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The Litigation Tango of La Casa Rosada and the Vultures: The Political Realities of Sovereign Debt, Vulture Funds, and the Foreign Sovereign Immunities Act

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Abstract:

When Argentina defaulted on more than $100 billion of sovereign debt at the end of 2001, its note holders may not have been surprised, but they were left deciding what to do with their valueless investments. Subsequently, the Argentine economy grew in the following years, and Argentina presented a massive restructuring plan to investors, offering new notes for a fraction of their original value. Most investors seized the opportunity to recoup some profit. However some refused, opting instead to take their chances in court. Among forty cases filed against Argentina in litigation spanning over a decade, Republic of Argentina v. NML Capital, Ltd. has garnered the most attention. At the core of these enforcement cases is the reach and strength of the United States' Foreign Sovereign Immunities Act ("FSIA"), an American statute meant, in part, to balance the interests to private creditors and the United States' foreign policy and diplomatic necessities. The FSIA is very much a legal tool in a political dance. As a result, there is a delicate three-party tango, danced in U.S. courtrooms to the music of the FSIA, with the objective of forcing political action. The NML Capital litigation has reiterated the inherent political difficulties in litigating sovereign debt issues.

I. Introduction

Tourists visiting Argentina flock to the Caminito *barrio* to watch *porteños* tango across the cobblestone streets of historic Buenos Aires. The dance partners engage in entwined kicks and dramatic separations between passionate embraces in time with the legato and staccato lulls of the accordion. The give and take of the dancers in time with the iconic rhythms is a popular attraction for Argentina's growing tourist economy. However, another tango taking place miles away has captivated observers. In the United States, a decades-long litigation dance between Argentina's executive branch, housed in the iconic *La Casa Rosada* (the pink Argentine equivalent of the American White House), American private investors and hedge funds, and spectating sovereigns has tested the bounds of sovereign immunity and the rule of law.

When Argentina defaulted on more than $100 billion of sovereign debt at the end of 2001,[1] its note holders may not have been all that surprised, but were left with deciding what to do with their valueless investments.[2] Then, the Argentine economy grew in the following years and Argentina presented a massive restructuring plan

1. Dan Rosenheck, "Argentina's Rational Default," *The New Yorker*, August 2014, *available at* www.newyorker.com/business/currency/argentinas-rational-default (last accessed Nov. 13, 2014).
2. *Id.*

to investors, offering new notes for a fraction of their original value. Most investors seized the opportunity to recoup some profit. But some refused, opting instead to take their chances in court. Among forty cases filed against Argentina in litigation spanning more than a decade,[3] *Republic of Argentina v. NML Capital, Ltd.*[4] has garnered the most attention.

At the core of these enforcement cases is the reach and strength of the United States' Foreign Sovereign Immunities Act ("FSIA"), an American statute meant to remove political inconsistency from the prosecution of claims against sovereigns. Nonetheless, the FSIA is very much a legal tool in a political dance. As a result, there is a delicate three-party tango, danced in U.S. courtrooms to the music of the FSIA, with the objective of forcing political action. The *NML Capital* litigation has reiterated the inherent political difficulties in litigating sovereign debt issues. The American courts' acceptance of the distressed debt investors', or "vulture funds," contract-based "rule of law" claim and the resulting power given to those judgment-empowered vultures is in direct conflict with the larger international law-based "rule of law" grounded in state sovereignty and the principle of comity.

II. Argentina's 2001 Default and Its Resulting Politics

Argentina is the "rogue state" in the saga of sovereign debt defaults and restructurings.[5] While still a developing nation, it is the second largest economy in South America.[6] However, Argentina is also notorious for not paying its debts.[7] Since 1828, Argentina has defaulted on its debts eight times, most recently in 2014.[8] Argentina's most recent default though is a consequence of the litigation tango it has danced with the vulture funds since 2001.[9]

3. Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 Chi. J. Int'l L. 311, 327 (2005).
4. 134 S. Ct. 2250 (2014); *see NML Capital Ltd. and EM Ltd. v. Banco Central de La República Argentina*, 652 F. 3d 172 (2d Cir. 2011); *see also EM Ltd. and NML Capital, Ltd. v. Republic of Argentina*, 695 F. 3d 201 (2d Cir. 2012). For purposes of this comment, references to the *"NML Capital"* case will refer to the 2014 United States Supreme Court decision.
5. *See* Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311, 329 (2005).
6. "Argentina Does it Kirchner's Way," *FTSE Capital Markets*, http://www.ftseglobalmarkets.com/emerging-markets-report/issue-20-july-august-2007/argentina-does-it-kirchners-way.html, July 1, 2007 (last accessed Nov. 13, 2014).
7. *See* Rosenheck, *supra* n. 1.
8. *Id.*
9. *Id.*

A. The historic 2001 default and Argentina's politics in its wake

In December 2001, Argentina defaulted on $82 billion of sovereign debt held by private creditors.[10] It was the largest sovereign debt default in history at the time.[11] In Argentina, however, the default was applauded as a show of Argentine independence from oppressive and greedy American financial obligations.[12] The default benefited Argentina both economically and politically, leading vulture funds to label it an "opportunistic default."[13]

At the time of default, "Argentina's economy was fundamentally sound except for its high level of indebtedness."[14] In the wake of the default, Argentina's economy grew.[15] The Argentine government maintained a surplus and added to its reserves,[16] which were largely maintained in the U.S.[17] The Central Bank kept interest rates down and managed monetary and currency policy to further economic expansion and, at least superficially, to control inflation.[18] Argentina's currency was devalued because of the default, and the Argentine *peso* was no longer pegged to the U.S. dollar.[19] This made Argentine exports extremely competitive and created a lucrative tourist industry.[20] In a bit of fortune, Argentina's economy also benefitted from increased Chinese demand for alloy, an Argentine export.[21] By 2007, Argentina's reserves were more than $40 billion.[22]

Argentina's government gained massive support both domestically and regionally.[23] Domestically, Argentines praised President Sáa and his successor, President Néstor Kirchner,[24] for putting Argentines first.[25] Regionally, Venezuelan President Hugo Chavez, a constant antagonist to the United States' foreign policy objectives in the region, stepped in to help.[26] Venezuela initially purchased $5 billion of Argentine debt.[27] The two countries also began talks to establish a bank in Latin America that would hold sovereign assets in order to avoid the litigation risks of

10. "Argentina Does it Kirchner's Way," *supra* n. 6.
11. Rosenheck, *supra* n. 1.
12. *See id.*
13. Porzecanski, *supra* n. 5, at 319-322.
14. "Argentina Does it Kirchner's Way," *supra* n. 6.
15. *Id.*
16. *Id.*
17. Rosenheck, *supra* n. 1.
18. "Argentina Does it Kirchner's Way," *supra* n. 6.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Rosenheck, *supra* n. 1.
24. Rosenheck, *supra* n. 1.
25. *Id.*
26. "Argentina Does it Kirchner's Way," *supra* n. 6.
27. *Id.*

creditor-friendly jurisdictions, such as the U.S. and Belgium.[28] This new relationship caught the attention of the U.S. and caused the U.S. to revise its own diplomatic strategy with Argentina.[29]

In all respects, the 2001 Argentine default was an opportunity for Argentina to restart its economy and to continue its struggling democratization process. Economically, the democratic regimes were able to appease their populace with economic growth and unprecedented prosperity.[30] Politically, Argentina was able to present itself as the victorious David of developing countries against the Goliath of creditors. By 2005, Argentina's President Néstor Kirchner ("Kirchner") was benefiting on all fronts from his predecessor's 2001 decision to default on Argentina's sovereign debt obligations.

