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Carving Out New Exceptions to Sovereign Immunity: Why the *NML Capital* Cases May Harm U.S. Interests Abroad

Adriana T. Ingenito

Christina G. Hioureas

ARTICLE

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ADRIANA T. INGENITO[†] AND CHRISTINA G. HIOUREAS[††]

I. INTRODUCTION

Judgment creditors face several obstacles to the enforcement of judgments against sovereign States. However, recent United States jurisprudence demonstrates that judgment creditors have adopted novel legal tools to enforce judgments against sovereigns—and that courts have endorsed the practice. In particular, the Supreme Court's decisions in the *NML Capital* cases signal a willingness on the part of U.S. courts to allow judgment creditors access to previously unavailable legal mechanisms—namely, the use of worldwide discovery and injunctions against a sovereign State.

† Adriana T. Ingenito is an Associate in the New York office of Chadbourne & Parke LLP and works in the International Arbitration and Public International Law group. Ms. Ingenito received her B.A. from the George Washington University Elliott School of International Affairs, her J.D. from American University Washington College of Law, and Master's Degrees in Public International Comparative Law and International Commercial Law from École Normale Supérieure and Université Paris X Nanterre.

†† Christina G. Hioureas is a Senior Associate in Chadbourne's New York office and also works in the International Arbitration and Public International Law group. She is also an Adjunct Professor of Law at Fordham University School of Law and serves as a Delegate before the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations Sixth Committee to the General Assembly (Legal Affairs). Ms. Hioureas received her J.D. from the University of California, Berkeley School of Law and her B.A. in Political Science and Peace & Conflict Studies from the University of California, Berkeley.

This recent jurisprudence shows that U.S. courts are increasingly limiting a State's ability to claim foreign sovereign immunity as a mechanism to prevent enforcement of a judgment. Though such rulings enable many judgment creditors to obtain payment, the decisions run counter to established principles of international law and may potentially jeopardize U.S. interests abroad.

This paper analyzes the history of U.S. sovereign immunity jurisprudence and the policy reasons underlying sovereign immunity;[1] the new legal tools—including (A) injunctions, (B) contempt orders and contempt sanctions, and (C) discovery—adopted by U.S. courts to enforce judgments against foreign states;[2] and why these decisions may run counter to U.S. interests.[3] Though these decisions may greatly aid creditors in enforcing judgments against sovereigns in U.S. courts, the use of such extraordinary measures may ultimately harm the interests of the U.S. government and even judgment creditors in judicial actions abroad.[4]

II. FOREIGN SOVEREIGN IMMUNITY IN THE UNITED STATES: POLICY CONSIDERATIONS AND THE FSIA

The doctrine of sovereign immunity, which generally shields a State from being sued in U.S. courts and protects a State against seizure of its property, is a primary reason why judgment creditors face difficulty in executing judgments against foreign States.[5] The United States has long recognized the principle of foreign sovereign immunity, which originates from the concept of foreign reciprocity.[6] Initially, States were provided with absolute immunity, and the decision whether to accord a State immunity was made by the

1. *See infra* Part II.
2. *See infra* Part III.
3. *See infra* Part IV.
4. *See infra* Part IV.
5. *See* 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., no. 3, 2008, at 666, 668 ("Sovereigns' reactions to adverse rulings vary. Some may denounce any such ruling and vow to resist compliance, while others may simply write a check.").
6. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136–37 (1812) (finding that "perfect equality and absolute independence of sovereigns, and [a] common interest impelling them to mutual intercourse" prevented U.S. courts from hearing any claim—no matter how justified—against France).

executive branch.[7] However, recognizing the need for a uniform set of laws on sovereign immunity, Congress enacted the Foreign Sovereign Immunities Act ("FSIA") in 1976.[8]

The FSIA codifies the general principle that foreign states are immune from suit ("jurisdictional immunity") and from seizure of their property ("execution immunity"), except in enumerated circumstances.[9] Of particular importance to judgment creditors is that under the FSIA, foreign State property is immune from attachment, arrest, and execution except if it is located in the United States and being used for commercial activity in the United States.[10] State property located outside the United States lies beyond the jurisdictional reach of U.S. courts.[11]

This limitation is rooted in foreign policy considerations including comity of nations and reciprocity. Specifically, the United States has a strong interest in ensuring that property used for governmental functions is not subject to attachment proceedings.[12] As a result, U.S. courts have uniformly found that the "exceptions to immunity in Section 1610(a) apply only to property located in the United States that is used for *commercial activity* in the United States."[13]

7. Erica E. Smith, *Immunity Games: How the State Department Has Provided Courts with a Post-*Samantar *Framework Determining Foreign Official Immunity*, 67 VAND. L. REV. 569, 571, 573 (2014).

