Leveraging Litigation: Enforcing Sovereign Debt Obligations in *Nml Capital, Ltd. v. Republic of Argentina*

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LEVERAGING LITIGATION: ENFORCING SOVEREIGN DEBT OBLIGATIONS IN NML CAPITAL, LTD. v. REPUBLIC OF ARGENTINA

EMMA KINGDON*

Abstract: In the sovereign debt market, the typical remedies to resolve sovereign default are either the negotiation route or a unilateral exchange offer. However, as a result of increasing insecurity in the sovereign debt market due to rogue sovereign debtors who take advantage of their immunity to opportunistically default and create unfavorable restructuring deals, creditors began resorting to a previously limited remedy: litigation. Although litigation to resolve sovereign default was not a new concept in the sovereign debt market, it was ineffective due to the creditor’s inability to actually recover the money judgment from the sovereign debtor. In NML Capital v. Argentina, the Second Circuit determined that the injunctive remedy was necessary to motivate sovereign debtors to meet the obligations to their creditors and to reduce the nonpayment risk in the sovereign debt market. By establishing an enforcement mechanism for a creditor against a sovereign debtor, the Second Circuit increased certainty for investors by ensuring collectability and providing an incentive to invest in sovereign debt markets.

INTRODUCTION

On October 26, 2012, the United States Court of Appeals for the Second Circuit decided NML Capital, Ltd. v. Republic of Argentina, the most significant decision of a nearly decade-long dispute between the hedge fund NML Capital, joined by other holdout creditors, and the Republic of Argentina (“Republic” or “Argentina”). The case upheld the district court’s injunctions designed to remedy Argentina’s breach of its promise to pay bondholders after a 2001 default on its sovereign debt. On November 21, 2012, the district court issued amended orders clarifying the operation of the injunctions against Argentina, and the Second Circuit subsequently affirmed the injunctions on ap-

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1 NML Capital commenced an action in September 2006 to obtain a declaratory judgment in the Southern District of New York that the Banco Central de la República Argentina (BCRA) is the “alter ego” of Argentina, and therefore the BCRA’s assets held at the Federal Reserve Bank of New York (FRBNY) may be attachable in the execution of the judgment against the Republic. EM Ltd. v. Argentina, 720 F.Supp.2d 273, 277, 299–301, 304 (S.D.N.Y. 2010), aff’d sub nom. NML Capital Ltd. v. Banco Central de la República Argentina, 652 F.3d 172 (2d Cir. 2011).

2 NML Capital, Ltd. v. Argentina (NML I), 699 F.3d 246, 250 (2d Cir. 2012).
peal in August 2013.\textsuperscript{3} Criticizing the judgment, Argentina’s president called
the hedge funds “vultures.”\textsuperscript{4}

Part I of this Comment discusses the debt Argentina issued, the restructur-
ings that led to the lawsuits, the district court injunctions, and the subsequent
appeals entered by the Republic. Part II discusses the traditional remedies for
sovereign default under legal precedent and discusses the structures for enforc-
ing sovereign debt. Part III argues that consistent with current legal precedent,
the Second Circuit’s decision correctly implemented an injunctive remedy.
This holding will provide security to future creditors by ensuring recovery
against defaulted sovereign nations of the full amount of their bonds, rather
than allow sovereign debts to opportunistically default.

\section{I. BACKGROUND}

\subsection{A. Argentina’s Debt Under the FAA and Subsequent Restructurings}

In 1994, Argentina began issuing debt securities according to a Fiscal
Agency Agreement (“FAA Bonds”) that NML Capital and other holdout credi-
tors purchased starting in December 1998.\textsuperscript{5} The FAA contains provisions to
protect purchasers of the FAA Bonds from subordination.\textsuperscript{6} Principal among
these provisions is the \textit{Pari Passu} Clause, a so-called “Equal Treatment” pro-
vision which requires that the payments on the FAA Bonds must always rank
at least equally with all other present and future unsubordinated debts.\textsuperscript{7} The
FAA also included a provision that required Argentina to pay all unpaid inter-
est and principal in full in the event of a default.\textsuperscript{8} In 2001, however, Argentina
defaulted on the FAA Bonds and its president issued a “temporary moratori-
um” on principal and interest payments on its debt, including the FAA Bonds.\textsuperscript{9}
The Argentinian president has renewed this temporary moratorium every year
since 2001.\textsuperscript{10}

