



## Global Justice: Why not State jurisdictions in transnational financial disputes?

*Justiça Global: Por que não jurisdições estatais em disputas financeiras transnacionais?*

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## Abstract

The article brings the debate about Global Justice to the centre stage of the Sovereign Debt Restructuring (SDRs) field. The judicial system that intervenes in sovereign debt conflicts was not on the agenda of the last reform processes activated in this field. In the NML Capital vs. Argentina (NML) trial, judges from different instances and different jurisdictions issued declarations of the same dimensions related to the same object of litigation. The article makes a comparative analysis of the argumentative strategies that judges used at the time of justifying their positions in order to show the tensions in which they incurred. It is explained that: a) these tensions are the result of agents –the judges– that must take decisions in a context of crossroads where the expected option in accordance with usual legal practices would undermine their own position in the field of sovereign debt market; b) these crossroads are rooted in the structural limits of the judicial system in which these agents operate. Contrary to what official statements postulate, it is argued that these limits conspire against the possibility that state courts provide Justice in transnational disputes, in which they must judge another equally sovereign State.

**Keywords:** Global justice; Sovereign debt; Transnational disputes.

## Resumo

Este artigo coloca o debate sobre Justiça Global no centro do campo da Reestruturação da Dívida Soberana (REDS). O sistema de justiça que intervém nos conflitos da dívida soberana não fazia parte da agenda dos últimos processos de reforma ativados neste campo. No litígio NML Capital vs. Argentina (NML), juízes de diferentes instâncias e diferentes jurisdições pronunciaram-se sobre as mesmas dimensões do mesmo objeto litigioso. Este artigo traz uma análise comparativa das estratégias argumentativas que estes juízes utilizaram para justificar suas posições e para mostrar as tensões em que incorreram. Explica-se então que: 1) essas tensões são o resultado de agentes –os juízes– que devem tomar decisões no contexto da encruzilhadas em que a opção esperada de acordo com as práticas legais habituais minaria sua própria posição no campo de mercado de dívida soberana; 2) essas encruzilhadas têm suas raízes nos limites estruturais do sistema de justiça, na qual que esses agentes operam. Contra o que postulam os discursos hegemônicos neste campo, argumenta-se que estes limites conspiram contra a possibilidade dos tribunais estatais



de brindar soluções *Justas* em disputas que devem julgar a outro Estado igualmente soberano e que excede-os em sua escala.

**Palavras-chaves:** Justiça global; Dívida soberana; Disputas transnacionais.



## I- Introduction

The debate about *Justice* has not yet occurred in the dominant positions of the sovereign debt market.<sup>1</sup> Modern Age hegemonic worldview of a State-centric *Justice* has been questioned over the last decades from multiple directions (Rawls, 1999, Habermas 2005, Pogge 2008, Beitz 1999). In particular, the problematization over the convenience of establishing transnational institutional arrangements has acquired growing weight in the global economic political agenda (Cortés Rodas, 2009, Kahn, 2012, Nagel, 2005, PrahRuger, 2014). Notwithstanding, in the last two reform processes of the Sovereign Debt Restructuring (SDRs)<sup>2</sup> regime, activated in 2001 and 2013 respectively, the existing judicial system remained unchanged.<sup>3</sup>

The case «NML Capital Ltd. vs. Argentina Republic» (NML, 2010-2016), called by the international press as “the trial of the century”, implied the largest judicial intervention in a SDR process (Halverson Cross, 2015: 113). As a result of this case, magistrates from different judicial instances of the United States and from the jurisdictions of England and Belgium issued declarations in a dispute over a set of funds deposited by Argentina in June 2014 for the payment of its creditors (see table 1).

In this dispute, the majority of the intervening magistrates agreed that the property of these Funds did not belong any longer to Argentina (Knighthead, 2015; 2015a). However, they presented different positions concerning the scope of the «execution sovereign immunity principle», the «applicable Law» and the «responsibility of the custodians of these Funds». Then, a question arises: Which were the argumentative tensions in the resolutions of these magistrates related to these three dimensions?

The existing tensions between the decisions adopted in the NML case and conceptions deeply rooted in the usual legal practices of the sovereign debt market have attracted the attention of the specialized literature. The scope of the protection of States in courts (Alterini et al., 2014), the proportionality of the harm to third parties

<sup>1</sup> The word "Justice" with a capital letter is used to refer to the idea or value of justice while "justice" with a small letter refers to the institution or the judicial system. The initiative to relieve the debt of highly indebted countries constitutes an exception to what has been expressed.

<sup>2</sup> SDRs are processes that begin when a State has problems to pay its sovereign debt. These processes, somehow similar to bankruptcy proceedings, basically seek to refinance or reduce the sovereign debt in order the State can overcome these difficulties.

<sup>3</sup> To understand the content of this regime and its last two reform processes, see Manzo (2018b; 2018c) and Gulati-Gelpner (2006).



(Weidemaier and Gelpner, 2013; Weidemaier, 2013) and the validity of extraterritorial resolutions have been thematic areas already studied (Halverson Cross, 2015). There are, nevertheless, few works that studied the NML case, comparatively analysing the decisions of magistrates of different jurisdictions about the same object of litigation (Manzo, 2018a).

In order to show these tensions, this article, taking official documents of the case as *corpus* of data (see Table 1), introduces a comparative analysis of the “argumentative strategies”<sup>4</sup> of the judges involved in the mentioned dispute –whose characterization is presented in the following title–, directed to justify the adequacy of their decisions at the three said dimensions.

Before that, the paper introduces the contemporary debate over Global Justice. It shows how and why its main exponents challenge the current state-centric judicial system, such as the one in force in the sovereign debt market. More relevant, the article translates the debate to the logic of this field. From there, it explains under which position and discourse the reform of the judicial system was impugned in the last two decades, although this system had been at the very centre –precisely because of the NML case– of the activation of the last SDRs reform processes (Manzo 2018b).

The paper completes its conceptual framework defining the meaning of the three selected dimensions, and tracing an analytical line between them and two structural limits to which the judges are subject at the time of intervening in typical sovereign debt market conflicts as: a) the limit that arises from the State scale of the jurisdiction in relation to the trans-State scale in which these disputes are in essence reproduced and b) the limit that emerges from the State character of the courts at the moment of judging another equally sovereign State (Manzo, 2018a; 2018b).

By means of this interface between the analysis level of social practices and that of social structures (see table 2), this article means to form part of the global *Justice* contemporary debate from a different perspective. Indeed, while the authors participating in this debate focus their efforts on theorizing about the benefits of building some kind of cosmopolitan order, this work opts for the opposite way of

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<sup>4</sup> Wodak and Meyer (2003:115) define “discursive strategies” as those that arise from a set of practices more or less interrelated and more or less intentional that an agent adopts in order to achieve a certain objective. The “argumentative strategies”, which suppose a specificity of these strategies, are those through which the emitters categorize, classify or define the characteristics of a given discursive object, trying to sustain their affirmations (Vasilachis, 2003:101).



empirically reflecting the deficiencies of maintaining a State-centric order in the globalization age. Then, the article changes the structuring axis of the debate by asking «why not a State-centric order» instead of «why yes a cosmopolitan order» and, in doing so, shifts from a mental experiment –in terms of Rawls (1999)– to one of empirical character.

The article helps to see that the judges involved in the Funds dispute offer mutually incongruent arguments over the same object of litigation and in relation to the same analysis dimension. It is explained, in accordance with the used conceptual framework, that: a) these inconsistencies are the result of agents –the judges– that must make decisions in a context of crossroads where the expected option, according to usual legal practices, would undermine their own position in the field of sovereign debt market; b) those crossroads are rooted in the structural limits of the judicial system in which these agents operate.

Finally and contrary to what the promoters of the last reform processes of the current SDRs regime state (Taylord, 2002, 2002a; Quarles, 2010; Chamberlin 2010; Hagan 2014; Gelpner, 2014; Makoff-Kahn, 2015; Sobel, 2016; DeLong-Aggarwal, 2016; Gelpner-Heller-Setser, 2015), in this paper it is argued that this system does not tend to efficiently distribute the rights and obligations of the parties involved in a sovereign debt dispute, as it was demonstrated in the NML case in which thousands of innocent third parties suffered irreparable damage (Manzo, 2018a).

## **II- The dispute over the funds deposited by Argentina in June 2014: involved agents and magistrates.**

There is not an International Bankruptcy Court or similar. Consequently, the judges of State jurisdictions intervene in those cases in which a dispute arises between a debtor State and its creditors (Alterini et. al, 2014).

The 2001 default of Argentina, the largest registered until then, was followed by hundreds of legal actions in different jurisdictions (Campora, 2010). The vast majority of these actions were declined as a result of the Argentinean SDR processes of 2005 and 2010, accepted by 93% of the creditor universe to which they were directed (Ranieri, 2015).



A minority of the remaining percentage (“holdouts”)<sup>5</sup> went on litigating in New York courts without being able to enforce their sentences by way of ordinary judicial remedies (Alterini et al., 2014).

As a result, between 2009 and 2011, several of those holdouts changed their strategy. Instead of demanding an embargo or similar, they required that the Court declare that Argentina had violated the clause of equal treatment or *pari passu*, discriminating against them, holdouts, in relation to the bondholders that had accepted the Argentinean SDRs offers (exchange bondholders) (Manzo, 2018a).

Judge Griesa, in charge of the NML case, actually did so, tying the destiny of the exchange bondholders, third parties unrelated to litigation, to that of the litigant holdouts. In effect, the Judge decided that, at the next payment expiration, Argentina would be able to pay its exchange bondholders *if and only if* prior to or simultaneously it did so with its plaintiffs (NML, 2011; 2012).

In order to ensure compliance with the resolution, the Judge ruled an *injunction* by which he ordered all agents involved in the payment chain (also third parties unrelated to litigation) to refrain from assisting Argentina with the payment of said exchange bondholders under penalty of being declared in contempt of Court (NML, 2012; 2012b).

These judicial measures were affirmed by the Court of Appeals (NML, 2012a, 2013) and, finally, became effective, on June 16, 2014, when the US Supreme Court declined its intervention in the NML case (NML, 2014; 2014a).

Ten days later, Argentina ignored the prescribed orders. In effect, on June 26, 2014, it deposited the equivalent of 539 millions of the US dollars in accounts of the Bank of New York (BNY) for the payment to the exchange bondholders, omitting payment to the plaintiffs. The next day, Judge Griesa ordered the BNY to freeze those Funds, opening a complex dispute around them (NML, 2014b).

Indeed, in the following months, Argentina asked the representation of the BNY in Buenos Aires to leave,<sup>6</sup> declared illegal the measures prescribed by the US courts<sup>7</sup> and

<sup>5</sup> The word *holdouts* precisely refers to those bondholders who stayed out of a particular SDR process. In other words, it refers to those creditors who did not accept the new conditions offered by the debtor State at the time of restructuring its debt.

<sup>6</sup> Resolution 437/2014, of *Superintendencia de Entidades Financieras y Cambiarias, Banco Central de la República Argentina*.

<sup>7</sup> Article 2 of Act 26.984, passed in September 2014 by Argentina’s National Congress, defines as illegitimate and illegal the obstruction of the deposited funds ordered by judicial orders of the Southern District Court of



sued the US government at the International Court of Justice (ICJ) of The Hague<sup>8</sup>. Judge Griesa ordered the illegality of the payments made (NML, 2014b, 2014c, 2014d) and declared the country in contempt (NML, 2014e). Also, different groups of creditors claimed the Funds; the most prominent of them were the so-called *turnovers* and *Euro bondholders*.

The *turnovers*, holdouts with definitive sentences against Argentina, asked the Judge, in August 2014, to be paid with the frozen Funds. In September of that year, the BNY, other holdouts and even the NML fund itself, objected this claim. Basically, the *turnovers* argued that they enjoyed priority right of those Funds over that of the BNY who only held them as a fiduciary agent. First Judge Griesa, on October 27, 2014, and then the Court of Appeals, on October 5, 2015, ruled against this argumentation (Applestein, 2014; Dussault, 2015).

The *Euro bondholders*, holders of Argentine exchange bonds denominated in Euros, were the recipients of the Funds in question: they were a group of bondholders, unrelated to the NML case, which would have been paid with those Funds if Judge Griesa had not ordered the BNY to retain them.

The *Euro bondholders* started different actions to release the Funds. Firstly, in June 2014, they asked Judge Griesa to make clear that his *injunction* did not include the universe of bonds in their possession (NML, 2014f). Secondly, they appealed the order of August 6, 2014, which formalized freezing of the referred Funds (NML, 2014h). These claims were rejected by two resolutions of November 25 and October 22, 2014, respectively (NML, 2014g, 2014h). Thirdly, in August 2014, they resorted to the High Court of England and, subsequently, to the Commercial Court of Brussels for these purposes (Knighthead, 2014; 2015a).

The *Euro bondholders* obtained relatively favourable pronouncements from the judges of those jurisdictions in February and September 2015, respectively, but could not collect their credits (Knighthead, 2015; 2015a).

The retained Funds were finally released on April 25, 2016, by order of Judge Griesa, virtually two years after they had been frozen (NML, 2016). During this period or later, the innocent third parties affected by the freezing order (exchange bondholders,

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the City of New York, which set actions of impossible compliance and violated the sovereignty and immunities of the Argentine Republic.

<sup>8</sup> See the judicial action presented by Argentina against the US government, on August 7, 2014, before the ICJ of The Hague.



assistant agents and citizens in general) did not receive any compensation for the damages they suffered.

**Table 1**

**Main judicial resolutions related to the frozen Funds**

<b>Dimensions</b>	<b>Date and description of resolutions</b>
General resolutions of the case	<p>-First instance: on December 7, 2011, Judge Griesa pointed out that Argentina violated the <i>paripassu</i> clause. On February 23 and November 21, 2012, the Judge prescribed the payment method and the measures for ensuring compliance with its resolutions (<i>injunction</i>).</p> <p>-Second instance: on October 26, 2012, and August 23, 2013, the Court of Appeals affirmed the orders prescribed by Judge Griesa.</p> <p>-US Supreme Court: on June 16, 2014, the Supreme Court declined its intervention in the NML case. Consequently, the mentioned orders became effective.</p>
Retention of the deposited funds	<p>-On June 27, 2014, in a judicial hearing, Judge Griesa ordered that the Funds deposited by Argentina did not continue their way to the exchange bondholders. In the hearing of July 22, 2014, he maintained this position.</p> <p>- On August 6, 2014, Judge Griesa specified and formalized his order, asking the BNY to retain the deposited Funds.</p>
Turnovers Request	<p>-First instance: on October 27, 2014, Judge Griesa rejected the request of the <i>turnovers</i> to be paid with the Funds retained by the BNY.</p> <p>-Second instance: on October 5, 2015, the Court of Appeals confirmed the mentioned order.</p>
<i>Euro bondholders</i> Request	<p>-Courts of New York: on October 22, 2014, the Court of Appeals denied the appeal filed by the <i>Euro bondholders</i> in relation to the August 6, 2014, order of Judge Griesa (the order to freeze the Funds). This Judge, on November 25, 2014, expressly made clear that his <i>injunction</i> reached the exchange bonds held by the <i>Euro bondholders</i>.</p> <p>- Court of England: Judge Richards decided on the <i>Euro bondholders'</i> request of February 13, 2015, warning that the Euro-denominated bonds were governed by English Law.</p> <p>- Court of Belgium: the judges of the Commercial Court of Brussels decided on the <i>Euro bondholders'</i> request of September 7, 2015, advancing their position in case the English Court ordered to defreeze the Funds.</p>
Release of the funds	<p>On April 22, 2016, Judge Griesa vacated his injunction, and three days later the retained Funds were released at the BNY.</p>

Table produced by the author, based on the judicial resolutions listed in references.



