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### The Extraterritorial Reach of Sovereign Debt Enforcement, 12 Berkeley Bus. L.J. 111 (2015)

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# The Extraterritorial Reach of Sovereign Debt Enforcement

Karen Halverson Cross\*

*A significant barrier to enforcing sovereign debt obligations in U.S. court has been finding and attaching non-immune assets of the foreign sovereign debtor. In June 2014, the U.S. Supreme Court issued decisions in litigation between Argentina and hedge fund NML Capital that will significantly benefit creditors in the enforcement process. In one decision, the Court affirmed an order to compel banks to provide information as to how Argentina moves its monetary assets around the world, finding that the U.S. Foreign Sovereign Immunities Act (FSIA) does not limit a court's power to order post-judgment discovery. In the other decision, the Court denied certiorari to review an injunction prohibiting Argentina from making payments to holders of its restructured debt unless and until it pays NML Capital, and threatening to hold liable third parties that aid and abet Argentina in processing such payments. The NML decisions follow protracted, previously unsuccessful efforts by hedge funds holding defaulted Argentine debt to enforce New York judgments against Argentina.*

*This article argues that the discovery and injunction orders at issue in NML contravene the FSIA due to their extraterritorial reach. The FSIA should be read to prohibit these orders for several reasons. The Court has interpreted the FSIA to be the exclusive basis for jurisdiction against a foreign state in U.S. court. Additionally, the historical context in which the statute was adopted supports a narrow reading of exceptions to execution immunity under the FSIA. Finally, the presumption against extraterritoriality calls for a restrained interpretive approach. The Supreme Court's interpretation of the FSIA in NML Capital adopts an acontextual reading of the FSIA's language to reach an unreasonable result.*

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## I. INTRODUCTION

The *Financial Times* refers to the litigation between the hedge fund NML Capital, Ltd. (“NML”) and Argentina as the sovereign debt restructuring “trial of the century.”<sup>1</sup> In 2001, at the height of a severe financial crisis, Argentina defaulted on over \$80 billion of its external debt. It succeeded in restructuring over 90 percent of the debt by entering into two bond exchanges – one in 2005 and another in 2010 – in which Argentina’s creditors agreed to accept new debt instruments worth about one third of the debt’s original face value.<sup>2</sup> NML is among the holdout creditors who refused to participate in these restructurings. Instead, it brought suit in New York federal district court and obtained judgments for the full outstanding amount of the defaulted debt. But Argentina has refused to pay, and NML generally has been unable to find non-immune property against which to execute the judgments.

Two recent decisions of the U.S. Supreme Court significantly improved NML’s enforcement prospects. First, in *Republic of Argentina v. NML Capital, Ltd.*,<sup>3</sup> the Supreme Court held that the U.S. Foreign Sovereign Immunities Act<sup>4</sup> does not limit a court’s discretion to order extraterritorial, post-judgment discovery. *NML Capital* affirmed the Second Circuit’s affirmance of an order compelling international banks<sup>5</sup> to provide information as to how Argentina moves its monetary assets around the world (the “Discovery Order”).<sup>6</sup> Second, the Supreme Court denied two petitions<sup>7</sup> for certiorari to review the Second Circuit’s affirmance of orders enjoining Argentina from making payments to holders of its restructured debt unless and until it pays the plaintiffs,<sup>8</sup> and

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1. See, e.g., Joseph Cotterill, *Look Ma, No Uniquely Recalcitrant Sovereign*, FTALPHAVILLE (Nov. 1, 2013, 5:38 PM), <http://ftalphaville.ft.com/2013/11/01/1677502/look-ma-no-uniquely-recalcitrant-sovereign/>.

2. See Karen Halverson Cross, *Sovereign Arbitration in SOVEREIGN DEBT MANAGEMENT* paras. 12.18–12.19 (Rosa M. Lastra & Lee Buchheit eds., 2014). Detailed information regarding the *NML* litigation, including relevant briefs and other documents, is available online at <http://www.shearman.com/en/services/practices/argentine-sovereign-debt>.

3. 134 S. Ct. 2250 (2014) [hereinafter “*NML Capital*”].

4. The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330–1620 (2012) [hereinafter “FSIA”].

5. Bank of America and Banco de la Nación Argentina.

6. *NML Capital, Ltd. v. Republic of Arg.*, No. 03 Civ. 8845 (TPG), (S.D.N.Y. Sept. 2, 2011). The Second Circuit decision affirming the order is *EM Ltd. v. Republic of Arg.*, 695 F.3d 201 (2d Cir. 2012). The plaintiffs in the discovery proceeding comprise NML and another hedge fund, EM Ltd. For simplicity, both plaintiffs are referred to in this article as “NML.”

7. In February 2014, Argentina and a group of the creditors that participated in the 2005 and 2010 bond exchanges (the “Exchange Bondholders”) each submitted a petition for certiorari to the U.S. Supreme Court, requesting review of the Second Circuit decision. The Supreme Court orders denying both petitions are *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (June 16, 2014) (No. 13-990), and *Exch. Bondholder Grp. v. NML Capital, Ltd.*, 134 S. Ct. 2819 (June 16, 2014) (No. 13-991).

8. The plaintiffs in the injunction proceeding comprise a group of holdout creditors, a handful of individual investors plus several hedge funds. The lead plaintiff, NML, is a Cayman Islands-based subsid-

threatening to sanction any U.S. or foreign participant in the international financial system who processes payments made by Argentina in defiance of the orders (the “Injunction Order”).<sup>9</sup> These decisions followed protracted, previously unsuccessful efforts by NML to enforce the New York judgments against Argentina.<sup>10</sup>

The *NML* litigation is already the subject of extensive commentary.<sup>11</sup> This article does not address the merits of the Second Circuit’s interpretation of the *pari passu* covenant in the debt contract, a topic that has already been extensively addressed.<sup>12</sup> It does not focus on the appropriateness of injunctive relief *per se*,<sup>13</sup> nor address in any detail the implications of the *NML* decisions for the sovereign debt markets. Instead, this article supports an argument that the U.S. government repeatedly asserted in the *NML* litigation: both the Discovery Order and the Injunction Order are inconsistent with the structure and purpose of the FSIA. The FSIA should be read to prohibit these orders for several reasons. The Supreme Court has interpreted the FSIA to be the exclusive basis for

ary of the hedge fund Elliott Associates. NML is a distressed debt, or “vulture,” fund, a term used to describe a hedge fund that purchases heavily discounted debt in the expectation of profiting by enforcing the debt at its full face value. Again, for simplicity, the plaintiffs are referred to in this article collectively as “NML.”

9. *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 21, 2012), *aff’d*, 727 F.3d 230 (2d Cir. 2013). These orders amended and clarified previous injunctions dated February 2012 (referred to collectively and as amended as the “Injunction Order”). The Second Circuit decision affirming the amended orders is *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014) [hereinafter “NML II”].

10. NML went so far as to sue the Bank of International Settlements in Switzerland, alleging that it improperly allowed Argentina’s central bank to maintain up to 90 percent of its foreign reserves on deposit. *Argentina’s debt default: Gauchos and gadflies*, *ECONOMIST* (Oct. 22, 2011), available at <http://www.economist.com/node/21533453>. NML also persuaded a Ghanaian court to attach the *ARA Libertad*, an Argentine naval vessel, until an international tribunal ordered Ghana to release the vessel. “*ARA Libertad*” (*Argentina v. Ghana*), ITLOS Case No. 20, Order of Dec. 15, 2012, available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.20/C20\\_Order\\_15.12.2012.corr.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.12.2012.corr.pdf). See also *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007), *cert. denied*, 552 U.S. 818 (2007) (affirming order vacating attachment sought by EM Ltd. and NML of Argentine Central Bank reserves earmarked to repay Argentina’s debt to the International Monetary Fund).

11. See, e.g., W. Mark C. Weidemaier, *Sovereign Debt after NML v. Argentina*, 8 *CAPITAL MARKETS L.J.* 123 (2013); Tim R. Samples, *Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu under New York Law*, 35 *NW. J. INT’L L. & BUS.* 49 (2014), available at [www.ssrn.com](http://www.ssrn.com); W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 *YALE J. ON REG.* 189 (2014); Anna Gelpern, *Sovereign Damage Control*, *PETERSON INST. INT’L ECON. POLICY BRIEF* (May 2013), available at [www.iie.com](http://www.iie.com).

12. See, e.g., Mark Weidemaier, Robert Scott & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 *LAW & SOC. INQUIRY* 72 (2013); Mitu Gulati & Robert E. Scott, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 109–38 (2013); William W. Bratton, *Pari Passu and a Distressed Sovereign’s Rational Choices*, 53 *EMORY L.J.* 823 (2004); Lee C. Buchheit & Jeremiah S. Pam, *The Hunt for Pari Passu*, 23 *INT’L FIN. L. REV.* 20, 20 (2004); Lee C. Buchheit & Jeremiah S. Pam, *The Hunt for Pari Passu (Part II)*, 23 *INT’L FIN. L. REV.* 47, 47 (2004).

13. For a discussion of the issues surrounding the use of injunctive relief in sovereign debt litigation, including *NML*, see Weidemaier & Gelpern, *supra* note 11.

jurisdiction against a foreign state in U.S. court.<sup>14</sup> Additionally, the historical context in which the statute was adopted supports a narrow reading of exceptions to the execution immunity provided under the FSIA.<sup>15</sup> Finally, the presumption against extraterritoriality calls for a restrained interpretive approach. The Supreme Court's interpretation of the FSIA in *NML Capital* adopts an acontextual reading of the FSIA's language to reach an unreasonable result. Part II provides background to foreign sovereign immunity and to the presumption against extraterritoriality. Part III discusses the *NML* litigation, and argues that the gap in the FSIA relating to extraterritorial scope of the discovery and injunction orders at issue in *NML* should have been construed against enforcement. Part IV concludes.

## II. BACKGROUND

### A. Foreign Sovereign Immunity

The Permanent Court of International Justice,<sup>16</sup> foreign courts,<sup>17</sup> and the *Restatement (Third) of Foreign Relations Law of the United States*<sup>18</sup> have taken the position that foreign sovereign immunity is a principle of customary international law.<sup>19</sup> However, the U.S. Supreme Court consistently has held that foreign sovereign immunity is not a legal right but rather a matter of comity between sovereigns.<sup>20</sup> In *Republic of Austria v. Altmann*,<sup>21</sup> a case about whether the FSIA applied retroactively, the Court concluded that the FSIA does not affect substantive rights (and therefore the presumption against retroactive application did not apply to the FSIA). The Court acknowledged that the FSIA, a statute that codifies the standards governing immunity, is more than merely a

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14. *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 434–35 (1989).