In 2005, Argentina offered creditors new exchange bonds (“Exchange
Bonds”) to replace the FAA bonds.\textsuperscript{11} These Exchange Bonds provided Argen-
tina with 70 percent debt relief.\textsuperscript{12} To encourage bondholders to participate in

\begin{thebibliography}{9}
\bibitem{nmlcapvarg}NML Capital, Ltd. v. Argentina (\textit{NML II}), 727 F.3d 230, 237–38 (2d Cir. 2013).
\bibitem{eavis}Peter Eavis, \textit{Hedge Funds Win Ruling in Argentina Bond Case}, N.Y. TIMES (Aug. 23, 2013),
\bibitem{nmli}NML \textit{I}, 699 F.3d at 251.
\bibitem{nmli2}Id.
\bibitem{nmli3}Id.
\bibitem{nmli4}NML \textit{II}, 727 F.3d at 237.
\bibitem{nmli5}NML \textit{I}, 699 F.3d at 251.
\bibitem{nmli6}Id.
\bibitem{nmli7}Id.
\bibitem{porzecanski}Arturo C. Porzecanski, \textit{From Rogue Creditors to Rogue Debtors: Implications of Argentina’s
\end{thebibliography}
the exchange offer, Argentina stated that any existing defaulted bonds that were eligible for exchange but were not restructured would remain in default indefinitely, as the Argentine government had no intention of resuming payments on those bonds. The Argentine Legislature also passed the “Lock Law” which prohibited any type of in-court, out-of-court, or private settlement regarding the bonds, and ensured that a bondholder could not seek a remedy at law against the Republic. In 2010, Argentina temporarily suspended the Lock Law in order to initiate a second exchange offering that was identical to the 2005 offering, including reaffirmation that non-restructured bonds would remain in default indefinitely. Argentina restructured 91 percent of its defaulted debt after the two exchange offers. The Argentine government continued to make payments on the Exchange Bonds while failing to make any payments on the defaulted FAA Bonds.

B. The District Court’s Injunctions and Argentina’s Appeal

NML Capital and the other holdout creditors filed suit seeking injunctive relief against Argentina over the defaulted FAA Bonds at various points from 2009 to 2011. Under the Equal Treatment provision in the FAA, Argentina is required to rank the payment obligation for the FAA Bonds equally with that of other debt. The Southern District of New York granted NML Capital’s motion for summary judgment and held that by lowering the rank of its bonds, Argentina violated the Equal Treatment provision in two ways: (1) “when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under [plaintiffs’] Bonds” and (2) “when it enacted [the Lock Law] and [the Lock Law Suspension].”

The district court granted injunctions providing that whenever Argentina pays any amount due on the Exchange Bonds, it must also pay NML Capital a “ratable payment.” The court reasoned that an injunction was necessary because Argentina’s clear intention to disobey any money judgment rendered any other legal remedy inadequate. The court further observed that the injunctions merely required that Argentina respect the commitments it made when it

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13 NML I, 699 F.3d at 252.
14 See id. at 252.
15 Id. at 252–53.
16 Id. at 253.
17 Id. at 251.
18 Id. at 253.
19 Id. at 259.
20 Id. at 254.
21 Id.
22 Id. at 255.
encouraged NML Capital and the other creditors to purchase the FAA Bonds.\textsuperscript{23} The court determined that the injunctions both ensured that Argentina would honor its legal obligations and served the public interest because otherwise creditors of a sovereign state have no other recourse through which to protect their interests.\textsuperscript{24}

At the appeals stage, Argentina put forth a number of reasons why the district court erred.\textsuperscript{25} On October 26, 2012, the Second Circuit rejected Argentina’s arguments and affirmed the district court’s holding.\textsuperscript{26} The court remanded the case back to the district court, however, to clarify the implementation of the injunctions, particularly their application to third parties and intermediary banks.\textsuperscript{27}

\textbf{C. The Amended Injunctions and Argentina’s Challenge}

On November 21, 2012, the district court issued amended injunctions and the case returned to the Second Circuit to determine whether the clarifications were reasonable.\textsuperscript{28} In the amended injunctions, the district court clarified that the “ratable payment” required Argentina to pay NML Capital the same percentage of the debt from the FAA Bonds as it pays to the Exchange Bondholders for the debt from the Exchange Bonds.\textsuperscript{29} The court also explained that Federal Rule of Civil Procedure 65(d) bound “agents” and “other persons who are in active concert or participation” with Argentina, and thereby prevents third parties from circumventing the injunctions for Argentina.\textsuperscript{30}