B. Argentina's 2005 and 2010 Debt Restructurings

With the Argentine economy growing only four years after the default, Kirchner implemented an historic sovereign debt swap on the defaulted 2001 notes, first in 2005 and again in 2010.[31] "They were able to do this thanks to the support of key international private and public institutions, notably the IMF . . . and the [United States] Securities and Exchange Commission."[32] The swap was a take-it-or-leave-it offer of more than $100 billion in defaulted bonds exchanged at 25 cents on the dollar with maturity periods ranging from thirty to more than forty years.[33] While ninety-three percent of creditors took the deal, NML Capital, Ltd. and EM Ltd. were among a handful of secondary creditors[34] who rejected the deal, opting to sue Argentina for the full value of the 2001 debt instead.[35] Argentina proceeded with the restructuring despite these holdout investors, and its economy continued to grow.[36]

For more than a decade, Argentina's economy grew, its domestic and regional

28. "Gauchos and gadflies," *The Economist*, Oct. 22, 2011, *available at* http://www.economist.com/node/21533453 (last accessed Jan. 9, 2015); *see* David Bosco, *The Debt Frenzy*, FOREIGN POL'Y, June 11, 2007, at 8, *available at* http://www.foreignpolicy.com/articles/2007/06/11/the_debt_frenzy.
29. *Id.*
30. *Id.*
31. *Id.*; J.F. Hornbeck, *Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts,"* CRS REPORT FOR CONGRESS, Congressional Research Service, Feb. 6, 2013, *available at* https://www.fas.org/sgp/crs/row/R41029.pdf (last accessed May 30, 2015).
32. David Bosco, *The Debt Frenzy*, FOREIGN POL'Y, June 11, 2007, at 8, *available at* http://www.foreignpolicy.com/articles/2007/06/11/the_debt_frenzy.
33. *Id.*
34. Vulture funds are always secondary creditors; they were not party to the original transaction and have only become involved by purchasing the sovereign bonds from the original creditor.
35. "Gauchos and gadflies," *The Economist*, Oct. 22, 2011, *available at* http://www.economist.com/node/21533453 (last accessed Jan. 9, 2015); *see* Bosco, *supra* n. 28, at 8.
36. *Id.*

reputation grew, and the United States government began to pay attention to it. At the same time, however, the value of Argentine debt held by holdout vulture funds grew, giving those noteholders more incentive to fight longer and harder in litigation. Argentines also began to expect continued growth from their leaders. In the long run, Argentina's opportunistic default put Argentine leadership in a precarious position, particularly for those housed in *La Casa Rosada*.

III. Setting the Dance Floor: Sovereign Debt and the Foreign Sovereign Immunities Act

For most of the nineteenth century and into the early part of the twentieth century, sovereign immunity was absolute and honored by courts of all jurisdictions.[37] Lawsuits against sovereigns were available only if the sovereign consented.[38] This absolute immunity was "based on the principle that all states are equal under international law and, thus, no state may exercise authority over another."[39] However, in the twentieth century, the roles of sovereigns changed. Sovereigns increasingly became involved in commercial markets.[40]

Unsurprisingly, sovereigns' participation in commercial markets was similar to participation by private parties and required a revision of the absolute theory of immunity.[41] In 1952, Acting Legal Advisor to the Department of State Jack Tate issued a letter which adopted a restrictive theory of sovereign immunity.[42] Under a restrictive theory of sovereign immunity, immunity is extended for a state's public acts but not its private acts.[43] Nonetheless, the Court followed the State Department, a department under the politically sensitive Executive branch and

37. Manooher Mofidi, *The Foreign Sovereign Immunities Act and the "Commercial Activity" Exception: The Gulf Between Theory and Practice*, 5 J. INT'L LEGAL STUD. 95, 96-99 (1999).
38. *Id.*
39. Jonathan Gorren, Note, *State-to-State Debts: Sovereign Immunity and the "Vulture" Hunt*, 41 THE GEO. WASH. INT'L L. REV. 681, 686 (2009-2010); *see The Schooner Exchange v. McFadden*, 11 U.S. 116 (1812) (the common law rule of sovereign immunity was one of absolute immunity, meaning sovereigns enjoyed immunity for all their actions, both governmental and commercial).; *see also* Gary Born and Peter B. Rutledge, *International Civil Litigation in United States Courts*, 4th Ed., Aspen Publishers, at 221 (2007).
40. Gary Born and Peter B. Rutledge, *International Civil Litigation in United States Courts*, 4th Ed., Aspen Publishers, at 221 (2007).
41. *Id.*
42. *Id.* ("The Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.")
43. Gary Born and Peter B. Rutledge, *International Civil Litigation in United States Courts*, 4th Ed., Aspen Publishers, at 221 (2007). The United Nations similarly contemplated adoption of a restrictive theory of sovereign immunity in 2004. 2004 U.N. Convention on Jurisdictional Immunities of States and their Properties ("U.N. State Immunities Convention"), 44 INT'L LEGAL MATS. 801 (2005), *available at* https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf (last accessed May 30, 2015).

which still acted as the ultimate decision maker in matters of sovereign immunity.[44]

Consequently, the State Department was often called upon to make a determination between whether an action was immune or not,[45] resulting in an unpredictable standard of sovereign immunity and exceptions.[46] This was the status quo until the passage of the Foreign Sovereign Immunities Act in 1976, which transferred decision-making authority from the executive branch to the Courts.[47]

In 1976, Congress sought to remove the State Department from the decision-making process by passing the FSIA. However, since the passage of the FSIA, U.S. courts have struggled to draw a fine line between a sovereign's immune actions and its commercial actions in disputes arising between sovereigns and non-sovereigns.[48]

Today, there is a unique—and often dramatic—tango that takes place in sovereign debt litigation, danced in United States' courtrooms to the music of the FSIA. The debtor-state, the private creditor, and the venue-state all have interests in such litigation. But these competing interests each struggle to maintain the lead as the parties dance across the courtrooms clinging to their own legal arguments like a rose between a dancer's teeth.

