much weight—Argentina had put forth no other evidence to suggest a financial crisis would result from the injunction.[141] Argentina and its amici argued that the injunctions would also prevent sovereigns from restructuring their debt in the future.[142] The court did not find in favor of this argument for two reasons.[143] First, the sovereign's conduct alone will dictate whether it violates the terms of a given *pari passu* clause.[144] Second, most relevant sovereign bond contracts now contain collective action clauses (CACs).[145] When a minimum threshold of bondholders accept a restructuring plan, the CAC forces all remaining bondholders to also accept the plan.[146] Therefore, NML Capital and the court concluded the prevalence of CACs minimize the risk of holdout litigation.[147]

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132. *Id*.
133. Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1604 (2014).
134. § 1605(a)(1).
135. *NML Capital, Ltd*., 699 F.3d at 263.
136. *Id*.
137. *Id*.
138. *Id*.
139. *Id*.
140. *Id*.
141. *NML Capital, Ltd*., 699 F.3d at 263.
142. *Id*. at 263–64.
143. *Id*.
144. *Id*. at 264.
145. *Id*.
146. *See id*. at 253 ("[Collective action] clauses permit Argentina to amend the terms of the bonds and to bind dissenting bondholders if a sufficient number of bondholders (66 2/3% to 75% of the aggregate principal amount of a given series) agree.").
147. *NML Capital, Ltd*., 699 F.3d at 264.

6. Impact of injunctive applicability to third parties

Argentina also presented a number of arguments regarding the injunction's impact on third parties.[148] This issue gave the court pause.[149] First, article 4-A of the Uniform Commercial Code (U.C.C.)[150] prevents court orders from restricting intermediary banks that are only facilitating a wire transfer.[151] Additionally, the court acknowledges that application to third parties must achieve some standard of reasonability.[152] Before assessing these questions substantially though, the court remanded to the district court to further specify the intended applicability to third parties, and intermediary banks in particular.[153]

B. November 2012 remand to District Court and amended injunctions

The U.S. District Court for the Southern District of New York clarified the two issues on remand.[154] First, the ratable payment formula initially ordered by the court was meant to require that Argentina pay 100% of the accelerated debt to the holdout bondholders if it paid 100% of a single periodic amount due to the exchange bondholders.[155] Second, the court addressed applicability to third parties.[156] Here, the court indicated the intention was to apply Federal Rule of Civil Procedure 65(d), which binds the parties' agents and those in active concert and participation with the parties.[157] This implies that the reach of Rule 65(d) to non-parties is an automatic function of any injunction.[158] This contrasts with the task before the court: clarifying which parties are affected.[159] Since a payment to the exchange bondholders absent a payment to the holdout bondholders would violate the terms of the appeal, the parties participating in the payment process are enjoined.[160] This would include, at least, the indenture trustee, the registered

148. *Id*.

149. *See id*. (stating the court's concerns about the injunction's application to intermediary banks).

150. N.Y. U.C.C. LAW § 4-A-503 (McKinney 2014).

151. *NML Capital, Ltd*., 699 F.3d at 264.

152. *See id*. (noting that concerns are not limited to the U.C.C. and that ultimately, the court must assess if application to third parties is reasonable).

153. *Id*.

154. *See* NML Capital, Ltd. v. Republic of Argentina, Nos. 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2012 WL 5895786, at *1 (S.D.N.Y. Nov. 21, 2012) (showing that the Court of Appeals remanded the case and directed that the District Court clarify precisely how the payment formula, regarding payments to plaintiffs, is intended to operate).

155. *See id*. at *2 (clarifying that the proportional comparison was based on the amounts currently due any given set of creditors which, here, was the accelerated amount for the holdout bondholders and any upcoming obligation to the exchange bondholders).

156. *Id*. at 4.

157. *Id*.

158. *Id*.

159. *See id*. at *5 ("[T]hird parties should properly be held responsible for making sure that their actions are not steps to carry out a law violation, and they should avoid taking such steps.").

160. *See NML Capital, Ltd*., 2012 WL 5895786**,** at *4 (establishing that while not all parties are agents of Argentina, they are in active concert or participation with the country).

owners, and the clearing systems facilitating the payment.[161]

Acknowledging that the U.C.C. does not allow intermediary banks to be enjoined from facilitating wire transfer payments, the court accepted an explicit carve-out for such intermediary banks.[162] Crucially, in conducting its analysis, the court observed that there is some dispute as to whether the payment from Argentina to its indenture trustee occurs in Argentina or New York, but "[t]he rest of the process, without question takes place in the United States."[163] Further, the plaintiffs made no request to enjoin financial institutions receiving the funds for the beneficial interest holders.[164] In sum, the final order addressed the bound non-party "participants" and unbound intermediary banks as follows:

> f. "Participants" refer to those persons and entities who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds, including (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 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.
>
> g. Nothing in this ORDER shall be construed to extend to the conduct or actions of a third party acting solely in its capacity as an "intermediary bank," under Article 4A of the U.C.C. and N.Y.C.L .S. U.C.C. § 4–A–104, implementing a funds transfer in connection with the Exchange Bonds.[165]

C. August 2013 Second Circuit Opinion

The revised injunction was in turn appealed back to the United States Court of Appeals for the Second Circuit.[166] Argentina and amici made several arguments that the court grouped into four categories.[167] Argentina argued that the injunctions

161. *Id*. at *5.
162. *Id*.
163. *Id*. at *5, n.2.
164. *Id*. at *5.
165. *NML Capital, Ltd*., 2012 WL 5895784, at *2–3.
166. NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230 (2d Cir. 2013).
167. *Id*. at 240–48.

were inequitable in that they unjustly injured (a) Argentina, (b) the exchange bondholders, (c) the participants in the exchange bond payment system, and (d) the public interest.[168]

1. Injuries to Argentina

Argentina argued that the injunctions unjustly injured Argentina on two grounds.[169] First, Argentina argued again that the injunctions violated the FSIA, but now, more specifically, that they force Argentina to use resources that the statute protects.[170] Second, the ratable payment method is inequitable in that it provides the holdout bondholders full principle and interest due on their loan while the exchange bondholders only get installments.[171]

The court was unconvinced on both arguments.[172] The court reiterated that the FSIA prohibits attachment, arrest, or execution of property, which the injunctions do not achieve.[173] The court did not seem to fully consider if it is relevant that the injunctions restrain the same property that may be immune from such attachment, arrest, or execution, but implied it may not be the same in any case, by saying, "the injunctions allow Argentina to pay its FAA debt with whatever resources it likes."[174]

Likewise, the court did not find it problematic that the exchange bondholders only receive an installment whereas the holdout bondholders receive full principal and interest.[175] Rather, these are simply the amounts currently due to each set of bondholders.[176] The amounts are different because the creditors are differently situated as a result of their respective bargained-for positions.[177] Here, those bargained-for positions appear to be, (a) in the case of the exchange bondholders their installment payments under their negotiated restructured exchange bonds, and (b) in the case of the holdout bondholders their accelerated principal and interest under the original negotiated FAA.[178] Ultimately, Argentina failed to convince the court that the amended injunctions unjustly injure Argentina.