On August 23, 2013, the Second Circuit rejected Argentina’s arguments against the amended injunctions and affirmed the orders.\textsuperscript{31} Ultimately, the court calculated that NML Capital’s unpaid principal and prejudgment interest amounted to approximately $1.33 billion, and must be received in full when Argentina pays an installment of interest on its subsequently issued debt.\textsuperscript{32} The enforcement of the amended injunctions was stayed, however, pending the resolution of a petition to the Supreme Court for a \textit{writ of certiorari}.\textsuperscript{33} The Supreme Court declined to hear Argentina’s appeal on October 7, 2013.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{23} \textsuperscript{Id.} at 256.
\item \textsuperscript{24} \textsuperscript{Id.}
\item \textsuperscript{25} \textsuperscript{Id.} at 256–57.
\item \textsuperscript{26} \textsuperscript{Id.} at 246, 265.
\item \textsuperscript{27} \textsuperscript{Id.} at 265.
\item \textsuperscript{28} NML Capital, Ltd. v. Argentina (\textit{NML II}), 727 F.3d 230, 237 (2d Cir. 2013).
\item \textsuperscript{29} \textsuperscript{Id.} at 238.
\item \textsuperscript{30} \textsuperscript{Id.} at 239.
\item \textsuperscript{31} \textsuperscript{Id.} at 230, 248.
\item \textsuperscript{32} \textsuperscript{Id.} at 239.
\item \textsuperscript{33} \textsuperscript{Id.} at 248.
\item \textsuperscript{34} Adam Liptak, \textit{Top Court Will Not Hear Argentina Debt Case}, N.Y. TIMES (Oct. 7, 2013), http://dealbook.nytimes.com/2013/10/07/top-court-will-not-hear-argentina-debt-case/?_r=0.
\end{itemize}
D. Types of Payment Structures for Sovereign Debt

An important consideration regarding the enforcement of a monetary judgment against a sovereign debtor is whether the debtor has chosen a fiscal agent or a trust indenture to pay its creditors.\(^{35}\) Under customary financial practices, the distinction between the two structures is crucial.\(^ {36}\) The type of payment structure determines whether or not the funds may be attached to enforce a remedy.\(^ {37}\)

Under a fiscal agent agreement, a sovereign appoints a fiscal agent to handle its fiscal matters, and thus is a representative of the debtor.\(^ {38}\) Funds held by a fiscal agent remain funds of the sovereign until they are deposited into the creditor’s accounts.\(^ {39}\) Under a trust indenture, a trustee is appointed as a fiduciary agent to manage the matters of the issuance and thus represents the bondholders.\(^ {40}\) Payments held by a trustee cannot be attached once deposited into the trustee’s account because the trustee serves the bondholders.\(^ {41}\) Once the funds are transferred from the sovereign to the trustee, the funds are no longer in the sovereign’s possession and thus are outside the scope of a judgment against the sovereign.\(^ {42}\) A trust indenture, therefore, reduces the incentive to pursue holdout litigation against defaulted sovereigns by limiting the funds available to execute a monetary judgment.\(^ {43}\) In the instant case, to pay interest on the Exchange Bonds, Argentina strategically appointed a trust indenture to transfer funds to the Exchange Bondholders.\(^ {44}\)

II. DISCUSSION

A. Remedies for Sovereign Default under International Legal Precedent

Sovereigns needing debt relief typically followed one of two paths: (1) the negotiated route, in which governments agreed on a debt restructuring deal with a representative committee of bondholders; or (2) a unilateral exchange offer, in which a settlement was presented to all bondholder creditors on a take-it-or-leave-it basis.\(^ {45}\) Argentina followed neither path.\(^ {46}\) Instead, Argentina


\(^{36}\) *Id.* at 42.

\(^{37}\) *See id.*

\(^{38}\) *Id.* at 41.

\(^{39}\) *Id.*

\(^{40}\) *See id.*

\(^{41}\) *Id.* at 41.

\(^{42}\) *Id.*


\(^{44}\) NML Capital, Ltd. v. Argentina (*NML II*), 727 F.3d 230, 239 (2d Cir. 2013).

\(^{45}\) Porzecanski, *supra* note 12, at 323.
issued an unprecedented unilateral exchange offer that provided the government with only 70 percent debt relief and lacked many incentive provisions common in restructurings. Furthermore, to ensure the clear message that this offer was the bondholders’ only option, despite these unfavorable terms, the government passed the “Lock Law.”

Litigation is a straightforward remedy for sovereign default. A landmark decision in sovereign debt litigation, the Elliott case not only established breaches of the Equal Treatment provision as grounds for bringing an action against a sovereign but also established the appropriate remedy. In that case, Elliott Associates, a hedge fund, brought an action in the Southern District of New York to enforce the debt it purchased from Peru in 1983. Holding in Elliott Associates’ favor, the district court issued a judgment against Peru for over $55 million. The judgment carried little value, however, because the hedge fund could not identify any property or assets within the jurisdiction to attach in order to execute the remedy.