### III- Global justice debate: from a State-centric to a cosmopolitan order

The political unit *par excellence* of Modernity is the State. The Westphalia Peace Treaty of 1648 symbolically marked the end of the pretention of organizing post-feudal European life by means of an empire (Foucault, 2007:22). Since then, unlike the Middle Ages, Hoffmann (1991) explains, territorial political borders have been clearly differentiated following the idea that to each «sovereign» unit corresponds the exclusive domain inside those borders. In other words, each territory can have only one central power and each of the existing central powers can claim the monopoly of violence within its territory and the exclusive right to make decisions on behalf of its subjects (Hoffmann, 1991: 47).

On planetary scale, the world map is visualized as a mosaic of States.<sup>9</sup> Considering their external face, the sovereign units appear as politically self-sufficient and complete. On this scenario, pre-modern relations among peoples or nations are reconfigured and translated into relations among States. That is to say, in Modernity, inter-national relations are reconstructed in terms of inter-state relations. Without the existence of a global government and without formal hierarchies among sovereign units, the «order»<sup>10</sup> at global level is developed in a relatively anarchic environment where each State seeks to guarantee its security and peace by pursuing its own self-interest (Cortés Rodas, 2010; Hedley, 2005; Hoffmann, 1991; Prah Ruger, 2014).

Like a mirror, on planetary scale, Justice is institutionalized as a mosaic of State jurisdictions. From the XVIth to the XVIIIth centuries, in Europe, the power of sovereigns to apply Law was bureaucratized and reconfigured as an attribute of the sovereignty of States (Foucault, 2007). Each jurisdiction exercised or claimed the monopoly to administer Justice over a neatly defined territory. Hence, during most of the Modernity period, International Law has played a “relational” and “competential” role (Rivero Evia, 2013:61). Indeed, International Law, reflecting the existing political organization, sought to stabilize the external relations among States by means of agreements about certain material areas, and by defining, in case of events that exceeded their territorial borders, the manner of attribution of their competences (Montanari, 2005, Rivero Evia, 2013).

<sup>9</sup> As Habermas (2005) rightly explains, this configuration of the global society is relatively recent and should be considered as such only since the decolonization processes of the second half of the 20th century.

<sup>10</sup> We use the word “order” between angle brackets (« ») to show that we do not assume that its units and structures necessarily tend towards equilibrium (Hoffmann, 1991).



### III.1- The debate over Global Justice: general characterization and main exponent.

In the described scenario, the currents that analyse International Relations (IR) have been reluctant to think in terms of global Justice.

The realist and neorealist mainstreams, either prioritizing in their analyses the atomistic character of the sovereign units or the logic of the system in which the units operate,<sup>11</sup> do not place culture as the immanent principle of the global «order».<sup>12</sup> Machiavelli and Hobbes, when this conception was started, and also Carr and Morgenthau, in the XXth century, believed that this «order» was created by way of the competition among entities –the States– that legitimately pursued their own self-interests (Hoffmann, 1991; Kahn, 2012; PrahRuger, 2014). Realists consider that Justice can be a virtue within a particular State territory. However, on planetary scale, where a cultural community is not conceived of, there are no relevant moral or legal obligations that bind States together (Cortés Rodas, 2010).

Neo-realism, reflecting upon the social world of the second half of the XXth century, has softened this conception (Cortés Rodas, 2009; Hedley, 2005; Prah Ruger, 2014). Nevertheless, as Hoffmann expresses, this school does not incur in idealistic illusions nor is it surprised by the weakness of the current global institutional architecture: even after the international order established after World War II, the game is still a game of interests and the monopoly of violence continues in the hands of States (Hoffmann, 1991:55). Global Justice is not only unthinkable on the basis of these assumptions, but, supposing it were possible, it would not necessarily be desirable if it included cessions of sovereignty that could undermine the precarious international equilibrium (Cortés Rodas, 2010).

Liberals have neither been enthusiastic about a global Justice. Unlike realists, they do not ontologically reject the possibility that Law become an immanent principle of a hypothetical cosmopolitan «order» (Habermas, 2005; Oropeza, 2004). This is so to the extent that, for this school, Law, as rational Law, acquires its force not only as the

<sup>11</sup> See the differentiation that Hoffmann (1991:55) makes of the sovereign units level and the systems level of analysis in the international "order".

<sup>12</sup> It should be noted that García Secura, prefacing Hedley's book (2005:15), points out that the realist and neo-realist conception "has not recognized the societal character of the international system"; similarly, Cortes Roda (2009:222) observes that contemporary realism overcame the Hobbesian idea of «order» by introducing "the concept of international society". We prefer not to use this terminology since, as Durkheim (1987) already showed, we can talk about "society" even when the immanent principle of social integration is not the community of values and ideas among its members.



result of the threat of physical violence. Also, Law acquires its force from the routine self-compliance of the learned norm and of the individual capacity for voluntarily complying with the rational decision of an impartial third party in case of conflict. However, liberals do not advance but timidly in the theoretical construction of this hypothetical «order» and, they do not do it for sound reasons (Cortés Rodas, 2009; Habermas, 2005; Prah Ruger, 2014).

Perhaps Kant (1999) can better illustrate what has been pointed out.<sup>13</sup> The logic of construction of his reasoning goes from the individual to the State and from the State to globalization, without ignoring the simultaneous imbrications of these three levels of analysis in his theory (Cortés Rodas, 2009, Habermas, 2005). Liberals presuppose that the social «order» must be a liberal «order» and, then, they organize their reflexion upon social reality. The State, which for Kant is a State of Law, must be institutionalized from the beginning to end for ensuring the freedom of individuals. This freedom cannot exist without peace in the external relations among States. Contrary to Grotius, Kant (1999) observes war not a phenomenon that must be ruled by Law but as a phenomenon which, through successive phases, must or can be overcome by humankind. His reflexion upon the global scale is ordered in its conception basically around the need to guarantee peace (Oropeza, 2004). To this end, he theorizes about the construction of a possible federation of Free States. Kant does not conceive a hypothetical supra-national State or an association of sovereign States (Habermas, 2005). In this sense, he chooses the protection of State sovereignty as guardian of individual freedom over those possibilities. In other words, said possibilities would necessarily lead to altering the foundations of the conceptual architecture on which individual freedom rests, something that Kant, aware of the historical context in which he was writing, does not wish to perform. Seen this way, perpetual peace –as Kant conceives it, a shared value to all humankind which needs to be constructed– would be ensured as a moral obligation among States, not legally or politically enforceable (Cortés Rodas, 2009; , 2005, Santiago Oropeza, 2004).

Neoliberals, already thinking about the global scenario of the post-Second World War, give more weight to an international «order» that goes beyond States. Unlike the realists and neo-realists, who tend to visualize the anarchic international environment in

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<sup>13</sup> The choice of Kant is not incidental because he thought about a possible cosmopolitan order and a global Justice. His work inspires the current debate; for example, by way of such prestigious authors as Habermas (2005) and Rawls (1999).



terms of a permanent conflict, those who enrol in this conception tend to highlight/presuppose the cooperation capacity of rational actors or an inclination toward equilibrium in the competition system that they analyse (Hoffmann, 1991, PrahRuger, 2014). However, either in their rational choice or neo-institutionalism version, neoliberals promote a world without government. For this school, governability must rest upon the self-regulating logic of the market and/or on a new global governance (Foucault, 2007; Sousa Santos, 2005; Manzo 2018), leaving little margin for global Justice (PrahRuger, 2014).

In the opposite side, the “*particularists*” (nationalists or communitarians), in terms of PrahRuger (2004:1354), conceive Justice as a virtue that ontologically can only be enjoyed by the partners of a given entity (the Nation or the community). Culture is presented as *the* principle of integration of a particular society. A common cultural base marks the limits and the specific characteristics of the society and of the subjects that form part of it (Beitz, 2011). The nationalists and communitarians understand that there is no global culture. Then, they do not conceive a human society but “human societies” in plural, which have different ways of thinking, feeling and organizing Justice (Beitz, 2011, PrahRuger, 2014).

In the 1970s, in the academic field of IR, an “ethical reflexion” was first perceived (Hoffmann, 1991:110). In this context, already in 1977, a lucid Hedley (2005) warned about the existence of three relatively autonomous conceptions of global Justice that would be in dispute in this field over the subsequent decades.<sup>14</sup> First, «human Justice», which, following the old humanist tradition, maintains that all individuals, regardless of their nationality or community, just by virtue of their condition as human beings, have inalienable rights which must be protected without considering their belonging to a particular State. Secondly, «inter-State Justice» is understood as a set of moral norms which grant common rights and establishes duties to all States as holders of the collective personality of a given people.<sup>15</sup> Finally, the «cosmopolitan Justice» that

<sup>14</sup> The classification of Hedley (2005) is taken into account in an introductory manner and without ignoring the fact that the complexity of the posterior approaches about global Justice can put this classification in tension.

<sup>15</sup> After a long historical process, States are configured as a conceptually autonomous entity of their citizens and rulers; they are transformed, by means of a legal fiction, into bearers of the collective personality of a nation or people –something ontologically different from the sum of their individual members– and, as such, into a centre of imputation of rights and duties: they are, in Modernity, *the* subject of International Law (Hedley, 2005).



prescribes the possibility of defining global common good and, therefore, establishes moral and legal norms for the whole of humankind (Hedley, 2005).

At the end of the Cold War, Rawls (1999) and Habermas (2005) presented two seminal articles –The Law of Peoples and A Political Constitution for the Pluralist World Society– that problematized the issue of Justice on a global scale. Unlike other philosophical worldviews that seek to extend Justice beyond the domestic sphere, Rawls (1999) does not start his reflexions with universal principles with authority in all cases. Indeed, while Leibniz and Locke, sustained in God or in divine Reason, or conceptions such as rational intuitionism and utilitarianism, with centre in human Reason, conceive the possibility of effecting such extension under the presumption of a source of common authority to all human beings –God or Reason–, Rawls (1999:7-8) proposes to achieve this result through a constructivist approach based on successive agreements among decentralized units («consensus by overlapping»). Then, he introduces a “political conception” of Justice that, on the one hand, appears as ontologically tied to institutions and, on the other, is not linked to any particular doctrine or worldview, although it is founded on certain prerequisites of liberal societies (Rawls, 1999:5). Even so, in the second phase of his mental experiment in which the social contract transcends the borders of a given nation-State, Rawls observes the existence of eight common principles not only to liberal societies but also to non-liberal ordered ones.<sup>16</sup> Seen this way, Justice is possible among peoples, and according to him, it is constructed around these principles (Beitz, 2011; Lafont, 2009; Martin, 2015; Rawls, 1999).

In Habermas (2005), the immanent principle that helps to build a notion of global Justice is not the consensus by overlapping but «deliberative democracy». In an attempt to overcome the limitations of the Kantian cosmopolitan project, the author proposes a new global institutionality built around three different scenarios and three types of collective actors: the «supranational», led by a single world organization, the «transnational», and the «global domestic policy», based on networks of governmental and non-governmental actors (Habermas, 2005). The content of the common principles on which Justice should rest on a global scale is not, in this view, defined *a priori* but will be deliberately determined by means of this new global organization. To be legitimate,

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<sup>16</sup> These principles are: political autonomy, legal equality among States, respect to treaties, self-defence, the duty of non-intervention, respect for Human Rights, duties in war conduction and the duty of assistance to other peoples living under unfavourable conditions (Rawls, 1999).



this organization must necessarily respect the procedures that ensure a truly democratic communication (Cortés Rodas, 2010; Habermas, 2005; Lafont, 2009).

The advances of globalization made the position of those who advocate for a kind of Justice that exceeds the domestic sphere acquire increasing visibility. In contemporary discussions, Lafont (2009) observes, it is widely accepted that Justice must guarantee peace, security and the defence of Human Rights on a planetary scale. However, while the objectives of peace and security are indisputable, the same cannot be said with respect to Human Rights (Lafont, 2009:113).

Polarizing positions, the global *Justice* field can be divided into «minimalist» and «maximalist» stands. The former understands that, in the current degree of development of international «order», humankind must establish institutional arrangements that transcend and penetrate a State-centric Justice *only* in those cases in which there are massive and/or systematic violations of this kind of Rights (Habermas, 2005; Rawls, 1999). The latter extends this obligation to a multiplicity of other cases, using the set of provisions contained in the UN International Bill of Human Rights as a point of reference (Lafont, 2009).

In this latter conception are enrolled, among others, Pogge (2008), Beitz (2011) and Caney (2006), known in the literature –simply– as exponents of «Global Justice» (Prah Ruger, 2014). The «redistributive demands» appear as a common topic to all of them and help to introduce their view.

These authors state that in the current world there is extreme social inequality and widespread poverty. Humankind cannot ignore this fact and its resolution should not be thought of in terms of charity but of Justice. This is so since they: a) presuppose social equality as a central value for the proper development of a given society; b) understand that without a minimum standard of material resources the rest of rights tends to become abstract rights; c) consider that these phenomena are related to the functioning of the prevailing social system and visualize a causal relationship between wealth and poverty (Pogge, 2008, Beitz 2011). They also think that this problem is a truly «global» problem and, therefore, it must be assumed and resolved on a planetary scale. The principles that inform global redistributive Justice, Cortes Conde (2009) explains in this sense, must be applied first to the world as a whole and only then, derivatively, to the nation States. Therefore, institutional arrangements of global scope should necessarily be established. On these grounds, the obligation to transfer resources or



capabilities from certain agents to other agents would be a priority (Cortés Rodas, 2009, 2010; Lafont, 2009; Prah Ruger, 2014).<sup>17</sup>

This kind of initiatives, like those proposed by the minimalists, although to a lesser degree, inevitably presupposes the deconstruction of the State-centric Justice. The demands of a global Justice are, in this direction, “demands in favour of a transformation of the system and society of States, and are intrinsically revolutionary (...). Pursuing the idea of a world Justice in the context of the system and society of States implies to enter into conflict with the mechanisms through which the «order» is currently maintained (Hedley, 2005: 140)”. This «order», the author concludes, is structurally incompatible, hostile or reluctant, depending on the type of proposal, with the claim of a Justice that goes beyond the time-space of States (Hedley, 2005).

### **III.2- The debate over Global Justice in the Sovereign Debt Restructuring field: an impugned debate.**

Specifically in the field of SDRs, criticism of the current «order» has recently come mainly from two different sources.