2. Injuries to exchange bondholders

Argentina also argued that the amended injunctions unjustly injured the exchange bondholders.[179] It relied on *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales*

168. *Id*.
169. *Id*. at 240.
170. *Id*.
171. *Id*. at 241.
172. *NML Capital, Ltd*., 727 F.3d at 240–41.
173. *Id* at 240.
174. *Id*. at 240–42.
175. *Id*. at 241.
176. *Id*.
177. *Id*.
178. *NML Capital, Ltd*., 727 F.3d at 241.
179. *Id*.

Corp.[180] to invoke the principle that equitable relief is inappropriate where the harm to third parties is unreasonable.[181] The point made by an amici—and a necessary inference of this argument—is that Argentina has stated it would not pay the debt.[182] Therefore, due to the injunctions, the exchange bondholders would not be paid.[183] This aspect was particularly troubling for the court, which ruled that inequity to a third party could not be based on a party's threatened noncompliance with the court's order.[184] Additionally, in accepting the exchange proposal, the exchange bondholders were warned that Argentina could not guarantee holdout litigation and would not interfere with payments.[185] Thus, Argentina also failed to convince the court that the injunction unjustly injured the exchange bondholders.

3. Injuries to participants in the exchange bond payment system

Argentina further argued that the injunction inequitably injures the non-parties who facilitate payments to the exchange bondholders and are bound by the injunction.[186] Argentina raised four issues concerning the injunction and its effects on the international financial system.[187] First, the injunction cannot bind the payment system participants because the court does not have personal jurisdiction over them.[188] Second, the injunction cannot apply outside of the United States.[189] Third, the participants were denied due process and therefore cannot be bound by a court's order.[190] And fourth, the injunction violates the U.C.C.'s protection of intermediary banks.[191]

Regarding the first issue, Argentina argued that the district court erred in finding that payment system participants were bound by the injunction order because the court lacks personal jurisdiction over the participants.[192] The court dispensed with the first and third arguments together, and did not find personal jurisdiction over the non-parties or due process to have been an issue here.[193] Specifically, it reasoned that the district court only enjoined Argentina, who it had personal jurisdiction over.[194] The non-parties are not directly enjoined, and therefore, personal jurisdiction is not required.[195] Rather, under Rule 65(d), any

180. 992 F.2d 430 (2d Cir. 1993).
181. *NML Capital, Ltd*., 727 F.3d at 241.
182. *Id*. at 242.
183. *Id*.
184. *Id*.
185. *Id*.
186. *Id*. at 242–43.
187. *NML Capital, Ltd*., 727 F.3d at 242–43.
188. *Id*.
189. *Id*. at 243.
190. *Id*.
191. *Id*.
192. *Id*. at 242–43.
193. *NML Capital, Ltd*., 727 F.3d at 243.
194. *Id*.
195. *Id*.

injunction automatically binds parties in active concert and participation with the enjoined party.[196] The amended injunction, the court says, only put the non-parties on notice that they "could become liable through Rule 65 if they assist Argentina in violating the district court's orders."[197] Should the non-parties be brought before the court for a violation of the injunctions—i.e., in a contempt hearing—they will then have a right to raise a personal jurisdiction concern.[198] Likewise, their due process would be satisfied prior to liability being assessed at the contempt hearing.[199] There, the non-parties would be entitled to notice and a right to be heard.[200] The court added that a district court is open to clarify the extent to which a specific non-party is bound, upon application to the court.[201]

Argentina and its amici also argued that the injunction was improper in that it inappropriately applied extraterritorially and that it at least violated comity, a doctrine of general deference to the power of another jurisdiction.[202] The court addressed this in two ways.[203] It first found that courts have the power to enjoin parties outside of their jurisdiction, and then assessed the reasonableness of the district court's decision.[204] Relying on *Bano v. Union Carbide*,[205] it determined that a court having personal jurisdiction over a party can enjoin the party from committing acts elsewhere.[206] Further, based on *United States v. Davis*,[207] a court can enjoin conduct that has or is intended to have a substantial effect within the United States.[208] Accordingly, the court found the district court's injunction reasonable under these rules.[209]

IV. CONFLICTING CONCEPTS? EQUITY POWER, RULE 65(D), AND EXTRATERRITORIAL REACH

NML Capital, Ltd. v. Republic of Argentina raises a number of interesting legal considerations; these considerations include interpretation of *pari passu* clauses, use of injunctions against sovereigns, and the ability of a sovereign to restructure a defaulted bond.[210] The broad application of the injunctions to non-parties also stands out.[211] The order enjoins a wide array of parties—named and

196. *Id*.
197. *Id*. at 242.
198. *Id*.
199. *NML Capital, Ltd*., 727 F.3d at 242.
200. *Id*. at 243.
201. *Id*.
202. *Id*. Comity is discussed further *infra* Part IV.C.
203. *Id*. at 243.
204. *Id*. at 243–44.
205. 361 F.3d 696 (2d Cir. 2004).
206. *NML Capital, Ltd*., 727 F.3d at 243.
207. 767 F.2d 1025 (2d Cir. 1985).
208. *NML Capital, Ltd*., 727 F.3d at 243.
209. *Id*.
210. 727 F.3d 230, 247 (2d Cir. 2013).
211. *See* Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp., 992 F.2d 430, 436 (2d Cir.

unnamed—involved in a complex financial payment system and does little to clarify its boundaries.[212] At its furthest reach, the injunction restrains foreign actors not party to the suit from taking action occurring entirely outside of the United States.[213] Two prominent actors specifically named in the order were the clearing systems for holders of the euro-denominated bonds: Euroclear Bank S.A./N.V. and the Euroclear System (collectively refered to as "Euroclear") and Clearstream Banking, S.A. ("Clearstream").[214] These clearing systems are financial institutions in the chain of payment from Argentina to the beneficial interest holders in the bonds.[215] Their function is to settle accounts between banks so that, essentially, Argentina's bank can pay the banks of the beneficial interest holders in the bonds.[216] Euroclear and Clearstream are examples of the broad reach of the order in that both companies are included in the wording of the injunction,[217] are foreign-incorporated companies, and their payment activities take place entirely outside of the United States.[218] However, it is important to consider that, under the court's analysis, various foreign non-parties acting exclusively outside of the United States—even those not explicitly named—could violate the injunction by effecting a payment.[219]

As the injunction applies to these foreign nonparties acting exclusively outside of the United States, it presents a tension between three concepts that help to define a court's power: traditional conceptions of equitable powers, Rule 65(d)[220] jurisprudence, and the extraterritorial power of a court from an international perspective.