Elliott Associates subsequently brought suit against Peru in Brussels, the location of Peru’s clearinghouse, for violation of the Equal Treatment provision. In order to enforce the judgment against Peru, Elliott Associates sought to attach Peru’s funds that were scheduled to pay interest on its restructured bonds. Peru attempted to avoid the attachment by transferring the funds to a fiscal agent. Elliott Associates, however, argued to the court that a fiscal agent is Peru’s agent; therefore the funds remained the property of Peru and could be attached to the money judgment. Elliott Associates successfully obtained a restraining order from the Brussels Court of Appeal that prohibited Peru’s fiscal agent and clearinghouse in Brussels from paying interest on the

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46 Id. at 323–24.
47 Id. at 324–25 (arguing that the transaction was unparalleled because it did not recognize interest arrears nor treat them preferentially, as was the custom; it failed to include an upfront payment to clear a portion of the arrears, a common incentive to ensure success; it was not accompanied by an endorsement from the IMF or other multilateral agencies; and it did not aim for 100 percent participation, but expressed only a need of fifty percent to cure the country’s default).
48 See id. at 325–26.
49 Olivares-Caminal, supra note 35, at 40.
50 Cours d’Appel [CA] [Court of Appeal] Bruxelles, 8th Chamber, Sept. 26, 2000, General Docket No. 2000/QR/92, P8 (Belg.), construed in Olivares-Caminal, supra note 35, at 43.
51 See Olivares-Caminal, supra note 35, at 43.
53 See id. at 824.
54 See id.; Olivares-Caminal, supra note 35, at 43.
55 Bratton, supra note 52, at 824.
56 Fisch & Gentile, supra note 43, at 1106.
57 Id.
58 Id.
restructured bonds.\textsuperscript{59} In order to avoid defaulting on its restructured bonds, Peru was forced to reach an agreement to settle Elliott Associates’ claim through a payment of $58.45 million.\textsuperscript{60} Thus, the Elliott case illustrates that transferring funds to a fiscal agent is not sufficient to avoid execution of a monetary judgment.\textsuperscript{61}

Hedge funds repeated the tactic from the Elliott case successfully, but it produced mixed results and courts did not always issue the injunctive remedy.\textsuperscript{62} Kensington International Ltd. brought an action against the Congo seeking injunctive relief to remedy the Congo’s failure to abide by its obligation under an Equal Treatment provision.\textsuperscript{63} The Court of Appeal refused to grant the injunction because Kensington sought to enjoin assets in England and Wales operated by third parties.\textsuperscript{64} The court determined that these were not available assets of the Congo that the court could appropriately enjoin.\textsuperscript{65} The court reasoned that an injunction would likely disrupt arrangements that the Congo had already made to pay creditors and would interfere with transactions outside the jurisdiction of the court by coercing third parties; therefore, it was an inappropriate remedy.\textsuperscript{66}

The district court, using similar reasoning as applied in the Elliott case, granted NML Capital injunctive relief against Argentina over the defaulted FAA Bonds.\textsuperscript{67} In March 2012, Argentina appealed the injunctions and advanced a number of reasons why the district court erred and the injunctions were an inappropriate remedy.\textsuperscript{68} First, Argentina contended that NML Capital and the other holdout creditors were limited to the remedy of acceleration, the remedy contractually agreed upon in the FAA.\textsuperscript{69} Second, Argentina argued that compliance with the injunctions violated the Foreign Sovereign Immunities Act (FSIA) because it would deprive the Republic of control over its property.\textsuperscript{70} Third, Argentina claimed that the assets were not the property of the Republic because they were deposited into a trust indenture for the bondholders

\textsuperscript{59} See Olivares-Caminal, \textit{supra} note 35, at 43.
\textsuperscript{60} \textit{Id.} at 44–45.
\textsuperscript{61} Fisch & Gentile, \textit{supra} note 43, at 1105–06.
\textsuperscript{62} See Bratton, \textit{supra} note 52, at 824.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.} ¶ 4, 7 (quoting Kensington Int’l Ltd. v. Republic of the Congo, 2002 No. 1088 (Commercial Ct. Apr. 16, 2003)).
\textsuperscript{66} \textit{Id.} ¶ 7 (quoting Kensington Int’l Ltd. v. Republic of the Congo, 2002 No. 1088 (Commercial Ct. Apr. 16, 2003)).
\textsuperscript{67} NML Capital, Ltd. v. Argentina (\textit{NML I}), 699 F.3d 246, 254 (2d Cir. 2012).
\textsuperscript{68} \textit{Id.} at 256.
\textsuperscript{69} \textit{Id.} at 257.
\textsuperscript{70} \textit{Id.}
and therefore could not be attached.\textsuperscript{71} Fourth, Argentina argued that because the harm to the creditors was monetary, the district court erred by concluding that the harm was irreparable.\textsuperscript{72} Fifth, Argentina contended that the injunctions ran counter to the public interest because they would plunge the Republic into a new financial and economic crisis.\textsuperscript{73} Finally, Argentina argued that this decision would have far-reaching implications for other sovereign nations issuing debt because it enables “a single creditor to thwart the implementation of an internationally supported restructuring plan” on other sovereign nations issuing debt.\textsuperscript{74}