15. See *infra* Part II(C).

16. S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7), available at [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm).

17. See HAZEL FOX, *THE LAW OF STATE IMMUNITY* at 18–19 (2d ed. 2008) (citing decisions from France, Italy, and the United Kingdom).

18. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. IV, ch.5, subch. A, intro note (1987) [hereinafter *Restatement (Third)*] (describing foreign sovereign immunity as “an undisputed principle of customary international law”).

19. See also Preamble to The United Nations Convention on Jurisdictional Immunities of States and Their Property, available at [https://treaties.un.org/doc/source/RecentTexts/English\\_3\\_13.pdf](https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf) [hereinafter *Jurisdictional Immunities Convention*], which states that “the jurisdictional immunities of foreign states and their property are generally accepted as a principle of customary international law.” The *Jurisdictional Immunities Convention* was concluded in 2004 but is not yet in effect, although it already has been signed by 28 countries (not including the U.S.) and ratified by 16. *Status Tracker*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=III-13&chapter=3&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en) (last updated Feb. 3, 2015 07:02 PM EDT).

20. FOX, *supra* note 17, at 13–15.

21. 541 U.S. 677 (2004).

jurisdictional statute.<sup>22</sup> However, it found that foreign sovereign immunity does not promise future immunity but “reflects current political realities and relationships, and aims to give foreign states . . . ‘protection from the inconvenience of suit as a gesture of comity.’”<sup>23</sup>

Until relatively recently, after states adopted the restrictive approach to immunity, foreign sovereigns generally were absolutely immune from suit. In practice, this meant that there was little recourse for creditors against a foreign sovereign debtor, other than denying the sovereign access to future credit, or relying on diplomatic or military intervention by the creditor’s home state.<sup>24</sup> In addition to codifying the restrictive approach, a principal purpose of the FSIA was to establish consistent guidelines for determining foreign sovereign immunity, which previously had been determined by the State Department on an ad hoc basis.<sup>25</sup> The statute sets forth a rule of absolute immunity for foreign states from suit in U.S. court,<sup>26</sup> and then lists enumerated exceptions to the rule.<sup>27</sup> Similar to its approach to immunity from suit, the FSIA establishes a rule of absolute immunity of foreign sovereign property from attachment, arrest, and execution, subject to enumerated exceptions, as discussed in Part II(C) below. In *Argentine Republic v. Amerada Hess*,<sup>28</sup> the Supreme Court held that Congress intended the FSIA to be the “sole basis for obtaining jurisdiction over a foreign state” in U.S. court.<sup>29</sup>

In *Peterson v. Islamic Republic of Iran*,<sup>30</sup> a case arising under the FSIA’s terrorism exception, the Ninth Circuit held that sovereign immunity is more than just a defense to liability on the merits; by enacting the FSIA, Congress also intended to protect foreign states from other burdens associated with litigation. The court found this to be particularly true in the context of immunity from execution, because of the controversy historically associated with attach-

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22. *Id.* at 695.

23. *Id.* at 696 (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)).

24. W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 68 (2014).

25. See Karen Halverson, *Is a Foreign State a “Person”? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT’L L. & POL. 115, 119 (2001) (citing FLOWERS, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. No. 94-1487, at 7 (1976)).

26. FSIA, 28 U.S.C. § 1604 (2012).

27. The principal exceptions to foreign sovereign immunity that are relevant to sovereign debt litigation are waiver, commercial activity, and actions to enforce arbitral agreements or confirm arbitral awards. *Id.* at §§ 1605(a)(1), (2), (6). FSIA Section 1605A provides an exception to immunity for certain claims against a foreign state for terrorist acts or providing material support for terrorist acts.

28. 488 U.S. 428 (1989).

29. *Id.* at 434 (emphasis added).

30. 627 F.3d 1117 (9th Cir. 2010).

ing foreign sovereign property.<sup>31</sup> The plaintiffs in *Peterson* sought to order Iran to assign them rights to tariff revenue that French shipping companies owed to Iran's port authority. The court rejected the plaintiffs' motion, finding that the intangible property, deemed to be located in France, was not eligible for assignment under the FSIA,<sup>32</sup> and that the sovereign immunity defense could be raised *sua sponte*, even though Iran failed to appear.<sup>33</sup> *Peterson*, therefore, stood for several propositions, which the *NML Capital* decision calls into question: first, that the FSIA was intended not only to provide foreign sovereigns with a defense to liability but also to shield them from the cost and inconvenience of litigation more generally; second, that the exceptions to immunity from execution under the FSIA are more narrowly defined than the exceptions to immunity from suit; and third, foreign sovereign property located outside of U.S. territory cannot be targeted for purposes of enforcement.

In spite of the FSIA, creditors have had little difficulty establishing jurisdiction over foreign sovereign debtors in U.S. courts. This is true in part because, ever since Congress enacted the FSIA, parties to sovereign debt contracts governed by New York law almost invariably have included in their loan documentation waivers of sovereign immunity from suit.<sup>34</sup> Additionally, in *Republic of Argentina v. Weltover, Inc.*,<sup>35</sup> the Supreme Court established that a foreign sovereign's default on a U.S. dollar-denominated debt obligation that was payable in New York fell within the FSIA's commercial activity exception. Similarly, the Second Circuit held in *Allied Bank Int'l v. Banco Credito Agricola de Cartago*<sup>36</sup> that an action to enforce a foreign sovereign's default on such a debt obligation was not barred by the act of state doctrine.<sup>37</sup> In other

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31. *Id.* at 1127–28 (citing *Foremost-McKesson Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)). The political sensitivity surrounding the issue of immunity from execution is addressed at *infra* Part II(C).

32. The court found that the FSIA only “abrogates the immunity of all Iranian commercial property in the United States.” *Id.* at 1131. Since the debtor was a French company, the debt was found to be located in France and therefore immune from assignment. *Id.* at 1132. The Supreme Court's *NML Capital* decision calls into question the continued validity of this finding, however. See *infra* notes 125–26 and accompanying text.

33. *Id.* at 1128–29.

34. See Weidemaier, *supra* note 24, at 86. Examining a dataset of over 1800 sovereign bond contracts issued between 1823 and 2011, Weidemaier found a pronounced shift in the use of foreign sovereign immunity waivers after the enactment of the FSIA. Although such waivers were relatively uncommon before the enactment of the FSIA, after 1977, “virtually all” new bond issuances included a waiver of foreign sovereign immunity from suit. *Id.* at 86. Waivers of immunity from execution, on the other hand, were not frequently utilized until the 1990s. *Id.* at 87.

35. 504 U.S. 607 (1992).

36. 757 F.2d 516 (2d Cir. 1985).

37. Act of state doctrine is a principle adopted by U.S. courts that “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.” Lee C. Buchheit, *Act of State and Comity: Recent Developments*, in JUDICIAL ENFORCEMENT OF INTERNATIONAL DEBT OBLIGATIONS 95, 96 (D. Sassoon and D. Bradlow, eds., 1987) (quoting Underhill



words, the real barrier to enforcing foreign sovereign debt obligations in U.S. court has not been obtaining a judgment against the sovereign debtor; rather, it has been finding assets against which to execute the judgment. The current sovereign debt litigation environment has been aptly characterized as a “hunt for assets.”<sup>38</sup>

In a recent paper,<sup>39</sup> Schumacher, Trebesch and Enderlein document a recent and dramatic increase in creditor litigation against defaulting sovereign debtors. They compiled a list of sovereign debt restructurings between 1970 and 2010, and searched for cases filed in foreign courts by commercial creditors in connection with these debt crisis events.<sup>40</sup> The paper identifies 108 instances of litigation by commercial creditors against 25 different foreign sovereign debtors. Of these, 54 – half of the instances – were filed since 2000,<sup>41</sup> and 90 percent of the cases filed after 2000 were initiated by distressed debt funds.<sup>42</sup> The authors attribute the increase in litigation in part to judicial decisions, such as *Weltover*, that limit the defenses a foreign sovereign debtor can raise in U.S. court.<sup>43</sup> Other causal factors include the trade-openness of sovereign debtors and an increase over time both in the amount of debt restructured and in “hair-cut size,” or the amount of debt reduction creditors agree to in the restructurings.<sup>44</sup> The authors attribute an increase in attachment attempts in recent sovereign debt litigation to the prevalence of distressed debt funds as claimants.<sup>45</sup>

To summarize, a principal limitation on enforcement of foreign sovereign debt is the immunity accorded to the property of the sovereign debtor. Litigation to enforce sovereign debt, particularly litigation involving attachment attempts against foreign sovereign property, has significantly increased over the past decade. For these reasons, the *NML* litigation, particularly its impact on the scope of immunity of foreign sovereign property against execution, is quite

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v. Hernandez, 168 U.S. 250, 252 (1897)).

38. Julian Schumacher, Christoph Trebesch & Henrick Enderlein, *Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010* 7 (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2189997](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997).

39. *Id.*

40. *Id.* at 8. The database excludes litigation filed in the debtor’s domestic courts, as well as suits filed by retail investors, and counts multiple suits filed by the same creditor (such as NML) as a single instance of litigation. *Id.* at 8–9.

41. *Id.* at 38, Table 1. Of the 120 instances of litigation, 102 of these were filed in New York federal district court, 15 in English court, and 3 in arbitration. The paper’s focus on debt issued under New York and English law is explained as being due to the dominance of New York and English law-governed bonds in sovereign debt markets. *Id.* at 1, n.3.

42. *Id.* at 2. For an explanation of distressed debt, sometimes known as “vulture,” funds, see *supra* note 8.

43. Schumacher, Trebesch & Enderlein, *supra* note 38, at 6.

44. *Id.* at 6–7.

45. *Id.* at 8.

significant.

*B. Extraterritoriality and the FSIA*

The presumption against extraterritoriality is an interpretive principle of U.S. law to the effect that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction” of the U.S.<sup>46</sup> The stated purpose behind the presumption is to “protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>47</sup> As Justice Holmes observed in *American Banana Co. v. United Fruit Co.*,<sup>48</sup> holding a party liable according to laws other than those of the country where the conduct took place not only would be unjust, but also “would be an interference with the authority of another sovereign, contrary to the comity of nations . . . .”<sup>49</sup>

Although the presumption against extraterritoriality has existed for about two centuries,<sup>50</sup> its influence declined during the mid-1900s, until the Supreme Court revived the presumption in 1991 with its adoption of the *Aramco* decision.<sup>51</sup> Over the past decade, the Supreme Court has applied the presumption to limit the extraterritorial scope of the Foreign Trade Antitrust Improvement Act,<sup>52</sup> the Patent Act,<sup>53</sup> the Securities Exchange Act of 1934,<sup>54</sup> and the Alien Tort Statute.<sup>55</sup>

According to Supreme Court decisions on extraterritoriality, the rationale behind the presumption is based on considerations of international law, international comity and separation of powers, among other considerations.<sup>56</sup> First, customary international law sets limits on a state’s authority to apply its law to

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46. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

47. *Id.*

48. 213 U.S. 347 (1909).