1993) (recognizing the unreasonable hardship or loss felt by an appellant who only sold cars manufactured by the appellee); *see also NML Capital, Ltd*., 727 F.3d at 241 (affirming the lower court's analysis that the injunctions that cover Argentina also cover the Exchange Bond payment system).

212. *See NML Capital, Ltd*. 2012 WL 5895786, at *1 (finding that while not all parties may be clearly agents of Argentina, that parties that are in "active participation" with the financial system are implicated in the injunction).

213. *See NML Capital, Ltd*., 727 F.3d at 244 (assuming for argument the entire payment process for holders of euro-denominated bonds takes place outside the U.S.); Brief for Euro Bondholders at 5; *NML Capital Ltd*., at 727 F.3d at 230 (describing the payment process for holders of euro-denominated bonds).

214. *NML Capital, Ltd*., 2012 WL 5895784, at *5.

215. *See* Brief for Euro Bondholders, *supra* note 213, at *5 (explaining what clearing systems are).

216. *See* Brief for the Clearing House Association LLC as Amicus Curiae in Support of Reversal at 3–4, NML Capital Ltd. v. Republic of Argentina, 727 F.3d 230 (2d. Cir. 2013) (Nos. 12-105-cv), 2013 WL 100420, at *3–4 (describing the role of clearing systems).

217. *See NML Capital, Ltd*., 2012 WL 5895784, at *2–3 (showing that the injunction specifically included these clearing systems).

218. *See* Brief for Euro Bondholders, *supra* note 213, at *5–6 (explaining the importance of the clearing systems being foreign incorporated companies).

219. *See NML Capital, Ltd*., 727 F.3d at 243 (confirming that Fed. R. Civ. P. 65(d) automatically binds individuals who bring about a violation in active concert or participation with the enjoined party).

220. FED. R. CIV. P. 65(d).

A. Equitable power

Generally, the primary basis of a court's power is related to the territorial limits of the state in which it sits.[221] The Court in *International Shoe Co. v. Washington*,[222] while easing the limitations on jurisdiction imposed by due process, noted "[t]hat clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."[223] The equitable power of a court, historically rooted in a monarch's personal power over his subject,[224] is a power that operates over the individual.[225] Historically, equitable decrees could only be enforced by taking action against a person.[226]

Despite the territorial limitations on a court, but because of this *in personam* power, a court can impose injunctions that have effects outside of the territory over which it has jurisdiction.[227] The court's injunction can compel the individual to take actions in another territory, including, for example, actions that affect property in the second territory.[228] The court would not be directly acting on property outside its territory, but the individual would be compelled to act in the manner prescribed by the injunction or otherwise risk contempt.[229] Thus, in the 1909 case *Fall v. Eastin*,[230] the Court distinguished two aspects of a Washington state court order.[231] On the one hand, the order instructed the defendant to transfer property in Nebraska, and he did not comply.[232] However, the order also instructed a commissioner appointed by the court to execute a deed in the event of his

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221. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed . . . an illegitimate assumption of power . . . .").

222. 326 U.S. 310 (1945).

223. *Id*. at 319.

224. *See* Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 796–97 (1998) (discussing the nature of the English Court of Chancery's equity powers).

225. *See id*. at 810 (viewing modern uses of equity as directed at the individual despite the expanded scope and use of equitable remedies).

226. *Id*. at 798–99.

227. *See id*. at 794 ("It has long been held in the United States that a court's equitable powers over a party subject to its *in personam* jurisdiction are not limited territorially.").

228. *See id*. at 806 (discussing the court's power to order extraterritorial acts when asserting *in personam* jurisdiction).

229. *See id*. (demonstrating that the threat of imprisonment could effect such extraterritorial acts); *see also* Ernest J. Messner, *The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494, 496 (1929–1930) (describing an individual's obligation to obey a decree from a court when it reaches beyond the territorial limits of the state).

230. 215 U.S. 1 (1909).

231. *See id*. at 8 (differentiating the order's instruction over a person from its instruction over the mode in which extraterritorial real estate was to be conveyed).

232. *Id*. at 4–5.

noncompliance, and a commissioner did just that.[233] The Court distinguished an order purporting to directly transfer title to property in Nebraska from an order that might do so by indirectly compelling a party before it to transfer the property.[234] The resulting deed—executed by the Washington state commissioner—was deemed invalid.[235]

One important manifestation of *in personam* power is the antisuit injunction.[236] In an antisuit injunction, one court enjoins a party from initiating or continuing litigation in another court, or from enforcing a judgment.[237] Again, the court acts on its power over the individual, and the threat of punishment toward that individual, rather than presume to enjoin the second, extraterritorial court itself.[238] In a case analyzing, *inter alia*, the propriety of the antisuit injunction (and extraterritorial reach), *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*,[239] the court noted that "[i]njunctions operate only on the parties within the personal jurisdiction of the courts."[240] Nevertheless, a second court could still recognize and enforce the original decree in deference to the first court.[241] The same degree of deference may factor into the initial court's analysis in the first place and restrain it from issuing an injunction with extraterritorial effects,[242] particularly in the context of an antisuit injunction.[243] However, any deference given does not mean the initial court lacks jurisdiction to act.[244] This "deference" is really based in comity,[245] which is discussed further in Part C below.

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233. *See id*. at 8–9 (discussing the jurisdiction of a court of equity over property in another state).

234. *See id*. at 11–12 (distinguishing the outcomes of a case where the subject-matter is located outside of a state's jurisdiction as from a case where the subject matter is located within a state's jurisdiction).

235. *See id*. at 14 (holding that the deed issued by the Washington State commissioner is invalid).

236. *See* Price, *supra* note 224, at 795, 823 (describing the historical use of antisuit injunctions in England and the United States).

237. *See id*. (explaining the purpose of antisuit injunctions).

238. *See id*. at 823 (describing the fundamentals of an antisuit); Messner, *supra* note 229, at 495–96 (discussing how antisuits are constitutional and are not an infringement on states' sovereignty).

239. 731 F.2d 909 (D.C. Cir. 1984).

240. *Id*. at 927. But the court, highlighting why caution was due prior to issuing such injunctions, also noted "they effectively restrict the foreign court's ability to exercise its jurisdiction." *Id*. Polly J. Price at times goes so far as to reference the direct/indirect distinction—generally—as legal fiction. Price, *supra* note 224, at 838. But, particularly because she points out that there is no dispute that antisuit injunctions need not be honored by the second court, *id*. at 833, she probably would not view this as a legal fiction in the *antisuit* injunction context.

241. *See* Price, *supra* note 224, at 782 (discussing the doctrine of comity).

242. *See id*. at 787–88 (describing how some courts address the extraterritorial effects of nationwide injunctions).

243. *Laker Airways, Ltd*., 731 F.2d at 931.