The Second Circuit affirmed the holding, agreeing with the district court’s determination that Argentina breached the Equal Treatment provision and this entitled NML Capital to injunctive relief.\textsuperscript{75} The court dismissed Argentina’s claim that acceleration was the contractually agreed upon remedy in the FAA, as no clause in the FAA limited the remedies available for a breach of the agreement.\textsuperscript{76} Therefore, the court found that other appropriate remedies, including injunctive relief, could be implemented.\textsuperscript{77} Furthermore, the Second Circuit concluded that the injunctions did not deprive Argentina of control of its property, as they did not attach, arrest or execute upon any property, but rather, allowed Argentina to pay its debts with any source it chose.\textsuperscript{78} The district court found that the Republic could pay NML Capital the amount of the judgment; therefore the Second Circuit did not find support for Argentina’s claim that the injunctions would force the sovereign into a new financial crisis.\textsuperscript{79} Finally, the court determined it was unlikely that future sovereigns would be in the same position as Argentina because collective action clauses, which eliminate the possibility of sovereign debt litigation, were included in 99 percent of the bonds issued since 2005, including Argentina’s restructured bonds.\textsuperscript{80}

\textbf{B. Enforcing Judgments Against Sovereign Debtors}

To pay interest to its Exchange Bondholders, Argentina transferred funds to an indenture trustee, Bank of New York Mellon ("BNY").\textsuperscript{81} BNY forwarded the funds to the registered owner of the Exchange Bonds, who then transferred
the funds to a clearinghouse. The clearinghouse subsequently deposited the funds into financial institutions that conveyed the funds to the Exchange Bondholders. Rule 65(d) binds “agents” and “other persons who are in active concert or participation” with an enjoined party. Therefore, in its amended orders, the court clarified that the injunctions applied to Argentina, and through the operation of Rule 65(d), also bind the indenture trusteed(s), the registered owners, and the clearinghouse. These parties are entities involved in the system through which Argentina pays Exchange Bondholders; therefore, they could assist Argentina in evading the injunctions.

To challenge the amended injunctions, Argentina advanced a list of reasons why the amended injunctions unjustly injured itself, the Exchange Bondholders, and the public. First, Argentina argued that the amended injunctions forced it to use resources protected by the FSIA. Second, Argentina claimed that the ratable payment remedy was inequitable because it resulted in holdout creditors receiving their full principal and all accrued interest while the Exchange Bondholders only received a single installment of interest on their bonds. Third, Argentina argued that the amended injunctions caused unreasonable hardship to Exchange Bondholders. As the Argentine government had made it clear that it would not pay the holdout creditors, neither NML Capital nor the Exchange Bondholders would be paid if the injunctions were enforced. Finally, Argentina claimed the injunctions were injurious to the public interest because their enforcement would have serious repercussions in the capital markets and the global economy.

Argentina, BNY, and a few Exchange Bondholders also advanced arguments as to how the injunctions injure participants in the Exchange Bond payment system. First, BNY and an Exchange Bondholder argued that the district court lacked personal jurisdiction over payment system participants, and therefore, could not enjoin them through the amended injunctions. Second, the Exchange Bondholders argued that the amended injunctions were improper because they could not extraterritorially enjoin the payment systems that deliv-

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82 Id.
83 Id.
84 Id. (citing FED. R. CIV. P. 65(d)(2)).
85 Id.
86 Id.
87 Id. at 240.
88 Id.
89 Id. at 241.
90 Id.
91 Id. at 242.
92 Id. at 246.
93 Id. at 242.
94 Id. at 242–43.
er funds.95 Finally, Argentina and the Exchange Bondholders argued that the amended injunctions violated Article 4A of the Uniform Commercial Code, which establishes the framework of the rights and obligations governing wire transfers, because the injunctions bind parties acting as intermediary banks.96 Argentina claimed that two sections were at issue: § 502, which defines creditor process and bars suits against creditors in the context of electronic fund transfer except against the beneficiary’s bank; and § 503, which requires “proper cause” before a party to a fund transfer may be enjoined.97 The Republic argued that the district court avoided § 502’s ban because the amended injunctions affect multiple banks and lacked the proper cause required under § 503 to enjoin any of parties to transfers not involving Argentina.98

The Second Circuit affirmed the amended injunctions and determined that none of Argentina’s arguments regarding the injuries to the participants in the Exchange Bond payment system had merit.99 The court dismissed the argument that the district court lacked personal jurisdiction, as the injunctions were only issued against Argentina.100 Although the injunctions automatically apply to those who participate with the enjoined party under Rule 65(d), the rule merely acted as notice to payment system participants that they could become liable.101 Therefore, it was irrelevant whether the district court had personal jurisdiction over the other participants, as they were not directly enjoined.102