49. *Id.* at 356.

50. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 85 (1998) (stating that the presumption against extraterritoriality has been around “nearly as long as there have been federal statutes”). Cases invoking the presumption date back to the early 1800s. *Id.* at 85 n.2 (citing *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630–32 (1818)).

51. *Id.* at 85–86.

52. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

53. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007).

54. *Morrison v. Nat’l Ausd. Bank Ltd.*, 561 U.S. 247, 255 (2010).

55. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–69 (2013).

56. Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 513–16 (1997). Additional considerations behind the presumption include consistency with conflicts of laws principles and the notion that Congress is presumed to legislate with domestic interests in mind. *Id.*

activity occurring outside its borders. According to the well-known *Charming Betsy*<sup>57</sup> canon of statutory interpretation, an act of Congress should be interpreted wherever possible in a manner that is consistent with international law.<sup>58</sup> Second, the Supreme Court's statement in *Aramco* about preventing clashes between U.S. and foreign law<sup>59</sup> suggests that the presumption is also grounded in considerations of international comity.<sup>60</sup> Third, *Aramco*, *Kiobel*,<sup>61</sup> and other Supreme Court decisions applying the presumption have done so out of separation of powers concerns – specifically, concerns that the determination of whether and how to apply U.S. legislation to conduct abroad raises difficult and sensitive policy considerations falling “outside both the institutional competence and constitutional prerogatives of the judiciary.”<sup>62</sup> Related to considerations of comity is the notion that the presumption protects U.S. interests. A territorial approach to statutory interpretation serves U.S. interests over the long term because it discourages other countries from imposing their laws extraterritorially on U.S. persons.<sup>63</sup>

As stated, the presumption against extraterritoriality is grounded in concerns about the potential for federal statutes to regulate matters under the authority of another state. A question to think about is whether the presumption should apply to the FSIA, a statute whose function is to open U.S. courts to “plaintiffs with pre-existing claims against foreign states.”<sup>64</sup> The Supreme Court has answered this question in the affirmative. It has held that the FSIA deals not only with federal court jurisdiction over suits against foreign states but also with the scope of foreign sovereign immunity, a matter of substantive

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57. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

58. Bradley, *supra* note 56, at 514–15. Some academics have argued that the presumption against extraterritoriality would be more consistent and coherent if applied in conjunction with international law considerations. See Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1030–33 (2011) (arguing that the *Charming Betsy* canon, but not the presumption, should apply when Congress implements international law under multilateral sources of legislative authority); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 396 (2010) (arguing that the presumption should apply strictly, loosely, or not at all, depending on whether the U.S. has sole or primary jurisdiction to legislate under customary international law).

59. See *supra* text accompanying note 47. The Supreme Court quoted this same language from *Aramco* in its recent *Kiobel* decision. *Kiobel*, 133 S. Ct. at 1664.

60. Bradley, *supra* note 56, at 515.

61. See *Kiobel*, 133 S. Ct. at 1664.

62. Bradley, *supra* note 56, at 516.

63. Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1494, 1497 (2008). The U.S. government invoked a similar idea in its oral argument before the Supreme Court in *NML Capital*. See Transcript of Oral Argument of Edwin S. Kneeder on behalf of the United States at 19, *NML Capital*, 134 S. Ct. 2250 (No. 12-842) [hereinafter “U.S. Oral Argument”] (stating that the U.S. would be “gravely concerned” if a foreign court issued an order comparable to the Discovery Order that was targeted at U.S. government assets).

64. *Republic of Austria v. Altmann*, 541 U.S. 677, 695 (2004).

federal law.<sup>65</sup> The Supreme Court applied the extraterritoriality presumption to the FSIA in *Amerada Hess*, a decision that predates *Aramco*. The issue in *Amerada Hess* was whether the tort exception to the FSIA<sup>66</sup> applies where the tort at issue occurred on the high seas. Although the plaintiff argued that the high seas were within the admiralty jurisdiction of the U.S., the Court applied the presumption against extraterritoriality and concluded that the tort exception should only apply to torts occurring within U.S. territorial waters.<sup>67</sup>

The Supreme Court has even applied the presumption against extraterritoriality to the Alien Tort Statute,<sup>68</sup> a statute the Court found to be “strictly jurisdictional.”<sup>69</sup> In *Kiobel*, the Court held that plaintiffs’ allegations against a Nigerian, a U.K., and a Dutch oil company relating to defendants’ conduct in Nigeria, did not “touch and concern” the U.S. with sufficient force to displace the presumption against extraterritorial application of the ATS.<sup>70</sup> The Court found the principles underlying the presumption against extraterritoriality to apply to jurisdictional as well as regulatory statutes, observing that, if anything, the “danger of unwarranted judicial interference in the conduct of foreign policy is magnified” in the context of the ATS, since it (like the FSIA) is concerned not with “what Congress has done but instead what courts may do.”<sup>71</sup> The Court cited its previous decision in *Sosa* for the idea that the potential foreign policy implications of recognizing causes of action under the ATS should make courts “particularly wary” of interfering with the political branches’ discretion in managing foreign affairs.<sup>72</sup>

Construing gaps in the FSIA in light of the presumption is particularly appropriate because, in contrast to the situation in *Kiobel* and other cases involving private defendants, cases arising under the FSIA typically involve foreign sovereign defendants.<sup>73</sup> When litigation is brought against a foreign

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65. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496–97 (1983) (holding that the FSIA does not merely concern access to the federal courts, but also codifies the standards governing foreign sovereign immunity “as an aspect of substantive federal law”); see also *Altmann*, 541 U.S. at 695.

66. FSIA Section 1605(a)(5) provides an exception to foreign sovereign immunity for certain non-commercial torts “occurring in the United States.” FSIA, 28 U.S.C. § 1605(a)(5) (2012). “United States” is defined to include “all territory and waters, continental or insular, subject to the jurisdiction of the United States.” FSIA, 28 U.S.C. § 1603(c) (2012).

67. *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 440–41 (1989).

68. The Alien Tort Statute confers on federal courts “jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2012).

69. *Kiobel*, 133 S. Ct. at 1664 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004)).

70. *Id.* at 1669.

71. *Id.* at 1664.

72. *Id.* (quoting *Sosa*, 542 U.S. at 727).

73. The FSIA, however, also confers diversity jurisdiction on federal courts to hear claims against U.S. citizens brought by foreign states. 28 U.S.C. § 1332(a)(4) (2012).

state, the concerns behind the extraterritoriality presumption – comity concerns of interfering with the authority of a foreign state, and separation of powers concerns relating to the courts interfering in delicate matters of foreign policy – are particularly pronounced. Although (at least as a matter of U.S. law) the doctrine of foreign sovereign immunity is grounded in comity and reciprocity whereas the presumption against extraterritoriality is based on comity as well as other considerations discussed above, both doctrines relate to a state’s respect for the sovereignty of other states.

In *Daimler AG v. Bauman*,<sup>74</sup> a recent decision addressing Constitutional limits on general jurisdiction over a foreign corporation, the Supreme Court emphasized how an overly expansive view to personal jurisdiction can raise international comity concerns.<sup>75</sup> Although the U.S. courts who have addressed the issue generally agree that a foreign state is not a “person” for purposes of the Due Process Clause and “minimum contacts,”<sup>76</sup> as a matter of international law it is generally accepted that a state does not have jurisdiction to adjudicate a dispute involving a foreign sovereign defendant unless there is a jurisdictional link to the forum state.<sup>77</sup> Similarly, a forum state’s jurisdiction over the property of a foreign sovereign is strictly territorial; any action to enforce a judgment against foreign sovereign property must be brought in the jurisdiction where that property is located.<sup>78</sup>

Even if a statute already makes clear that it applies extraterritorially (e.g., the FSIA’s commercial activity exception, which encompasses actions based on acts outside of U.S. territory causing a “direct effect” within the U.S.), the presumption is still applicable to determine the *extent* of a statute’s extraterritorial scope.<sup>79</sup> Analogous to these decisions is Justice Scalia’s dissenting opinion in *Hartford Fire Ins. v. Cal.*,<sup>80</sup> where he argued that even if a statute (such as the Sherman Act) applies extraterritorially, the extent of the statute’s application is limited by the requirements of international law and principles of prescriptive

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74. 134 S. Ct. 746 (2014).

75. *Id.* at 763.

76. See *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002); *Frontiera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); see also Halverson, *supra* note 25, at 135–41 (discussing the rationale behind this line of case law).

77. FOX, *supra* note 17, at 78–84; James Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT’L L. 820, 857 (1981); see also Halverson, *supra* note 25, at 148–51 (discussing international law limits on jurisdiction to adjudicate).

78. Crawford, *supra* note 77, at 852. As the Supreme Court stated in *NML Capital*, U.S. courts generally do not have the power to execute against property (whether sovereign- or privately-owned) located in other countries. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014).

79. See *Microsoft Corp. v. AT&T Corp.* 550 U.S. 437, 455–56 (2007) (stating that, even when Congress has enacted a statute with extraterritorial application, the presumption “remains instructive in determining the *extent* of the statutory exception”) (emphasis in original).

80. 509 U.S. 764 (1993) (Scalia, J., dissenting).

comity, as reflected in the reasonableness limitation of Restatement (Third) Section 403.<sup>81</sup>

To summarize, the Supreme Court has embraced the presumption against extraterritoriality, and has invoked related comity concerns, in numerous recent decisions involving corporate defendants. Decisions such as *Kiobel* and *Daimler* stand in contrast with *NML Capital*, where the Court interpreted the FSIA as according no protection whatsoever to a foreign state's extraterritorial property.

### *C. FSIA Provisions on Immunity From Attachment, Arrest, and Execution*

As a matter of international practice, the immunity of a foreign state's property from execution is significantly more restricted than immunity from suit. As Fox explains,

[e]nforcement against State property constitutes a greater interference with a State's freedom to manage its own affairs and pursue its public purposes than does the pronouncement of a judgment or order by a national court of another State. States increasingly maintain some of their national wealth in foreign reserves, and discretion as to their disposal is seen as an element in the exercise of sovereign authority.<sup>82</sup>

Therefore, the issue of execution on foreign state property has long been a particularly sensitive one.<sup>83</sup> Sovereigns tend to resist efforts to execute judgments against their property, viewing such exercises of jurisdiction by the forum state as an interference with sovereign interests, even when the property is located within the territory of the forum state.<sup>84</sup> Indeed, the issue of execution against foreign state property was one of the most challenging and contentious issues addressed during the negotiation of the Jurisdictional Immunities Convention.<sup>85</sup>

Even after the U.S. adopted the restrictive theory of foreign sovereign immunity, it adhered to an approach of absolute immunity of foreign state property from execution until passage of the FSIA in 1976. Before the FSIA's passage, plaintiffs bringing an action against a foreign state in U.S. court had no means of executing against the defendant's property.<sup>86</sup> The ICSID Convention successfully circumvents foreign sovereign immunity by providing

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81. *Id.* at 814–19.