8. H.R. REP. NO. 94-1487, at 12–13, 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611, 6631 (noting Congress's intent to promote a "uniformity in decision" in "cases involving foreign "sovereigns," Congress's concerns about the potential sensitivity of actions against foreign states, and the importance of developing a uniform body of law in this area); GUY S. LIPE AND AMIN OMAR, LITIGATION AGAINST "FOREIGN STATES" IN THE UNITED STATES COURTS: AN OVERVIEW OF THE AMERICAN FOREIGN SOVEREIGN IMMUNITIES ACT 1–2 (2004).

9. Foreign Sovereign Immunities Act, 28 U.S.C § 1604 (2012); *see also* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 480 (1983) (noting that the FSIA "codifies, as a matter of federal law, the restrictive theory of foreign sovereign immunity" and transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch).

10. 28 U.S.C § 1610 (2012).

11. Brief for the United States as Amicus Curiae at 14, Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) (No. 12-842); Autotech Techs. LP v. Integral Research & Dev Corp. 499 F.3d 737, 750–52 (7th Cir. 2007).

12. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 460 cmt. b (1987) ("[T]he primary function of states is government, and absent waiver, their liability should be limited to particular claims and their amenability to post-judgment attachment should be limited to particular property.").

13. LIPE & OMAR, *supra* note 8 at 28–29 (emphasis added); *see also, e.g.*,

There are also significant reasons why the United States provides foreign sovereigns with immunity from jurisdiction and attachment. First, the United States grants foreign sovereigns the same protections it would want to receive abroad. This is because some States base their foreign sovereign immunity decisions on reciprocity, meaning that they provide only the treatment that they would receive in U.S. courts.[14] Because the U.S. government does not want to be brought to suit abroad in another nation's courts nor have its property seized under the laws of another country, it favors providing immunity to foreign sovereigns.

Equally, the United States aims to shield foreign States from unwarranted litigation costs and overly intrusive legal inquiries, so as to also avoid being subjected to adverse treatment in foreign courts.[15] In *Société Nationale Industrielle Aérospatiale v. United States*, the Supreme Court noted that "extraterritorial asset discovery in cases involving foreign states raises comity concerns, and courts ordering discovery should demonstrate due respect for any sovereign interest expressed by a foreign state."[16]

The U.S. Government's interest in protecting sovereign immunity, on the one hand, and the courts' interest in permitting judgment creditors to execute their judgments against foreign States, on the other, came to a head in the *NML Capital* cases. In these cases, the Supreme Court effectively permitted the use of injunctions against foreign states and explicitly allowed for worldwide discovery of a foreign State's assets—including assets that would otherwise be

Fidelity Partners, Inc. v. Philippine Export & Foreign Loan Guar. Corp., 921 F. Supp. 1113, 1118 (S.D.N.Y 1996) ("Section 1610 . . . speaks only of a foreign state's property in the United States . . . [and] creates no exception to immunity for property outside the United States.").

14. Brief for the United States as Amicus Curiae, *supra* note 11, at 11 (citing Persinger v. Islamic Republic of Iran, 729 F.2d 835, 841 (D.C. Cir), *cert. denied*, 469 U.S. 881 (1984) (finding that Iran was immune from suit in the United States by a former hostage injured during the Iran hostage crisis on the basis, *inter alia*, of reciprocal sovereign immunity).

15. Brief for the United States as Amicus Curiae, *supra* note 11, at 11 (noting that "[t]he United States maintains extensive overseas holdings as part of its worldwide diplomatic missions and security operations. and law enforcement missions, and engages in widespread financial transactions . . . in connection with those and other activities" and that "a U.S. court's allowance of unduly broad discovery concerning a foreign state's assets" – especially assets beyond the jurisdiction of the U.S. Courts – could result in less favorable treatment for the United States in various respects when sued abroad.").

16. 482 U.S. 522, 546–47 (1987).

immune from attachment in the United States.[17] These decisions, viewed alongside other recent U.S. case law outlined below, demonstrate that U.S. courts are increasingly using their inherent discretionary powers (including injunctions, contempt sanctions, and broad discovery) to design remedies that force compliance with their judgments. In so doing, the courts have altered U.S. foreign sovereign immunity jurisprudence, to the potential detriment of foreign States.