Firstly, it comes from a position that aims to harmonize or to subordinate the phenomena occurring on the sovereign debt market to Human Rights (Bohoslavsky, 2016).<sup>18</sup> This position considers that the logic that governs the contemporary financial system violates the fundamental Rights of the disadvantaged social sectors and, therefore, must be modified on a global scale in compliance with Human Rights prescriptions.<sup>19</sup> The UN Human Rights Council (HRC), enrolled in this conception, in 2014 condemned the actions of the plaintiffs against Argentina. In effect, the UN HCR understood that with their «vulture funds» practices the plaintiffs violated such Rights<sup>20</sup>, and, in this sense, sent letters to the NML fund and the US government.<sup>21</sup>

<sup>17</sup> Whereas in “commutative” Justice the rights and duties arise from the mutual recognition of the units of a given entity in terms of exchange or negotiation, in the “redistributive” Justice they emerge from a holistic view of the entity that prescribes these rights and duties taking the common good into consideration (Hedley, 2005: 132-133).

<sup>18</sup> This conception overlaps, to a large extent, with that which analyses the sovereign debt field in terms of development (Stiglitz, 2009, UNCTAD, 2015).

<sup>19</sup> See A/HRC/20/23, “Report of the Independent Expert on the Effects of Foreign Debt (...)”, 10 April 2011, UN.

<sup>20</sup> See A/HRC/27/L.26 “Effects (...) of all human rights: the activities of vulture funds”, September 23th, 2014.

<sup>21</sup> Letters sent by the UN HRC on August 20th, 2014. See pages 62 to 65 of A/HRC/28/85, UN General Assembly.



Secondly stands a position that promotes the creation of a global mechanism for regulating SDRs. This position, commonly known as «legal» or «statutory», seeks to replace the contractual regime that currently organizes this kind of processes (Manzo, 2018b). Different legal or statutory initiatives have circulated in this field over recent years. The two most important ones were channelled through the IMF in 2001-2003 (Krueger and Hagan, 2005) and the UN Special Committee in 2014-2015 (A/RES/68/304, 2014). Despite the existing variability, all the initiatives agree on the need to ensure the international community participation in SDRs and to limit the role that today State jurisdictions play or could play in these events (Manzo, 2018b; 2018c).

The dominant position, generally called «contractual», has impugned the debate about Justice in the last two reform processes of the SDRs regime (Gulati- Gelpner, 2006; Sobel, 2016).

*Contractualists*, inhibiting the demands expressed by the pro-Human Rights position, considered inappropriate discussing financial issues in any other forum except that of the International Finance Institutions (IFIs) or by any other type of knowledge other than the technical knowledge prevailing in these institutions (Xercavins, 2009, Manzo 2018b).

Also, *contractualists* oppose a statutory or legal SDRs mechanism (Makoff& Kahn, 2015). Then, the debate about the role of State jurisdictions in SDRs was put off from the very beginning and did not even form part of the 2001 or 2013 reform agendas. Any institutional arrangement aimed at forging new specialized international entities or that may grant the existing ones the specific faculties for intervening in SDRs processes necessarily requires the sanction of an international bankruptcy law or similar (Gulati-Gelpner, 2006; Sobel, 2016; Manzo, 2018b).

Similarly, with the IR predominant conceptions briefly described and in order to justify this position, *contractualists* oscillated between the discourse of the «unrealizable» or realizable but «undesirable». In effect, in relation to the «unrealizable», they simply maintained that, considering the existing balance of power in this social space, it would be impossible to obtain the required consensus for creating a SDRs mechanism that would alter, among other issues, the role of these jurisdictions. (Gelpner, 2014; Hagan, 2014). With reference to «undesirable», *contractualists* observed that any other change not incremental and gradual, such as the one they



advocate for, would increase the financing costs and, consequently, decrease international financial flows to emerging countries (Sobel, 2016; Gelpner, 2014).

The main premise on which these *contractualist* statements rest, in the hegemonic version of this position, considers that equally efficient results to those proclaimed by the *statutory or legal* position can be achieved without the need of the creation of a statutory or legal SDRs mechanism, and by wording standardized contractual clauses (Manzo, 2018b).

This article aims to challenge this premise. It considers that the transnational disputes which arise between a debtor State and its creditors should necessarily be resolved by a «global» entity governed by norms specifically designed for regulating them. Unlike the perspective commonly used for approaching the global Justice debate, it is not the purpose of the article to think up the qualities that this hypothetical entity should have. It aims to empirically show how profoundly are the structural limitations to which a State-centric judicial system is subjected at the time of judging –at its ordinary courts– a transnational dispute in which one of the intervening parties is a sovereign State, and how this limitation ultimately affects its capability to provide Justice.

This way of approaching the object of study also calls attention to the proposals for global Justice, such as those by Rawls (1999) and Habermas (2005), which imagine a new cosmopolitan «order» that maintains in force the bulk of the existing institutional architecture. More specifically and in the SDRs field, it calls attention to those proposals that promote a new legal or statutory SDRs regime without altering the current conflict resolution system,<sup>22</sup> as long as these proposals seem to ignore that –as explained below– the current crisis of the State Law does not obey to superficial but to structural causes.

#### **IV- The intervention of state jurisdictions in trans-state financial disputes: dimensions of analysis**

The sovereign debt market is essentially a trans-state market. Until the 1970s, the States financing on the international market was satisfied through inter-state relations, while

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<sup>22</sup> There are very few contemporary statutory or legal proposals, like the one of Ugarchete-Acosta (2003), that advocate for the creation of an International Bankruptcy Court or similar and, there are even some, such as Makoff's (2015), which construct their initiative precisely around State jurisdictions.



at the end of the '90s it was obtained through private agents, especially by the issuance of sovereign bonds (Manzo, 2018c).<sup>23</sup> The main stock exchanges where these bonds are issued, although physically located in the territory of particular States, constitute real global spaces: meeting points between money demanders and suppliers from different parts of the world. When they are issued, these bonds and their derivatives are traded on de-localized secondary markets. The foreign exchange flows that these operations entail are transferred electronically, making national borders largely invisible. Finally, the agents that assist debtor States and their creditors in the issuance, purchase and payment of these bonds are essentially companies whose ownership and their organization/production systems are globalized (Gulati-Gelpner, 2006; Krueger & Hagan, 2005).

Despite its trans-state nature, there are no international laws that regulate this market. In this context, «contracts» appear as the main legal form that the operations that take place on it assume. In effect, the involved parties –debtors, creditors and assistant agents– set their rights and obligations in contracts that are materialized in fiduciary or fiscal agreements and in the prospectuses of these debt securities. In the case of parties located in more than one national territory, these contracts emerge as true *ad hoc* international regulations or, in other words, as source of Private International Law (Campora, 2010, Rodríguez, 2012).

However, in the absence of a global judicial system, these contracts are embedded in State jurisdictions. That is to say, the contracts incorporate clauses that in case of conflict remit to judicial systems of particular States. In such cases, the judges of these States will be held responsible for interpreting them in accordance with the specific rules of their own legal system. This is so, because, on the one hand, the State laws organize their judicial systems and regulate the procedures from which the parties can access and litigate in them; on the other hand, the contracts –by governing law clauses– are themselves tied to these State laws (Campora, 2010; Kupelian & Rivas, 2014). In the absence of domestic laws that regulate debtor States crises, these judicial procedures are substantiated before the ordinary civil or commercial judicial branches of said States (Manzo 2018a).

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<sup>23</sup> With credits from other States, either by means of their official banks, development agencies or international financial institutions (Boughton, 2001).



The intervention of this kind of Justice in trans-state sovereign debt disputes locates, as shown in the following sections, local magistrates facing dilemmas of complex resolution.

**Table 2:**  
**Argumentative strategies at the interface between  
the structural and the social practices levels.**

STRUCTURAL LEVEL		SOCIAL PRACTICES LEVEL	
Structural limits	Structural limits in juridical key	Crossroads of judges acting in the dispute over the frozen Funds	Argumentative strategies of the judges acting in the mentioned dispute
Courts of a State judging another equally sovereign State.	Principle of sovereign immunity from jurisdiction and execution.	<b>United States judges:</b> Option 1: respect state sovereignty, even if their sentences could remain without execution. Option 2: execute the sentences, even if their orders could violate state sovereignty.	<b>United States judges:</b> How to justify the implementation of a post-judgment alternative <i>ad hoc</i> remedy that <i>a priori</i> violates the principle of sovereign immunity?
Courts of a State judging a trans-state dispute	Rules that circumscribe the jurisdiction to the state territory and to the object of litigation, and rules that resolve Conflicts of Laws.	<b>United States judges:</b> Option 1: circumscribe their orders to the state territory and to the object of litigation, even if the orders may not be effective. Option 2: issue extraterritorial orders that affect third parties, even if these orders could exceed their jurisdictional power and crash with other Laws.  <b>England and Belgium Judges:</b>	<b>United States judges:</b> How to justify the implementation of an <i>ad hoc</i> alternative remedy that <i>a priori</i> exceeds their jurisdictional power, affects innocent third parties and crashes with other Laws?  <b>England and Belgium Judges:</b>



		Option 1: defend the rights of their citizens, crashing against United States courts and large financial corporations. Option 2: avoid crashing against US courts and financial corporations, leaving their citizens unprotected.	How to justify their inaction in a claim of Justice <i>a priori</i> lawful and fair, in order to avoid crashing against US courts and financial corporations?
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Table produced by the author, based on the conceptual framework presented in the article.

#### **IV 1. A State judges another equally sovereign State: the principle of sovereign Immunity of execution**

All States are formally equal. The inter-state system of international relations is built around this basic assumption (Hoffmann, 1991). This principle is present in classic doctrinaires well as in most contemporary works (Rawls, 1999). It is not just a principle morally recognised. It is at the very heart of International Law. The global legal system is ordered around the consideration that States, as sovereign units, are all equal (art. 2.2 UN Charter). Thus, the possibility that a State judge another State sets this principle in tension from start.

States, formally equal, are materially different. Although in theory any State can request international financing on the sovereign debt market, in practice, not all of them do so. The US and the rest of the G-7 countries, with mature domestic markets and currencies internationally recognized, have the capacity of accessing to investors in their own territories and of issuing debt in their own currency (Gulati-Gelpner, 2006). Similarly, although in theory the States can denominate their debt bonds under the Law of any other State, in practice, this does not happen. In effect, according to the IMF, the 88% of the stock of international sovereign bonds was in 2014 denominated under New York and England Law, and the remaining percentage was under the Law of other key jurisdictions, such as Germany and Japan (IMF 2014, 6).

Seen this way, the judicial system in this field is largely ordered following the power relations that structure global financial governance since the 1970s. Which is to say, the system is ordered by placing the jurisdictions of the G-7 States as crucial fora of



conflict resolution and peripheral/semi-peripheral States as transferors of their own jurisdiction in favour of these States (Campora, 2010, Manzo, 2018c).

Considering the key jurisdictions point of view, a series of arguments directed to justify this power imbalance have been set. These arguments basically follow the logic of rational choice. Indeed, the power to judge an equal is justified since the debtor State obtains benefits from using goods and services (markets, specialized agents, efficient regulations, currency, etc.) located in the jurisdiction of the State that judges them. (Campora, 2010). The judicial systems of key jurisdictions tend to be considered as more reliable than those of other jurisdictions (Makoff, 2015). Similarly, the key jurisdictions judges, at the moment of resolving an international case, usually give priority to the contract clauses over other social-legal dimensions and, therefore, creditors tend to visualize them as market-friendly (FMLC, 2015; Makoff, 2015). Then, it is argued that debtor States which voluntarily renounce their sovereignty increase the success chances of their bond operations and reduce their costs (Campora, 2010).

Considering the debtor States point of view, it is emphasized that these decisions are not taken in a void but within the context of the structurally unequal power relations that shape global governance. This type of sovereignty transfers underline the «US juridical hegemony» that define this governance and enable G-7 countries to «internationalize their own Law» (Manzo, 2018a; 2018b). In this scenario, different specialized authors discuss whether these waivers of sovereignty are or not according to the Constitutions of those States (Kupelian& Rivas, 2014).

Nevertheless, these waivers do not eliminate the nature ontologically different of States with respect to private agents. In fact, at the very core of the Modern State origin appears a complex historical process of differentiation of the State from the person of the King and also from civil society (Foucault, 2007). Well into the twentieth century, the State, as a sovereign entity and representative of a given people, was the only subject of Law in the international arena (Hedley, 2005, Montanari, 2005). This implies, in relation to other States, a claim of the State itself to be treated as a similar entity and, in relation to private agents, on the contrary, as a different one. The State, in function of its pretended monopoly of the physical and symbolic violence, demands to relate itself to non-state entities in terms of hierarchy and verticality (Sousa Santos, 2005).



In the global juridical field, the awareness of this difference is manifested – among others– in the principle of «sovereign immunity». Its relevance in the sovereign debt market is essential. Since the beginning of this market in the 19th century, the issue of how to collect sovereign debts has been a central concern, especially when creditors were private agents. The response to this issue showed different variants throughout history: from the use of military force to diplomatic pressures on the part of the central States in territories where these creditors were settled (Ranieri, 2015).<sup>24</sup> In this context, until the 1980s, the judicial via was not an option, precisely because of the sovereign immunity principle (Weidemaier and Gulati, 2014).

Internationally, this principle was accepted by the UN convention in 2004<sup>25</sup> and by a Hague Court decision in 2012.<sup>26</sup> At state level, it was accepted by the vast majority of the local legislations, beginning with the US in 1976 (Foreign Sovereign Immunities Act, FSIA). There are basically two variants of this principle: the immunity of «jurisdiction» that protects States in case of being sued, and of «execution» that renders protection at the moment when plaintiffs seek to enforce a judgment against them (Kupelian & Rivas, 2014).

In the State of New York, where the NML case was sustained, the immunity of «jurisdiction» was eroded in three different stages. Firstly, when the judges abandoned the «absolute» conception prevailing until the mid 1950s and began to admit demands against States, according to the executive branch recommendations (Tate Letter). The second stage, started in 1976 with the enactment of the FSIA, which institutionalized the «relative» conception of this principle –according to which States are only considered protected by it when they act as such (*iure imperii* acts)– when magistrates gave way to actions of creditors progressively equating the titles of sovereign debt to those issued by private agents (considering these titles as the product of *iure gestionis* acts). The third stage, post *Weltover* case of 1992, in which US judges admitted demands of creditors even if debtor States had not expressly waived their jurisdiction, and whenever there

<sup>24</sup> With the advent of the financial globalization in the 1970s, the financial governance was ordered to isolate from the financial market those debtor States that did not pay their debts or that intended to do so without fulfilling the conditionalities established by the IMF (Manzo 2018c).

<sup>25</sup> “United Nations Convention on Jurisdictional Immunities of States and Their Property”. Although the Convention has not yet come into force, it compiles international custom principles and, as such, is a source of Public International Law in accordance with the provisions of the Article 38 of the ICJ Statute (Alterini et al., 2014: 3).

<sup>26</sup> International Court of Justice (ICJ), “Germany v. Italy”, February 3th, 2012, case available at <http://www.icj-cij.org/docket/files/143/16883.pdf>, consulted on 08-09-2018.



was a «minimal connexion» between the case and its jurisdiction (Manzo, 2018d; Alvarez & Adelarde, 2015).