82. FOX, *supra* note 17, at 601.

83. Crawford, *supra* note 77, at 852.

84. David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 206 (2005).

85. *Id.*

86. H.R. REP. NO. 94-1487, at 7 (1976); Crawford, *supra* note 77, at 852.

for the enforceability of an ICSID award as if it were a final judgment in any Contracting State.<sup>87</sup> However, even the ICSID Convention does not derogate from the immunity of a foreign state's property from execution under applicable domestic law.<sup>88</sup>

For these reasons, the immunity accorded a foreign state's property under the FSIA was intended to be broader than immunity from suit. Recognizing that the existing rule in the U.S. was that a foreign state's property was *absolutely* immune from execution, the drafters of the FSIA sought to lower existing barriers, but only "in part."<sup>89</sup> In *De Letelier v. Republic of Chile*,<sup>90</sup> the Second Circuit acknowledged that Congress deliberately set different standards for immunity from suit and immunity from execution, even though, as was the case in *De Letelier*, a plaintiff sometimes ended up having a "right without a remedy."<sup>91</sup> The *De Letelier* court observed that the FSIA was enacted at the same time as comparable European legislation, which did not provide any mechanism for enforcement of judgments, instead requiring claimants to satisfy judgments against foreign sovereigns through executive or administrative channels.<sup>92</sup>

Consequently, even though the FSIA provides that a foreign sovereign defendant is liable in the same manner as a private defendant would be once an exception to immunity from suit is found to apply,<sup>93</sup> enforcement against that sovereign defendant's property is subject to a more restrictive set of rules. FSIA Section 1609 provides that "the property in the United States of a foreign state shall be immune from attachment, arrest and execution," except as provided in Section 1610. In turn, each of the exceptions enumerated in Section 1610, including the waiver exception, is qualified by the requirement that foreign state assets must be "used for a commercial activity in the U.S." In other words, Section 1610 establishes a threshold requirement: in order for foreign state property to be attachable, there must be a connection between that property and a U.S.-based commercial activity.<sup>94</sup>

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87. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 54(1), Mar. 18, 1965, 17 U.S.T. 1291, T.I.A.S. No. 6090.

88. *Id.* at art. 55.

89. H.R. REP. NO. 94-1487, at 8 (1976).

90. 748 F.2d 790 (2d Cir. 1984).

91. *Id.* at 798.

92. *Id.*

93. FSIA, 28 U.S.C. § 1606 (2012).

94. George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities and Some Proposals for its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 672 (2008).

Additionally, in enforcing a judgment against a foreign state, U.S. courts will not attach the assets of an agency or instrumentality of that state, such as a state-owned enterprise, except in circumstances

Except for brief mention in the legislative history that injunctive relief may be available against a foreign state where circumstances are “clearly appropriate,”<sup>95</sup> the text and legislative history of the FSIA are otherwise silent on the extent of availability of injunctive relief under the statute. Except for a provision allowing the Attorney General to stay discovery against the U.S. in the context of the terrorism exception, the FSIA is similarly silent as to the degree to which discovery can be ordered, whether to establish an exception to immunity or with respect to foreign state property.<sup>96</sup> As with injunctive relief, the legislative history only briefly refers to the right to discovery, noting that the FSIA bill does not attempt to address issues of discovery because existing law is “adequate.”<sup>97</sup> Thus the interpretive question affecting both the injunction order and the discovery order at issue in *NML* is one on which the statute is silent – whether FSIA limits injunctive relief or a discovery order, particularly when that injunction or discovery order targets a foreign state’s extraterritorial property.

As for injunctions, the Second Circuit has held that a court cannot grant through an injunction relief that the FSIA prohibits it from providing by attachment. In *S&S Mach. Co. v. Masinexportimport*,<sup>98</sup> a Romanian state-owned company agreed to sell machine parts to a New York buyer in exchange for payment through irrevocable letters of credit. When the buyer was dissatisfied with the quality of the goods delivered, it obtained a pre-judgment attachment of the seller’s New-York based assets and an injunction preventing the seller from negotiating the letters of credit. The district court subsequently vacated the injunction and attachment orders on the basis of FSIA Section 1610(d), which prohibits pre-judgment attachment unless the foreign sovereign has explicitly waived such immunity. The Second Circuit affirmed, finding that the seller had not explicitly waived its immunity. It also found that the district court was correct to dissolve the injunction:

The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property . . . . courts in this context

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comparable to corporate veil-piercing. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983); Foster, *supra* note 94, at 682–84.

95. S. REP. NO. 94-1310, at 22 (1976). The report goes on to indicate that the existence of a court’s power to order an injunction does not determine its power to enforce such an order. *Id.* For example, a court’s imposition of a fine for violating an injunction may be unenforceable under FSIA Section 1609. *Id.*

96. *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 795 (2d Cir. 2012).

97. S. REP. NO. 94-1310, at 22 (1976).

98. 706 F.2d 411 (2d Cir. 1983) [hereinafter *S&S Machinery*].



may not grant, by injunction, relief which they may not provide by attachment.<sup>99</sup>

*S&S Machinery* is still followed; it was recently invoked in a decision that invalidated on FSIA grounds a post-judgment order to compel third parties to turn over funds owed to a foreign sovereign.<sup>100</sup>

In *Autotech Techs. LP v. Integral Research & Dev. Corp.*,<sup>101</sup> the Seventh Circuit invoked the presumption against extraterritoriality to limit the scope of the FSIA's execution provisions. The court upheld a district court's authority to issue contempt sanctions against a Belarusian state-owned semiconductor company for violating a settlement agreement.<sup>102</sup> However, the court vacated the writ of execution because it failed to identify specific properties in the U.S. against which to enforce the judgment.<sup>103</sup> It found that the FSIA does not authorize execution of a foreign state's assets regardless of their location, stating that the court "would need some hint from Congress before [it] felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction."<sup>104</sup>

### III. THE *NML* LITIGATION

#### A. Background

The debt instruments that NML is seeking to enforce were issued pursuant to an agreement concluded between Argentina and its fiscal agent in 1994.<sup>105</sup> Under the agreement, Argentina agreed to waive its immunity from suit in state or federal New York court,<sup>106</sup> and also to waive its immunity from execution of a judgment "to the fullest extent permitted" by law.<sup>107</sup> The agreement contained a covenant that the bonds would "rank pari passu and without any preference among themselves," and that Argentina's payment obligations under the bonds would "rank at least equally" with its other unsecured and unsubordinated

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99. *Id.* at 418; see also *Stephens v. National Distillers & Chem. Corp.*, 69 F.3d 1226, 1230 (2d Cir. 1995) (stating that the principle behind *S&S Machinery's* prohibition "should apply broadly").

100. *Thai Lao-Lignite v. Gov't of the Lao Peoples' Democratic Republic*, No. 10 Civ. 5256, 2013 U.S. Dist. LEXIS 56815, at \*10-13. (S.D.N.Y. 2013).

101. 499 F.3d 737, 750-51 (7th Cir. 2007).

102. *Id.* at 744-45.

103. *Id.* at 750.

104. *Id.*

105. *Fiscal Agency Agreement between the Republic of Argentina and Bankers Trust Company, Fiscal Agent, dated as of October 19, 1994*, available at <http://www.shearman.com/~media/Files/Services/Argentine-Sovereign-Debt/2013/FiscalAgencyAgreementOct191994.pdf> [hereinafter FAA].

106. *Id.* at § 22.

107. *Id.* at A-18.

debt.<sup>108</sup> NML did not participate in either the 2005 or 2010 debt exchange, but instead sought to enforce the debt, as already discussed.

### *1. Discovery Order*

As noted,<sup>109</sup> NML experienced significant difficulty finding assets against which to enforce the judgments it obtained in 2003. In 2010, it served document subpoenas on Bank of America and Banco de la Nación Argentina, seeking to “locate Argentina’s assets and accounts” and “learn how Argentina moves its assets through New York and around the world.”<sup>110</sup> Both subpoenas sought detailed information regarding the accounts Argentina<sup>111</sup> maintained anywhere in the world, including opening and closing dates, current balances, and documents relating to transfers into or out of these accounts.<sup>112</sup> Argentina moved to quash these subpoenas and NML moved to compel. At a hearing that was later confirmed in the Discovery Order, Judge Griesa denied the motion to quash and granted NML’s motion, stating that the court “intended to serve as a ‘clearinghouse for information’” to assist NML in its enforcement efforts.<sup>113</sup> Argentina appealed.

The Second Circuit affirmed the district court’s order, rejecting Argentina’s argument that the FSIA bars discovery of immune assets. While conceding that a court sitting in New York would lack the power to attach Argentine property located abroad, it found that the district court’s power to order post-judgment discovery is unaffected by the FSIA.<sup>114</sup> The Second Circuit drew a distinction between jurisdictional discovery under the FSIA and post-judgment discovery. It reasoned that foreign sovereign immunity concerns are not present once an exception to immunity is established and the purpose of discovery is for enforcement purposes.<sup>115</sup> Since Argentina expressly waived its immunity in the debt instrument, the concerns expressed in precedents dealing with jurisdictional discovery under the FSIA were not relevant.<sup>116</sup> Finally, it found that since the subpoenas were directed at commercial banks that lack sovereign immunity, the banks’ compliance with the discovery orders “will cause Argentina no bur-

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108. *Id.* at § 1(c) (the “*pari passu*” covenant).

109. *See supra* note 10 and accompanying text.

110. *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 203 (2d Cir. 2012).

111. The subpoena broadly defined Argentina to include its agencies, instrumentalities, ministries, political subdivisions, state-owned companies, or persons acting on behalf of these entities. *Id.* at 204.

112. *Id.*

113. *Id.*

114. *Id.* at 208–09.

115. *Id.* at 210.