244. *See* Messner, *supra* note 229, at 500 (explaining that courts sparingly use antisuit injunctions because of comity).

245. *Id*.

In this manner, the *in personam* source of a court's injunctive power can rationalize enjoining activities outside the court's territory. However, restricting activities of third parties that are neither before the court, nor within its jurisdiction—as happened to Euroclear and Clearstream in *NML Capital, Ltd*.—is problematic. While neither crucial to nor the focus of their discussions, some of the sources discussed in this section suggest that enjoining such third parties is not within the power of a court.[246] But, the analysis of cases drawing from Rule 65(d) suggests otherwise.

B. Rule 65(d)

The *NML Capital, Ltd*. courts relied on Rule 65(d) to enjoin individuals not party to the suit.[247] Rule 65(d)(2) dictates that "[t]he order binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)."[248] *Regal Knitwear Co. v. N.L.R.B.*[249] was a 1945 case that defined some of the contours of this power. First, the extension of the injunction beyond the parties before the court was derived from common law powers, to bind "those identified with them in interest, in 'privity' with them, represented by them, or subject to their control."[250] The purpose was to prevent a defendant from conducting prohibited acts by way of "aiders and abettors."[251] Further, an injunction directed at a party before the court inherently and automatically binds appropriate third parties—that is, the order does not need to explicitly identify parties.[252] On the same token, whether a third party is bound "depends on an appraisal of his relations and behavior" and not on the party's express inclusion in the order.[253] The court limited the reach of third parties and stated that "[t]he courts,

246. *See Laker Airways, Ltd*., 731 F.2d at 927 ("Injunctions operate only on the parties within the personal jurisdiction of the courts."); Messner, *supra* note 229, at 508 ("These decrees are directed to the parties to the suit, and are not binding upon persons who were not within the jurisdiction of the court."); Price, *supra* note 224, at 808 ("*In personam* jurisdiction, a prerequisite for an equitable remedy . . . .").

247. *Id*.

248. FED. R. CIV. P. 65(d)(2).

249. 324 U.S. 9 (1945).

250. *See id*. at 14 (explaining which parties may be bound by an injunction).

251. *See id*. (discussing the purpose of enjoining not only the parties to an injunction, but also third parties related to the party enjoined).

252. *See id*. (explaining that orders granting injunctions automatically bind third parties related to the enjoined party).

253. *See id*. at 15 (discussing how to evaluate whether a third party is bound by an injunction). The Court was addressing whether the inclusion of "successors and assigns" in an order enjoining a company was appropriate. *Id*. at 11. It pointed, on the one hand, to Second Circuit precedent suggesting the words could be included, but they would not hold a successor or assign in contempt if it did not participate with the defendant, and, on the other hand, Seventh Circuit precedent suggesting the words should not be included, but a successor or assign could be bound without words. *See id*. (comparing the precedent of the Second Circuit with that of the

nevertheless, may not grant . . . [an] injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law."[254] Finally, *Regal Knitwear Co*. establishes that a party uncertain whether an injunction applies to their relationship with a defendant can apply to the court for clarification, which should not be withheld.[255] In sum, *Regal Knitwear Co*. suggests that: (a) Rule 65(d) simply encapsulates common law powers; (b) injunctions can apply to non-parties; (c) the applicability is limited; and (d) that applicability and its limits depend on the relations and behavior of the non-party.[256]

Determining the applicability and limits of an injunction has forced courts to confront the problem of clearly defining the requisite relationship for enjoining the third party conduct. In *Alemite Mfg. Corp. v. Staff*,[257] the Second Circuit said a court "cannot lawfully enjoin the world at large."[258] The court focused on the fact that it had power over the defendant, and therefore, the defendant had to be involved in the contempt for a non-party to violate the order.[259] An order could not bind a non-party acting on his own, which has not helped to bring about the enjoined action by the defendant.[260] *Golden State Bottling Co. v. N.L.R.B.*[261] (relying heavily on *Regal Knitwear*) suggests Rule 65(d) in fact is restrictive, since a policy purpose of the rule is to not punish individuals acting independently and whose rights have not been adjudged.[262] Nonetheless, the Supreme Court found that the purchaser of a company who had engaged in unfair labor practices was bound

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Seventh Circuit regarding the express inclusion of "successors" and "assigns" in injunction orders and whether or not they are bound by injunctions). "[T]here is more than a faint suggestion that the conflict is over semantics rather than over practical realities." *Id*.

254. *See id*. at 13 (addressing the limitations on courts' authority to issue overly broad injunctions which punish third parties whose conduct is independent and should not be subject to an injunction).

255. *See Regal Knitwear Co*., 324 U.S. at 15 (explaining that defendants who are unsure if an injunction applies to them should petition the court for clarification of the applicability of the injunction).

256. *See id*. at 13–15 (discussing Fed. R. Civ. P. 65(d)(2), the applicability of injunctions to non-parties, the limitations of the applicability of injunctions, and how the relation and behavior of a non-party determines the applicability of the injunction to that party).

257. 42 F.2d 832 (2d Cir. 1930).

258. *Id*. at 832.

259. *See id*. at 833 (explaining when it is appropriate to hold a third party in contempt of an injunction against a defendant).

260. *Id*.; Bano v. Union Carbide Corp., 361 F.3d 696 (2d Cir. 2004)—relied on in *NML Capital Ltd*, 727 F.3d at 243—cites *Alemite Mfg. Corp*., 42 F.2d 832 (2d Cir. 1930), in endorsing limitations on non-party reach: the injunction "would be dependent on permission from an entity that is not a party to this lawsuit and that, therefore, cannot be subject to the district court's injunction." *Bano*, 361 F.3d at 717. While this consideration factors into that court's factual analysis, it is probably dicta as a standalone statement.

261. 414 U.S. 168 (1973).

262. *See id*. at 180 (discussing the policy of FED. R. CIV. P. 65(d)(2) which prohibits overly broad injunctions punishing third parties whose conduct is independent of the enjoined party's actions).

to a remedial order, where the successor had knowledge of the litigation and continued the business operations without significant changes.[263] Here, the successor was considered in privity with the predecessor "for purposes of Rule 65(d)."[264] The Court also indicated the restrictive policy of Rule 65(d) is satisfied by affording "procedural safeguards."[265] That is, the non-parties would have an opportunity to be heard at a contempt hearing enforcing liability.[266] *Golden State Bottling Co*. also seemed to justify expanding the reach of the order on two related policy grounds.[267] First, doing so will effectuate the public policy goals of the labor statutes that were violated in the case.[268] Second, courts of equity may go farther when furthering public interests, rather than just private interests.[269]

Waffenschmidt v. Mackay[270] also offers a useful analysis of the rule because it involves an extraterritorial aspect, albeit within the United States.[271] The defendant had a temporary restraining order, followed by a preliminary injunction entered against him enjoining him from dissipating any funds or assets to be used to pay the plaintiff.[272] The court analyzed the activities of two individuals and a bank who had helped dissipate the funds but who were outside of the state.[273] The court offered two analyses that support its injunctive reach to non-parties outside its territory.[274] First, a court inherently must be able to enforce its orders.[275] That necessity would be easily thwarted if they could not reach non-parties outside the court's territory.[276] Therefore, a court has inherent power to reach outside its

263. *See id*. at 170–72 (holding that a bona fide purchaser of a business is considered a "successor" and is bound by an injunction on its predecessor).