However, the erosion did not occur with equal intensity in relation to «execution» (Halverson Cross, 2015). In effect, at the beginning of the 21st century, when Argentina defaulted, a kind of paradoxical situation occurred in New York courts. Creditors sued debtor States, their legal actions were generally accepted; in many cases they obtained favourable judgments, but they did not have the instruments to enforce them in courts (Manzo, 2018a). This is so since sections 1609 and 1610 of the FSIA prescribe that the property of a foreign State in the United States shall be immune from attachment, arrest or execution except the property is destined to «commercial activities». Embassies, military bases and diplomatic residences are not included in this type of activities, and US judges have made a restrictive interpretation of their meaning and scope (Alvarez & Adelarde, 2015).

Nevertheless, in ordinary judicial proceedings, this kind of monetary remedies are not the only tools that magistrates have at the time of executing their sentences (Manzo, 2018a). Courts, in terms of section 65 of the US Federal Rule of Civil Procedure (FRCP), have the possibility of ordering the defendant to carry out a certain course of action, such as ordering an «*injunction*» (Weidemaier and Gelpert, 2013).

In this sense, an *injunction* is a judicial remedy aimed at executing a sentence that does not directly apply to «objects», but to «subjects» (*ad personam*) (Ranieri, 2015) and that is granted only as a measure of *ultima ratio*. That is to say, it is granted in those cases in which judges perceive that plaintiffs do not have any other alternative judicial remedy to satisfy their claims (Weidemaier and Gelpert 2013).

Consequently, it is the moment to ask: Could a judge of New York, in a patrimonial litigation, order an *injunction* against a State (Manzo, 2018a)? When having to do it against Argentina, the Magistrates had to support their decisions considering the following dimensions.

A- The *FSIA silences*: until 1976, a judge's decision whether to grant immunity to States was made case-by-case in consultation with the US executive branch. By means of the FSIA, the US legislators intended to change this situation by providing the magistrates a unified and comprehensive legislative framework for all matters relating to sovereign immunity (section 1602, FSIA).



Nonetheless, the complexity of reality does not allow the use of language to leave margin for regulations defining in detail all possible practical circumstances that might arise. In anticipation of this situation, the US legislators opted for a legislative technique in which they detailed only those circumstances in which States are not protected by sovereign immunity –called «exceptions»–and left the rest of the universe of possible circumstances without description, but not without a clear guideline to judges. For this last portion of the universe, the general rule is applied: States are protected by this principle.

In the case of the immunity of «jurisdiction», this «rule-exceptions» logic was expressly prescribed in section 1604, and for that of «execution», it is found in section 1609. Also, this logic was recognized in different jurisprudential precedents. In the *Republic of Argentina v. Amerada Hess* (488 US 428, 434-35, 1989) case, for example, the US Supreme Court stated that the FSIA was the only way for obtaining jurisdiction against a sovereign State. Legal actions would only be admissible in the United States if plaintiffs demonstrated that their cases were contemplated in one of its exceptions. In *De Letelier v. Republic of Chile* (748 F.2d 790, 2d Cir. 1984) case, the intervening magistrates observed that the US Congress had established even stricter interpretation standards for the immunity of «execution», which cannot be ignored even in those circumstances in which plaintiffs finally obtained a “right without a [judicial] remedy”<sup>27</sup>. This corollary, they pointed out, is consistent with the historical purpose of US legislators at the time of enacting the FSIA, when the «absolute» conception of this principle prevailed.

Considering that *injunction* is not expressly contemplated in the FSIA text, the following question should be asked: Which have been the argumentative strategies that the judges used in the NML case for supporting the application of an *injunction* against Argentina? Were the strategies used by magistrates of different instances in relation to the frozen Funds all consistent?

B- The *FSIA restrictive interpretation*: the safeguarding of sovereign property in courts has a high value for US jurists and politicians. They understand that in its proper respect largely rest the attractiveness of the New York jurisdiction as centre of the global financial system (Halverson Cross, 2015).

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<sup>27</sup> *De Letelier v. Republic of Chile* (748 F.2d 790, 2d Cir. 1984), pag. 798.



The different degrees of erosion of immunity from «jurisdiction» in relation to immunity from «execution» are based on this premise and on the fact that in the US jurisprudence it has been zealously safeguarded. In this sense, in *S&S Machinery Co. v. Masinexportimport* (706 F.2d 411, 2d Cir. 1983), a precedent cited in multiple judgments, the judges specifically argued that a Court cannot grant an *injunction* in cases that the FSIA prohibits attachments. The FSIA, they sustained in this sense, would cease to be a referent if courts could avoid its protection simply by naming their restrictions as *injunctions* instead of using the word *embargoes* [or similar].<sup>28</sup>

Then, it is interesting to enquire into which have been the argumentative strategies that the magistrates used in NML at the time of moving away from this juridical standard.

In brief, in 2011, when Argentina had already accumulated a multiplicity of condemning judgments and the litigating holdouts had requested the application of an alternative remedy, the judges of New York were in a dilemma.

The rejection of the holdouts' request would for the judges imply the recognition that, even as magistrates of the world's major power, they had not, in the current degree of globalization development, the legal mechanisms to compel a condemned State to comply with their sentences in case that the State refused to do it. In more accurate terms, this option would for the judges suppose the acceptance that the international political system –including the US– had prioritized the protection of sovereignty over the execution of their judicial judgements in cases of patrimonial disputes.<sup>29</sup>

The affirmation of the holdouts' request would for the judges imply moving away from well-established legal practices, to almost sure incur in arbitrariness and, consequently, put the honour of their courts at stake.<sup>30</sup> The options, of course, were

<sup>28</sup> *S&S Machinery Co, Masinexportimport* (1983):706 F.2d 411, (2d Cir. 1983), pag. 5.

<sup>29</sup> From 2002 to 2016, litigant creditors, in the United States and in other countries, systematically tried to execute properties of Argentina. None of these attempts prospered. This was so not because of Argentina's illegal actions but for the decisions made by the intervening courts. Basically, the courts rejected these requests on the grounds of sovereign immunity from execution (Ranieri, 2015). Then, it must be noted that the current legal system offers different post-judgment remedies: the system itself considers inadmissible the remedies related to sovereign property.

<sup>30</sup> In monetary remedies, the honor of the Court is not directly involved. If the plaintiff fails to gather enough assets to comply with the judgment, the problem lies principally with the plaintiff and not with the Court. In an *injunction*, the Court itself is involved in the dispute; or, stated differently, the Court's reputation gets involved in the conflict. A challenge by the defendant is considered a challenge to its authority and, thus, it should be punished due to contempt *to the Court*. Consequently, the nature of the assets at stake is modified: in a monetary conflict, the monetary remedies relate assets of economic nature to assets of



mutually incompatible and none of them, as it was demonstrated, was gratuitous (Manzo 2018a).

#### **IV.2 Judges with delimited state competences judging a global phenomenon: extraterritorial agents and goods, and conflicts of Laws**

The so-called «regulatory gap» is at the very centre of the state Law crisis in the globalization era. Basically, this gap appears as the result of maladjustment between the time-space in which the Law is reproduced, and in which the phenomena it pretends to regulate are found. On the one hand, the regulations, both in their formal production and application sources, are still largely tied to a State time-space; on the other, the economy, the culture and politics are organized mostly in a global time-space (Sousa Santos & Rodriguez Garavito, 2007).

The Argentine default was a truly global phenomenon. While after the 1982 crisis the Mexican government had to negotiate with about 500 commercial banks with main offices in the G-7 countries territories –(Boughton, 2001)– the Argentinean government, after the 2001 crisis, had to do it with thousands of bondholders scattered all around the world. The Argentinean 2005/2010 exchange bonds were offered on the stock exchanges of Argentina, United States, Germany, Italy and Japan, and were issued in Argentine pesos, dollars, Euros or yens and tied to Argentine, New York, English or Japanese legislations.<sup>31</sup>

The jurisdictional power of magistrates is always limited by the jurisdiction of their courts. From a territorial point of view, as a general principle, a judge jurisdictional power is narrowed to the territory where its Court exercises jurisdiction. When a certain judge prescribes an order that exceeds the Court territorial jurisdiction, the order effectiveness will depend on the correct substantiation of the procedures that the legislation establishes so that the authorities of the territory where it is meant to be applied validate it (Manzo 2018a).

In addition, jurisdictional power is exercised case-by-case. In patrimonial disputes, the parties themselves voluntarily activate a Court and set a *litis* by means of

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economic nature, while in an *injunction* such assets are put in relation to the honor of the Court (Weidemaier & Gelpner 2013; Manzo 2018a).

<sup>31</sup> The information in this paragraph was obtained from pages 6 and 7 of the Argentine demand against the US government, dated August 7, 2014, presented before the ICJ.



the content of their demand and answering-demand. The magistrates must focus on resolving it. As a general principle, they cannot affect objects and subjects unrelated to the *litis*. More accurately, they can only exceptionally do so, in as limited a way as possible, and as long as the affectation renders the community greater benefit than harm (Weidemaier and Gelpert, 2013; Manzo 2018a).

Consequently, this question arises: Could a New York judge in a patrimonial litigation, such as that of NML, order an *injunction* that prescribes courses of action to subjects and, through them, affect rights and objects unrelated to the cause and/or to its State territory? (Manzo, 2018a). The magistrates, at the time of doing so against Argentina, had to support their decisions considering the following dimensions.

A) *Extraterritorial assets*: approximately only one third of the funds that Argentina directs to the payment of its exchange bonds must go through the US territory in order to reach their legitimate recipients (the exchange bondholders). The 539 million dollars that Argentina allocated for these purposes on June 26, 2014, were deposited at the BNY in Buenos Aires, not in US territory. Of said amount, the equivalent of 225 million Euros was directed to Europe –without going through the US territory– in order to precisely pay the *Euro bondholders* (Knighthead, 2015).

In NML, the issue of the extraterritoriality of the assets possibly affected by the *injunction* was debated mostly in terms of the FSIA (Halverson Cross, 2015, Manzo 2018a). Article 19, point “c”, of the UN Convention about sovereign immunity, consistently with the prevailing conception in the international arena, establishes that a judgment against a State can be executed only by means of properties that the State uses for commercial activities within the jurisdiction in which the judgment was established. Likewise, sections 1609 and 1610 of the FSIA expressly state that property of a sovereign State in the United States will be immune unless it is used for commercial activities.

Therefore, which were the argumentative strategies that the intervening magistrates in NML utilized for authorizing and putting into practice a measure that could affect, as actually happened, financial funds outside the US territory (funds that also, in a significant percentage, did not need to pass through the US territory to reach their destination)?

B) *Conflict of Laws*: at international «order» where there is no centralized global government, global phenomena simultaneously set in motion a multiplicity of different



legislations. In such «order», International Law is mainly drafted to establish rules in order to discern which particular Law is applicable in each case (Montanari, 2005, RiveroEvia, 2013). In NML, the frozen Funds dispute activated the legislations of the following four state jurisdictions:

Firstly, the Law of New York State. The bonds held by the plaintiffs had been issued by Argentina under the Fiscal Agent Agreement (FAA) of 1994, which included clauses that denominated such bonds according to the New York Law and assigned jurisdiction in favour of the mentioned state courts.

Secondly, the Law of Argentina. The «contracts» governing the 2005/2010 exchange bonds had been approved by Argentinean norms (decrees 1735/2004 and 536/2010, and acts 26017 and 26547). Because these norms regulate an essential function of the State –as is the payment of its sovereign debt–, they are considered as regulations with a special hierarchy within the country’s legal system. Indeed, both the Argentinean National Congress and its Supreme Court of Justice had expressly referred to them in terms of norms of “national public interest or order”.<sup>32</sup>

Thirdly, the Law of England. As already noted, the 2005/2010 exchange bonds had been denominated under different Laws. Specifically, the deposited 539 million dollars were directed to pay bonds denominated under the Law of New York and England. This latter one was the Law mentioned in the «contracts» of the bonds held by the *Euro bondholders* affected by the *injunction*.

Finally, the Law of Belgium. The *Euro bondholders* were scattered in different countries. Some of them had to be paid by financial agents settled in Belgian territory and authorized by the pertinent authorities of the country to operate in their jurisdiction as such. The decreed *injunction* imposed these agents certain courses of action that, at the moment of being put in practice, would have meant non-compliance with some Belgian norms (Knighthead, 2015a).

In NML, the conflict among these state legislations was materialized in two different manners: a) directly, when the intervening judges discussed which was the Law applicable to the frozen Funds and b) indirectly, at the time of problematizing the legality/illegality of the deposit made by Argentina.

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<sup>32</sup> See art. 1 of the Act (Law) 26.984 and the case called “Claren Corporation e/ E.N - arts. 517/518 CPCC exequátur s/ varios”, CSJN, C. 462. XLVII. R.O.



In consequence, an interesting query emerges: Which were the argumentative strategies that these magistrates used to support their positions?

C) *Extraterritorial agents*: over the last decades, the increasing complexity of the sovereign debt market was accompanied by the progressive financial agents specialization in the assistance of debtor States and their creditors.

These agents are, in essence, global entities which act simultaneously in a multiplicity of state territories. Likewise, a specific financial operation –such as, for example, the payment of the Argentinean exchange bondholders– is usually organized as an «agents global chain» that begins with the State deposit of funds and ends, at the other end, with the collection of these funds by bondholders. Different state jurisdictions play their part in the mentioned chain (Gulati and Gelpner, 2006; Manzo, 2018a).

There are basically two legal forms a State related to these assistance agents: by means of a «fiscal agent agreement» or with a «trust indenture». The main difference between these two forms, Olivares-Caminal (2013:42) observes, is that, in the former case, the fiscal agent acts as a representative of the sovereign issuer while, in the latter, the trustee is an agent representing the bondholders.

This distinction is not a minor one: as soon as the funds are deposited in the trustee's account, they cease to be sovereign funds (they are held by the trustee acting on behalf of the bondholders), while the funds held in a fiscal agent's account continue to be sovereign funds until they are deposited in each creditor's account (Olivares-Caminal, 2013).

In this process, the place of payment is relevant. In fact, if the trustee's account is located within the territory of the Issuer State, the State completes the transfer of property of the fund entirely within its own jurisdiction, which *a priori* contributes to protect these funds against possible embargoes or similar dictated by foreign judges (Olivares-Caminal, 2013, Manzo, 2018a).

The rights and obligations of the trustee or fiscal agent are established in the trust indenture or fiscal agent agreement. In case of financial operations that exceed a given national territory, these «contracts» emerge as real international regulations.

Also and as earlier noted, these «contracts» also refer to the Law of individual States and to the prospects of the bonds issued in their contractual framework (Campora, 2010; Rodríguez, 2012).



Finally, the assistance agents must obey the legislations of the state territories where they have been opportunely authorized to operate as such (Olivares-Caminal, 2013; Manzo, 2018a). Following these considerations, a breach of their obligations could result in different sanctions in the different concerned States.