116. *Id.* at 209–10.

den and no expense.”<sup>117</sup>

After the Supreme Court granted Argentina’s petition for *certiorari*, the U.S. government filed an *amicus* brief,<sup>118</sup> and the Deputy Solicitor General appeared at oral argument, in support of Argentina’s position. Argentina and the U.S. Government argued that the Discovery Order was overly broad, in contravention of the FSIA.<sup>119</sup> Although Argentina had waived its immunity from execution, the U.S. government argued that the FSIA’s execution provisions still protected Argentina’s extraterritorial property from the Discovery Order regardless of any waiver.<sup>120</sup>

Justice Scalia delivered the Supreme Court’s decision affirming the Second Circuit. In contrast with the Court’s approach in *Amerada Hess*, which presumed a foreign state to be immune from suit unless a statutory exception could be proven,<sup>121</sup> *NML Capital* starts with the reverse presumption, finding that “any immunity defense made by a foreign sovereign in an American court must stand on the [FSIA]’s text.”<sup>122</sup> In other words, in *NML Capital*, the Court interpreted the FSIA’s general silence with respect to discovery to mean that the FSIA does not limit a court’s discretion to order discovery of a foreign state’s assets,<sup>123</sup> finding that any “gap” in the statute regarding discovery is for Congress to resolve.<sup>124</sup> Observing that the FSIA’s execution provisions only apply to a foreign state’s U.S.-based property, the opinion goes on to state that the FSIA’s text accords execution immunity *only* to a foreign state’s property that is located *within the U.S.*<sup>125</sup> In other words, *NML Capital*’s reasoning suggests that the FSIA’s execution provisions simply do not apply to protect a foreign state’s extraterritorial property against expansive discovery orders of a U.S. court. Although Justice Ginsburg dissented, she did not challenge the extraterritorial scope of the Discovery Order, only objecting to the order’s application to Argentina’s non-commercial property.<sup>126</sup>

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117. *Id.* at 210.

118. Brief for the United States as Amicus Curiae in Support of Petitioner, Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2256 (2014) (No. 12-842) [hereinafter U.S. *NML Capital* Amicus Brief].

119. *Id.* at 14–18.

120. U.S. Oral Argument, *supra* note 63, at 26.

121. Argentine Republic v. Amerada Hess Shipping Co., 488 U.S. 428, 439–43 (1989).

122. *NML Capital*, 134 S. Ct. at 2256.

123. *Id.*, at 2256–57.

124. *Id.* at 2258.

125. *Id.* at 2257.

126. *NML Capital*, 134 S. Ct. at 2259 (Ginsburg, J., dissenting).

## 2. Injunction Order

The injunction order was issued in connection with a separate lawsuit. NML anticipated that it would have difficulty enforcing its judgments, and so it retained an additional amount of Argentine debt, bringing suit in New York federal district court to demand specific performance of that debt, alleging breach of the *pari passu* covenant in the debt agreement.<sup>127</sup> In February 2012, Judge Griesa granted NML's request for an injunction, directing Argentina to make a "ratable payment" to NML whenever it pays the Exchange Bondholders.<sup>128</sup> He interpreted the *pari passu* covenant to require Argentina to extend equal treatment to NML when making payments to holders of the restructured debt.<sup>129</sup>

The U.S. Department of Justice ("DOJ"), joined by the Departments of Treasury and State, submitted an *amicus* brief to the Second Circuit urging reversal.<sup>130</sup> In addition to contesting the district court's interpretation of the *pari passu* covenant,<sup>131</sup> the DOJ argued that the injunction contravened the FSIA's execution provisions because of its extraterritorial reach.<sup>132</sup> Since Argentina makes payments on its restructured debt outside of U.S. territory, the DOJ argued that the injunction prohibiting these payments violates the FSIA because it targets Argentina's immune property.<sup>133</sup> Quoting *Autotech*, the *amicus* brief characterized the Injunction Order as a "breathtaking assertion of extraterritorial jurisdiction."<sup>134</sup> The brief also quoted *S&S Machinery*<sup>135</sup> for the idea that a court cannot circumvent the immunity of foreign state property under FSIA through the use of an injunctive order.<sup>136</sup>

The Second Circuit disregarded the DOJ's arguments. It affirmed the district court's interpretation of the *pari passu* covenant. It also found that the injunction did not attach, arrest, or execute upon any of Argentina's property, and therefore it did not function as an attachment masquerading as an injunction under the rationale of *S&S Machinery*.<sup>137</sup> The court characterized the injunc-

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127. See Weidemaier & Gelpert, *supra* note 11, at 3.

128. *NML Capital v. Republic of Argentina*, 699 F.3d 246, 254–55 (2d Cir. 2012) [hereinafter *NML I*].

129. *Id.* at 254.

130. Brief for the United States as *Amicus Curiae* in Support of Reversal, *NML I*, 699 F.3d 246 (No. 12-105-cv(L)) [hereinafter "U.S. *NML I* Amicus Brief"].

131. *Id.* at 5.

132. *Id.* at 23.

133. *Id.* at 24–25.

134. *Id.* at 22.

135. For a discussion of *S&S Machinery*, see *supra* notes 98–99 and accompanying text.

136. U.S. *NML I* Amicus Brief, *supra* note 130, at 25–26.

137. *NML I*, 699 F.3d at 261–63.

tion, which prohibited Argentina from transferring payment to some bondholders but not others, as only affecting Argentina's property "incidentally."<sup>138</sup> While affirming the injunction, the Second Circuit remanded for the district court to clarify its terms, in particular, the formula for payment and the effects of the injunction on third parties, including participants in the international payment system for the Exchange Bonds.<sup>139</sup>

In November 2012, Judge Griesa issued his amended injunction order. First, he clarified that "ratable payment" means 100 percent of what is due to NML at the time of payment.<sup>140</sup> Additionally, he found that all "Participants" in the payment process of the restructured debt<sup>141</sup> were prohibited under FRCP 65(d)(2)<sup>142</sup> from aiding and abetting Argentina in any violation of the order.<sup>143</sup> "Participants" was defined to include (i) indenture trustees and/or registrars under the Exchange Bonds, in particular Bank of New York Mellon; (ii) registered owners of the Exchange Bonds and nominees of the depositories for the Exchange Bonds; (iii) clearing corporations and systems and settlement agents for the Exchange Bonds; and (iv) trustee paying agents and transfer agents for the Exchange Bonds. The order specifically named both U.S. and foreign participants in the payment system, in particular, Depository Trust Company (New York), Euroclear S.A./N.V. (Belgium), and Clearstream Banking S.A. (Germany and Luxembourg), as falling within the definition of "Participants."<sup>144</sup>

Argentina filed a petition before the Second Circuit for rehearing and for *en banc* review of *NML I*. Although the DOJ submitted a brief in support of Argentina's petition,<sup>145</sup> echoing the arguments made in its previous *amicus* brief, both petitions were denied.<sup>146</sup>

In August 2013, the Second Circuit affirmed the amended Injunction Order, reaffirming its previous decision that the injunction does not violate the

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138. *Id.* at 262–63.

139. *Id.* at 265.

140. Injunction Order, *supra* note 9, at paras. 2(b) – (c).

141. *See id.* at 1 (noting that the restructured debt is also referred to as the "Exchange Bonds," and the holders of the debt as the "Exchange Bondholders").

142. Fed. R. Civ. P. 65(d)(2) defines the scope of an injunction as binding not only the enjoined party, but also any person who is "in active concert or participation" with that party, so long as the person receives notice of the order.

143. Injunction Order, *supra* note 9, at para. 2(e).

144. *Id.* at para. 2(f).

145. Brief for the United States of America as *Amicus Curiae* in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing *En Banc*, *NML I*, 699 F.3d 246 (No. 12-105-cv(L)).

146. *See* Order, *NML I*, 699 F.3d 246 (No. 12-105) (Feb. 28, 2013); Order, *NML I*, 699 F.3d 246 (No. 12-105) (Mar. 26, 2013).

FSIA,<sup>147</sup> and finding that it need not decide whether it has personal jurisdiction over certain participants in the international payment system for the Exchange Bonds.<sup>148</sup> The court also rejected an argument raised by several *amici* – mainly, that the injunction would negatively affect future sovereign debt restructurings. The court characterized Argentina’s behavior as extraordinary and found that the facts of *NML* litigation were unlikely to be repeated in the future.<sup>149</sup> The Second Circuit, however, stayed the Injunction Order pending appeal to the Supreme Court.<sup>150</sup>

Argentina filed a petition for *certiorari* to review the Second Circuit decision in *NML II*. The Exchange Bondholders filed their own petition for *certiorari*, arguing that the Injunction Order uses the restructured debt obligations as leverage to coerce Argentina into paying NML, increases the risk of Argentina’s default, and therefore constitutes a taking of the Exchange Bondholders’ property.<sup>151</sup> The Supreme Court denied both petitions in June 2014.<sup>152</sup> Once the Supreme Court denied appeal, the stay on the Injunction Order was lifted.

#### B. FSIA Analysis

As discussed,<sup>153</sup> in its *amicus* submissions and at oral argument in the *NML* litigation, the U.S. government consistently argued that Judge Griesa’s expansive discovery and injunction orders contravene the structure and the purpose of the FSIA. These arguments were dismissed, first by the Second Circuit, and then by the Supreme Court with respect to the Discovery Order. Additionally, the Supreme Court’s decision in *NML Capital* interpreted the FSIA’s execution provisions as affording no protection to a foreign state’s property located outside of the U.S. It is true that the FSIA’s execution provisions expressly refer to a foreign state’s U.S.-based property. As the Supreme Court acknowledged in

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147. See *supra* notes 137–38 and accompanying text.

148. The court reasoned that the injunction merely “provide[s] notice to payment system participants that they could become liable through Rule 65 if they assist Argentina in violating” the injunction, and that any jurisdictional issues can be raised if and when such a participant is adjudicated to be found liable. *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 243 (2d Cir. 2013), cert. denied, 134 S. Ct. 2819 (2014) [*NML II*].

149. The court observed that Argentina has been “an uniquely recalcitrant debtor,” and that newer sovereign debt contracts almost invariably contain collective action clauses, contract provisions that permit a supermajority of creditors to impose a debt restructuring on holdout creditors. *Id.* at 247.

150. *Id.* at 248.

151. Petition for Writ of Certiorari at 12–15, *Exch. Bondholder Grp. v. NML Capital Ltd.*, 134 S. Ct. 2819 (June 16, 2014) (No. 13-991).

152. See *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (June 16, 2014) (No. 13-990), and *Exch. Bondholder Grp. v. NML Capital, Ltd.*, 134 S. Ct. 2819 (June 16, 2014) (No. 13-991).

153. See *supra* Part III(A).

*NML Capital*, a U.S. court would lack the power to execute upon any property located outside of the U.S.<sup>154</sup> It should not follow, however, that a foreign sovereign is then vulnerable to discovery or injunction orders of a U.S. court targeted at its property located abroad. Such a result defies the purpose of the FSIA, ignores the context in which the statute was adopted, and contravenes the spirit, if not the letter, of the presumption against extraterritoriality.