The Second Circuit also concluded that because it was necessary that the process to pay Exchange Bondholders was covered by the injunctions in order to prevent Argentina from avoiding its obligations to NML Capital, the district court had sufficient reasons to bind Argentina’s conduct, regardless of whether that conduct occurred in the United States or abroad.103 Furthermore, the court determined that § 502 did not apply because the injunctions do not fall within the definition of creditor process.104 Finally, the Second Circuit found that the district court satisfied the “proper cause” requirement of § 503 because injunctions would be ineffective at holding Argentina accountable if they did not cover Argentina as well as the Exchange Bond payment system.105 In accordance with § 503’s ban on injunctions against intermediary banks, the district court excluded intermediary banks from the scope of the amended injunctions,

95 Id. at 243.
96 Id. at 244
97 Id.
98 Id. at 244–45.
99 Id. at 242–43.
100 Id. at 243.
101 Id.
102 Id.
103 Id. at 243–44.
104 Id. at 244.
105 Id. at 244, 245.
but correctly included BNY, the registered owners, and the clearing system within the scope of the injunctions because they did not function as intermediary banks.\footnote{Id. at 245.}

III. ANALYSIS

The Second Circuit was correct in granting injunctive relief to enforce the monetary judgment and in validating litigation consistent with the Elliott case to resolve sovereign default cases.\footnote{See id. at 248; Olivares-Caminal, supra note 35, at 41.} The proliferation of injunctive remedies has become a way to give creditors the certainty and security they seek when investing abroad.\footnote{Porzecanski, supra note 12, at 327 (arguing that international pressure through litigation is the only way to motivate a sovereign debtor to meet its obligations to its creditors in a fair and responsible manner).} Prior solutions for resolving claims with sovereigns needing debt relief created uncertainty for investors because they did not have enforcement mechanisms to ensure the creditors’ recovery rights.\footnote{Id. at 315, 327 (arguing that reforms should be aimed at facilitating the enforcement of claims against sovereigns as seeking a remedy in courts against a sovereign had been a fruitless endeavor); see also Fisch & Gentile, supra note 43, at 1044 (arguing that because countries are not subject to a standardized process of reorganization upon default, the process of negotiations between the sovereign debtor and its creditors allows a sovereign to opportunistically default rather than make the necessary sacrifices to make payments, to create unreasonable restructuring terms, to discriminate against minority creditors, and to allow political factors to influence the restructuring process).} Therefore, the injunctive remedy is the most predictable remedy and best promotes investment.\footnote{See Fisch & Gentile, supra note 43, at 1086–87 (arguing that the District Court for the District of Columbia in Turkmani v. Republic of Bolivia acknowledged the importance of the policy considerations adopted in the New York courts’ acceptance of litigation to enforce sovereign debt because it reduces the nonpayment risk associated with investment in sovereign debt); Olivares-Caminal, supra note 35, at 41.}

Ultimately, in the instant case, NML Capital’s expectations about recovering its investment after Argentina’s default were based on the Elliott case.\footnote{See Olivares-Caminal, supra note 35, at 60.} Prior to this case, trust indentures were typically exempt from attachment because they were considered a distinct entity independent from the sovereign that holds the funds on behalf of the bondholders.\footnote{See id. at 42.} While the use of the trust indenture initially worked in the sovereign debtor’s favor by limiting the funds available to satisfy judgments and thus deterred litigation, the extension of Rule 65(d) in this case now enables holdout creditors to pursue litigation by making those funds available for attachment.\footnote{See Fisch & Gentile, supra note 43, at 1105.} By applying the injunction to the indenture trustees, the registered owners, and the clearinghouse to enforce