In case of conflict, the trust indenture or fiscal agent agreements referred to a specific jurisdiction (Campora, 2010). Likewise, if a trustee or fiduciary agent violates the legislation of a given country, a judge of such country can intervene to review or punish its actions. In this situation, it must be clarified, the agent is not judged as a trustee or fiscal agent but as a financial institution authorized to operate in that country's jurisdiction. That is to say, the judge intervening in this case has no jurisdictional power to punish the agent for breach of trust indenture or fiscal agent agreement (which in such cases is remitted to the jurisdiction of another magistrate) but for breach of its state Law.

Finally, it should be noted that, if the trustee or fiscal agent is an international entity with subsidiaries in different state territories, for legal purposes and as a general principle, it is held that these subsidiaries are legally separate entities different from each other and from their head office (Halverson Cross, 2015).

Considering that: a) Argentina had organized the assistance of its exchange bonds using a «trust indenture» legal form; b) Buenos Aires was established as the «place of payment»; c) not all the agents assisting the exchange bondholders with the collection of their debts are tied by «contract» to the New York jurisdiction –in fact, those who assist the *Euro bondholders* are tied to the English jurisdiction; d) many of these agents operate outside the US territory and do not necessarily have their main business offices there; e) for them to comply with the NML *injunction* would imply, as actually happened, coming into conflict with the «contract» they had signed and with the Law of other States in which they were authorized to operate, then, it may be opportune to ask which were the argumentative strategies that the magistrates involved in the frozen Funds dispute used to justify their jurisdiction over these agents. Also, which were those strategies which they used at the time of discussing the responsibilities of these agents for not fulfilling their contractual/legal obligations?

In brief, the US judges at the moment of ordering or confirming the NML *injunction* were at a crossroads. Restricting it exclusively to its state territory would have largely limited the capacity for pressuring Argentina and the chances of forcing



Argentina to comply with the sentences.<sup>33</sup> Extending it beyond the US territory, it would have very likely led them to overstepping their jurisdictional power and causing tension with international contracts unrelated to the *litis*.

The magistrates of England and Belgium, at the moment of deciding the destiny of the frozen Funds, were aware that a decision contrary to the NML *injunction* would have pushed their courts into conflict with the US courts and, perhaps, also with the large financial institutions assisting Argentina with the exchange bonds payment. The opposite would have unjustly left the *Euro bondholders* unprotected.

## V. Argumentative tensions among the magistrates involved in the NML frozen Funds dispute

Bellow, the argumentative strategies used for supporting the judge's position in each dimension are explained, with stress on the tensions among them.

### V 1- Argumentative strategies to justify the validity of the NML *injunction*: silences and restrictive interpretation of the FSIA

The magistrates that intervened in NML did not state their standpoints about the «FSIA silences» when they justified the validity of the ordered *injunction*. However, the US Supreme Court did so at the moment of confirming the *discovery* requested by NML.<sup>34</sup> Taking into account that this resolution was issued the same day,<sup>35</sup> in relation to the same litigating parties and considering post-judgment remedies authorized by the same procedure code (the US FRCP), the literature –quite reasonably– extends the

<sup>33</sup> Judge Griesa expressly presented this argument in different instances of the NML process (NML 2014b; 2014c). This was so because the *injunction* was directed to force Argentina to comply with the sentences. The crossroads was either Argentina paid the plaintiffs or defaulted on its exchange bonds (Weidemaier-Gelpner, 2013). If the *injunction* had been limited to the US territory, said default would not have affected the entire exchange bonds universe but about a third part of them.

<sup>34</sup> In 2010, after successive unsuccessful attempts at executing Argentina's property, NML sent subpoenas to the Bank of America and *Banco de la Nación Argentina* requesting information about the country's assets. The banks rejected the sub-poenas, the reason why NML demanded the intervention of the New York Court. On September 2, 2011, Judge Griesa dismissed Argentina's objections and compelled, through a *discovery* order, the said entities to provide the requested information. The order was confirmed by the Court of Appeals on August 20, 2012. Consequently, Argentina, on February 18, 2014, submitted the case to the US Supreme Court (NML, 2014i).

<sup>35</sup> On June 16, 2014, the US Supreme Court decided, on the one hand, not to intervene in the *certiorari* presented by Argentina in relation to the ordered *injunction* (NML, 2014a) and, on the other, to do so in the case against the *discovery* order (NML, 2014i).



arguments used by the US Supreme Court, in this case, about the *discovery* (NML, 2014i), to the *injunction* case, (NML, 2014a; Halverson Cross, 2015).

These arguments, in relation to the silences of the FSIA, chain-connected a set of interrelated premises. In effect, the US Supreme Court stated that: a) Congress established in the FSIA a comprehensive framework for resolving any claim of sovereign immunity; that is to say, that any sovereign immunity claim must be resolved based on the text of the Act (NML, 2014i:7); b) the text of the Act regulates immunity from execution expressly in sections 1609 to 1611 which, basically, consider that “the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611” (NML, 2014i: 7); c) the *discovery* –and also the *injunction*– are not contemplated in the FSIA as remedies for enforcing a judgment: the text of the Act does not mention a single word on the subject (NML, 2014i:8).<sup>36</sup>

At this point, a hypothetical observer, linking premises “a”, “b” and “c”, could well conclude that these post-judgment remedies would be, consequently, inappropriate against a sovereign State, in accordance with the structure of the FSIA. In addition, the outcome would be consistent with the historical purpose of the US legislators, who, at the moment of enacting the Act, conceived the absolute protection of immunity from execution as the general principle on which specific exceptions should be expressly established (Halverson Cross, 2015).

Nevertheless, in this case, the US Supreme Court moved away from this reasoning. For supporting their decision, the judges sequentially associated the following argumentative premises:

First, the Supreme Court made a brief historical review of the development of the sovereign immunity principle in the United States, not for adhering to the Congress historical purpose but for extending the discretionary power of the judiciary in relation to the FSIA. Foreign sovereign immunity –the Court stated in this sense– “is, and always has been, a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution (NML, 2014i: 5)”.

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<sup>36</sup> It is important to emphasize that the US Supreme Court in this instance refers to the *discovery* as a post-judgment remedy that could help in the execution of a sentence. The clarification is pertinent because, as the Court observed, the FSIA does mention the *discovery*, but does it in a different section (No. 1605) which does not regulate sovereign immunity from execution (NML, 2014i:8).



Secondly, the Supreme Court observed that the US federal executive branch before 1952 determined grace and comity. Then, in the 1952-1976 period, it was defined by a dual regime that enabled the judiciary to do so in cases in which the executive branch had not expressly ruled in this respect, and following the logic established in similar precedents (NML, 2014i: 6).<sup>37</sup> However, the Court pointed out that this regime was replaced in 1976 by the FSIA, which compels the judges to decide not on the basis of the executive branch considerations but following the text of the Act (NML, 2014i: 7).

At that point, the Supreme Court deconstructed the «rule-exceptions» structure of the FSIA (section 1609: rule; sections 1610-11: exceptions) by seeking a “third provision forbidding or limiting a *discovery* [or, we add, an *injunction*] (NML, 2014i: 8)”. Not finding it, the Court questioned whether this silence should or not be interpreted in favour of the sovereign State as required by Argentina (NML, 2014i: 8);<sup>38</sup>

Finally, the Supreme Court left the answer to this question in the hands of the judiciary discretionary power and, then, placed this power outside the executive branch considerations in this respect. The opinion of the executive branch about granting or not immunity to a given sovereign State<sup>39</sup> –the Court argued in this direction– should be directed to the US Congress, which was, as a matter of fact, the branch of government that put an end to the dual regime that gave voice to the executive branch in this kind of decisions (NML, 2014i: 11).

However, the fact that the intervening judges were inclined to consider post-judgment remedies not contemplated in the text of the FSIA did not automatically guarantee their validity. For such a situation to actually take place, the judges should explain why these remedies would not incur in any of the extremes observed in the case by those opposed to their materialization. Especially, they should answer why these measures would not attack immune property of a sovereign State.

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<sup>37</sup> Grace and comity –and we add the principle of reciprocity– are central to the proper functioning of International Law and are granted primarily based on considerations of foreign policy. As in a republican system the «political» organs are the legislative and the executive branches, the judicial branch of the United States has been historically very respectful in their suggestions in order of not to affect the division of powers with its decisions (Halverson Cross, 2015; Manzo, 2018a).

<sup>38</sup> On page 10, the US Supreme Court again introduced this issue, thinking about the possible intention of the US legislators of 1976 in relation to the FSIA silences concerning discovery as a post-judgment remedy (NML, 2014i: 10).

<sup>39</sup> These considerations were expressed in NML by means of two *amicus curiae* in favour of Argentina (NML, 2012c and 2012d).



Concerning *injunction*, the organ that expressly rules on this issue was the Court of Appeals (NML, 2012a and 2013). The defence of those who submitted the case to this organ made special emphasis on the protection of sovereign property provided by the FSIA and on the tradition of American jurisprudence to protect it zealously (Halverson Cross, 2015, Manzo, 2018a).<sup>40</sup>

The Court of Appeals, at the time of deciding the case, recognized this tradition. In fact, in its resolution of October 26, 2012, the Court specifically quoted the S&S Machinery Co. precedent in order to show that US courts cannot ignore the FSIA purpose and structure by “granting by *injunction* the relief which they may not provide by attachment [or similar] (NML, 2012a: 24)”.

Notwithstanding, the Court of Appeals understood that the NML *injunction* did not operate with the same dynamic as do the ordinary remedies prohibited by the FSIA (NML, 2012a:24). In order to maintain this assertion, the Court issued a number of arguments at the centre of which was placed an argumentative logic that distinguished and dissociated the «abstract» from the «concrete»: basically, the Court held that in abstract –or in paper– the NML *injunction* did not attack any particular Argentine property. In the judges’ words:

“Section 1609 of the FSIA establishes that “the property in the United States of a foreign state shall be immune from attachment, arrest and execution”. 28 U.S.C. § 1609. Each of these three terms refers to a court’s seizure and control over specific [sovereign] property (NML, 2012a:24)”

Here the keyword is «specific». The enforcement remedies mentioned by the FSIA always affect an identified or individualized set of assets of a sovereign State, while compliance with the prescribed *injunction* –the Court of Appeals indicated– “would not deprive Argentina of control over any of its property [in particular] (NML, 2012a: 24)”.

In order to reinforce this core idea, the Court then presented a couple of interconnected premises. Indeed, the judges stated that the NML *injunction*: a) does not affect any specific sovereign property since it only seeks that Argentina comply with its contractual obligations without discriminating against its bondholders in default. That is to say, the *injunction* does not affect any property since it is an «*ad personam*» measure related to subjects, not to objects (NML, 2012a: 25); b) it affects Argentina’s property only «incidentally» to the extent the order precludes Argentina from transferring money

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<sup>40</sup> See, for example, in this regard, the arguments used by Argentina and by the US executive branch in their *amicus curiae* (NML, 2012d, 2012e).



to some bondholders, the exchange bondholders, without having done it previously or simultaneously to the claimants (NML, 2012a: 25); c) it does not give a specific purpose to any particular sovereign property. The NML *injunction* does not require Argentina to pay any bondholder any amount of money, nor does it limit the other uses to which Argentina may put its fiscal reserves (NML, 2012a: 25).

Taking these considerations, the Court concluded that “the *Injunctions* do not transfer any dominion or control over sovereign property to the Court. Accordingly, the District Court’s *Injunctions* do not violate § 1609 (NML, 2012a: 25).”<sup>41</sup>

It must be said that this argumentative logic did not rule out the possibility that once the *injunction* was put in practice, it could affect specific immune properties and also affect the rights of innocent third parties (bondholders and assistant agents). For the Court of Appeals, the relevant point was that, in abstract, these situations do not occur, and that there were logical possibilities that they would never occur (NML, 2012a).

These possibilities, basically, would appear if Argentina actually complied with the *injunction*: “For example, Argentina can pay all amounts owed to its exchange bondholders provided it does the same with its defaulted bondholders. Or it can decide to make partial payments to its exchange bondholders as long as it pays a proportionate amount to holders of the defaulted bonds (NML, 2012a: 25).” In these cases, the Court noted, the *injunction* would be satisfied without “transfer of any dominion or control over sovereign property to the Court (NML, 2012a: 25).”

However, the Court of Appeals was aware that also there was the possibility that Argentina did not obey the US judicial order (NML, 2013:13). If this were the case, the affected persons –the Court noted– would be able to have the opportunity to exercise their defence (NML, 2013: 16). Even more explicitly and in direct relation to the FSIA, the US Supreme Court pointed out that once the NML *discovery* –and, we add, the *injunction*– were activated, it could affect immune assets, as Argentina argued; also, it could affect enforceable assets such as the plaintiff wished. When the time has come: “the District Court will have to settle the matter (NML, 2014a:10).”

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<sup>41</sup> On August 23, 2013, the Court of Appeals ratified its position in the following terms: “As discussed in our October debate, the original *injunctions*—and now the amended *injunctions*—do not violate the FSIA because “they do not mean seizure or execution of any property” as proscribed by the statute (NML I at 262-63). On the contrary, the *injunctions* allow Argentina to pay its FAA debts with whatever resources it may deem adequate. Not having further guidance from the Supreme Court, we remain convinced that the amended *injunctions* are consistent with the FSIA (NML, 2013: 11)”.



When such a situation actually took place, the District Court in charge of Judge Griesa was confronted with a dilemma. If the Funds deposited by Argentina were left to continue their way to the legitimate recipients, he would allow Argentina to violate his *injunction*. Although this concrete action did not imply that the remedy he prescribed was ineffective in itself, it would greatly weaken the pressure that –he understood– Argentina should receive to be forced to comply with his judgments (NML, 2014c; 2014g). The opposite option, freezing the Funds, would turn the until then hypothetical damages into real damages to third parties and oblige the District Court to violate the very arguments used by the Court of Appeals to confirm its *injunction* in terms of the FSIA.

Judge Griesa chose the latter option. In effect, by means of an order dated August 6, 2014, the District Court: a) individualized a specific set of assets that Argentina directed to the payment of its exchange bondholders. The Court jurisdictional power ceased to be exercised on any property in particular but started to be exercised on “the equivalent of approximately \$539 million (230,922,521.14 in US dollars and 225,852,475.66 in Euros)” deposited by the country in the BNY on June 26 of that year (NML, 2014d:3); b) ordered the BNY to retain those Funds (NML, 2014d: 4). Then, the Court, clearing all possible doubts whether the Funds were or not under its control, explained that the retention would be exercised “pending further Order of this Court” and without making or permitting “any transfer of the Funds unless ordered by the Court (NML, 2014d: 4)”.<sup>42</sup>

On October 27, 2014, the District Court also cleared the doubts in relation to whether the Funds were or not «immune» in terms of the FSIA. Indeed, that day the Court denied the *turnovers* any pretention of having the sentences against Argentina executed, arguing that the deposited 539 million dollars were actually «immune» (Applestein, 2014: 6).

This way the Court –by means of the implementation of its *injunction* and with the aim of enforcing a judgment against a foreign State– took control of a specific group of properties that the Court itself had defined as protected by the principle of sovereign immunity from execution.