The policies that the Supreme Court has invoked in favor of the presumption against extraterritoriality – adherence to international law norms relating to prescriptive jurisdiction, considerations of international comity, and separation of powers concerns<sup>155</sup> – also weigh in favor of interpreting gaps in the FSIA so as to restrain a court’s power to issue extraterritorial discovery and injunction orders against a foreign sovereign defendant. Although the presumption against extraterritoriality was invoked in Argentina’s briefs filed with the Supreme Court,<sup>156</sup> it was not mentioned at oral argument before the Court in *NML Capital*, nor in the *NML Capital* opinion or in *NML I* or *II*. The following sections first discuss the Supreme Court’s broad interpretation of the FSIA in its decision upholding the Discovery Order, and then address the extraterritorial reach of the Second Circuit’s decision upholding the Injunction Order.

### 1. Discovery Order

Judge Griesa granted NML’s request for a worldwide discovery order regarding Argentina’s bank accounts in order to serve as a “clearinghouse for information” to support NML’s efforts to find and attach Argentine assets. The Second Circuit and the Supreme Court affirmed, finding that the FSIA does not limit a court’s ability to seek discovery regarding a foreign state’s assets for purposes of executing a judgment.<sup>157</sup> Federal district courts have already followed the *NML* precedent by granting broadly-drafted discovery order requests in connection with the enforcement of judgments against foreign sovereign defendants.<sup>158</sup>

By holding that the FSIA does not limit a court’s discretion to order post-

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154. *NML Capital*, 134 S. Ct. at 2257.

155. See *supra* note 56 and accompanying text.

156. Brief for Petitioner at 36–38, *NML Capital*, 134 S. Ct. 2250 (No. 12-842), (2014); see also Petition for Writ of Certiorari at 26, *Republic of Argentina v. NML Capital, Ltd.* 134 S. Ct. 2819 (June 16, 2014) (No. 13-990) (discussing extraterritoriality concerns and citing *Kiobel*).

157. See *supra* Part III(A).

158. See *Aurelius Capital Partners v. Republic of Argentina*, No. 07-2715, 2013 U.S. Dist. LEXIS 32459, at \*24–25 (S.D.N.Y. 2013) (granting a discovery order seeking information regarding any contract or financing arrangement Argentina or any branch of the Republic is entering into in the U.S., Germany, France, “or anywhere”); *Thai Lao Lignite (Thail.) Co. v. Gov’t of the Lao People’s Democratic Republic*, 924 F. Supp. 2d 508 (S.D.N.Y. 2013) (rejecting, in reliance on *NML*, Laos’ FSIA-based objections to a broadly-drafted discovery order).

judgment discovery, *NML Capital* changes the law in the Fifth, Seventh, and Ninth Circuits, where courts until recently interpreted the FSIA to require a more restrained approach to post-judgment discovery. In a decision emphasizing the FSIA's limits on the immunity of foreign state assets from execution, the Fifth Circuit stated that the court on remand should order discovery "circumspectly and only to verify allegations of specific facts crucial to the immunity determination."<sup>159</sup> The Ninth Circuit quoted this same language with approval in a decision addressing discovery in connection with execution of a judgment under the FSIA.<sup>160</sup> Most significantly, the Seventh Circuit held that the FSIA requires that post-judgment discovery must be limited to the specific property identified for attachment.<sup>161</sup> The *Rubin* court reversed a lower court order seeking discovery of information regarding all Iranian-owned assets within the U.S., finding such an order to be incompatible with the FSIA's text, structure, and history.<sup>162</sup> It found that the FSIA was intended to protect foreign states from the "cost and aggravation of discovery,"<sup>163</sup> and emphasized that the FSIA's exceptions to attachment immunity are more narrowly drawn than its exceptions to immunity from suit.<sup>164</sup> The *Rubin* court also relied on its previous decision in *Autotech*, which applied the presumption against extraterritoriality to limit the territorial scope of the FSIA's execution provisions.<sup>165</sup>

As noted, the *NML Capital* decision begins with the proposition that there is no protection to a foreign state unless the FSIA provides for it, concludes that the FSIA's silence should be read to impose no limits on a U.S. court's power to order discovery of a foreign state's property, and suggests that the FSIA does not accord any protection whatsoever to a foreign state's extraterritorial property. This approach is inconsistent with the FSIA's basic structure, which begins with the proposition of absolute immunity, subject only to enumerated exceptions. In its decision in *Amerada Hess*, the Court found that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state" in a U.S. court; in

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159. *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260 (5th Cir. 2002), as amended on denial of reh'g (Aug. 29, 2002) (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992)).

160. *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096–97 (9th Cir. 2007).

Although the D.C. Circuit affirmed contempt sanctions on a foreign sovereign for failure to comply with an extraterritorial discovery order, it rejected arguments relating to the order's scope because the argument was not presented in the proceedings below. *F.G. Hemisphere Assocs. LLC v. Democratic Republic of Congo*, 637 F.3d 373, 379 (D.C. Cir. 2011).

161. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 796–99 (7th Cir. 2011), as corrected (Apr. 1, 2011).

162. *Id.* at 785.

163. *Id.* at 795.

164. *Id.* at 795–96.

165. *Autotech Technologies LP v. Integral Research & Dev. Corp.*, F.3d 737, 750–51 (7th Cir. 2007).



other words, the only way a plaintiff can get into U.S. court with a claim against a foreign state is by finding that one of the FSIA's exceptions to immunity applies. By interpreting the FSIA's silence against the foreign sovereign, *NML Capital's* approach to execution immunity is in tension with *Amerada Hess's* approach to immunity from suit. The Court's approach in *NML Capital* also disregards the historical context in which the FSIA was adopted. As observed in *De Letelier* and as reflected in the statute's legislative history, the FSIA was enacted at a time when the property of a foreign state had enjoyed absolute immunity from execution, both in the U.S. and around the world.<sup>166</sup> Such a reading of the statute also subverts a broader purpose of the FSIA, which is to shield foreign states generally from the inconveniences of litigation in U.S. court, as recognized in numerous decisions,<sup>167</sup> including those of the Supreme Court.<sup>168</sup>

Finally, the Court's interpretive approach turns the presumption against extraterritoriality on its head. *NML Capital's* reading of the FSIA leads to the absurd result that a foreign state's *extraterritorial* property, property that a U.S. court admittedly lacks the power to attach, is accorded no protection from a U.S. court's enforcement orders.

To summarize, the FSIA's silence regarding discovery should cut in the opposite direction, against allowing discovery orders targeted at foreign state property that is immune under the FSIA's execution provisions. Additionally, the FSIA's execution provisions should be read to shield a foreign state's extraterritorial property from discovery orders that a U.S. court might otherwise have the power to issue against a private defendant. This approach gives deference to the U.S. government's position in the *NML* litigation, and supports the narrower reading of the FSIA adopted in the Fifth, Seventh, and Ninth Circuits.

A narrow reading of the right to post-judgment discovery under the FSIA is also justified on policy grounds. As the U.S. government observed at oral argument in *NML Capital*, even if the U.S. is unlikely to become a "rogue debt-

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166. *See supra* Part II(C).

167. *See, e.g.,* *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1127–28 (9th Cir. 2010); *Kelly v. Syria Shell Petroleum Development B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation."); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("[S]overeign immunity is an immunity from the burdens of becoming involved in any part of the litigation process . . ."); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 (7th Cir. 1989) ("[S]overeign immunity is an immunity from trial and the attendant burdens of litigation, not just a defense to liability on the merits.")

168. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003) (quoting *Verlinden B.V. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)) (foreign sovereign immunity is meant "to give foreign states and their instrumentalities some protection from the inconvenience of suit").

or,<sup>169</sup> it still has an interest in ensuring that foreign courts refrain from someday issuing comparable orders seeking information on the location of U.S. reserves, so as to serve as a “clearinghouse for information” regarding U.S. government property around the world.<sup>170</sup> The fact that the Discovery Order was directed at third parties does not eliminate international comity concerns. As the U.S. government has argued,<sup>171</sup> Argentina has a substantial interest in maintaining the confidentiality of the information targeted for disclosure.

Similarly, upholding the broad extraterritorial scope of the Discovery Order raises separation of powers concerns. The order at issue in *NML Capital* is likely to be particularly offensive to the sensibilities of foreign states because it involves international discovery. As the reporters to *The Restatement (Third) of Foreign Relations Law* observed “no aspect of the extension of the American legal system beyond the territorial frontier of the U.S. has given rise to so much friction as the requests for documents in investigation and litigation in the U.S.”<sup>172</sup> As Justice Blackman once observed in a case involving a private defendant, international discovery implicates foreign interests, the presence of which “creates a tension between the broad discretion our courts normally exercise in managing . . . discovery and the discretion usually allotted to the Executive in foreign matters.”<sup>173</sup> In the context of enforcing claims against a foreign sovereign defendant, such discovery requests are particularly sensitive. In the context of the *NML* litigation, plaintiffs’ interest in procuring an effective remedy is outweighed by Argentina’s interest in avoiding the burdens of litigation with respect to its extraterritorial property.<sup>174</sup>

## 2. Injunction Order

Although the Supreme Court denied *certiorari* to review the Injunction Order, the rationale of the *NML Capital* decision, issued the very same day as its orders denying *certiorari*, suggests that the Court may well have affirmed

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169. As Justice Sotomayor remarked to the U.S. Deputy Solicitor General at oral argument in *NML Capital*, 134 S. Ct. 2250 (No. 12-842) “How often do you think the U.S. is going to default on paying a judgment and have people chase it all around the world?” U.S. Oral Argument, *supra* note 63, at 19.

170. *Id.*

171. U.S. *NML Capital* Amicus Brief, *supra* note 118, at 32–33.

172. Restatement (Third), *supra* note 18, at § 442.

173. *Societe Nationale Industrielle Aerospatiale, v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 551–52 (1987) (Blackmun, J., concurring in part and dissenting in part).

174. As commentators have argued in the context of jurisdictional discovery against a foreign state, such discovery requests require a court to balance the plaintiff’s interest in having its day in court against the sovereign interest in avoiding the burdens of litigation. Steven R. Swanson, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 13 EMORY INT’L L. REV. 445, 491 (1999); Joseph M. Terry, Comment, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 66 U. CHI. L. REV. 1029, 1037 (1999).

the Second Circuit had it decided to review the decision. The Court's reasoning in *NML Capital* flatly rejects an argument the U.S. government made repeatedly in the *NML* litigation: that the FSIA's execution provisions protect against court orders directed at the extraterritorial property of a foreign state.<sup>175</sup> As argued in the previous section, the FSIA should be read to protect a foreign sovereign's extraterritorial property. For the reasons elaborated below, the injunctive order at issue in *NML* improperly targeted Argentina's extraterritorial property.