264. *See id*. at 180 (explaining that a bona fide purchaser is considered in privity with its predecessor under FED. R. CIV. P. 65(d)(2) if it refuses to abide by its predecessor's injunction).

265. *See id*. (indicating that no adjudication of liability will be made against a bona fide successor without a full hearing regarding the successor's obligations regarding the injunction).

266. *See id*. ("The successor [will] also be entitled, of course, to be heard against the enforcement of any order issued against it." (quoting Perma Vinyl Corp., 164 N.L.R.B. 968, 969 (1967)). However, the successor in this case had, in fact, been made a party to parts of the proceedings. *Golden State Bottling Co*., 414 U.S. at 181.

267. *See Golden State Bottling Co*., 414 U.S. at 179–80 (stating it is necessary for the reach of injunctions need to be expanded).

268. *Id*. at 179.

269. *Id*. at 179–80.

270. 763 F.2d 711 (5th Cir. 1985).

271. *See id*. at 714 (analyzing non-parties that reside outside of the district court's territorial jurisdiction actively aiding and abetting a party in violating an order).

272. *See id*. (setting out the facts of the case).

273. *See id*. at 715 (explaining that the defendants did not have any contact with the forum state).

274. *See id*. at 716–18 (explaining the circumstances in which a court's enforcement of an order for injunctive relief needs to extend outside its territorial boundaries).

275. *See id*. at 716 (explaining the importance of courts' authority to be able to enforce injunctions).

276. *See Waffenschmidt*, 763 F.2d at 717 (discussing the importance of allowing a court to enforce its injunctions on non-parties outside of its territory).

territory.[277] Second, the court contended that *in personam* jurisdiction is established because, by actively aiding and abetting the defendant, non-parties outside the court's territory have placed themselves within the court's jurisdiction.[278]

Unsurprisingly, these arguments parallel the court's assessment that the non-parties due process had not been violated.[279] First, the court's special interest in enforcing its judgments, where it is foreseeable to the non-party that they will have to respond to the court, reflect its inherent powers and do not offend traditional notions of due process.[280] Second, a court may assert jurisdiction over persons whose extraterritorial acts cause effects within it, and violation of the injunction has the effect of burdening the court's administration of justice.[281] Aside from these central arguments, *Waffenschmidt* suggests a limitation on non-party reach under Rule 65(d).[282] It does not authorize jurisdiction where the non-party is acting with an independent interest, rather than on behalf of the defendant.[283] The court also suggested that whether the non-party acts in good faith is relevant to the analysis of the injunctive reach.[284]

S.E.C. v. Homa[285] follows a similar analysis as *Waffenschmidt* but specifically involves non-parties outside of the United States.[286] Knowingly violating a court's order submits an individual to the jurisdiction of the court, because the violation has the purpose and effect within the United States of frustrating the order.[287] Where "an individual undertakes activity designed to have a purpose and effect in the forum, the forum may exercise personal jurisdiction over that person with respect to those activities."[288] An observation of the court though, is that, "more importantly," the non-parties were citizens of the United States and thus were

277. *See id*. at 716 (stating that courts have an inherent power to enforce its own injunctions).

278. *Id*. at 718. The court also suggested that the non-parties had an opportunity at their contempt hearing to show that they did not aid and abet the defendant. *Id*.

279. *See id*. at 721 (analyzing the due process issue in the same framework as the analysis for the reach of injunction).

280. *See id*. at 722 (providing factors to be considered when deciding if jurisdiction over a defendant comports with traditional notions of due process).

281. *See id*. at 722–23 (explaining that when a defendant's actions are intentional and the effects substantial, lack of contacts with the forum state does not defeat jurisdiction).

282. *See Waffenschmidt*, 763 F.2d at 718 (providing an exception to Rule 65(d) regarding jurisdiction over non-parties).

283. *See id*. (stating courts lack jurisdiction over a non-party when it asserts an independent interest in the subject property and is not acting on behalf of the defendant).

284. *See id*. at 726 (explaining that good faith is relevant in determining if a non-party aided and abetted a defendant in violating court orders).

285. 514 F.3d 661 (7th Cir. 2008).

286. *See id*. at 673 (discussing jurisdiction over two non-parties who reside outside of the United States but are American citizens).

287. *See id*. at 674–75 (explaining that a person who violates a freeze order submits himself to the court's jurisdiction for contempt proceedings).

288. *Id*. at 675.

required to obey an order directed at them and their activities.[289] The court also characterizes Rule 65(d) as a codification of inherent powers and not a limitation on them.[290] Additionally, while the court does not analyze this aspect of Rule 65(d), the defendant in the case had not violated the order himself—the requirement discussed in *Alemite Mfg. Corp.*[291] that the non-party must help bring about the defendant's violation of the order appears to have been ignored.[292]

As discussed, *NML Capital, Ltd.* relies on Rule 65(d) to enjoin non-parties like Euroclear and Clearstream.[293] The opinion does not extensively analyze this reach, however.[294] The logic implicitly follows *Waffenschmidt* and *Golden State Bottling*. Indeed, the court referenced *Golden State Bottling* for the premise that the parties will have an opportunity to raise personal jurisdiction at a contempt hearing.[295] *NML Capital, Ltd.* took a further step by not offering a rationale that establishes personal jurisdiction over non-parties—rather, personal jurisdiction is not required as the court "has issued injunctions against no one but Argentina . . . . Since the amended injunctions do not directly enjoin payment system participants, it is irrelevant whether the district court has personal jurisdiction over them."[296] The injunction communicates to non-parties that they *could* become liable, and they can apply to the district court for clarification.[297]

The court seems to be skirting the issue of the reach of its power.[298] To suggest that the injunction "forbids others—who are not directly enjoined but who act in 'active concert or participation' with an enjoined party—from assisting in a violation of the injunction"[299] seems to imply the court has not exerted any power over those non-parties, despite them being forbidden from taking action.[300] On the

289. *See id.* (emphasizing that because the defendants were United States citizens, they were required to obey an order of the United States directed at them and their activities).

290. *See id.* at 673–74 (discussing FED. R. CIV. P. 65(d) as a codification and not a limitation on federal courts' inherent power to render a binding judgment).

291. 42 F.2d 832 (2d Cir. 1930).

292. *See Homa*, 514 F.3d at 671 (describing how the defendant's business partners dissipated the defendant's assets in violation of the order for their own benefit).