III. A NEW LEGAL REGIME: NOVEL TOOLS USED BY JUDGMENT CREDITORS IN AN EFFORT TO ENFORCE JUDGMENTS AGAINST FOREIGN STATES

Despite the exceptions to sovereign immunity outlined under the FSIA, creditors seeking to enforce a judgment against sovereign States in the United States traditionally faced significant difficulty. As a result, creditors have sought creative solutions to execute on their judgments, and many of these approaches have been endorsed by courts.

One such tactic is the use of U.S. courts' broad discretionary power to fashion remedies for judgment creditors. Under U.S. law, a court "has the right to take appropriate orders to make the original judgment effective."[18] Applying this principle, courts have ordered injunctions against foreign States where a final judgment has been rendered but remains unpaid.[19] Where judgments have been frustrated, courts have begun to enforce judgments through contempt orders and contempt sanctions against foreign States. And, most

17. Republic of Argentina v. NML Capital, Ltd. (*Discovery Case*), 134 S. Ct. 2250, 2253–58 (2014) (permitting worldwide discovery against a foreign State); NML Capital, Ltd. v. Republic of Argentina (*Equal Treatment Case I*), 699 F.3d 246, 250 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 201 (U.S. 2013) (refusing to rule on the Second Circuit's use of injunctions against Argentina).

18. *See, e.g.*, Telenor Mobile Commc'ns v. Storm, 587 F. Supp. 2d 594, 615 (S.D.N.Y. 2008) *aff'd*, 351 F. App'x 467 (2d Cir. 2009) (finding that when parties fail to comply with a court order, the court can order the violating party in contempt of court).

19. *See infra* Part III.A.; *see also Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692, 694–95 (S.D.N.Y. 1985) (citing *Sperry Int'l Trade, Inc. v. Government of Israel*, 532 F. Supp. 901 (S.D.N.Y. 1982) *aff'd*, 689 F.2d 301 (2d Cir. 1982)) (confirming an arbitral panel's preliminary ruling granting a preliminary injunction and ordering the removal of Pemex's notice of claim of lien because "the very purpose of the arbitrators' award would be frustrated if the parties' ability to enforce it were left until a complete resolution on the merits.").

notably, the Supreme Court's decision in *NML Capital v. Argentina* has greatly expanded creditors' ability to execute judgments or arbitral awards by permitting worldwide discovery of assets held by a State.[20] These non-traditional means of enforcing arbitral awards and foreign judgments in the United States are outlined in sections (A) through (C), below.

A. Injunctions Against Foreign States

Courts recently have found that injunctions can be used against a foreign State to pressure the State to comply with a judgment. In *NML Capital*,[21] the Second Circuit affirmed an injunction prohibiting Argentina from making payments on its restructured bonds without also making payments on the defaulted bonds that were the basis for NML Capital's money judgments against Argentina.[22] In that case, Argentina argued, *inter alia*, that the injunction violated the FSIA by ordering Argentina to satisfy the judgment with funds held outside the United States.[23] Argentina relied on the Second Circuit's decision in *S&S Machinery Co. v. Masintexportimport*, in which the court held that a district court could not grant an injunction that effectively permitted an attachment that would be otherwise be prohibited under the FSIA.[24] However, the court in *NML Capital*, rejected this argument and held that injunctive relief against Argentina was proper.[25] In rendering its decision, the court noted that "[s]pecific performance may be ordered where no adequate monetary remedy is available and that relief is favored by the balance of equities, which may include the public interest."[26] It further stated that "[o]nce the district court determined . . . that injunctive relief was warranted, the court had considerable latitude in fashioning the relief."[27] Accordingly, absent the parties' express intent to restrict the remedies available for a breach, the "full panoply of appropriate remedies remains available" to a court.[28]

The Second Circuit found that injunctive relief against

20. *Discovery Case*, 134 S. Ct. 2250, 2253–54.
21. *Equal Treatment Case I*, 699 F.3d 246.
22. *Id.* at 250.
23. *Id.* at 257.
24. 706 F.2d 411, 418 (2d Cir. 1983).
25. *Equal Treatment Case I*, 699 F.3d 246, 262.
26. *Id.* at 261.
27. *Id.*
28. *Id.* at 262 (citing Vacold LLC v. Cerami, 545 F.3d 114, 130 (2d Cir. 2008)).