Judge Griesa's injunction order, as implemented, will have extraterritorial effect. This is so not only because of the order's extraterritorial reach as to third parties, but also because the order's *in terrorem* effect on these parties is designed to coerce Argentina into using its financial reserves – immune property that is not located within U.S. territory – to pay NML. As discussed,<sup>176</sup> the Injunction Order applies to all Exchange Bondholders, whether U.S. or foreign, to European clearinghouses, and to the agents of these parties. As Euroclear S.A./N.V. argued in an *amicus* submission before the Supreme Court, the Injunction Order directly conflicts with Belgian legislation, which was enacted specifically to protect Euroclear from an attachment order, or any other blocking order that would prevent the proper functioning of Euroclear as a settlement system.<sup>177</sup>

In addition to its impact on third parties, the Injunction Order targets Argentina's overseas assets. The order allows Argentina no reasonable alternative but to default or use its immune assets to pay NML. It does so by threatening participants in the international payment system with contempt sanctions if they process payments from Argentina that would defy the order. The likelihood is extremely low that participants in the international payment system, especially those institutions operating in New York, would risk being held in contempt of court.<sup>178</sup> In an affidavit submitted to the Second Circuit, Stephen Choi observed that even if Argentina wanted to defy the injunction order, Argentina has no means of paying the Exchange Bondholders outside of the existing payment system. The clearinghouses (Depository Trust Company, Euroclear S.A./N.V., and Clearstream Banking S.A.) are enjoined from cooper-

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175. U.S. *NML I* Amicus Brief, *supra* note 130, at 22–23; U.S. Oral Argument, *supra* note 63, at 18–19; U.S. *NML Capital* Amicus Brief, *supra* note 118, at 10–12.

176. See *supra* notes 140–43 and accompanying text.

177. Brief of *Amicus Curiae* Euroclear Bank SA/NV in Support of Petitioner at 9–10, *NML II* petition for *certiorari* (No. 13-990) (Mar. 24, 2014).

178. Supplemental Declaration of Stephen Choi in the United States Court of Appeals for the Second Circuit, Petition for Writ of *Certiorari*, *supra* note 151, at Appendix C [hereinafter Supplemental Choi Declaration]; see also Weidemaier & Gelpert, *supra* note 11, at 12; Euroclear *amicus* brief *supra* note 177, at 5 (discussing “no reasonable person would risk contempt . . .”).

ating with Argentina to alter the payment mechanism, and it would not be possible for Argentina to independently obtain information as to the identities and holdings of the Exchange Bondholders.<sup>179</sup> The trustee under the indenture governing the Exchange Bonds, Bank of New York Mellon, is similarly enjoined from assisting Argentina in defying the order and, in any event, is bound to protect the interests of the Exchange Bondholders, not Argentina.<sup>180</sup>

In other words, the Injunction Order leaves Argentina only two choices: pay NML, or pay no one and default on the Exchange Bonds. Defaulting on the restructured debt is not only a failure for Argentina but it also irrevocably harms the Exchange Bondholders, and even the global economy in general.<sup>181</sup> Since Argentina's supply of financial reserves is limited and mostly held outside of the U.S., in effect the injunction order compels Argentina to transfer its immune assets from abroad in order to pay NML, thereby achieving a result that the FSIA otherwise would prohibit if attempted through attachment. After June 2014, when the Supreme Court denied *certiorari* to review the Injunction Order, the Second Circuit's stay on its enforcement was lifted. Barred by the Injunction Order from making its June 2014 payment on the Exchange Bonds, Argentina defaulted on its restructured debt one month later.<sup>182</sup> As Joseph Stiglitz characterized the situation, it was the first time in history that a country was ready and willing to pay its creditors but was blocked by a judge from doing so.<sup>183</sup>

As discussed,<sup>184</sup> in *NML I*, the Second Circuit distinguished its previous *S&S Machinery* decision, reasoning that the Injunction Order does not execute on any of Argentina's property. This is a narrow and formalistic distinction. *S&S Machinery* involved an injunction that ordered the foreign sovereign seller not to collect payment under letters of credit, whereas *NML* involves an injunction that effectively compels Argentina to use its overseas assets to pay NML.

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179. Supplemental Choi Declaration, *supra* note 178, at Appendix C, paras. 5, 9, 12. Choi further observes that, even if the foreign clearinghouses cooperated with Argentina to pay only those bondholders located abroad, Argentina's failure to pay the U.S. cleared Exchange Bonds would still constitute a default. *Id.* at para. 12.

180. *Id.* at paras. 6, 11.

181. See Petition for Writ of Certiorari, Declaration of Stephen Choi in the United States Court of Appeals of the Second Circuit, *supra* note 151, at Appendix B, paras. 19–22. Among other things, default may trigger credit default swaps, \$100 million of which NML's parent company, Elliot Associates, acquired in expectation that Argentina would default on the Exchange Bonds. *Id.* at paras. 18, 20.

182. Argentina unsuccessfully petitioned Judge Griesa for a stay from the Injunction Order to make a June 2014 payment on the restructured debt, subject to a thirty-day grace period that expired at the end of July.

183. Joseph E. Stiglitz & Martin Guzman, *Argentina default? Griesafault is much more accurate*, THE GUARDIAN (Aug. 7, 2014, 11:37 AM), <http://www.theguardian.com/business/2014/aug/07/argentina-default-griesafault-more-accurate>.

184. See *supra* notes 137–138 and accompanying text.

In both cases, the injunction functions as an alternate means of obtaining property that should otherwise be immune from attachment under the FSIA.<sup>185</sup> *NML*'s expansive interpretation of the availability of injunctive relief against a foreign state contravenes the FSIA's intent and implicates all of the policy concerns that the Supreme Court has invoked in support of the presumption against extraterritoriality.

U.S. courts traditionally use care when issuing injunctions against foreign sovereign defendants. Even in cases involving private defendants, U.S. courts have invoked the presumption against extraterritoriality as a basis for limiting injunctive relief. *Vanity Fair Mills v. T. Eaton Co.*,<sup>186</sup> a decision involving the extraterritorial reach of the Lanham Act, expressed a note of caution regarding the extraterritorial reach of an injunction:

We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere. But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country.<sup>187</sup>

Although courts have construed the FSIA as allowing a court to issue an injunction against a foreign state, even to issue contempt sanctions where the foreign sovereign has clearly violated an injunction,<sup>188</sup> such action raises comity concerns, especially when the injunction has extraterritorial reach.<sup>189</sup> Sanctioning a foreign state contravenes the Jurisdictional Immunities Convention (not yet in effect, but signed by 28 states), which prohibits a party from imposing sanctions on a foreign state for violating an injunction.<sup>190</sup>

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185. See *S&S Mach. Co. v. Masinexportimport*, 706 F.2d at 411, 418 (2d Cir. 1983) (concluding that once the district court found that the foreign sovereign defendants were immune from prejudgment attachment, it "properly refused to sanction any other means to effect the same result").

186. 234 F.2d 633 (2d Cir. 1956).

187. *Id.* at 647.

188. See *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 915 F. Supp. 2d 148, 154–55 (D.D.C. 2013) (imposing contempt sanctions of \$50,000 per day on Russian Federation until it complies with the Court's injunction order); *Autotech Technologies LP v. Integral Research & Dev. Corp.*, F.3d 737, 744 (7th Cir. 2007) (affirming a court's power to issue contempt sanctions against a foreign state for failure to comply with an injunction order); *FG Hemisphere Associates v. Democratic Republic of Congo*, 637 F.3d 373, 378–79 (D.C. Cir. 2011) (imposing contempt sanctions on the Democratic Republic of Congo for failure to comply with a discovery order).

189. For example, in *Republic of the Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65 (3d Cir. 1994), the Third Circuit vacated a district court order compelling the Philippine government to refrain from harassing witnesses who had testified against it in a suit adjudicated in New Jersey. The court found that the district court had unduly interfered with the foreign state's domestic law enforcement activities, in violation of principles of international comity. *Id.* at 77–79.

190. Article 24(1) of the Jurisdictional Immunities Convention provides that "no fine or penalty shall be imposed on the State for failure or refusal" to comply with a court order.

*Agudas Chasidei Chabad of United States v. Russian Federation*<sup>191</sup> highlights the foreign relations complications that can arise from broad injunctive relief issued against a foreign state. In the case, a federal district court enforced an injunction against the Russian Federation and its Ministry of Culture to return rare religious papers and other artifacts that it had allegedly expropriated from the plaintiffs, a religious organization. The court eventually imposed civil contempt sanctions of \$50,000 on the Russian defendants for each day they continued to violate the court order. The U.S. appeared, arguing against the imposition of contempt sanctions, warning of the potential impact the sanctions would have on ongoing cultural exchanges between the U.S. and Russia, and urging that the dispute instead be resolved through diplomatic channels. The court disagreed with the U.S. and issued the sanctions anyway. In the aftermath of the *Agudas Chasidei Chabad* decision, Russia's Ministry of Culture filed a retaliatory claim against the U.S. Library of Congress in Russian court, seeking recovery of books on loan to the Library.<sup>192</sup> The unsuccessful outcome of *Agudas Chasidei Chabad* illustrates why diplomatic channels may be preferable to broad injunctive orders in resolving sensitive claims against foreign sovereigns.<sup>193</sup>

In its *amicus* submissions before the Second Circuit in *NML I* and before the Supreme Court in *NML Capital*, the U.S. similarly argued that upholding the expansive discovery and injunction orders at issue in the *NML* litigation would be harmful to U.S. relations with other foreign states.<sup>194</sup> Justice Scalia's opinion in *NML Capital* dismissed such concerns, suggesting that "[t]hese apprehensions are better directed to that branch of government with authority to amend the [FSIA]."<sup>195</sup> *NML Capital's* dismissal of the U.S. government's international comity concerns can be contrasted with other recent Supreme Court decisions involving private defendants, in which similar concerns were embraced by the Court in support of its decisions. In *Kiobel* and in *Microsoft*, the Supreme Court invoked foreign relations implications and international comity concerns as justifications for limiting the reach of the Alien Tort Statute and the U.S. Patent Act, respectively.<sup>196</sup> Similarly, in *Daimler*, the Court invoked con-

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191. 915 F. Supp. 2d 148 (D.D.C. 2013).

192. Irina Tarsis & Elizabeth Varner, *Reviewing the Agudas Chasidei Chabad v. Russian Federation, et al Dispute*, ASIL INSIGHTS (Mar. 9, 2014), available at [www.asil.org/insights/volume/18/issue/8/reviewing-agudas-chasidei-chabad-v-russian-federation-et-al-dispute](http://www.asil.org/insights/volume/18/issue/8/reviewing-agudas-chasidei-chabad-v-russian-federation-et-al-dispute).