A. The Debtor-State Dancer: The Sovereign Debt Challenge

Sovereign debt is debt taken out by a country, either from another country (often distinguished as "public debt") or from a private creditor, such as a bank.[49] Every country has sovereign debt. As with private debts, creditors can sell the sovereign debt (in the form of bonds) to other creditors, including hedge funds.[50] As debt grows, payments increase, and therefore states often attempt to restructure their debts. Debt restructuring is akin to refinancing: the debt is sold to other creditors or payments are modified, typically to have the debt repaid over a longer period of time.[51] States, like private parties, have an interest in repaying their debts: states need good credit to participate in international markets, and good credit is

44. Gary Born and Peter B. Rutledge, *International Civil Litigation in United States Courts*, 4th Ed., Aspen Publishers, at 221 (2007).
45. *Id*.
46. *Id*; Letter of Acting Legal Advisor, Jack B. Tate to Department of Justice, May 19, 1952, 26 DEPT. OF STATE BULL. 984 (1952).
47. Charles N. Bower, F. Walter Bistline Jr., George W. Loomis Jr., *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L L. 200, 200 (1979).
48. Gary Born and Peter B. Rutledge, *International Civil Litigation in United States Courts*, 4th Ed., Aspen Publishers, at 221 (2007).
49. Steven L. Schwartz, *"Idiot's Guide" to Sovereign Debt Restructuring*, 53 EMORY L. J. 1189, 1190-1191 (2004). This is a very brief and simplified explanation of the sovereign debt process meant only to provide basic context for the legal issues involving the state-debtor/private-creditor relations.
50. *See id.*
51. *See id* at 1190-1191.

developed through regular timely payment of debt obligations.[52] Unlike private debt, issuance of sovereign debt inherently requires an evaluation of a borrower's good will. Political good will is created when states lend to each other and reciprocal political good will is further developed when states honor their debt obligations.[53] This creates a unique challenge for sovereign debtors to balance the political realities of fiscal management while also maintaining the good will of their creditors so restructurings are possible.

B. The Vulture Fund Dancer: The Rule of Law Argument

"Distressed debt investors," also known as "vulture funds," are private investment groups that purchase the sovereign debt of developing countries at hugely discounted rates.[54] Many of these funds are based in the United States. After purchasing the debt, the vulture funds utilize all avenues available to them to enforce the full value of the debt they purchased. The vulture funds' tactics include lobbying politicians,[55] employing the media to expose scandalous spending of foreign officials,[56] and initiating legal actions against the sovereign debtor to enforce contractual rights.[57] Critics chastise vulture funds for attacking financially vulnerable and politically weak states already struggling to meet the needs of their citizens.[58]

Distressed debt investors argue that their willingness to take on sovereign debt "keep[s] the cost of capital down" as long as there is a predictable and enforceable contract.[59] By their logic, a reliable legal right invites investors into the market to lend capital, thereby increasing availability of cheaper capital for emerging economies that need it.[60] In these investors' opinion, debt forgiveness—which is often included in restructuring—gives blank checks to corrupt regimes to squander public funds for their personal benefit, only to claim poverty when debts are

52. *See id.*
53. *See id.*
54. David Bosco, *The Debt Frenzy*, FOREIGN POL'Y, June 11, 2007, at 2, *available at* http://www.foreignpolicy.com/articles/2007/06/11/the_debt_frenzy.
55. "Argentina Does it Kirchner's Way," *supra* n. 6; David Bosco, *The Debt Frenzy*, FOREIGN POL'Y, June 11, 2007, at 2, *available at* http://www.foreignpolicy.com/articles/2007/06/11/the_debt_frenzy.
56. Bosco, *supra* n. 54, at 2.
57. Felix Salmon, *Hedge Fund vs. Sovereign*, FOREIGN POL'Y, June 24, 2014, *available at* http://www.foreignaffairs.com/articles/141588/felix-salmon/hedge-fund-vs-sovereign (last accessed Oct. 6, 2014).
58. Brian Finlay, *Taming the Vulture: Turning Distressed-Debt Investors into Agents of Social Change*, Henry L. Stimson Center (July 2, 2007), *available at* http://www.stimson.org/spotlight/taming-the-vulture-turning-the-distressed-debt-investors-into-agents-of-social-change (last accessed Oct. 6, 2014).
59. Gorren, *supra* n. 39, at 692; Bosco, *supra* n. 54, at 41-42.
60. Salmon, *supra* n. 57.

enforced.[61] Predictably, these distressed debt investors emphasize "the rule of law" grounded in the contractual rights they purchased. Specifically, vulture funds argue that disregarding the "rule of [contract] law" would undermine our fundamental understanding of ordered social organization.[62]

However, when dealing with sovereigns, the reality is two different "rules of law." For the vulture funds, their myopic understanding of the "rule of law" is the contractual rights they purchased for pennies on the dollar from the original creditor. Vulture funds bring contract-enforcement lawsuits against defaulted sovereign debtors and, if possible, use sovereign immunity as codified in the FSIA to establish jurisdiction over the debtor and potential sovereign assets to enforce a favorable judgment. This litigation strategy is pursued at the expense of the "rule of law" of the sovereign states whose debt they hold. For the sovereign debtor, their understanding of the "rule of law" is inescapably tied to the state's notion of sovereignty, their ability to manage their own affairs without external meddling. Sovereign debtors, especially democracies, are beholden to their own population. A vulture fund dictating terms of repayment directly interferes with a sovereign debtor's own monetary policy.

C. The Forum-State Spectator: Political Temperance

Forum states, such as the United States, have interests in these restructuring deals as well. However, the forum states are typically torn between the micro-level "protection" of their electorates', i.e., the vulture funds', interests and the macro-level preservation of favorable diplomatic relationships.

The United States and United Kingdom are unique forum states due to New York and London being global financial centers.[63] These forum states, while spectators to litigation, also want to attract other sovereigns to maintain their foreign resources in its reserve banks.[64] Likewise, domestic banks in these forum states want to remain on favorable terms with foreign sovereign customers.[65]

Politically, forum states are in a difficult position. At the most basic level, credit and lending is valuable leverage in diplomatic relations.[66] Like sovereign debtors

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61. Bosco, *supra* n. 54, at 1, 38-39 (The president of the Republic of the Congo racked up more than $300,000 in New York hotel bills while visiting for meetings in at the United Nations while his country's per capita gross domestic product was around $1,700. The Republic of Congo's sovereign debt was partially owned by Elliot Associates.).
62. *Id.* at 41.
63. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 618 (1992).
64. Rosenheck, *supra* n. 1.
65. *Id.*
66. *Id.*

earning political good will through timely repayment, forum-states can also develop political good will by supporting debtor-states facing enforcement litigation within their territory, through legislation, briefing, and lobbying efforts, among other means.[67] Furthermore, states like the U.S. have an interest in preserving sovereign immunity over foreign state's assets in U.S. banks[68] and in maintaining friendly relations with sovereigns.[69] Still, though, the larger concept of comity, or legal reciprocity, is also at play. Forum states have to consider their own affairs, including the potential they will face the same situation as the sovereign debtor. As a consequence, the U.S. government has typically sided with the debtor sovereigns in litigation, filing *amicus curiae* briefs on their behalf.[70]

D. The Music: The Foreign Sovereign Immunities Act

In 1976, Congress passed the FSIA,[71] which codified the restrictive theory of sovereign immunity adopted by the 1952 Tate Letter.[72] The effect of the FSIA was to shift decision-making authority regarding sovereign immunity from the State Department to the Courts.[73] At the same time, Congress struggled to attract foreign investment into the Federal Reserve and private banks, to dollarize foreign currency reserves, while still protecting the interests of the investors and would-be creditors of these sovereigns.[74] Although sovereign debt was not a consideration at the time of passage, the FSIA nonetheless preserves sovereign immunity and also carves out specific areas of commercial and other activity where private parties could hold sovereigns accountable.