\begin{footnotes}
\footnote{Id. at 245.}{Id. at 245.}
\footnote{See id. at 248; Olivares-Caminal, supra note 35, at 41.}{See id. at 248; Olivares-Caminal, supra note 35, at 41.}
\footnote{Porzecanski, supra note 12, at 327 (arguing that international pressure through litigation is the only way to motivate a sovereign debtor to meet its obligations to its creditors in a fair and responsible manner).}{Porzecanski, supra note 12, at 327 (arguing that international pressure through litigation is the only way to motivate a sovereign debtor to meet its obligations to its creditors in a fair and responsible manner).}
\footnote{Id. at 315, 327 (arguing that reforms should be aimed at facilitating the enforcement of claims against sovereigns as seeking a remedy in courts against a sovereign had been a fruitless endeavor); see also Fisch & Gentile, supra note 43, at 1044 (arguing that because countries are not subject to a standardized process of reorganization upon default, the process of negotiations between the sovereign debtor and its creditors allows a sovereign to opportunistically default rather than make the necessary sacrifices to make payments, to create unreasonable restructuring terms, to discriminate against minority creditors, and to allow political factors to influence the restructuring process).}{Id. at 315, 327 (arguing that reforms should be aimed at facilitating the enforcement of claims against sovereigns as seeking a remedy in courts against a sovereign had been a fruitless endeavor); see also Fisch & Gentile, supra note 43, at 1044 (arguing that because countries are not subject to a standardized process of reorganization upon default, the process of negotiations between the sovereign debtor and its creditors allows a sovereign to opportunistically default rather than make the necessary sacrifices to make payments, to create unreasonable restructuring terms, to discriminate against minority creditors, and to allow political factors to influence the restructuring process).}
\footnote{See Fisch & Gentile, supra note 43, at 1086–87 (arguing that the District Court for the District of Columbia in Turkmani v. Republic of Bolivia acknowledged the importance of the policy considerations adopted in the New York courts’ acceptance of litigation to enforce sovereign debt because it reduces the nonpayment risk associated with investment in sovereign debt); Olivares-Caminal, supra note 35, at 41.}{See Fisch & Gentile, supra note 43, at 1086–87 (arguing that the District Court for the District of Columbia in Turkmani v. Republic of Bolivia acknowledged the importance of the policy considerations adopted in the New York courts’ acceptance of litigation to enforce sovereign debt because it reduces the nonpayment risk associated with investment in sovereign debt); Olivares-Caminal, supra note 35, at 41.}
\footnote{See Olivares-Caminal, supra note 35, at 60.}{See Olivares-Caminal, supra note 35, at 60.}
\footnote{See id. at 42.}{See id. at 42.}
\footnote{See Fisch & Gentile, supra note 43, at 1105.}{See Fisch & Gentile, supra note 43, at 1105.}
\end{footnotes}
the monetary judgment, the Second Circuit promoted certainty and security for
investors in Argentina like NML Capital.\footnote{See Eavis, supra note 4 (arguing that the government debt market lacks an authority to resolve disputes between creditors and debtors, thus, by binding the registered owners and clearinghouses, the US courts have become an enforcer); see also Nate Raymond & Jonathan Stempel, UPDATE 4-Argentina Loses Appeal in $1.33 billion U.S. Bondholder Fight, REUTERS, Aug. 23, 2013, http://www.reuters.com/article/2013/08/23/argentina-appeal-decision-idUSL2N0GO0O320130823 (last visited Oct. 16, 2014) (arguing that the enforcement measures were also necessary given New York’s status as a financial center which is advanced only by requiring debtors, including sovereign debtors, to pay their creditors).}

The Second Circuit’s decision to extend Rule 65(d) to bind trust indentures
was necessary because the current legal remedies for bondholders against sover-
eign debtors were not working.\footnote{See Porzecanski, supra note 12, at 326–27.} Throughout the rapid globalization of stock, bond, and currency markets, parties investing in sovereign debt increasingly sought reforms to facilitate the enforcement of claims against sovereigns.\footnote{See id. at 311, 315.} Many creditors had unsuccessfully sought to recover their funds from sovereign
debtors who take advantage of their de facto immunity by entering into litiga-
tion.\footnote{Id. at 316.} By including an injunctive remedy, the Second Circuit’s decision should increase the recovery rate of creditors against rogue sovereign debtors because
the injunctions ensure that monetary judgments are enforced.\footnote{See Olivares-Caminal, supra note 35, at 61.}

Leading scholars of corporate, securities, and financial law highlight sev-
eral reasons why litigation by holdout creditors like NML Capital improves the
debt market.\footnote{Fisch & Gentile, supra note 43, at 1043.} First, it serves as a check on opportunistic defaults and unreasonable restructuring terms.\footnote{Id. at 1047.} Second, it benefits the restructuring process by empowering creditors, particularly minority creditors, and limits complicity among the majority of the creditors.\footnote{Id. at 1047.} Finally, litigation and injunctive relief against rogue debtors promotes the functioning of international capital markets by increasing capital flows to sovereign debtors and increasing liquidity in the
sovereign debt market.\footnote{Id. at 1047.}

Economists have also expressed concern about the deleterious effects of
rogue debtors.\footnote{See Porzecanski, supra note 12, at 311, 316.} One observer noted in the instant case where the unilateral restructuring called for 70 percent relief on debt, that “Argentina’s demand for such massive debt relief was without precedent in its own checkered financial history.”\footnote{Id. at 324–25 (arguing that Argentina’s proposal was unparalleled in other respects, including the fact that it was not accompanied by financial support from the IMF and it did not aim for 100}
not to walk away from its lawful obligations.\textsuperscript{125} Litigation provides the necessary pressure and the injunctive relief provides additional security whereby creditors feel confident to invest.\textsuperscript{126}