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<sup>42</sup> As already noted, the Funds were frozen since the June 27, 2014, Hearing; the aforementioned order of August 6, 2014, formalized said retention (NML, 2014b; 2014d).



Paradoxically, the District Court reached this conclusion after applying to the silences of the FSIA the «rule-exceptions» logic that the US Supreme Court itself had ruled out at the time of affirming its *discovery* order (NML, 2014i). In effect, Judge Griesa, at the moment of denying the turnovers' request, argued that section 1609, which governs the attachment, arrest and execution of the property of a foreign State, "simply does not mention" property located outside the US territory. Therefore, the judge concluded, the claim of the plaintiffs should be considered as not authorized by the FSIA (Applestein, 2014: 6-7).<sup>43</sup>

## V.2- Argumentative strategies for extending jurisdictional power over extraterritorial assets and frozen Funds ownership

As a general rule, the jurisdictional power of a given magistrate is limited to the territory in which his Court has territorial jurisdiction. Nevertheless, the US Supreme Court affirmed in NML a *discovery* order that authorized the plaintiffs of Argentina to request information –and obliged the requested entities to provide it– in relation to assets located outside the US territory ( NML, 2014i:1).

In order to justify the validity of their resolution, the US Supreme Court began by making a strict interpretation of their competence. In effect, the Court stated that their intervention should be exclusively limited to the issues that Argentina had put under their consideration at the time of taking the case to the Court. "What if the assets targeted by the *discovery* request are beyond the jurisdictional reach of the court to which the request is made? May the court nonetheless permit *discovery* so long as the judgment creditor shows that the assets are recoverable under the Laws of the jurisdictions in which they reside, whether that be Florida or France? We need not take up those issues today, since Argentina has not put them in contention (NML, 2014i:4)." The single question to be asked, the Court thereupon concluded, "is whether the FSIA specifies a different rule [for authorizing a *discovery* that operates extraterritorially] when the judgment debtor is a foreign State. (NML, 2014i:5)".

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<sup>43</sup> Although the Court of Appeals at the time of affirming this order did not state whether the remedy requested by the turnovers was or not prohibited by the FSIA, they considered that the remedy was inadmissible because Argentina was «not entitled to possession» of the Funds (Dussault, 2015). The use of this kind of language indicates that the Court was now referring to "objects" and no longer to "subjects" and, therefore, that the Court knew that the *injunction* was affecting specific sovereign property.



To address this issue, the US Supreme Court first observed that the text of the Act makes the distinction between immunity from jurisdiction and immunity from execution. Then, the Court pointed out that the exceptions for the latter were more limited than those of the former and that the FSIA conferred a robust protection for sovereign property (NML, 2014i:7).

In addition, the Court considered appropriate to make a strict interpretation of the text of the Act. Nonetheless, while historically this interpretation rule was followed by American jurisprudence precisely to protect this kind of property, in this concrete case the Court re-signified it in terms of a literal interpretation of the language in the norm, and used it precisely in the opposite sense. In their words,

“even if Argentina were right about the scope of the common-law execution immunity rule, then it would be obvious that the terms of §1609 execution immunity are narrower [than that Argentina considers], since the text of that provision immunizes only foreign-state property “*in the United States.*” So even if Argentina were correct that §1609 execution immunity implies coextensive discovery in-aid-of-execution immunity, the latter would not shield from discovery a foreign sovereign’s extraterritorial assets (NML, 2014i:9).”

As Halverson Cross stated, the results derived from this argumentative logic are “absurd” (Halverson Cross, 2015: 134). This is so if it is considered that, from this logic the assets of a sovereign State located in the US territory, where the American judges have jurisdiction, are potentially more difficult to achieve by means of post-judgment remedies than those other assets located outside the US territory, where *a priori* said judges have no jurisdiction (Halverson Cross, 2015).

It is worth mentioning that the US Supreme Court expressly adhered to this last consideration. Our courts, the Court observed in this sense, “generally lack authority in the first place to execute against property in other countries” (NML, 2014i: 9) and, they reinforced this idea expressing that, “a writ of execution can be served anywhere *within* the State in which the District Court is held” (NML, 2014i: 9).

Then, in the NML case, the Supreme Court authorized a *discovery* designed to operate extraterritorially, mentioning the possible absence of jurisdiction of US courts, but without «making a decision about it»<sup>44</sup>, because, as has already been mentioned,

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<sup>44</sup> According to the US Supreme Court: “This Court assumes without deciding that, in the ordinary case, a district court would have the discretion under Federal Rule of Civil Procedure 69(a)(2) to permit *discovery* of third-party information bearing on a judgment debtor’s extraterritorial assets (NML, 2014i: *syllabus*:1)”.



this issue was not introduced by Argentina at the moment of appealing the *discovery* order (NML, 2014i: 4-5).

However, the fact that the authorized *discovery* could be used for tracing sovereign properties all around the world did not mean, following the US Supreme Court logic, that American courts could take control over those properties with the aim of executing a judgment. The reason is initially because these courts generally do not have jurisdictional power to do so (NML, 2014i: 9), and additionally, because said properties could still be immune in terms of the FSIA (NML, 2014i:9).

When the time came, the Supreme Court –following the argumentative logic that dissociated the «abstract» from the «concrete», similar to the one used by the Court of Appeals for confirming the NML *injunction*– concluded that the District Court should ponder on the matter (NML, 2014i: 10).

When the moment actually arrived, the District Court did not make such evaluation (NML, 2014d) and would not do so until four months after the judge ordered to freeze in Buenos Aires the Funds deposited by Argentina (Applestein, 2014).<sup>45</sup> The result, as stated in the aforementioned October 27, 2014, Order, was that the Funds were effectively immune in terms of the FSIA and, therefore, not available for enforcement measures (Applestein, 2014). Despite this consideration, the Court did not reverse its retention Order but kept it in force for approximately a year and a half longer (NML, 2016).<sup>46</sup>

The October 27, 2014, Order was paradoxical also for two further reasons.

Firstly, because the central argument used by the District Court to justify the Funds immunity was the same as the one used by the US Supreme Court a few months before to confirm its *discovery* order despite the extraterritorial effects (as already noted, the FSIA is only applicable in relation to assets located “in the US”). However, the District Court used such argument exactly in the opposite sense (assets are protected by the FSIA as long as they remain located “outside the US”). In effect, Judge Griesa denied the turnovers’ request to be paid by Argentina by redirecting the frozen Funds to their benefit:

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<sup>45</sup> Exactly four months passed from the time when the retention was decided on June 27, 2014 (NML, 2014b) and the moment when the rejection of the turnovers motion was decided on October 27, 2014 (Applestein, 2014).

<sup>46</sup> It is worth mentioning that on October 22, 2014 the Court of Appeals rejected the appeals of Argentina and of the *Euro bondholders* against the order of August 6, 2014, on procedural grounds (NML, 2014d); therefore, the order and the retention of the Funds was strengthened (NML, 2014j).



“because the Funds are located outside the United States (...), the FSIA, which governs the arrest, execution, or attachment of the property of a foreign sovereign, does not authorize attachment or execution of sovereign property located *outside* the United States (...). Thus, even if plaintiffs show that The Republic has an interest in the Funds, which the court does not reach, turnover would not be authorized by the FSIA. In dealing with what can be subjected to turnover, the FSIA simply does not mention property located *outside* the United States (Applestein, 2014:6-7)”.

Secondly, these considerations clashed with the decision of the August 6, 2014, Order. In fact, this Order had prescribed that, for the reasons stated in the Hearings of June 27 and July 22, 2014, the payments made by Argentina to its exchange bondholders were “illegal” (NML, 2014d: 2). In the Hearings, Judge Griesa said that, consequently, the Funds should be “returned” to Argentina (NML, 2014b: 33, 2014c: 42).

It is inferred that the Court understood that the Funds continued to be the property of The Republic (the payments, the Judge said, “had not been made”<sup>47</sup>) and for that reason the Funds should be returned (NML, 2014b; 2014c). If this inference is correct, then a pertinent question arises: Why should someone “show that The Republic has an interest in the Funds”, as the Court on October 27, 2014, demanded of the turnovers, given that it is self-evident that a person who owns a certain property is naturally interested in it?

If the inference is incorrect, that is to say, if the magistrate considered that the deposited 539 million dollars were not already Argentina’s property –as he had apparently suggested in his last order–, the Funds, therefore, should belong to a third party. In this case, the logical options that appear are also two: either the Funds property then belonged to the exchange bondholders or else belonged to the agent who held them (the BNY), being this last option very difficult to sustain as said agent was a “fiduciary agent” (NML, 2014k: 8).

Regardless of who was the third party owner involved, if the Funds did not yet belong to Argentina, the District Court should have answered not only why it was right to freeze assets considered immune but, also, why the orders did not violate the US Constitution. This is so, because its Fifth Amendment –as the bondholders had formally

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<sup>47</sup> See the District Court opinions in the mentioned Hearings (NML, 2014b; 2014c). Two days after the referred order was presented, at the Hearing of August 8, 2014, the Judge reaffirmed this idea when he observed that there had been no payment [on the part of Argentina] to the exchange bondholders (NML, 2014k: 8).



stated in the judicial file— prevents the US government from using a third party’s private property without fair compensation.<sup>48</sup>

### V.3 Argumentative strategies to justify the legality/illegality of the payment made in Buenos Aires: conflicts among Laws of different jurisdictions and scales

The intervening judges indirectly raised the debate over “ownership” of the frozen Funds concerning the “legality/illegality” of the already made payment.

The action that Argentina carried out on June 26, 2014, was not a random action: in fact, Argentina had deposited the amount, in the form, place and date prescribed by the «contracts» that regulated payment of its exchange bondholders (Knighthead, 2015).<sup>49</sup>

These «contracts» were not under discussion in NML. The plaintiffs had sued Argentina in New York not on their behalf but in the legal framework of the “1994 FAA” that regulated the bonds in their possession. The orders of the District Court in NML, as is widely known, had tied the fate of the payment of these last bonds to those of the exchange bonds, which in no way implied that the exchange bonds «contracts» were under the District Court control (NML, 2012; 2012b; Knighthead, 2015).

The District Court, at the time of deciding about the «legality/illegality» of Argentina’s payment, was confronted with a new dilemma. If Judge Griesa opted for the «legality», he would be retaining assets owned by third parties and, also, he should have admitted that Argentina, in breach of its *injunction*, had not defaulted on its exchange bonds. In so doing, he would be considerably reducing the pressure capacity to force Argentina to obey his sentences (Weidemaier and Gelpner, 2013; NML, 2014b). If the Judge opted for the «illegality», he would necessarily have been led to affirm that the Law of New York, represented in the orders derived of its jurisdictional power, was above International Law, represented in the exchange bonds «contracts», fully valid and in full force outside and within the New York State.

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<sup>48</sup> These arguments were offered, for example, in two appeals against the amended *injunction* filed by the *Euro bondholders* and Ficherd Advisore on December 28, 2012. The Court of Appeals rejected them on procedural grounds, but explained that in case some hypothetical damage actually occurred, the bondholders could bring their claim to Court and also exercise similar actions (NML, 2013: 16). Paradoxically, when that moment arrived, their presentations were again rejected on procedural grounds. See, for example, NML (2014j).

<sup>49</sup> We use the word «contract» of the exchange bondholders to refer to the terms of the prospectus of the exchange bonds securities and of the trust indenture of June 2, 2005 and its 2010 addendum (Knighthead, 2015).



The District Court chose the last option mentioned. The Court declared illegal the payment that Argentina had made in Argentinean territory and in line with said regulations and with the Argentinean legislation, because the payment had been made in violation of the NML *injunction* (NNL, 2014b, 2014c, 2014k). When a notice refers to or asserts the proposition that the Republic has paid, Judge Griesa in this sense stated:

“that proposition, as presented here, is false and misleading. The Republic did pay money to the indentured trustee (...). But that did not constitute payment within the terms specified under the Law as laid out by the District Court and the Court of Appeals. Consequently, there has been no payment to the bondholders, [neither] to the judgment creditors. There has been no payment. Let me repeat: There has been no payment (NML; 2014k:8).”

The Court of Appeals affirmed the August 6, 2014, Order and, consequently, also the arguments used by the District Court for supporting it (NML, 2014j). However, they rejected the turnovers motion, warning that Argentina had not acted fraudulently according to the New York legislation when it deposited the Funds in the BNY because, “under New York laws, preferring one creditor [the exchange bondholders] over another [the bondholders on default] is neither actually nor constructively fraudulent (Dussault, 2015: 4).” Although the Court of Appeals was referring in this point to the general laws that in New York regulate the transfers between debtors and creditors (Dussault, 2015: 3-4), in this particular case there was a specific norm –precisely, the NML *injunction* by them affirmed (NML, 2012a and 2013)– that prevented Argentina from making such transfer if it had not previously or simultaneously paid the defaulting bondholders.

Then, in the consideration of the Court, the action performed by Argentina was «illegal», because it was carried out against the New York Law –represented here by the aforementioned *injunction*– (NML, 2014j), but at the same time «not fraudulent», because this Law was obeyed (Dussault, 2015). These premises are mutually inconsistent if it is observed that precisely a fraud is an action performed by a subject knowing that the action is contrary to a norm, as was the case of The Republic in relation to the NML *injunction*.<sup>50</sup>

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<sup>50</sup> The hypothetical consideration that the Court of Appeals did not actually incur in this argumentative tension because it understood that the ordered *injunction* was not specifically applicable to the situation since Argentina’s action had entirely taken place in Buenos Aires is here of no substance. In the same Resolution in which the Court observed that there had been no fraudulent transaction, the Court considered that Argentina was «not entitled to possession» of the Funds –without clarifying if they were or not of Argentina’s «property». This is so, the Judges stated in this sense, to the extent that the Order of the District Court that declared illegal the made payment (v. NML, 2014d), simultaneously and expressly, prevented The Republic “from”tak[ing] steps to interfere with BNY’s retention of the Funds in accordance with the terms of this Order” (Dussault, 2015: 3)”. Concerning these *injunctions*, the Court concluded, “The Republic [in its



Without expressly declaring it, the intervening Court of England opted for the «legality» of the accomplished payment (Knighthead, 2014; 2015). The English Judge, Mr Richards, presented his conclusion specifically in relation to the *Euro bondholders* (Knighthead, 2015), although his rationale could well be extended to all the bondholders to whom the payment was directed. His arguments can be synthesized following the interrelated premises. The Judge held that:

1) The contracts of the exchange bonds were valid and in full force. The US courts, the magistrate pointed out in this regard, had not prescribed the illegality of the exchange bonds and their orders in no sense had “abrogated or suspended” their contracts (Knighthead, 2015: 10).

2) By depositing, on June 26, 2014, 225 million Euros to the accounts of the fiduciary agent in the Central Bank in Buenos Aires, Argentina in due form complied with the obligations prescribed in sections 3.1 and 3.5 of the 2005/2010 trust indenture and with the complementary terms of this indenture, with respect to payment of the interests accrued and to be demanded by the *Euro bondholders* on June 30, 2014 (Knighthead, 2015: 3 and 6).