193. See *id.* (suggesting that "[p]erhaps it is time" to return to diplomatic channels or arbitration to resolve the standstill in *Agudas Chasidei Chabad*).

194. U.S. *NML I* Amicus Brief, *supra* note 130, at 28–29; U.S. *NML Capital* Amicus Brief, *supra* note 118, at 18–22.

195. Exch. Bondholder Grp. v. NML Capital, Ltd., 134 S. Ct. 2819, 2258 (June 16, 2014) (No. 13-991).

196. *Kiobel*, 133 S.Ct. at 1664–65; for a quotation of the relevant text from *Kiobel*, see *infra* the

siderations of international comity to restrict the power of U.S. courts to adjudicate a dispute against a foreign corporation.<sup>197</sup>

Finally, although the Second Circuit characterized the *NML* litigation as extraordinary and unlikely to be repeated,<sup>198</sup> the implications of the Supreme Court's interpretation of the FSIA in *NML Capital* are quite broad and potentially of concern to any foreign state facing the prospect of an enforcement order affecting its extraterritorial property. The Supreme Court interpreted the FSIA as not according any protection to such property. This reading creates a glaring hole in the statute which, until Congress amends the FSIA, leaves foreign sovereign property vulnerable to extraterritorial enforcement orders from U.S. courts.

#### IV. CONCLUSION

The *NML* litigation raises challenging interpretive issues that the text and the legislative history of the FSIA do not clearly address. In *NML Capital*, the Supreme Court held that the FSIA does not limit a court's power to order post-judgment, worldwide discovery. In *NML I* and *NML II*, decisions the Supreme Court decided not to disturb, the Second Circuit found that the Injunction Order did not contravene the FSIA's enforcement provisions because it did not operate as an attachment of Argentina's property. This article argues for a different outcome in the *NML* litigation, due to the historical context in which the FSIA was adopted and the policies behind the presumption against extraterritoriality. The FSIA's silence as to its applicability to discovery and injunction orders should be interpreted so as to impose territorial limits on the property that can be subject to such orders. Exceptions to the immunity of a foreign state's property against execution should be interpreted in a limited way, not an expansive one. Such an interpretive approach is necessary in order to carry out the purpose of the FSIA: to protect foreign states from the burdens of litigation and "to minimize irritations in foreign relations arising out of such litigation."<sup>199</sup>

The stakes of the *NML* litigation were high. When the Injunction Order was appealed for the second time to the Second Circuit, the courtroom was packed at oral argument.<sup>200</sup> In addition to the U.S., about a dozen *amici* submitted

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text accompanying note 217; *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007).

197. *Daimler*, 134 S. Ct. at 763.

198. See *supra* note 149 and accompanying text.

199. H.R. Rep. No. 94-1487, at 45 (1976).

200. According to a security guard at the federal courthouse, the only other case he had seen that generated a similar level of interest was the Martha Stewart trial. See Shearman & Sterling LLP, *Don't Cry for Me Argentine Bondholders: Important Argument in the Second Circuit* (Feb. 28, 2013), availa-

briefs to the court – academics, bondholders, participants in the payment system, and a former deputy managing director of the International Monetary Fund.<sup>201</sup> Similarly, about fifteen *amici*<sup>202</sup> submitted briefs in support of Argentina's second petition for *certiorari* to the Supreme Court with respect to the Injunction Order.<sup>203</sup>

In previous cases involving sovereign debt enforcement, the Second Circuit has been mindful of New York's status as a preeminent commercial and financial center. In *Allied Bank*,<sup>204</sup> the Second Circuit reversed on rehearing its previous decision to deny enforcement of a Costa Rican debt obligation on the basis of international comity.<sup>205</sup> The court's previous decision had provoked an immediate and negative reaction from New York's financial community;<sup>206</sup> the United States submitted an *amicus* brief on rehearing that persuaded the court that "its earlier interpretation of United States policy had been wrong."<sup>207</sup> Reversing itself on the comity issue, the court also rejected Costa Rica's act of state doctrine defense:

[t]he United States has an interest in maintaining New York's status as one of the foremost commercial centers of the world. . . . In addition to other international activities, United States banks lend billions of dollars to foreign debtors each year. The United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law.<sup>208</sup>

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ble at [http://www.shearman.com/~media/Files/NewsInsights/Publications/2013/02/Dont-Cry-for-Me-Argentine-Bondholders-Important-\\_/Files/View-full-memo-Dont-Cry-for-Me-Argentine-Bondhol\\_/FileAttachment/DontCryforMeArgentineBondholdersImportantArgumen\\_.pdf](http://www.shearman.com/~media/Files/NewsInsights/Publications/2013/02/Dont-Cry-for-Me-Argentine-Bondholders-Important-_/Files/View-full-memo-Dont-Cry-for-Me-Argentine-Bondhol_/FileAttachment/DontCryforMeArgentineBondholdersImportantArgumen_.pdf).

201. For the text of these *amicus curiae* briefs, see Briefs and Other Related Documents, *NML Capital v. Argentina*, 699 F.3d 246 (2d Cir. 2012).

202. Some of the *amici* were the same parties who had filed *amicus curiae* briefs with the Second Circuit. These were joined by the governments of France, Brazil and Mexico, a group of former federal judges, and economist Joseph Stiglitz.

203. Argentina filed two petitions for *certiorari* of the Second Circuit's decisions affirming the injunction orders. The first petition requested review of the Second Circuit's decision affirming Judge Griesa's December 2011 order (*NML I*). The Republic of France and several other *amici* submitted briefs. The Supreme Court denied Argentina's petition in October 2013. Republic of Argentina. *NML Capital, Ltd.*, 134 S. Ct. 201 (2013). The Supreme Court denied Argentina's second *certiorari* petition, along with the *certiorari* petition filed by the Exchange Bondholders, in June 2014. See *supra* note 7.

204. *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 519–20 (2d Cir. 1985).

205. See *supra* Part II(A).

206. See Buchheit, *supra* note 37, at 102–03; James Thuo Gathii, *The Sanctity of Sovereign Loan Contracts and Its Origins in Enforcement Litigation*, 38 GEO. WASH. INT'L L. REV. 252, 255–58 (2006).

207. *Allied Bank*, 757 F.2d at 520.

208. *Id.* at 521–22.



In *Weltover, Inc. v. Republic of Argentina*,<sup>209</sup> the Second Circuit invoked similar policy considerations to conclude that Argentina's unilateral extension of the maturity of its U.S. dollar-denominated bonds, payable in New York, caused a "direct effect" in the U.S. for purposes of the FSIA's commercial activity exception.<sup>210</sup> As these cases demonstrate, the Second Circuit endeavors to enhance New York's reputation as a creditor-friendly jurisdiction, adopting rulings that encourage debtors and creditors to conclude debt agreements governed by New York law.

In its opinion in *NML II*, the Second Circuit once again invoked New York's status as a leading commercial center, stating that this status "is advanced by requiring debtors, including foreign debtors, to pay their debts."<sup>211</sup> A question to think about is whether the Second Circuit's affirmance of the Injunction Order went too far. The order's controversial interpretation of the *pari passu* covenant,<sup>212</sup> combined with its broad reach, so drastically enhances the leverage of holdout creditors at the expense of sovereign debtors and holders of restructured debt that it may dissuade foreign sovereigns from issuing debt under New York law in the future. Some observers predict that *NML II* provides issuers of sovereign debt an incentive to leave the New York market and instead issue debt under English or local law.<sup>213</sup> In response to the *NML* litigation, an association of international capital market participants recently adopted changes to model clauses, including the *pari passu* covenant, in standard sovereign debt contracts.<sup>214</sup> By highlighting the weaknesses of the existing, voluntary approach to sovereign debt restructurings, the *NML* litigation has even prompted a revival of interest in a failed 2001 International Monetary Fund proposal to establish a Sovereign Debt Restructuring Mechanism.<sup>215</sup>

These reactions to the *NML* litigation attest to its political sensitivity and to

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209. 941 F.2d 145 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

210. *Id.* at 153–54; *see also* *L'Europeene de Banque v. La Republica de Venez.*, 700 F. Supp. 114, 122 (S.D.N.Y. 1988) (citing the policies identified in *Allied Bank* in support of its conclusion that Venezuela's repudiation of a debt payable in New York caused a "direct effect" in the U.S. for purposes of the FSIA). *But see* *Republic of Argentina v. Weltover*, 504 U.S. 607, 618 (finding that New York's status as an international financial center is too attenuated an effect to qualify as "direct" for purposes of the FSIA).

211. *NML II*, 727 F.3d at 248.

212. *See* text accompanying *supra* note 129.

213. Supplemental Choi Declaration, *supra* note 178, at Appendix C, para. 33; Stiglitz, *supra* note 183.

214. *See* Anna Gelpern, *A Sensible Step to Mitigate Sovereign Bond Dysfunction*, REALTIME ECONOMIC ISSUES WATCH (Aug. 29, 2014, 4:57 PM), <http://blogs.piie.com/realtime/?p=4485> (discussing the International Capital Market Association's August 2014 adoption of Standard Collective Action and *Pari Passu* Clauses for the Terms and Conditions of Sovereign Notes).

215. *See* R. Wigglesworth & A. Beattie, *Bankruptcy Regime for Nations Urged*, FIN. TIMES (Jan. 6, 2013), available at <http://www.ft.com/intl/cms/s/0/ad3068d6-4613-11e2-ae8d-00144feabdc0.html>.

its legal and economic significance. The extraordinary level of interest the litigation has attracted, both from the New York financial community and internationally, highlights another reason why U.S. courts should read the FSIA as limiting the permissible reach of such enforcement orders. As the Supreme Court stated in *Kiobel*, quoting its previous decision in *Sosa v. Alvarez-Machain*,<sup>216</sup>

the potential foreign policy implications of recognizing causes under the [Alien Tort Statute] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.<sup>217</sup>

The Second Circuit's affirmance of extraterritorial enforcement measures against Argentina in the *NML* litigation raises similar foreign policy concerns. When Congress enacted the FSIA, it defined the exceptions to immunity against execution more narrowly than it did the exceptions to immunity from suit precisely because the issue of execution against a foreign state's assets was particularly sensitive and controversial.<sup>218</sup> It remains so today, and in this context a more restrained approach to applying the FSIA is especially needed.

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216. 542 U.S. 692 (2004).

217. *Kiobel*, 133 S. Ct. at 1664 (quoting *Sosa*, 542 U.S. at 727) (brackets and ellipses omitted).

218. See *supra* Part II(C).