Argentina was proper because "monetary damages are an ineffective remedy" for the harms the plaintiffs sought, because "*Argentina will simply refuse to pay any judgments*" as it had done in that case by effectively "closing the doors of its courts to judgment creditors."[29] Moreover, such injunctions were not barred by Section 1609 of the FSIA, because they "do not attach, arrest, or execute upon any property," but instead "direct Argentina to comply with its contractual obligations" not to pay certain bondholders ahead of others.[30] However, as the United States cautioned in its amicus brief in support of Argentina in that case, such a formalistic interpretation would permit courts to "eviscerate [the FSIA's] protections merely by denominating their restraints as injunctions against the . . . use of property rather than as attachments of that property."[31] By declining to review the Second Circuit's decision in this stage of the *NML Capital* litigation,[32] the Supreme Court effectively affirmed that courts can levy injunctions on foreign States to assist judgment creditors in satisfying those judgments.[33]

Notably, at least one court has refused to extend the decision in *NML Capital* to prohibit the use of acts similar to injunctions, when doing so would effectively amount to an attachment of immune property under the FSIA. For example, in *Thai Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic ("Laos"),*[34] Lao Lignite won an arbitral award against Laos, and sought to attach the assets of Laos by issuing restraining notices against airlines that owed Laos fees for flying over the country. In litigation before the Southern District of New York, Laos argued that the fees were immune assets, and, therefore, the restraining notices

29. *Id.* at 261–62 (citing Pashaian v. Eccelston Props., Ltd., 88 F.3d 77, 87 (2d Cir.1996) (emphasis added); RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. d (1981) ("Even if damages are adequate in other respects, they will be inadequate if they cannot be collected by judgment and execution.")).

30. *Equal Treatment Case I*, 699 F.3d 246, 262.

31. Brief for the United States of America as Amicus Curiae in Support of Argentina's Petition for Panel Rehearing and Rehearing En Banc at 6, *Equal Treatment Case I*, 699 F.3d 246 (citing S & S Machinery Co. v. Masinexportimport, 706 F.2d 411, 417 (2d Cir. 1983)).

32. NML Capital, Ltd. v. Republic of Argentina (*Equal Treatment Case II*), 727 F.3d 230 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014).

33. *See Implications of the Argentina Debt Litigation for Foreign Sovereign Immunity*, ROPES & GRAY ALERT, (July 30, 2014), http://www.ropesgray.com/news-and-insights/Insights/2014/July/Implications-of-the-Argentina-Debt-Litigation-for-Foreign-Sovereign-Immunity.aspx.

34. No. 10 CIV. 5256 KMW DCF, 2013 WL 1703873 (S.D.N.Y. Apr. 19, 2013).

issued against the airlines should be vacated and a motion for turnover of funds should be denied because the acts were equivalent to an attachment of immune assets. The court agreed, noting that courts must consider "the practical effect of the proposed remedy, not simply whether it is specifically listed in the FSIA, in analyzing whether the property is immune."[35] It held that the remedies the plaintiffs sought, namely restraining notices, violated the FSIA because they "are functionally equivalent to the attachment of Respondent's property because they involve court-ordered seizure and control."[36]

B. Contempt Orders and Contempt Sanctions

Judgment creditors have also increasingly requested that courts hold judgment debtors in contempt and issue contempt sanctions against the debtor if it fails to abide by a U.S. court judgment. District Courts have "broad discretion to design a remedy that will bring about compliance" from a recalcitrant contemnor and can issue sanctions against a party for failing to comply with a judgment.[37] Notably, certain courts have issued contempt sanctions against sovereign states, bypassing sovereign immunity concerns.

In *FG Hemisphere v. Democratic Republic of Congo*, the Court of Appeals for the D.C. Circuit found that "[t]here is not a smidgen of indication in the text of the FSIA that Congress intended to limit a federal court's inherent contempt power."[38] Accordingly, in *FG Hemisphere*, following entry of a default judgment, and after the Democratic Republic of Congo ("DRC") began participating in the litigation, the district court issued contempt sanctions against the DRC for failing to respond to court-ordered discovery.[39]

35. *Id.* at *4 (citing *Equal Treatment Case* I, 699 F.3d 246, 262 for the proposition that "courts are barred from granting relief that is functionally equivalent to attachment").