293. *See* NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230, 243 (2d Cir. 2013) (discussing how courts use FED. R. CIV. P. 65(d) to enjoin parties).

294. *See id.* (showing that the opinion does not contain extensive analysis on the court's reliance on Rule 65 to enjoin non-parties).

295. *See id.* ("[T]here will be no adjudication of liability against a [non-party] without affording it a full opportunity at a hearing, after adequate notice, to present evidence." (quoting Golden State Bottling Co., Inc. v. N.L.R.B., 414 U.S. 168, 180 (1973))).

296. *See id.* (declining to address the issue of personal jurisdiction over payment participant systems because they were not directly enjoined).

297. *See id.* (explaining that injunctions provide notice of potential liability to non-parties).

298. *See id.* (lacking any real discussion of the court's ability to exert power over the non-party actors).

299. *NML Capital, Ltd.*, 727 F.3d at 243.

300. *See id.* (showing that the court is not confronting the issue that it is already exerting power on non-state actors).

other hand, this could also be viewed as restating the rule of *Alemite Mfg. Corp.*[301] The court has the power to forbid an act of the defendant, and the non-parties' actions are simply a component of Argentina's violation.[302]

It could be assumed, on the other hand, that the non-party payment system participants enter the court's jurisdiction when they violate the order, as suggested by *Waffenschmidt* and *Homa*.[303] Both of these cases characterized the jurisdiction as resulting from the effect the violation will have within the territory of the court.[304] If Euroclear or Clearstream were to facilitate payments on exchange, bondholders in Europe, without proportionate payment having been made to the holdout bondholders in New York, would have the effect in New York of (a) denying the holdout bondholders a contractual right to equal payment—a privately-contracted right the terms of which Euroclear and Clearstream did not negotiate—and (b) hinder the administration of justice, i.e., since they would be violating the judicially-imposed injunction.[305]

As previously discussed, *NML Capital, Ltd*. also reasserts the value of the contempt hearing as a forum for the non-party to raise a personal jurisdiction challenge and have an opportunity to be heard prior to imposing liability.[306] This is consistent with *Golden State Bottling*.[307] *Golden State Bottling*, however, may be distinguishable since (a) the court determined the third party successor was in privity with the defendant for the purposes of the injunction;[308] and (b) the court noted the public interest violated warranted a more expansive use of equitable powers.[309] It may be the case that where—as in *Golden State Bottling*—a non-party is a successor that continues the operations of its predecessor, its interests are the same and were originally represented.[310]

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301. 42 F.2d 832 (2d Cir. 1930), as discussed in Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9, 14 (1945).

302. *See id*. (holding that defendants may not nullify a decree from a court by carrying out prohibited acts through aiders and abettors).

303. *See* Waffenschmidt v. Mackay, 763 F.2d 711, 721 (5th Cir. 1985) (finding that a non-party who has aided in knowingly violating an injunction is subject to the jurisdiction in which the injunction is issued because it is foreseeable that the person would be required to respond in that forum); *see* SEC v. Homa, 514 F.3d 661, 674–75 (7th Cir. 2008) (explaining that a person who knowingly circumvents an injunction submits to the jurisdiction of that order for contempt proceedings).

304. *Waffenschmidt*, 763 F.2d at 721; *Homa*, 514 F.3d at 674–675.

305. *Cf*. *NML Capital*, *Ltd*., 727 F.3d at 243 (emphasizing the impact a violation will have on the administration of justice).

306. *See id*. at 243 ("[T]here will be no adjudication of liability against a [non-party] without affording it a full opportunity at a hearing, after adequate notice, to present evidence." (quoting Golden State Bottling Co., Inc. v. N.L.R.B., 414 U.S. 168, 180 (1973))).

307. *See Golden State Bottling Co*., 414 U.S. at 180 (affording bona fide successors an opportunity to be heard before imposing liability for violating an order or injunction).

308. *Id*. at 180.

309. *Id*. at 179–80.

310. *See* Richard A. Bales & Ryan A. Allison, *Enjoining Nonparties*, 26 AM. J. TRIAL ADVOC. 79, 97 (2002) (suggesting that where interests are not identical, the injunctive reach to a successor may be inappropriate).

More importantly, the non-parties, if they are interested in obeying a court's order, are in fact restrained after the injunction is entered but before they are heard—before personal jurisdiction is established at a contempt hearing. The injunction imposes the court's power over the non-party prior to the contempt hearing.[311] *NML Capital, Ltd*. follows *Regal Knitwear* in that it permits a non-party to receive clarification from the court as to whether they are bound to the injunction or not.[312] But the district court had already amended the injunctions on remand and expressly included Euroclear, Clearstream, and other non-parties.[313] It is not clear if the district court's remand was equivalent to the type of clarification the court suggests is available, and, if so, whether the court substantially addressed its power to restrain the activities of these extraterritorial non-parties.[314] On the other hand, since *Regal Knitwear* also indicates an initial order neither broadens nor narrows the inherent reach of the injunctive power, the amended injunction may have had no substantial effect on whether these foreign non-parties were restrained in the first place.[315] Without more substantially and directly approaching the question of this Rule 65(d) reach, *NML Capital, Ltd*. has left it unclear if such checks on this reach apply.[316]

C. Extraterritorial power from the perspective of international law

The presumed reach of the injunction to parties and actions outside of the United States implicates questions about the court's ability to make decrees not just outside of its immediate territory, but also outside of the United States. Much of the preceding discussion is derived from cases analyzing the power of one U.S. state court (or a federal court with diversity jurisdiction) over the persons or conduct of other states. While this has been discussed where it is applicable or analogous to a court reaching across national borders,[317] the presumed reach invokes additional consideration of principles of international law.

In international law, a state's authority to effect its national policies is limited

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311. *Cf*. *Jurisdictional Limitations on Injunctive Relief*, 78 HARV. L. REV. 1027, 1029 (1965) (indicating where a non-party violates an injunction solely in pursuit of its own otherwise legitimate interests, a contempt proceeding is insufficient protection since a negative result will mean a fine or imprisonment, rather than a denial of the claim); *Contempt Proceedings Against Persons Not Named in an Injunction*, 46 HARV. L. REV. 1311, 1313–14 (suggesting where an injunction follows a bona fide transfer of property it may not be justifiable to bind the vendee on the basis of protections afforded by a contempt hearing).

312. NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230, 243 (2d Cir. 2013).

313. NML Capital, Ltd. v. Republic of Argentina, Nos. 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2012 WL 5895786, at *4 (S.D.N.Y. Nov. 21, 2012).

314. *Id*.

315. *See* Price, *supra* note 224, at 791 ("The primary constraint disfavoring injunctions with extraterritorial effect may well be futility of enforcement."); *see also* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 931 (D.C. Cir. 1984) (". . . [A] state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests.").