Under the FSIA, there are two layers of immunity that must be overcome in order to pursue claims against a sovereign: (1) jurisdictional immunity and (2) attachment and execution immunity.[75] While overcoming jurisdictional immunity is rather simple and routine, attachment and execution immunity has been an obstacle for

67. *See generally* Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina*, (Wash. Legal Found., Working Paper No. 140, Sep. 2006), *available at* www.atfa.org/wp-content/uploads/2012/09/scott_wp.pdf (last accessed Nov. 13, 2014).
68. Rosenheck, *supra* n. 1.
69. *See generally* Scott, *supra*, n. 67.
70. *Id.* The Reagan through G.W. Bush Administrations had a history of not intervening on behalf of the foreign-sovereigns.
71. 28 U.S.C. §§ 1330, 1602 *et seq.*; H.R. Rep. No 94-1487 (1976).
72. 28 U.S.C. § 1602 *et seq.*; *Republic of Austria v. Altman*, 541 U.S. 677 (2004) (Explaining the FSIA "codifies, as a matter of federal law, the restrictive theory of sovereign immunity and transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch." (internal quotations omitted))
73. *Id.*
74. Horacio T. Liendo III, *Sovereign Debt Litigation Problems in the United States: A Proposed Solution*, 9 OREGON REVIEW OF INT'L LAW 107, 122 (2007).
75. 28 U.S.C. 1602 *et seq.*

judgment creditors and a political issue for debtor-sovereigns.

1. The Jurisdictional Immunity Exceptions

The FSIA is the "sole basis for obtaining jurisdiction over a foreign state in Untied States courts."[76] The law grants immunity to foreign sovereigns and establishes certain exceptions from that grant of immunity, two of which are relevant here: the sovereign's waiver of immunity and the commercial activity exception.

Section 1605 of FSIA establishes that a sovereign is not immune from United States courts' jurisdiction if the sovereign has "waived its immunity, either explicitly or by implication."[77] Once a sovereign has waived immunity, the waiver cannot be revoked.[78] Consistent with contract law principles, this provision was intended to prevent a foreign state from inducing a private party into a contract with the promise not to invoke immunity, only to go back on that promise when litigation ensues.[79]

Under the commercial activity exception, a foreign state acting in a commercial capacity, rather than a sovereign capacity, does not have sovereign immunity and is therefore subject to U.S. courts' jurisdiction. Sovereign immunity does not exist in cases in which a sovereign's actions are either: (a) commercial activity carried on in the United States; (b) performed in the United States in connection with a commercial activity; or (c) have a direct effect in the United States.[80] This exception requires a two-fold analysis: first, whether the sovereign's activity is commercial and, second, whether it has an effect on the United States. A "commercial activity carried on in the United States" is defined by the FSIA as activity having "substantial contact."[81] Likewise, "commercial activity" is broadly defined as the "regular course of commercial conduct or a particular commercial transaction or act."[82] "There is a presumption of commerciality when the activity is customarily carried for a profit,"[83] including the issuance of sovereign bonds.[84]

2. The Attachment and Execution Immunity Exceptions

Exceptions to attachment and execution on sovereign assets are enumerated in

76. *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434 (1989).
77. 28 U.S.C.A. § 1605(a)(1).
78. H.R. Rep. No 94-1487 at 18 (1976).
79. *Id*. at 113-114; H.R. Rep. No 94-1487 at 18 (1976).
80. 28 U.S.C. § 1603.
81. 28 U.S.C. § 1603(e).
82. 28 U.S.C. § 1603(b).
83. H.R. Rep. No. 94-1487 (1979), at 16.
84. *Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

Section 1610 of the FSIA.[85] "The Statute differentiates the property of a foreign state in the United States from the property of an agency or instrumentality of a foreign state in the United States."[86]

Property of a foreign state subject to attachment or execution is property "of a foreign state . . . used for a commercial activity in the United States."[87] This immunity can be waived similar to jurisdictional immunity.[88] In order for a Plaintiff to attach and execute a judgment, the property must be connected to the commercial activity at the heart of the claim that resulted in the judgment; other commercial property of the sovereign remains immune from attachment and execution.[89]

Property of an agency or instrumentality of a foreign state is not limited in the way property of a foreign state is.[90] Under section 1610(b)(2), as long as the courts have jurisdiction under Section 1605, the property of a sovereign's agent or instrumentality is not immune from attachment and execution regardless of whether the property is related to the underlying claims.[91] It is important to remember that the FSIA is a domestic statute, not a foreign treaty. Accordingly, jurisdiction can only be conferred to United States courts over sovereign assets within United States territory.[92]

Section 1611 also immunizes two key foreign assets: central bank assets "held for its own account" and military assets.[93] Central bank assets "held for its own account" are "funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or foreign states."[94] Only the sovereign can explicitly waive this immunity; there is not implied waiver available to judgment plaintiffs.[95]

In sovereign debt litigation, the attachment and execution immunities are key. If a vulture fund creditor wins a judgment, they are empowered to seek out attachable assets in order to execute the judgment. Typically, creditors are already aware of where a debtor's assets are located. However, when dealing with a sovereign debtor, creditors may not know where the sovereign's assets are located, much less where the *attachable* assets to satisfy their judgment are located. In this sense, the FSIA becomes an obstacle for the vulture funds. In the *NML Capital*

85. 28 U.S.C. § 1610.
86. Liendo, *supra* n. 74, at 115
87. 28 U.S.C.A. § 1610(a) (2005).
88. 28 U.S.C.A. § 1610(a)(1) (2005).
89. 28 U.S.C. § 1610.
90. 28 U.S.C. § 1610(b)(2).
91. *Id.*
92. 28 U.S.C. § 1610.
93. 28 U.S.C. § 1611.
94. H.R. Rep No. 94-1487, at 31 (1976).
95. 28 U.S.C. § 1611(b).

litigation, this was the main issue. Argentina waived its sovereign immunity in the original bonds it issued, which the vulture funds purchased for pennies on the dollar. As a result, the vultures were within their contractual rights to pursue attachable Argentine assets in order to fulfill any judgment granted to them.