3) The deposit made, pursuant to law, had legal effects. The structure created by the trust indenture and the terms of the Euro debt securities, the English Court noted, was “clear and straightforward. Payments made by The Republic to the trustee in respect of the Euro debt securities are to be held by the Trustee on the trusts of the trust indenture and for the purpose of making payments due on the Euro debt securities of principal and interest. Once received by the Trustee, the Funds are held on those trusts and The Republic has no interest in them (Knighthead, 2015:3)”.

Following the arguments of the Court of England, three logical consequences can be inferred, which collide with the briefly described logic of reasoning of the American courts. Firstly, the New York Law, represented in the orders of these courts in NML, is not above International Law, as reflected in the «contracts» of the exchange bonds that maintain their validity. Secondly, Argentina, for as long as it complied with its contractual obligations, did not default on these bonds; it may however be noted that Judge Richards stated that “payment is not deemed to be made on the Euro debt securities until the relevant sums are received by the Holder (Knighthead, 2015: 4)”.

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own territory] is barred from getting the Funds back from BNY, and The Republic is therefore not “entitled to the possession” of the Funds (Dussault, 2015: 3)”.



Finally, the *Euro bondholders*, to the extent that the deposit made was legal, were the owners of the Funds in question. Argentina has no interest in them because once the deposit was made, the Trustee retained the Funds as fiduciary agent and exclusively for transferring them to their legitimate recipients, the exchange bondholders (Knighthead, 2015:3; 2014:5).

The Brussels Court, activated by the *Euro bondholders*, kept silent about the «legality/illegality» of the payment made (Knighthead, 2015a). Nevertheless, the Court adhered to the considerations made by the Court of England with respect to the payment «legality». The Brussels Court subordinated the practical efficiency of its participation in the process to what the England Court would decide in relation to the Funds frozen in Buenos Aires. This is so because, in light of the payment chain of these bondholders, the Funds would reach a Belgian entity, the BNY Brussels, only if the English Court ordered BNY Mellon of New York to transfer them to BNY Brussels (Knighthead, 2015a: 2 and 9-11).

The Brussels Court considered that the Funds, in the percentage addressed to *Euro bondholders*, were governed by English Law (Knighthead, 2015a: 10). Therefore, the intervention of this Court was not in this case directed to interpret or apply the trust indenture –competence, as the Brussels Court understood, of the English jurisdiction (Knighthead, 2015a: 10 and 11). Specifically, it was directed to judge, in accordance with the Belgian Law, whether the Belgian financial entities that were part of the payment chain could or not refuse to transfer the Funds when these latter had been deposited in those entities with the purpose of paying certain *Euro bondholders* (Knighthead, 2015a).

This rationale was consistent with that of the intervening Court of England, but it clashed with the logic followed by the American courts in NML.

The English Judge, in relation to the *Euro bondholders*, stated that the destiny of the deposited Funds concerned his Law and jurisdiction (Knighthead, 2015). This was so because the Funds destiny was regulated by the «contracts» of the exchange bonds. These «contracts», on the one hand, by Section 12.7, denominated the bonds in English Law and, on the other, by Section 12.8, submitted any proceedings arising out of or in connection with the bonds to the jurisdiction of the courts of England (Knighthead, 2015: 3).



The American judges, although they briefly described British and Brussels Resolutions were incorporated in NML's file,<sup>51</sup> did not mention a word whether the Funds in question were or not subjected to English Law and jurisdiction.

At the Hearing of July 22, 2014, Judge Griesa was questioned by the *Euro bondholders* for his lack of jurisdiction, precisely because the Euro exchange bonds in their possession were subjected to English Law and jurisdiction, and because their payments should not go through the US territory. In response, the Judge simply expressed: "The crucial thing is the Court has jurisdiction over The Republic of Argentina, and The Republic of Argentina is making these payments. That is the crucial thing (NML, 2014c: 37)."

However, the District Court never explained (nor did it the Court of Appeals at the time of affirming his orders) how and upon which arguments the jurisdiction waived by Argentina for resolving issues specifically related to the bonds governed by the FAA of 1994 was extended to the exchange bonds. Neither did the US Judges explain in NML why the mentioned jurisdiction waived by Argentina allowed US courts the power to decide about the Funds destiny outside the US territory (NML, 2014b, 2014c, 2014d, 2014h, 2014k, Applestein 2014, Dussault, 2015).

#### **V.4 Argumentative strategies for justifying the jurisdiction and responsibility of the agents assisting exchange bondholders in the collection of their debts**

Both the Court of England and the Court of Brussels affirmed that the English courts were the courts that had jurisdiction over the Trustee who retained the Funds deposited by Argentina (Knighthead, 2015; 2015b).

The English Court observed that: a) the «contracts» of the exchange bonds were in full force; b) the payment made by Argentina was legal; c) the *Euro bondholders* were the legitimate recipients of this payment; d) Argentina or the *holdout* creditors had no proprietary interests in the Funds; e) the BNY was a simple custodian of them and had the obligation of transferring them to their recipients; f) the state of paralysis caused by the US courts was very problematic (Knighthead, 2015). The *Euro bondholders*, mostly European citizens and third innocent parties in NML who were suffering the damage of

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<sup>51</sup> The British and Brussels Resolutions were incorporated by the Euro bondholders in NML's file on November 7, 2014, March 3, 2015, and February 29, 2016.



this situation, had activated the English Court for unlocking the Funds in question (Knighthead, 2014, 2015; 2015a).

However, the English Court did not do so. In order to understand the judges' decision, it is necessary to remember that the English Court faced a dilemma. If the Court affirmed the *Euro bondholders'* request, it would have contradicted the decision of the principal jurisdiction of the global financial market, with which the United Kingdom had much closer economic and political interests than with Argentina. In addition, the Court would have placed the agents of the exchange bonds payment chain, also innocent third parties in NML, at a crossroads when having to choose between breaching the English Court orders or those of the US courts, with the possible sanctions which could have arisen from such breaching. If the Court denied the request, it would have worsened the damage to the *Euro bondholders*. Also, this option would have led the Court to argumentatively circumvent –and it would have almost incurred in arbitrariness– the legal option that, in light of even the Court own description of the facts and laws applicable to this case, appeared as the most likely option to be applied in a situation of this kind.

The English Court chose the last option mentioned. In order to support his position, Judge Richards argued that the New York Court also had jurisdiction over the BNY as the Trustee of the exchange bonds (Knighthead, 2015:10). Seen this way, two courts of two different jurisdictions –those of England and New York– were, according to the Judge, simultaneously competent for ordering courses of action to the same subject (the BNY, as the Trustee) in relation to the same object (the Funds deposited by Argentina for paying the exchange bondholders), (Knighthead, 2015: 11).

The rationale used by the English magistrate for attributing jurisdiction to the New York Court can be described as follows. Firstly, he observed that the case he had to resolve involved “no connection at all with the United States”<sup>52</sup> and, then, clarified that “except one” (Knighthead, 2015: 4). The connection with the United States, Judge Richards explained, emerges from section 5.8 of the exchange bonds trust indenture. This section prescribes that the Trustee for operating as such must have its Corporate

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<sup>52</sup> The present proceedings involve no connection at all with the United States, since –the Judge Richards explained: “The euro debt securities, and the trust indenture so far as it relates to them, are governed by English law, and the Republic has submitted to the jurisdiction of the English courts. Payments are made in euros and are made to an account in the Republic for onward transmission to those ultimately entitled to them, through the systems operated by Euroclear Bank SA/NV and Clearstream Banking SA under Belgium and Luxembourg law respectively (Knighthead, 2015: 4).”



Trust Office in the City of New York, do business in good standing under the laws of the United States, be authorised under such laws to exercise corporate trust powers, and be subject to supervision or examination by US federal, or state authority (Knighthood, 2015: 4). Without further ado, several pages later, Judge Richards stated that “because the Trustee [the BNY] is subject to the personal jurisdiction of the US courts”, it is not convenient, at the moment, to order the Trustee to unlock the retained Funds (Knighthood, 2015: 10-11).

Paradoxically, the New York District Court did not attribute itself said jurisdiction or, at least, did not expressly do so. The aforementioned section 5.8 does not automatically operate in this sense. The intention in this section is to ensure a quality standard for those agents that pretend to operate as trustees in an international business operation such as that of the exchange bonds. In effect, the agents must comply with all the requirements that American laws require for financial entities to act as trustees in their market and are subjected to the control of the authorities that supervise the performance of these entities in said market. If a given entity fails to comply with these requirements or takes actions contrary to the good financial practices in terms of the US legislations, that entity is exposed to an administrative or judicial procedure in the US jurisdiction for correcting or sanctioning that anomaly (Manzo, 2018a). This situation was not the case of the BNY.

During the process, the District Court several times repeated that his jurisdiction fell over Argentina, who had voluntarily waived it by means of the 1994 FAA. The capacity of the Court in extending NML *injunction* over to third parties, such as the BNY and the rest of the payment chain agents, is derived from the rule 65 (d) (2) of the US FRCP. This rule, precisely, establishes that this kind of orders can be extended to those subjects “in active concern or participation” with the condemned (NML, 2012; 2012b; 2014c).

From this reasoning and considering the silence of the Court, two logical possibilities emerge: either the New York Court has had jurisdiction over said agents, or the Court has not had jurisdiction but, nevertheless, ordered them the courses of action. This last possibility appears when it is seen that the mentioned rule 65 (d) (2) is linked to the court power of discretion or equity but says nothing about the court power of jurisdiction. In other words, a rule of a procedure code of a given State does not have nor does it claim to have the capacity to extend the jurisdiction of a magistrate over to a



person or an object not subject to it. The power of discretion or equity of a judge is an attribute of the jurisdictional power of the court and not vice versa. Therefore, the second option, although logically possible, is not valid from a juridical point of view.

The issue becomes even more complex when we continue advancing on the payment chain. While the BNY has its principal business office in the US territory, a factor that American judges usually value at the time of considering the court jurisdiction in a specific case (Campora, 2010), the other agents of the exchange bonds chain do not necessarily have it. Consequently, the bonds that tie these agents to the New York courts are increasingly tenuous, making more difficult imagining the reasons why such consideration would be possible.<sup>53</sup>

The case of the Euroclear Bank is paradigmatic in this regard. Euroclear is a financial institution subject to Belgian Law that manages one of the largest clearing systems in the world and comes into play, as far as payment of certain *Euro bondholders* is concerned, after the BNY Brussels (Knighthead, 2015a:2). Euro Clear participation in the payment process is done entirely in Belgium; that is, outside the US territory, where the Bank only has a small representative office.<sup>54</sup> The exchange bonds on the basis of which Euroclear exercises its participation had been issued in Euros and were not denominated under New York Law (Knighthead, 2015a: 1).

However and mentioning the said rule 65 (d) (2), Judge Griesa expressly stated that his *injunction* reached Euroclear (NML, 2012b: point 2.f 3) and on November 25, 2014, the Judge refused to exclude the Bank from it, arguing that if he did so, he would be making important exceptions to the basic general rule (NML, 2014g; 2014h).<sup>55</sup>

Paradoxically, when its turn came, in this respect the Brussels Court acted in a similar manner as the British Court. In effect, firstly, the Brussels Court recognized the Euroclear Bank's contractual obligation of transmitting the Funds when they eventually reach its accounts. Also, the Court recognized the existence of public order Belgian legislation specifically aimed at preventing that judicial measures similar to the NML *injunction* block this kind of financial transfers (Knighthead, 2015a:13). However, the

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<sup>53</sup> It is pertinent to highlight that although the BNY has its principal business office in New York, the American Judges in NML did not use this circumstance for substantiating their jurisdiction over the BNY. As already pointed out, they based their capacity to order the BNY in the terms of rule 65 (d) (2) of the US FRCP.

<sup>54</sup> An office with approximately 10 employees (Knighthead, 2015a:16).

<sup>55</sup> It is relevant to clarify that the order of November 25, 2014, through which the Judge rejected the motion for clarification presented by the Euro bondholders and supported by Euroclear Bank, was not addressed exclusively to this entity but to all agents of the Euro bonds payment chain (Knighthead, 2015a: 4).



Brussels Court rejected the claim of the *Euro bondholders* to ensure collection of their credits, with the idea that the New York District Court had “jurisdiction” over Euroclear Bank (Knighthead, 2015a: 16).

In order to substantiate the decision, the Belgian Court did not resort to the aforementioned section 5.8. Instead, the Court observed that, “as a matter of fact”, the US courts had already attributed themselves jurisdiction over the Euroclear Bank under rule 65 (d) (2) of the US FRCP (Knighthead, 2015a:16). Thereupon and far from confronting the “matter of fact” with the Law, the Brussels Court sought to predict what the US courts would decide in this respect in future, reaching the conclusion that “it would be highly hazardous” to assume “that the US Courts would not decide that they have jurisdiction over Euroclear (Knighthead, 2015a:16)”.

The Brussels Court made this consideration at the time of evaluating whether Euroclear Bank could validly excuse itself from meeting its transfer obligations in Belgium to comply with the NML *injunction* ordered in the United States (Knighthead, 2015a: 16). In this sense, it is worth reminding that the *injunction* ordered Euroclear –as well as the rest of the payment chain agents– to refrain from assisting Argentina *so pena* of being declared in Contempt of Court by the New York courts (NML, 2012; 2012b). The problem emerges when it is seen that the «contracts» by which these agents had to provide such assistance were international contracts, valid and in full force within and outside the US jurisdiction (Knighthead, 2015). Consequently, for these financial entities, acting in accordance with the NML *injunction* necessarily implied acting unlawfully in relation to said «contracts» and, therefore, being exposed to different possible sanctions.

The US judges never justified why such an *injunction* would be admissible according to US Law. Although an *injunction* is a remedy that grants the magistrate a great flexibility for adapting its content to the particular circumstances of a given case, this characteristic does not imply that at the time of ordering an *injunction* the magistrate can violate general principles of the US legal system. For example, a US judge could not demand –as they did in NML– someone to act against a juridical norm (Weidemaier and Gelpner, 2013; Manzo, 2018a). Because said demand and the damage that could arise from it would be maintained in NML on a hypothetical level until Argentina would not decide to breach the ordered *injunction*, the Court of Appeals



affirmed it, holding that, when the time came, the affected third parties could oppose the defence that they may deem pertinent (NML, 2013).

When the moment actually arrived, Judge Griesa, at the July 22, 2014, Hearing described as “very responsible” the BNY’s action of refusing to transfer the Funds in Buenos Aires, despite the fact that this action, he knew, clashed with the exchange bonds «contracts» and with the laws of other countries (NML, 2014c: 8).

Foreseeing possible sanctions, two weeks later, the Judge Griesa did not act in the cause that produced the BNY’s illegality –that is, amending the Order that requested the Bank to carry out actions against the international contracts that had opportunely been signed– but on its effects, so that they would actually not occur. Indeed, on the August 6, 2014, the Order the District Court prescribed that: “BNY shall incur in no liability under the Indenture governing the Exchange Bonds or otherwise to any person or entity for complying with this Order (NML, 2014d: 2)”. The Court of Appeals, as was already noted, rejected the defence presented against this Order on procedural grounds, consolidating it (NML, 2014h).