316. *See generally NML Capital, Ltd*., 727 F.3d 230.

317. *See*, *e.g*., *Laker Airways*, *Ltd*., 731 F.2d at 934.

based on its jurisdictional reach.[318] The Restatement (Third) of The Foreign Relations Law of the United States[319] identifies three categories of jurisdiction.[320] First, "jurisdiction to prescribe" refers to a state's ability to make law regulating activities, relations, statuses, or interests of persons or things.[321] It applies whether the regulating law is an executive decree, legislation, or judge-made.[322] Second, the "jurisdiction to adjudicate" refers to a state's ability to subject persons or things to the process of its tribunals.[323] Finally, "jurisdiction to enforce" refers to a state's ability to "induce or compel compliance, or to punish noncompliance with its laws or regulations."[324]

A state must have jurisdiction to prescribe a rule to have jurisdiction to enforce it.[325] Additionally, though judicial decrees prescribing or enjoining future conduct "are issued by courts in exercise of equity powers, they are in a real sense a second exercise of jurisdiction to prescribe."[326] From this perspective, the propriety of the *NML Capital, Ltd*. injunction, and any ability to enforce it, is limited by the U.S. court's jurisdiction to prescribe,[327] and "if there is no justification for the court's exercise of jurisdiction, the injunctive relief should necessarily fail."[328]

There are two bases relevant for a court's jurisdiction to prescribe: territoriality and nationality.[329] The nationality basis of a state's jurisdiction simply allows the state to regulate its nationals whether they are within or outside of its territory.[330] The territoriality basis of jurisdiction allows it to regulate activity within a state's boundaries: "an essential, definitional element of sovereignty."[331] The territoriality bases include conduct outside of the state's borders that has or is intended to have a substantial effect within the state.[332] Thus, if an injunction

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318. *See* Kathleen Hixson, Note, *Extra Territorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT'L L.J. 127, 130 (1988) (". . . [V]alid prescriptive jurisdiction is a prerequisite to valid enforcement jurisdiction, and any limitations placed on prescriptive jurisdiction will operate to limit enforcement as well.").

319. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1988) [hereinafter, RESTATEMENT THIRD].

320. RESTATEMENT THIRD § 401.

321. *Id*.

322. *Id*.

323. *Id*.

324. *Id*.

325. Hixson, *supra* note 318, at 130.

326. RESTATEMENT THIRD § 415 cmt. h.

327. *Id*.

328. Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984).

329. *Id*.

330. RESTATEMENT THIRD § 402(1).

331. *Laker Airways, Ltd*., 731 F.2d at 921.

332. *Id*. at 922; As the Restatement (Third) considers territorial jurisdiction, "a state has jurisdiction to prescribe law with respect to (1) (a) conduct that, wholly or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its

against an action outside of the state is appropriate, based on sufficiently substantial effects within the state, it is not truly an exercise of "extraterritorial" jurisdiction.[333] Nonetheless, this "effects doctrine" is often analyzed distinctly and its application is more controversial than regulation of conduct occurring entirely within a state.[334]

The Second Circuit in *NML Capital, Ltd*. relied on *U.S. v. Davis*[335] to reference the effects doctrine and its ability to enjoin conduct having or intending to have a substantial effect in the United States.[336] The *Davis* court found that it had jurisdiction to prescribe on both the nationality basis—the defendant was a U.S. citizen—and the effects doctrine.[337] The court enjoined the criminal defendant, Davis, from continuing foreign litigation to prevent a Cayman Islands bank from producing evidence subpoenaed by the court in a criminal case.[338] The court determined that the foreign action initiated by Davis and enjoined was designed to interfere with the already pending prosecution in the United States, and thus had a substantial effect.[339] Additionally, the court reiterated that its order was directed at Davis, who was before the court, though it also acknowledged that the antisuit injunction *effectively* restricted the jurisdiction of the foreign court.[340]

Another important consideration in the international context is comity.[341] Comity "summarizes in a brief word a complex and elusive concept—the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum."[342] *Laker Airways, Ltd*.[343] considered the "central precept" of comity that, "when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations."[344] The deference afforded to the foreign jurisdiction under comity also would cause the domestic court to consider the extraterritorial effect of an order it could enter on the foreign jurisdiction.[345] On the other hand, "where there is no interference with the sovereignty of another nation," a court exercising equitable powers can command

territory; (c) conduct outside its territory that has or is intended to have substantial effect within its territory. . . ." RESTATEMENT THIRD § 402.

333. *Laker Airways Ltd*., 731 F.2d at 923.

334. *See* Hixson, *supra* note 318, at 138–39 (discussing the effects doctrine specifically and its critics abroad).

335. 767 F.2d 1025 (2d Cir. 1985).

336. NML Capital, Ltd. v. Republic of Arg., 727 F.3d 230, 243 (2d Cir. 2013).

337. *Davis*, 767 F.2d at 1036.

338. *Id*.

339. *Id*.

340. *Id*. at 1038.

341. Comity is also relevant to interstate relations. *See, e.g*., Price, *supra* note 224, at 787.

342. *Laker Airways, Ltd*., 731 F.2d at 921.

343. *Id*.

344. *Id*.

345. Price, *supra* note 224, at 787–88.

"persons properly before it" to act or refrain from acting outside of its territory.[346]

NML Capital, Ltd. dispensed with any comity concerns as it relates to the foreign non-party payment system participant by citing *Bano v. Union Carbide*[347] for the premise that it had the power to enjoin a party over which it has personal jurisdiction from committing acts elsewhere.[348] This is interesting since, as the court acknowledged, its personal jurisdiction was over Argentina and not, necessarily, the non-parties.[349] But the reference to *Bano* is also noteworthy because it stated that "injunctive relief may properly be refused when it would interfere with the other nation's sovereignty" and "this power should be exercised with great reluctance when it would be difficult to secure compliance . . . or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country."[350] While *Bano* does not reference "comity" explicitly, it seems to stand for the same degree of deference.[351] The court upheld the district court's refusal to grant injunctive relief on the impracticality grounds.[352] Nonetheless, in *NML Capital, Ltd*., the analysis seems to stop after application of the effects doctrine and recognition that, per *Bano*, acts in other territories might be enjoined (though *Bano* did not do so).[353]

Thus, the *NML Capital, Ltd*. court does not truly address its jurisdiction to prescribe or comity with respect to activities of the foreign non-parties. It relies, again, on the effect of Argentina's conduct and the automatic application of Rule 65(d) with respect to these non-parties.[354] This seems insufficient from an international perspective since the court is, in fact, regulating the conduct of these parties, and such regulation is limited by its jurisdiction to prescribe. Moreover, the court did not consider to what extent comity should restrain its injunctive power.[355] On the other hand, the injunction might be seen to only affect these private parties, and not the sovereign power of the nations in which their conduct is restrained.