E. The Dance Floor: The Southern District of New York and the Second Circuit

Foreign investments through the U.S., specifically through the Federal Reserve, result in channeling debt payments through domestic banks headquartered in New York City. For this reason, the Southern District of New York and the Second Circuit Court of Appeals are focal points in the development of sovereign debt litigation.

IV. The Sovereign Debt Litigation Tango Immunity Exceptions and Boundaries

There are inherent legal and political tactics involved in litigating matters of sovereign debt. While the FSIA provides a statutory means for private investors to recover sovereign debt, it is difficult to actually collect on those debts. Additionally, the U.S. government is not inclined to side with a private investment firm against a sovereign if it would jeopardize international relations. As a result, judgment-empowered creditors have utilized litigation, even in other territories, as part of a strategy to realize the full value of their investments.

A. Republic of Argentina v. Weltover (1992)

In one of the defining cases of FSIA jurisprudence, *Republic of Argentina v. Weltover*[96] established two crucial standards for sovereign debt litigation: (1) any connection sovereign bonds have to the United States is sufficient to establish jurisdiction, and (2) borrowing money is a commercial activity that is not exempt from prosecution.[97] Long before its historic 2001 default, Argentina defaulted on sovereign bonds issued under the U.S.'s Brady Plan.[98] These bonds contained an

96. 504 U.S. 607 (1992).
97. *Weltover,* 504 U.S. at 615.
98. *Id.* at 609-610. The Brady Plan was America's response to the Latin American debt crisis in the late 1980s and early 1990s, whereby sovereign debt was forgiven and/or restructured at heavily discounted rates. Ian Vásquez*, The Brady Plan and Market-Based Solutions to Debt Crises*, 16 Cato J. 233, 233-235 (1996-1997).

explicit waiver of immunity under the FSIA.[99] Argentina issued the bonds to private creditors to refinance some of Argentina's existing debt and to stabilize Argentina's struggling currency.[100] While the economic woes of Argentina continued, Argentina unilaterally extended the repayment date of the bonds.[101] Some of the private creditors who held the bonds, including two Panamanian companies and a Swiss bank, then sued Argentina in the Southern District of New York for breach of contract to collect the debt owed.[102]

Ultimately, a unanimous Supreme Court ruled in favor of the private creditors.[103] The plaintiffs' first obstacle was establishing jurisdiction. The terms of the Argentine bonds provided three options for payment locations, including New York.[104] At the time of filing, the plaintiffs had already received some interest payments in New York.[105] This minimal connection was sufficient to establish jurisdiction under the FSIA's "direct effect" requirement.[106] Argentina impliedly consented to jurisdiction because the lenders received payments in their New York accounts, and were presumably likely to receive payments there in the future.

After establishing jurisdiction, the Court had to determine the status of this particular sovereign debt under the FSIA. In his opinion for the Court, Justice Scalia's reasoning relied entirely on the FSIA exception for sovereigns acting in a commercial capacity.[107] Argentina acted as a commercial participant, not a sovereign regulator of a market, by issuing the bonds to private entities to refinance its earlier debts.[108]

Weltover armed vulture funds with crucial tools under the FSIA to enforce the full value of the distressed debt they purchased. With implied consent based on two interest payments and a broad understanding of the commercial activity exception, judgment against Argentina was inevitable. However, the ability to enforce the judgments on obviously struggling sovereign states was near impossible to do because of the FSIA's preservation of immunity from execution. Consequently, creditors again resorted to litigation as part of a strategy to recover sovereign debts.

99. *Weltover,* 504 U.S. at 609-610.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 614.
104. *Weltover*, 504 U.S. at 618-619.
105. *Id.*
106. *Id.*
107. *Id.* at 614.
108. *Id.* Similar to United States Constitutional law analysis under sovereign's commerce clause power, Justice Scalia explained, "When a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meanings of the FSIA."

B. Elliot Associates L.P. v. Banco de la Nación (Peru) (1999)

Elliot Associates ("Elliot") is a successful—if not infamous—vulture fund with experience using litigation to obtain and enforce judgments against Latin American countries. In *Elliot Associates L.P. v. Banco de la Nación*,[109] the vulture fund used litigation to force the Peruvian government to fulfill its debt obligations.

In 1990, Peru, like Argentina, began restructuring its economy under the Brady Plan.[110] In this process, Peru sold $20.7 million worth of its distressed debt to Elliot for only $11.4 million in 1996.[111] Elliot then sued Peru in the Southern District of New York for the full value of the discounted debt it had purchased before Peru finished its restructuring process.[112] The district court dismissed the case on the grounds that purchasing distressed debt with the intent to sue violated state law.[113] However, the Second Circuit reversed the district court, and Elliot ultimately won a judgment in its favor.[114]

With its favorable judgment, Elliot then sought to attach Peruvian assets in the U.S. to enforce the judgment, but found none.[115] However, Elliot was able to find vulnerable Peruvian assets in Belgium.[116] Based on the U.S. court judgment, Elliot persuaded a Belgian court to block other Peruvian debt payments.[117] With its payments blocked and a default imminent, Peru was forced to settle with Elliot for the full amount of the original debt plus interest, amounting to $58 million.[118]

Compared to sovereign debts, $58 million is rather small. However, this test case provided Elliot and other vulture funds with a viable collection strategy through litigation in the U.S. and other friendly territories: judgment debtors, armed with their contractual "rule of law" argument, exploit legal systems to force nations to pay the full value of their debt rather than participate in debt renegotiations with other debtors. Indeed, the existing law favors the holdout creditors over those who cooperate in restructurings. If all creditors followed the lead of Elliot, no one would get paid, and countries would fall into default, permanently at the mercy of paying

109. 194 F. 3d 363 (2d Cir. 1999).
110. Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311, 316 (2005-2006).
111. *Elliot Assocs. L.P. v. Banco de la Nación*, 948 F. 3d 1203, 1205-07 (S.D.N.Y. 1996). The distressed Peruvian sovereign debt was originally incurred in 1983.
112. *Id.*
113. *Elliot Assocs., L.P. v. Banco de la Nación*, 948 F. 3d 1203, 1214 (S.D.N.Y. 1996). *See also Camdex Int'l Ltd. v. Bank of Zambia*, [1996] 3 All E.R. 431, 436 (A.C.) (Eng.) (discussing a similar case where a British court chastised the vulture funds' "trafficking in litigation" as objectionable).
114. *Elliot Associates, L.P. v. Banco de la Nación*, 194 F. 3d 363, 381 (2d Cir. 1999).
115. Bosco, *supra* n. 54 at 2, 8, 11.
116. *Id.*
117. *Id.* at 8.
118. *Id.* at 2, 11.

private investors rather than providing for their citizens.