36. *Id.*

37. *Telenor Mobile Commc'ns*, 587 F. Supp. 2d 594, 621 (S.D.N.Y. 2008) (citing Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc., 673 F.2d 53, 57 (2d Cir. 1982)).

38. FG Hemisphere Associates, LLC v. Democratic Republic of Congo, 637 F.3d 373, 378 (D.C. Cir. 2011) (citing Autotech Techs. v. Integral Research & Dev., 499 F.3d 737, 744 (7th Cir. 2007))**;** *see also* EM Ltd. v. Republic of Argentina, 695 F.3d 201, 208 (2d Cir. 2012) *aff'd sub nom. Discovery Case*, 134 S. Ct. 2250 (2014) (citing the *FG Hemisphere* decision as support for the court's power to enforce valid judgments, including through contempt sanctions against a State).

39. *Id.* at 375.

Likewise, in *Chabad v. Russian Federation*,[40] the district court entered a final order compelling the defendants to return a collection of expropriated materials to Chabad's representatives, and issued contempt sanctions of $50,000 per day until defendants complied with the order.[41] The district court rejected Russia's argument that the Foreign Sovereign Immunities Act does not permit a court from ordering monetary sanctions against a foreign sovereign.[42]

Although a United States court has the right to issue a contempt sanctions, it may be difficult to enforce those sanctions by obtaining possession of a foreign state's assets. In *Chabad*, for example, the court noted that although U.S. courts can *order* a sanction against a State, the FSIA may prohibit *enforcement* of those sanctions by attaching the assets of the Foreign State.[43]

C. Discovery

In its landmark decision issued on June 16, 2014, the Supreme Court redefined the boundaries creditors face in attempting to execute a judgment against a foreign State. In *Republic of Argentina v. NML Capital Ltd,* the Supreme Court held that the Foreign Sovereign Immunities Act does not bar post-judgment discovery of *any* of a foreign State's assets.[44]

NML Capital is a bondholder that holds several judgments against Argentina, which direct the State to pay the company on its defaulted bonds. In 2010, NML Capital pursued the discovery of Argentina's assets in its effort to collect on these judgments.[45] As part of this effort, NML Capital served a subpoena on a bank in the United States.[46] The subpoenas sought information about Argentina's assets in the United States and abroad, including information about government agencies, and certain Argentine officials and employees.[47] The U.S. District Court for the Southern District of New York granted a motion to compel compliance with these

40. 915 F. Supp. 2d 148 (D.D.C. 2013).
41. *Id.* at 150.
42. *Id.* at 152–53.
43. *Id.*
44. *Discovery Case*, 134 S. Ct. 2250 (2014).
45. *Id.*
46. *Id.* at 2253.
47. *Id.*

subpoenas, and the Second Circuit Court of Appeals affirmed.[48]

Argentina petitioned the Supreme Court to review the Second Circuit's ruling regarding the discovery subpoenas.[49] In its petition, Argentina argued that the FSIA, which curtails the circumstances when foreign sovereign assets can be seized or attached by U.S. courts, also limited discovery of such assets.[50] The United States filed an amicus brief in support of Argentina, also arguing that the discovery subpoenas violated the FSIA and contradicted longstanding principles of foreign sovereign immunity, and that the FSIA does not permit the discovery of immune assets.[51] In their submissions, Argentina and the United States relied heavily on the Seventh Circuit's decision in *Rubin v. Republic of Iran*, which supported Argentina's position that general asset discovery of a foreign state's property violates the FSIA.[52] In *Rubin*, the Seventh Circuit reversed a district court order permitting general asset discovery into Iran's assets in the United States because the order was not tailored to discovery concerning assets that might be subject to attachment in the U.S.[53]

In *Republic of Argentina v. NML Capital Ltd*, the Supreme Court granted certiorari, and considered whether the Foreign Sovereign Immunities Act prohibited the discovery of a judgment debtor state's assets.[54] The Supreme Court noted that the FSIA was adopted to prescribe a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign

48. *Id.* at 2253–54.

49. Petition for Writ of Certiorari at 27, Republic of Argentina v. NML Capital, Ltd., 699 F.3d 246 (2d Cir. 2012) (No. 12-842).

50. *Id.* at 14–26.