D. Assessment of the NML Capital, Ltd. Injunction

As suggested, the injunction as applied to the foreign conduct of foreign non-parties, like Euroclear and Clearstream, does not appear to be adequately justified within the Second Circuit's jurisdiction to prescribe. *Homa*[356] and *Waffenschmidt*[357]

346. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) (allowing injunctive relief in Mexico in a patent case against a U.S. citizen, when Mexico had withdrawn the defendant's Mexican patent registration).

347. 361 F.3d 696 (2d Cir. 2004).

348. NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230, 243 (2d Cir. 2013).

349. *Id*. at 243.

350. *Bano*, 361 F.3d at 716.

351. *See id*. at 716 ("But injunctive relief may properly be refused when it would interfere with the other nation's sovereignty.").

352. *Id*. at 717.

353. *NML Capital, Ltd*., 727 F.3d at 243.

354. *Id*. at 244.

355. *Id*.

356. Sec. & Exch. Comm'n v. Homa, 514 F.3d 661 (7th Cir. 2008).

perhaps offer a suggestion. In both cases, domestic courts viewed jurisdiction over non-parties as premised on the effect violation of an injunction has within the court's territory.[358] In the case of *Homa*, an international case, the court is explicitly using the effects doctrine—though it also has national jurisdiction to prescribe over the defendant.[359] Consequently, parties like Euorclear and Clearstream could be brought under the Second Circuit's jurisdiction to prescribe if their conduct will have or is intended to have a substantial effect within the United States.

Waffenschmidt and *Homa* view the domestic effect as that which a violation of the injunction will have on the administration of justice.[360] Accordingly, Euroclear, Clearstream, and like parties may be under the court's jurisdiction because a violation of the injunction would have a direct and substantial effect on the administration of the court's order in New York.[361] There are two problems with viewing the court's reach in this manner. First, it is circular. The power to restrain the non-parties in the first place is premised on a violation of that putative restraint. Second, and relatedly, this imposes no real limit on a court's jurisdiction to prescribe. Since a court could fashion an injunction—perhaps a reasonable one with respect to the parties before it—any individual, anywhere, could effectively hinder the administration of the order if they helped violate the injunction.

Additionally, while a court's showing of restraint based on comity is discretionary and does not abolish jurisdiction,[362] the Second Circuit should have conducted a more thorough comity analysis as it relates to the foreign conduct of foreign non-parties like Euroclear or Clearstream. The injunction may be considered as only directed at private parties and not a direct confrontation of sovereign power, as is the case in an antisuit injunction.[363] However, there are a few reasons to think otherwise. First, the injunctions restrain the foreign corporations from engaging in otherwise legal activities in foreign countries, all on the basis of a private contract they did not negotiate.[364] Second, in the case of Euroclear, at least, there is a confrontation with the sovereign authority of its home country, Belgium.[365] After the *pari passu* interpretation and relief was provided by the Court of Appeals in Belgium in 2000,[366] the Belgian legislature enacted legislation to prevent courts from hindering the payment systems in this manner.[367] *NML Capital*,

357. Waffenschmidt v. Mackay, 763 F.2d 711 (5th Cir. 1985).

358. *Waffenschmidt*, 763 F.2d at 718; *Homa*, 514 F.3d at 674–75.

359. *See Homa*, 514 F.3d at 674–75.

360. *Waffenschmidt*, 763 F.2d at 718.

361. *Id*.; *Homa*, 514 F.3d at 674–75.

362. *See* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 952 (D.C. Cir. 1984) (discussing a reasonableness-based test as it relates to the assertion of jurisdiction during a court's decision of whether or not to show restraint based on comity).

363. NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230 (2d Cir. 2013).

364. *Id*. at 239–41.

365. *Id*. at 244–45.

366. Romain Zamour, NML v. Argentina *and the Ratable Payment Interpretation of the* Pari Passu *Clause*, 38 YALE J. INT'L L. 55, 61 (2013).

367. Floyd Norris, *Ruling on Argentina Gives Investors an Upper Hand*, INT'L N.Y. TIMES

Ltd. has therefore done what a Belgian court would not be permitted to do. Even if this is not a direct confrontation with the sovereign, it certainly challenges their national policy. Third, the injunction could be construed to act as an antisuit injunction. The order contains a broad prohibition against taking action that would "evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER . . . ."[368] A bound participant in the payment system may desire to sue Euroclear in a Belgian Court to process payments pursuant to its contractual obligation. However, the injunction might be interpreted to prohibit such a suit and thus effectively rob Belgian courts of their jurisdiction.

Finally, the cases frequently cite the necessity of a court to enforce its orders and avoid allowing a party to circumvent them through a non-party as the reason Rule 65(d) must be allowed to apply to non-parties.[369] While this is an important policy purpose, this can't be allowed to swallow up inherent limitations on the jurisdiction of a court. As discussed above, this justification, taken to its utmost, could lead to any party, anywhere being bound by the terms of an order.[370] And in *NML Capital, Ltd*., the court, aware of the likelihood that Argentina would blatantly violate the order, likely fashioned the injunction to target those non-parties, instead of primarily targeting Argentina.[371]

V. CONCLUSION

NML Capital, Ltd.—the result of long-term evasion of judgments (or settlements) by a sovereign debtor—demonstrates the importance of a court's ability to enforce its orders.[372] Nonetheless, the interpretation of the *pari passu* clause accepted by the court, and the relief suggested, put within the court's sights a large array of independent actors, some of whom were foreign, acting in a foreign territory, and not party to the suit.[373] The use of an injunction by a court over the foreign conduct of foreign non-parties implicates the traditional concepts of equity, Federal Rule of Civil Procedure 65(d), and international law concepts of extraterritorial reach of courts.[374] The *NML Capital, Ltd*. courts failed to fully analyze how these concepts define the inherent power of the court and thus (a)

(June 19, 2014), http://www.nytimes.com/2014/06/20/business/economy/ruling-on-argentina-gives-investors-an-upper-hand.html.

368. Amended Order, NML Capital, Ltd. v. Republic of Argentina, Nos. 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2012 WL 5895784, *3 (S.D.N.Y Nov. 21, 2012).

369. Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945).

370. Norris, *supra* note 367.

371. *See* NML Capital, Ltd. v. Republic of Arg., 727 F.3d 230, 243 (2d Cir. 2013) (concluding that the amended injunctions serve as notice to payment system participants that they could become liable if they were to assist Argentina in violating the district court's orders).

372. *Id*.

373. *Id*.

374. *See id*. 239–43 (discussing Argentina's issues on appeal which include issues of equity and jurisdiction of the court).

overextended the injunction to reach parties over which they did not have power, and (b) missed an opportunity to better define the limits on equitable power over such non-parties. Until these limits are better defined, the precedent created by *NML Capital, Ltd*. risks further overreach by the courts into areas outside of their jurisdiction.