C. Donegal International Ltd. V. Zambia (2007)

The United States is not the only country that has to deal with private investors who use their judicial system to collect on defaulted sovereign debt. In *Donegal Int'l Ltd. v. Zambia & Anr.*,[119] Zambia was brought before a court in the United Kingdom.[120] The case concerned $15 million of sovereign debt originally borrowed by Zambia from Romania in 1979.[121] Over the next thirty years, Zambia was plagued with poverty, draught, and a debilitating AIDS epidemic.[122] As a result, Zambia was unable to pay its debts and defaulted on its debt to Romania.[123] In 1998, Donegal International, Limited ("Donegal") purchased the defaulted Zambian debt from Romania for a fraction of its face value.[124]

Donegal then began a strategy of negotiations, restructurings, and litigation to turn a profit on its investment. As part of its strategy, Donegal sought debt-to-equity adjustments such that the vulture fund received ownership interests in privatized national commodities.[125] Zambia rejected the offer.[126] Donegal also initiated a lawsuit against Zambia in the British Virgin Islands, which was likely meritless but nonetheless became a bargaining chip in its dealings with Zambia.[127] In an effort to settle the Virgin Islands claims, Zambia entered into a settlement agreement with Donegal whereby Zambia was to make thirty-six monthly payments to Donegal on the original Romanian debt, explicitly waived any possible immunity defense it might have retained, and submitted to jurisdiction in U.K. courts.[128] Zambia defaulted after making only four payments in accordance with the settlement agreement.[129]

In 2005, on the eve of an International Monetary Fund ("IMF") plan that would have cancelled debt obligations of developing countries including Zambia, Donegal sued Zambia in a U.K. court for the full value of the debt, which was more than $55 million at the time.[130] Donegal's claims relied entirely on the rule of (contract) law and Zambia's voluntary waiver of all immunity defenses in the British Islands

119. [2007] EWHC (Comm) 197 [23] (Eng.).
120. *Id.* at [82].
121. *Id.* at [6]; Bosco, *supra* n. 54, at 11.
122. Gorren, *supra* n. 39, at 681-2.
123. [2007] EWHC (Comm) 197 [78] (Eng.).
124. *Id.* at [82].
125. Gorren, *supra* n. 39, at 695-6.
126. *Id.*
127. [2007] EWHC (Comm) 197 [11], [17] (Eng.).
128. *Id.* at [1], [10], [11].
129. *Id.* at [18].
130. *Id.* at [82], [6], [65]-[82].

settlement agreement.[131] Conversely, Zambia argued the settlement contract was induced through corruption and bribes paid by Donegal to Zambian officials and tried to avoid enforcement as a matter of public policy.[132] In the end, it appears both arguments persuaded the Court: judgment was entered in favor of Donegal, but the payments were reduced because of factual findings of corruption.[133]

The *Donegal* case illustrates the difficulties of sovereign debt litigation. On the one hand, the Zambian people epitomize the humanitarian arguments of the vulture funds' critics.[134] Donegal leveraged a questionable suit in the Virgin Islands to secure non-immunized sovereign debt and bribed corrupt officials to consent to a settlement. These tactics do not help to change prevailing perceptions of vulture funds' greed.[135] On the other hand, however, the greed and corruption of the Zambian officials are precisely the type of government activity that should be penalized for squandering sovereign assets. Crucially, Zambia was a military dictatorship, not a democracy. Theoretically, this type of financial penalty should incite social uprisings demanding democratic and accountable regimes. However, the chance of an impoverished and epidemic-ridden populace doing this is unlikely. The vulture funds will continue to court the corrupt regimes. However, when their investment is threatened, that same corruption will be paraded in a courtroom as a violation of the contract-based "rule of law."[136]

These cases demonstrate that sovereign debt litigation is really a political leverage tool. For creditors, judgments and the threat of subsequent litigation to enforce those judgments have been effective means to avoid participation in restructuring processes and to force sovereigns to pay the full amount of their debts.[137] In this sense, domestic statutes like the FSIA—even with its enforcement problems—are necessary legal and political tools for creditors. For committed vulture funds emboldened by the results of these cases, the enforcement issue can be worked around, as the *NML Capital* and *EM Ltd.* cases have demonstrated. However, the vulture funds have only recently discovered that a determined debtor-sovereign can use political leverage to their advantage to resist the vulture funds' oppressive repayment claims. Argentina, while still a struggling democracy, is distinguishable from the military dictatorship of Zambia and the impoverished fledgling democracy of Peru in the 1990s. In contrast, Argentina is a regional power

131. *Id.* at [19], [522].
132. *Id.* at [472], [474].
133. *Id.* at [500]; Gorren, *supra* n. 39 at 699.
134. *See* [2007] EWHC (Comm) 197 [2] (Eng.); Bosco, *supra* n. 54, at 11.
135. *See* [2007] EWHC (Comm) 197 [11] (Eng.).
136. *See* Bosco, *supra* n. 54, at 10.
137. *See* "Gauchos and gadflies," *supra* n. 35.

with a growing economy governed by democratically elected leaders. Whereas Zambia and Peru feared additional litigation and defaults, Argentina has used the vulture funds' tactics to highlight their encroachments on the fundamental international law concept of state sovereignty.

V. The Litigation Tango of La Casa Rosada and the Vulture Funds

Since 2003, U.S.-based vulture funds NML Capital, Ltd. ("NML") and EM Ltd. ("EM") have used a Southern District of New York courtroom to tango with Argentina over the reach and limits of the FSIA. While the litigation has drawn on, each side has been able to claim the lead with victories. However, as previous cases have demonstrated, the political realities of litigating sovereign debt persist.

In *Republic of Argentina v. NML Capital, Ltd.*,[138] plaintiffs were vulture funds who had purchased defaulted bonds issued by Argentina at a steep discount before Argentina's 2001 default.[139] Crucially, these bonds contained explicit waivers of sovereign immunity,[140] a necessary clause to attract private investors already wary of investing with the default-prone Argentina. Shortly after Argentina defaulted on these bonds in 2001, NML and EM brought suit against the sovereign through more than a dozen cases filed in the Southern District of New York and won favorable judgments on each of their claims.[141] NML is an affiliate company of Elliot Associates, a company with experience in sovereign debt litigation and strategy—as demonstrated in the *Elliot Associates L.P. v. Banco de la Nación* case with the Peruvian government.[142]

However, while the NML and EM claims were pending in New York, Argentina had restructured its defaulted debt first in 2005 and again in 2010.[143] Unsurprisingly, neither NML nor EM agreed to the restructurings,[144] and, by 2006, NML and EM had multiple judgments against Argentina amounting to more than $900 million.[145] Opting to honor its restructuring agreements rather than the