The two intervening English judges in the Funds dispute had relatively different positions about this issue. On the one hand, Judge Newey, on November 7th, 2014, observed that the prescription of the said US Order could excuse the BNY from any liability concerning the *Euro bondholders* as a matter of American Law, although he said “I find it hard to see how it can do so in the eyes of the English Courts (Knighthead, 2014: 5)”. On the other, Judge Richards, on February 13, 2015, decided to keep this aspect open “because the Trustee is subject to the personal jurisdiction of the US courts” and, he added, “it may as a matter of English Law be able to rely on the *injunction* as a proper ground for [the BNY] non-compliance with what would otherwise be its obligations under the trust indenture (Knighthead, 2015: 10)”.

The Belgian Court reached different conclusions about the two agents who were in this case subjected to its jurisdiction<sup>56</sup> and, therefore, prescribed two different solutions for them. As concerns the BNY Brussels, the Court understood that when the Funds reached its accounts, there would not be physical or legal obstacle for the Bank to transfer the Funds downstream in the payment chain. “If BNYM Brussels could fear the consequences of such a transfer under US Law, such a fear does not constitute an

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<sup>56</sup> It must be noticed that legal action was filed also against Euroclear SA. The Belgian Court deemed it as inadmissible and, therefore, did not open the process in relation to this agent (Knighthead, 2015: 18).



insuperable obstacle to the execution of its obligations as paying agent (...). The risk of being found in Contempt of Court by the New York courts may not be considered as a legal fact existing as such in Belgium as a result of Article 29 IPC (Knighthead, 2015a: 12).” In relation to Euroclear Bank, on the contrary, the Court considered that in light of the possible sanctions that could be prescript in New York, “it must be concluded that Euroclear Bank does not trespass its right when refusing to transfer to its Participants’ bank accounts, the payments that it would receive from the Republic of Argentina through the chain of intermediaries (Knighthead, 2015a: 16)”.

Then, the Brussels Court stated that, when the moment arrives, BNY Brussels must transfer the Funds deposited in its accounts, while Euroclear Bank could refuse to do so (Knighthead, 2015a: 16).

## VI- Final remarks

This article seeks to bring the debate on Global Justice to the centre of the SDRs field. The performed literature review indicates that during the 19th century and a good part of the 20th century, the bulk of the existing academic currents (realist, neo-realist, liberal, neoliberal, nationalist and communitarians IR currents) were reluctant to think about a «cosmopolitan social order». This was so, because, as Hedley (2005: 140) well explains, pursuing the idea of a world Justice in the context of a world society of States implies to enter into conflict with the mechanisms through which this society is maintained.

With the globalization advance, this conflict has already taken place. In many areas, such as the one analyzed here, the Law has not accompanied the processes of economic and cultural trans-nationalization. The existing gap between a fundamentally State-centric Law and an increasingly globalized social «order» has led to rethinking conceptions deeply rooted in the literature. In this scenario, different authors promote a global Justice debate that deconstructs the current social structure in cases, for example, of massive violations of Human Rights, deep economic inequalities and environmental risks (Rawls, 1999; Habermas 2005; Pogge 2008; Beitz 1999).

This debate has already begun in emerging positions of the SDRs field, through two different lines. As it was shown in the article, the first line purports to translate



typically economic-financial dimensions to the legal-discursive logic of Human Rights (Bohoslavsky, 2016).

The second line intends to modify the SDRs regime, by means of the creation of a legal or statutory mechanism to regulate these processes. Although in the last two major attempts to draft such mechanism, activated in 2001 and 2014 respectively, the instauration of an international bankruptcy court was not specifically proposed, there were initiatives that sought to grant capacities of conflict resolution to supra-state entities such as the IMF, the International Court of the Hague or *ad hoc* Commissions (Manzo, 2018c).

These initiatives found no support in the hegemonic positions of the field and, in practice, did not prosper. In this sense, representatives of the *contractualist* position oppose to any SDRs reforms that involves a regulative intervention on the financial market. From there, the latest two reform processes have basically implied the drafting of new standardized contractual clauses, with which the *contractualists* expect to achieve similar results to those propitiated by the *legalists or statutarists* position (Manzo, 2018b).

Under these considerations, in this field there is no judicial system structured on global scale or a regulation that organises SDRs processes contemplating their specificities. In this frame, the intervention of state jurisdictions in case of conflicts between a debtor State and its creditors appears as a pragmatic solution to one of the “most serious gaps” – in terms of Heillener (2008:89) – in the global financial architecture.

However, it is an imperfect solution. It sets a State in the place of judging, on the one hand, another equally sovereign State by means of its civil or commercial Law and, on the other, a phenomenon that exceeds the State on its tempo-spatial scale. In this scenario, the NML litigation appears as a particularly fertile case of study for empirically visualizing how these two structural limits conspire against the possibility of providing *Justice* in this kind of disputes.

Indeed, the performed analysis shows that during the frozen Funds dispute the intervening magistrates found themselves facing a series of complex dilemmas that led them to incur in the argumentative tensions that are presented in the following table.



Table 3

## Argumentative tensions of the judges involved in the frozen Funds dispute.

Dimension	Argumentative tensions		
	First proposition	Second proposition	
<b>Principle of sovereign immunity from execution</b>	When a post-judgment remedy is not contemplated in the FSIA's text, the competent court must resolve whether it is applicable against a sovereign State in a specific case (NML, 2014i).	When a remedy is not contemplated in the FSIA's text, the competent court must dismiss it without further analysis because the remedy is not contemplated in the FSIA's text (Applestein, 2014).	<b>1</b>
	A post-judgment remedy is inadmissible in terms of the FSIA if it implies that a court takes control of a specific and immune sovereign property (NML, 2012a; 2013).	A judge takes control of a specific and immune sovereign property and his order is admissible in terms of the FSIA (NML, 2014d; 2014j)	<b>2</b>
	Extraterritorial assets are not protected by the FSIA simply because of being located outside the US territory (NML, 2014i).	Extraterritorial assets are protected by the FSIA simply because of being located outside the US territory (Applestein, 2014).	<b>3</b>
<b>Applicable Law</b>	The payments made by Argentina are illegal (NML, 2014d).	The payments made by Argentina are legal (Knighthead, 2014; 2015, 2015a). <sup>57</sup>	<b>4</b>
	The destiny of the Funds deposited in Buenos Aires is a matter of English Law (Knighthead, 2014; 2015; 2015a).	The destiny of the Funds is resolved as a matter of American Law (NML, 2014d, 2014j, Applestein, 2014, Dussault, 2015).	<b>5</b>
<b>Payment chain agents</b>	The BNY as Trustee of the <i>Euro bondholders</i> is subjected to English jurisdiction (Knighthead, 2014; 2015a).	The BNY as Trustee of the <i>Euro bondholders</i> is subjected to New York jurisdiction (Knighthead, 2015).	<b>6</b>
	Euroclear Bank at the time of paying the <i>Euro bondholders</i> in Belgium is subjected to Belgian jurisdiction (Knighthead, 2015, 2015a)	Euroclear Bank at the time of paying the <i>Euro bondholders</i> in Belgium is subjected to New York jurisdiction (Knighthead, 2015a). <sup>58</sup>	<b>7</b>

<sup>57</sup> From this tension, another may be inferred, linked to the property of the deposited Funds; from the positions of the intervening judges, it can be said that the Funds are owned by Argentina (NML, 2014d); the Funds are not owned by Argentina, they belong to the bondholders (Knighthead, 2015); Argentina, being or not the proprietary of the Funds, has no interest in them (Applestein, 2014); Argentina, being or not the proprietary of the Funds, was «not entitled to possession» of them (Dussault, 2015).

<sup>58</sup> It is worth remembering that the American judges ordered these agents without clarifying whether they had or not jurisdiction over them; those who argued in favour of said jurisdiction in the case of the BNY and Euroclear Bank, were the judges of the English and Belgian courts respectively (Knighthead, 2015; 2015a).



	As a matter of English Law, the BNY cannot be exempted from fulfilling its international obligations by adducing the compliance with an extraterritorial order emitted by an American judge (Knighthead, 2014).	As a matter of English Law, the BNY could do so (Knighthead, 2015).	8
	As a matter of Belgian Law, the BNY Brussels cannot be exempted from fulfilling its international obligations by adducing the compliance with an extraterritorial order emitted by an American judge (Knighthead, 2015a).	As a matter of Belgian Law, Euroclear Bank can do so (Knighthead, 2015a).	9

Table produced by the author, based on the analysis carried out in the article.

It is possible to classify these tensions into two different levels according to whether they are or not contradictory.

From a logical point of view, when two propositions simultaneously attribute to the same object two essentially opposite qualities are contradictory and cannot be the two true.<sup>59</sup> In our analysis, this is the case of tensions 1 to 4 of table 3 which, in essence, established: a) the FSIA's «rule-exception» logic applies/does not apply; b) the specific immune sovereign property is protected/is not protected; c) the assets simply because are outside the US territory are/are not immune; d) the payment is legal/illegal.

If these proposals are used, as in the specific case, to support judicial decisions, it is appropriated to review their validity. From a legal point of view, that courts of different instances of the same country present contradictory arguments over the same litigious object is not in itself problematic. The problem appears when the order issued by a lower court is the one that contradicts the order of a higher court. This situation occurred in the tensions reflected in points “a”, “b” and “c” of the preceding paragraph. In these tensions, the District Court of New York was the one that contradicted, at the moment of activated the analysed *injunction*, the propositions that its superior Courts used to affirm it and, consequently, the orders that frozen the Funds in question should not be considered valid ( NML, 2014d; 2014j; Applestein, 2014).

<sup>59</sup> For example: the car is white; the car is black. Both statements cannot be true. Both may be false, or one of them true and the other false.



In the second group, argumentative tensions whose propositions are not logically contradictory are presented. This is the case of the rest of the tensions shown in table 3. Although in this group the propositions in tension can be both true, their content has also negative consequences for the proper functioning of the international financial system. This is so, basically, for two reasons.

Firstly, since these tensions provide judges from different jurisdictions the competence for deciding over the same dimension of the same object of litigation. In particular, this is the condition of the tensions 5 to 7 of table 3 which, in essence, postulated: a) the Funds are governed by English/American Law; b) the BNY is subject to English/ American jurisdiction; c) Euroclear Bank is subject to Belgian/American jurisdiction. The problem arises when it is observed that the international legal system is constructed from its very beginning for preventing this situation occurs, precisely to avoid possible judicial contradictions such as the number 4 of the preceding table (the payments are legal / illegal).

Secondly, since these tensions prescribe or make it possible to prescribe different solutions for agents of a single payment chain. Specifically, this is the case of tensions 8 and 9 of table 3 which, in essence, indicated that: 1) an agent can/cannot be exempted from his obligations; 2) an agent can be exempted/another agent cannot be exempted from his obligations. Juridically, both propositions could be admissible as long as the judges could have supported their decisions in different legal or factual circumstances. However, in practice, these tensions generate uncertainty in the financial system, if we are conscious that these agents are part of the same financial transfer mechanism.

Both such tensions, at a higher level of abstraction, make the current state Law crisis ostensible in the SDRs field. Under these considerations, the Law does not constitute an efficient instrument for organizing restructuring processes since, in the prevailing judicial system, basically any result is possible, as was shown in the NML case.

Also, it should be noted that this case raised this unpredictability to a new level. The performed analysis makes possible to observe in this sense that –contrary to what happens in the rest of State jurisdictions and in the International Law orientation– the US courts, using this precedent, in the future can: a) in case of silence in the FSIA’s text, decide to protect or not the property of a certain State, acting in this sense even against the recommendations made by the US Executive Branch in this regard (NML, 2014i); b)



authorize post-judgment remedies that order courses of action that could affect extra-territorial assets of a sovereign State, whether these assets are or not immune (NML, 2012a, 2013, 2014i); c) take decisions of extraterritorial scope that, on the one hand, fall over subjects and/or objects *a priori* not subjected to their jurisdiction and, on the other, operate over international contracts and/or laws of other States (NML, 2012a, 2013, 2014d, 2014j).

From there, as it has been seen in the work, the US courts exhibited their capacity to act in the NML case as «supra-state»<sup>60</sup> and «global» scope state courts. This way of acting generated reactions in the diplomatic sphere and activated, among others, courts of the England and Belgium jurisdictions that claimed for themselves the jurisdiction over the issues submitted to them (Knighthead, 2015, 2015a).

Nevertheless, in their resolutions, the intervening England and Belgium courts were especially cautious of not pronouncing themselves directly against what was ordered by the US courts. Moreover, the English and Belgian judges legitimized the US courts actions by means of the construction of a set of arguments that attributed jurisdiction to the US courts over the same judicial dimension (Knighthead, 2015, 2015a). In other words, they legitimized the US courts decisions in NML based on a set of arguments which –even despite their precariousness– sought to translate to the logic of the legal field actions of the US courts that until then transcended US borders more as a matter of fact than as matter of Law.

Seen this way, either because of its unpredictability or because of its ex-post facto arrival, the analysis reveals that Law does not constitute the ordering immanent principle of the sovereign debt market. In this direction it must be concluded, with the scope of the data presented here, that the realist and neo-realist schools are both right when they state that the game at international scale is ultimately a game of power and interests.

This last assertion does not imply ignoring the relatively autonomous efficiency of Law. The point is that when the practices of agents located in subordinate positions are perceived by those who are located in the dominant positions as a challenge to their authority or to the *status quo*; when necessary, the latter can, as they actually did in this

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<sup>60</sup> Here, the word «supra-state» is used to refer to the fact that US courts operated in terms of hierarchy and verticality with another equally sovereign State. This characteristic is ostensible, when the US courts, for example, ordered Argentina, in a matter over which they had not assigned jurisdiction, how to act in Argentinean territory in relation to a typically *iure imperii* act as it is the payment of the restructured sovereign debt ( NML, 2014d).



concrete case, place themselves above the Law and stretch its limits until making them virtually unrecognizable.

When this situation takes place, the power relations over which the international financial order rests emerge to the surface. If, as it was visualized in the analysis, those who promote and lead the game of power are agents that represent the prevailing judicial system in the field –judges of key jurisdictions–, the Law crisis is elevated to a new stage and demands deep solutions.<sup>61</sup>

Notwithstanding, the judicial system was not part of the last round of reforms of the current SDRs regime (Manzo, 2018b). The *contractualist* position that guided these reforms opposed to openly debate about global *Justice*. Although they did not promise a solution to all the existing problems (Gelpner, 2014), *contractualists* presented a diagnosis in which there was no real need of producing a structural change in the field (Manzo, 2018b). The article puts this perspective to the test by showing that the state nature of the courts that intervene in these financial disputes structurally conspire against their ability for providing fair and efficient solutions, as it was demonstrated in NML, in which thousands of innocent third parties suffered irreparable damage.

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<sup>61</sup> This is so, on the one hand, because the parties affected by the game have in this context nowhere to go to claim their rights; on the other, while it is expected that these agents guide their practices from a strictly legal rationality and not, as was shown in the NML process, from a calculation in which that rationality appears permeated by extra-legal factors.



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**The author is solely responsible for writing the article.**