51. Brief for the United States as Amicus Curiae in Support of Petitioner at 17, Republic of Argentina v. NML Capital, Ltd. 134 S. Ct. 2250 (2014) (No. 12-842). ("Broad, general discovery into the character, use, location, or amount of a foreign state's property without regard to whether those assets are subject to execution in U.S. courts is no more appropriate, and no less intrusive, than broad, general discovery into the acts of a foreign state without regard to whether the state itself is subject to the jurisdiction of our courts. Because foreign-state property is presumed immune under the FSIA, and because that immunity is lifted only in limited circumstances and only as to property located in the United States and used for commercial purposes, a district court may not simply require disclosure of 'all' of a foreign state's assets.").

52. Rubin v. The Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012).

53. *Id.* at 794 (holding general asset discovery "incompatible with the text, structure, and history of the FSIA").

54. *Discovery Case*, 134 S. Ct. at 2255.

state."[55] Stressing the "comprehensive" nature of the FSIA, the Court held that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA's] test. Or it must fall."[56] The Court found that "[t]here is no . . . provision forbidding or limiting discovery in aid of a foreign-sovereign judgment debtor's assets," and permitted broad discovery of Argentina's assets around the world.[57] In doing so, the Court held that the FSIA does not provide a foreign State immunity from post-judgment discovery, and that, as a result, judgment creditors can seek information concerning the assets a State holds outside the United States.[58] Additionally, the Court also ruled that a district court could even order discovery of assets that are potentially immune from attachment or execution under the Act.[59] In response to Argentina's (and amicus curiae the United States') arguments that allowing broad discovery would have worrisome international relations consequences, the Court states that those "apprehensions are better directed to that branch of government with authority to amend the Act[.]"[60]

The Supreme Court's decision indicates that, although some State property may be immune from attachment under the Foreign Sovereign Immunities Act, it does not mean it is immune from discovery. However, as discussed in Section (II), *supra*, the FSIA only grants immunity to State property held within the United States that is used for a sovereign purpose. Other States, however, grant different standards of immunity to State property, some of which permit the attachment of broader types of State assets. As a result, after the Supreme Court's decision in NML Capital, judgment creditors now may have the ability to find the State property held outside the United States that is attachable under the laws of a foreign jurisdiction, but that would otherwise be immune from attachment in the United States.

This ruling suggests that the U.S. federal courts increasingly interpret the Foreign Sovereign Immunities Act as providing less immunity to sovereigns, to the benefit of private litigants. Moreover, by permitting broad discovery of State assets worldwide, the Supreme Court has in effect internationalized, in part, the Foreign

55. *Id.*
56. *Id.* at 2256.
57. *Id.*
58. *Id.* at 2256–57.
59. *Id.* at 2254.
60. *Id.* at 2258.

Sovereign Immunities Act by permitting worldwide asset discovery through United States law.

IV. DESPITE THE POSITIVE EFFECTS FOR JUDGMENT CREDITORS, THESE RECENT DECISIONS MAY RUN COUNTER TO U.S. SOVEREIGN IMMUNITY JURISPRUDENCE

Although the decisions referenced above indicate that U.S. courts are increasingly willing to grant non-traditional relief to judgment creditors in an attempt to satisfy those judgments, these decisions depart from previous jurisprudence on foreign sovereign immunity. The decisions also raise concerns about their reciprocal application to the United States. Notably, the Supreme Court's rulings in the *NML Capital* decisions run counter to positions taken by the U.S. Justice Department and the U.S. State Department during the proceedings. Utilizing injunctions and broad discovery against foreign states may pose several potential problems.

First, by declining to accept review of the decision by the Second Circuit[61] in which the court enjoined Argentina, the Supreme Court effectively upheld injunctions against a foreign state. This is important because the Supreme Court has permitted private litigants to achieve ends that might not have been directly achievable against the foreign state under the FSIA. The injunctions make it impossible for Argentina to pay the exchange bondholders unless it pays NML, and Argentina's assets held in banks—the only assets that are potentially not immune from attachment by a U.S. Court—have been frozen. As a result, these decisions have the effect of compelling Argentina to pay the NML judgment with assets held outside the United States, or with other assets that are otherwise immune from execution under the FSIA. Argentina had the option to pay the holdout bondholders with immune assets or to default on the exchange bonds even though it was willing to pay them**.** Argentina chose the latter, and on July 30, 2014 Standard & Poor's declared that Argentina defaulted.[62] Because of the default, no Argentine bondholders are receiving payment on their bonds, creating a lose-lose situation for NML, the restructured debt bondholders, and the

61. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2819 (2014), *denying cert. to* 727 F.3d 230 (2d Cir. 2013).