138. 134 S. Ct. 2250 (2014).
139. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2253 (2014) ("*NML Capital*"); *EM Ltd. v. Republic of Argentina*, 695 F. 3d 201, 201 (2d Cir. 2012) ("*EM Ltd.*").
140. *NML Capital*, 134 S. Ct. at 2253 fn. 1.
141. *NML Capital*, 134 S. Ct. at 2253 (NML alone had eleven claims against Argentina).
142. Bosco, *supra* n. 54, at 10.
143. *EM Ltd*, 695 F. 3d at 203; J.F. Hornbeck, *Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts,"* CRS REPORT FOR CONGRESS, Congressional Research Service, Feb. 6, 2013, *available at* https://www.fas.org/sgp/crs/row/R41029.pdf (last accessed May 30, 2015).
144. *Id.*
145. *EM Ltd. v. Republic of Argentina*, 695 F. 3d 201, 203 (2d Cir. 2012).

holdout vulture funds,[146] Argentina refused to pay the NML and EM judgments.[147]

A. The Circling of the Vultures: Identifying Argentine Assets to Enforce their Judgments

Like the dramatic circling of dancers beginning their tango, the vulture funds sought enforcement of their judgments plus interest while Argentina ignored or opposed all efforts to pay the holdout funds. Through post-judgment litigation since obtaining their judgments in 2006, NML and EM sought to attach Argentine assets in order to execute their judgments.[148] Under the FSIA, only particular Argentine assets located in the United States were potentially susceptible to attachment. Nonetheless, the vulture funds sought any attachable Argentine assets, both abroad and in the United States, to recover the full value of the defaulted notes plus accruing interest.[149] The actions had mixed results, due to the type of Argentine asset the vultures sought to attach.

1. The Vulture's Execution Actions Around the World

The vultures also brought enforcement proceedings abroad in Ghana, England and Germany.[150] In the Ghana action, the vultures were successful in seizing an ancient Argentine war vessel for a few days. However, the vessel was subject to sovereign immunity and was released.[151] Nonetheless, other hold-out creditors have won judgments against Argentina in both England and Germany, where they sought to attach Euro and British Pound-denominated securities related to Argentina's sovereign bond repayments.[152]

146. Jon Hartley, "Argentina's Default: Lessons Learned, What Happens Next," FORBES, Aug. 4, 2014, *available at* http://www.forbes.com/sites/jonhartley/2014/08/04/argentinas-default-lessons-learned-and-what-happens-next/ (last accessed May 13, 2015).
147. *Id.*
148. *Id; NML Capital*, 134 S. Ct. at 2253.
149. Agustino Fontevecchia, "The Real Story of How a Hedge Fund Detained a Vessel in Ghana and Even Went For Argentina's 'Air Force One,'" *Forbes*, Oct. 5, 2012, *available at* http://www.forbes.com/sites/afontevecchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane/#23b5b7f615da (last accessed Aug. 14, 2015); *Knighthead Master Fund LP & Ors v. The Bank of New York Mellon & Anor*, [2015] EWHC 270 (Ch) (13 February 2015), *available at* http://www.bailii.org/ew/cases/EWHC/Ch/2015/270.html (last accessed Aug. 14, 2015) ("Knighthead Master Fund LP"); Karin Matussek, "Argentina Loses German Top Court Case Over Bond Payments," *Bloomberg Business,* Feb. 24, 2015, *available at* http://www.bloomberg.com/news/articles/2015-02-24/argentina-likely-to-lose-german-appeals-case-over-bond-payments (last accessed Aug. 14, 2015).
150. Fontevecchia, *supra* n. 149.
151. *Id.*
152. Knighthead Master Fund LP, *supra* n. 149; Matussek, *supra* n. 149.

2. The Vulture's Execution Actions Across the United States

Similarly, in the U.S., vulture funds have pursued multiple cases in various courts seeking both traditional sovereign assets, such as planes, as well as investment assets, such as natural gas securities.

In 2007, the vulture funds futilely sought to seize President Kirchner's Tango 01, the Argentine equivalent of Air Force One, during a scheduled trip through California.[153] Argentina counter sued NML, resulting in a Northern District of California opinion determining that Tango 01 was protected by sovereign immunity and therefore was un-attachable.[154] The vultures even sought to seize instruments contributed to an international satellite program by the Argentine Comisión Nacional de Actividades Espaciales ("CONAE")—the Argentine equivalent of NASA—at Vandenberg Air Force Base in California.[155] There, the vultures claimed Argentina's participation in a NASA-led international satellite program to measure sea surface salinity was being used for commercial activities.[156] As before, the California District Court judge found that CONAE was neither used in the United States nor was the satellite used for a commercial activity and therefore was not subject to attachment under the FSIA.[157]

NML and EM also subpoenaed other third parties holding Argentine assets across the country. This included initiating litigation in the Northern District of California,[158] the District of Nevada,[159] and the Northern District of Texas.[160] Argentina again moved to quash the third-party subpoenas, arguing that the subpoenas were limited by the FSIA's sovereign immunity for foreign assets.[161] For example, in the California Litigation, NML sought discovery of documents held by Chevron relating to Argentina's "ministries, political subdivisions, agencies, instrumentalities and alleged representatives and assigns," including a company called Yacimientos Petroliferos Fiscales S.A. ("YPF").[162] NML argued that YPF, a recently privatized company that Argentina remained a majority shareholder of, was the alter ego of Argentina and susceptible to attachment to enforce the Southern

153. Fontevecchia, *supra* n. 149.
154. *Id.*
155. *NML Capital, Ltd. v. Spaceport System Intern.*, 788 F. Supp. 2d 1111, 1115-6 (C. D. Cal. 2011) ("*Spaceport System Intern.*").
156. *Spaceport System Intern.*, 788 F. Supp. 2d 1111, 1116-9 (C. D. Cal. 2011).
157. *Id.* at 1120-1125.
158. *NML Capital, Ltd. v. Republic of Argentina*, Case No. 3:12-mc-80185-JSW ("California Litigation").
159. *NML Capital, Ltd. v. Republic of Argentina*, Case No. 2:14-cv-01573-RFB-VCF.
160. *NML Capital, Ltd. v. Republic of Argentina*, Case No.3:12-mc-00086-L-BF.
161. *EM Ltd*, 695 F. 3d at 203-204; *NML Capital*, 134 S. Ct. at 2253-2254.
162. California Litigation, *supra* n. 158, Discovery Order Re Dkt. No. 27 at 1 (Feb. 21, 2013).

District of New York's judgment against Argentina.[163] Specifically, NML claimed YPF was controlled by Argentina "for the purpose of developing natural gas resources for the Argentinian people, pursuant to Argentine government policy."[164] Argentina argued that the subpoenas violated sovereign immunity and the FSIA.[165] The court quashed the subpoenas, finding NML had not sufficiently pleaded enough facts to effectively "pierce the corporate veil" of YPF.[166]

3. Full-Circle: The Vulture's Discovery Efforts into Argentine Banking Activities and the 2012 Injunction

Crucially, in the U.S., the vulture funds could also seek discovery of Argentine assets transferred through domestic banks to locate additional assets. These banks also happened to be located within the Southern District of New York, bringing the matter full circle

While the vulture finds had been pursuing any potentially attachable assets they could, Argentina was making payments on its 2005 and 2010 restructured bonds through banks in the United States.[167] Utilizing the broad discovery rules of Federal court,[168] in 2010, NML and EM subpoenaed the banks Argentina was making these payments through, including Bank of New York Mellon, Bank of America, and Banco de la Nación, for information on how Argentina moved its assets through the U.S. to pay its other non-immunized debts.[169]

The vulture funds' search for attachable assets continued with few victories. Consequently, the vulture funds sought an injunction against Argentina from paying its restructured payments until after paying the vulture funds' judgment. In November 2012, Judge Thomas Griesa of the Southern District of New York granted the injunction, which prevented Argentina from making payments on any of its restructured debt without also paying the vultures. [170] When the Supreme Court refused to grant certiorari in this case,[171] the vulture funds took the lead in their tango with Argentina.