Increased judicial intervention, however, has sparked debates against holdout creditors and against litigation for resolving sovereign default.\textsuperscript{127} Critics argue that litigation creates disruption in the restructuring process, lengthens the time needed to complete the restructuring, and increases costs, which results in less money to pay creditors.\textsuperscript{128} Furthermore, the potential for holdout litigation discourages sovereign debtors and other creditors from even entering the restructuring process.\textsuperscript{129} Therefore, according to critics, litigation from holdout creditors brings instability and vulnerability to the sovereign debt market and serves to chill investment because it disadvantages other creditors and harms sovereign debtors.\textsuperscript{130}

These arguments do not recognize that litigation restricts a rogue sovereign debtor’s ability to delay restructurings and enables minority creditors to challenge the terms of restructurings that only benefit majority creditors.\textsuperscript{131} Without the injunctive remedy, litigation was previously unsuccessful in deterring rogue debtors.\textsuperscript{132} After Argentina’s default in 2001, but prior to the restructuring, nearly forty individual lawsuits and more than a dozen class action lawsuits were filed in the United States seeking repayment of Argentina’s obligation.\textsuperscript{133} In Italy, half a dozen bondholders brought legal proceedings against Argentina and similarly in Germany more than 100 additional claimants commenced such actions.\textsuperscript{134} Any holdings in the creditors’ favor would not have any value without an injunction if no property could be attached to the judgments.\textsuperscript{135} Thus, by issuing injunctive relief, the court established itself as an authority to stop rogue debtors from opportunistic defaults and to bring certainty to the sovereign debt market by enforcing monetary judgments.\textsuperscript{136}

\textsuperscript{125} See \textit{id.} at 327.
\textsuperscript{126} See Fisch & Gentile, \textit{supra} note 43, at 1112.
\textsuperscript{127} See \textit{id.} at 1088.
\textsuperscript{128} \textit{Id.} at 1088–89.
\textsuperscript{129} \textit{Id.} at 1089.
\textsuperscript{130} \textit{Id.} at 1090.
\textsuperscript{131} \textit{Id.} at 1098.
\textsuperscript{132} See Porzecanski, \textit{supra} note 12, at 327.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} See Bratton, \textit{supra} note 52, at 824; Porzecanski, \textit{supra} note 12, at 327.
\textsuperscript{136} See Eavis, \textit{supra} note 4; Fisch & Gentile, \textit{supra} note 43, at 1112.
The injunctions at issue in *NML Capital* best encourage investment by ensuring recovery for creditors. Injunctive relief that binds financial agents of sovereigns from making payments on restructured debt creates the incentive for sovereign debtors to meet the terms of their obligations to their creditors. In the original bond, Argentina promised that, in the event of default, unpaid interest, and principal would be due in full. To that end, the court noted that it is equitable for a creditor to receive what it bargained for; therefore, the holding only requires Argentina to meet its contractual obligation. Furthermore, the injunctive remedy provides an authority measure over disputes between creditors and sovereign debtors where the government debt market lacks such a body. Unlike in the private market where there are bankruptcy measures, a country cannot be subject to liquidation or standardized processes of reorganization. Thus, the injunction improves the sovereign debt market by ensuring that a sovereign pays its debts and does not place itself “above the law.”

**CONCLUSION**

In the sovereign debt market, the typical remedies to resolve sovereign default include either the negotiation route or a unilateral exchange offer. As a result of increasing insecurity in the sovereign debt market due to rogue sovereign debtors who take advantage of their immunity to opportunistically default and create unfavorable restructuring deals, creditors began resorting to a previously limited remedy. Although litigation to resolve sovereign default was not a new concept in the sovereign debt market because it brought predictability to the debt market by ensuring recovery to creditors, it was ineffective due to the creditor’s inability to actually recover the money judgment from the sovereign debtor. Without a binding injunction on a sovereign’s financial agents, litigation to recover a money judgment was a fruitless endeavor because there was rarely any sovereign property to attach to the judgment. In *NML Capital*, the Second Circuit determined that the injunctive remedy was necessary to motivate sovereign debtors to meet the obligations to their creditors and to reduce the nonpayment risk in the sovereign debt market. By establishing an enforcement mechanism for a creditor against a sovereign debtor, the Second Circuit followed similar reasoning as the Elliott case and avoided creating additional

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138 *NML Capital, Ltd. v. Argentina (NML I)*, 699 F.3d 246, 256 (2d Cir. 2012).

139 *NML II*, 727 F.3d at 237.

140 *NML I*, 699 F.3d at 256; *see* Raymond & Stempel, *supra* note 114.

141 *See* Eavis, *supra* note 4; *see* Fisch & Gentile, *supra* note 43, at 1047.


143 *See* Raymond & Stempel, *supra* note 114 (quoting Theodore Olson, a lawyer for NML).
uncertainty from issued money judgments that could not be collected due to sovereign immunity. Such an approach for future courts resolving sovereign debt cases would further increase certainty for investors by ensuring collectability and provide an incentive to invest in sovereign debt markets.