62. *Standard & Poor's Sovereign Ratings Unsolicited Foreign Currency Argentina to SD (Selective Default)*, STANDARDANDPOORS.COM (Jul. 30, 2014), http://www.standardandpoors.com/ratings/articles/es/la/?articleType=HTML&assetID=1245372076453.

Argentine economy.

The *NML Capital* cases may also undermine future negotiations between countries that have defaulted on their debt obligations and their creditors. Foreign States must restructure voluntarily, and creditors may be less likely to agree to a bond discount, knowing that holdouts can insist on full repayment on the original bond. As the United States has argued in its amicus briefs before the New York courts, "[v]oluntary sovereign debt restructuring will become substantially more difficult, if not impossible, if holdout creditors are allowed to use novel interpretations of boilerplate bond provisions to interfere with the performance of a restructuring plan accepted by most creditors and to dramatically tilt the incentives away from consensual, negotiated restructuring in the first place."[63] The United States further argued that "[the *NML Capital* decision concerning the injunction against Argentina] could enable a single creditor to thwart the implementation of an internationally supported restructuring plan, and thereby undermine the decades of effort the United States has expended to encourage a system of cooperative resolution of sovereign debt crises."[64]

The Supreme Court's decision, which allows for worldwide discovery in aid of execution on a judgment, permits a judgment creditor to determine where a state's assets are worldwide. These assets may be immune from execution or discovery under the FSIA, or under the laws of other foreign States. The scope of U.S. discovery is often significantly broader than that permitted by other jurisdictions.[65] Accordingly, worldwide discovery subpoenas issued by the U.S. could circumvent the limitations and protections afforded not only by FSIA, but also by foreign law.

Perhaps most importantly, the Supreme Court's decision on discovery, the Second Circuit's upholding of injunctions, and the use of contempt sanctions and contempt orders "could lead to reciprocal adverse treatment of the United States in foreign courts," where the United States may now also be subjected to same treatment.[66] As the

63. Brief for the United States of America as Amicus Curiae in Support of Reversal at 17, NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246(2d Cir. 2012), *cert. denied*, 134 S. Ct. 201 (2013).

64. *Id.* at 5.

65. Brief for the United States as Amicus Curiae in Support of Petitioner, *supra* note 50, at 19 (citing Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S.D. of Iowa, 482 U.S. 522, 542 (1987)).

66. *Id.* at 20; National City Bank v. Republic of China, 348 U.S. 356, 362

United States noted in its amicus brief, the "judicial seizure" of a foreign state's property "may be regarded as an affront to its dignity and may . . . affect our relations with it."[67] As a result, foreign states and the U.S. itself (because of reciprocity) may be burdened by litigation over the scope and manner of discovery, running afoul of one of the principles of the FSIA.[68]

V. CONCLUSION

United States jurisprudence historically provided judgment creditors with narrow exceptions under which a judgment could be enforced against a foreign Sovereign. Despite the FSIA's exceptions to sovereign immunity, judgment creditors often face significant hurdles in their attempts to execute on a judgment or award against a foreign Sovereign. In an effort to remedy that problem, U.S. courts, including the Supreme Court, have increasingly provided for new means to enforce judgments against recalcitrant States. Specifically, in the landmark decision of *Republic of Argentina v. NML Capital*, the Supreme Court upheld the use of broad discovery around the world to permit judgment creditors to locate the assets of foreign sovereigns. As a result, the United States legal regime has recently shifted to become more favorable to judgment creditors. Although these decisions are facially beneficial to judgment creditors, it remains to be seen whether the decisions result in increased success of judgment creditors seeking repayment on their judgments. However, the benefits to judgment creditors come with significant risks to sovereign states—including the United States. Specifically, the decisions risk subjecting the United States to reciprocal treatment in foreign states (including worldwide discovery, injunctions, and contempt sanctions), and may alter U.S. interests abroad.

(1955) (one basis for foreign sovereign immunity is "reciprocal self-interest").

67. *Id.* at 13–14 (citing Philippines v. Pimentel, 553 U.S. 851, 866 (2008)); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 346 (5th ed. 1998) (noting that "forcible execution directed against [foreign state] assets . . . may lead to serious disputes.").

68. *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 546 (noting that extraterritorial asset discovery in cases involving foreign states raises comity concerns, and courts ordering discovery should "demonstrate due respect . . . for any sovereign interest expressed by a foreign state.").