163. *Id.* at 1, 3.
164. *Id.* at 3.
165. *Id.* at 2.
166. *Id.* at 3-4.
167. *Id.*
168. *NML Capital*, 134 S. Ct. at 2254 ("The rules governing discovery in postjudgment execution proceedings are quite permissive."); *see* Fed. R. Civ. P. 69.
169. *EM Ltd*, 695 F. 3d at 203; *NML Capital*, 134 S. Ct. at 2253.
170. *NML Capital Ltd. v. Republic of* Argentina, 699 F. 3d 246 (2d Cir. 2012). After the Second Circuit asked for clarification of Judge Griesa's injunction, the injunction was upheld. *NML Capital Ltd., v. Republic of Argentina*, 727 F. 3d 230, 237, 247 (2d Cir. 2013); *see* Rosenheck, *supra* n. 1.
171. *Republic of Argentina v. NML Capital, Ltd.,* 2014 U.S. Lexis 4259 (June 16, 2014); *Exchange Bondholders Group v. NML Capital, Ltd.*, 2014 U.S. Lexis 4198 (June 16, 2014).

With Argentina's economy in jeopardy because of the 2014 default and President Fernandez de Kirchner's term ending, the dance floor was ripe for a new approach to handling the vultures. On November 22, 2015, Mauricio Macri was elected to *La Casa Rosada*.[172] In contrast to Fernandez de Kirchner's approach, President-elect Macri promised free market economic policies and immediately sought settlements with the vulture funds.[173] In response to this new approach by Argentina Judge Griesa lifted the injunction on February 19, 2016.[174] Judge Griesa explained, "Put simply, President Marci's election changed everything. The Republic has shown a good-faith willingness to negotiate with the holdouts."[175] With the injunction lifted, Argentina could pay the other non-holdout creditors.[176] As a result, the vulture funds lost their own negotiating leverage, forcing them to the negotiation table.[177] On February 29, 2016, the day Judge Griesa's injunction was to be lifted, Argentina and the vulture funds announced a $4.65 billion settlement in principle.[178]

B. Attachment Immunity in the Argentine Debt Litigation

Enforcing judgments against a state is nearly impossible due to sovereign immunity and the ability to move vulnerable assets when litigation ensues.[179] The Argentina litigation tango reminds creditors that obtaining a judgment can happen very quickly, but enforcing one can take decades and may never happen. In that time, sovereign assets can be moved.[180] This is not new or even unexpected in sovereign debt litigation. As Elliot demonstrated in its litigation against Peru, judgment plaintiffs can pursue extra-territorial litigation to stop payments from

172. Liz Moyer, "Argentina's Debt Settlement Ends 15-Year Battle," *New York Times*, Feb. 29, 2016, *available at http://www.nytimes.com/2016/03/01/business/dealbook/argentinas-debt-settlement-ends-15-year-battle.html* (last accessed March 30, 2016).
173. *Id*.
174. Bob Van Voris and Katia Porzecanski, "Argentina Debt Injunction to be Lifted in Blow to Hedge Funds," *Bloomberg*, Feb. 19, 2016, *available at* http://www.bloomberg.com/news/articles/2016-02-19/argentina-bonds-judge-says-he-will-lift-injunctions-on-debt-iku9ykz3 (last accessed March 30, 2016).
175. *Id.*
176. *Id*.
177. *Id.*
178. Liz Moyer, "Argentina's Debt Settlement Ends 15-Year Battle," *New York Times*, Feb. 29, 2016, *available at* http://www.nytimes.com/2016/03/01/business/dealbook/argentinas-debt-settlement-ends-15-year-battle.html (last accessed March 30, 2016); Julie Wernau and Taos Turner, "Argentina Debt Deal Poised to Deliver Big Payday to Holdouts," *The Wall Street Journal*, Feb. 29, 2016, *available at* http://www.wsj.com/articles/argentina-holdout-creditors-agree-to-4-65-billion-settlement-1456760652 (last accessed March 30, 2016). The settlement agreement must still be approved by the Argentinian Congress. Daniel Bases, Richard Lough, and Sarah Marsh, "Argentina, lead creditors settle 14-year debt battle for $4.65 billion," Reuters, March 1, 2016, *available at* http://www.reuters.com/article/us-argentina-debt-idUSKCN0W2249 (last accessed March 30, 2016).
179. Scott, *supra* n. 53, at 13-15.
180. *Id.*

other creditor-friendly jurisdictions.

For NML and EM, the judgments were only a minor victory; the ability to enforce them was key to turning a profit after balking at the restructurings. Having already secured U.S. Federal court jurisdiction through Argentina's waiver in the original bonds, the vulture funds were free to use the Federal court system to attach assets to execute the judgement. However, unlike judgment-creditors seeking a private creditor's assets, the vultures had only general ideas of where potential attachable assets were located. This lead to a strategy of the vulture funds casting the largest net possible with sweeping third-party subpoenas against companies in any way affiliated with Argentina, as demonstrated by the *Spaceport System Intern*.[181] and YPF matters.[182] However, this third-party discovery litigation strategy dramatically changed the tempo of the on-going tango between the vulture funds and Argentina.

The vultures were arguing that when Argentina waived its sovereign immunity in the limited instance of issuing sovereign bonds during a fiscal emergency, Argentina also waived its sovereignty. Such an argument undermines the bedrock principle of international law and ignores Argentina's own "rule of law" argument: that it is a sovereign state beholden to its own population to determine policy. To be sure, the vulture funds' attempts to seize parts to an international space satellite, Tango 01, and an aging war ship were harassing; the vulture funds knew such assets were immune from any attachment because of the FSIA, yet they pursued them anyway. For Argentina, the third-party discovery litigations and resulting judgments ignited lingering disdain for the vulture funds and further empowered Argentina's President Christina Fernández de Kirchner—widow of President Kirchner—to continue to ignore the holdout vulture funds.[183] Ironically, Argentina was able to pay the restructured payments, but Argentina again defaulted in July 2014 due to the injunction preventing payments from the U.S. banks.[184] Argentina was prohibited from making any payments at all because of the injunction against the Bank of New York Mellon Corporation, where Argentina kept its national

181. *Spaceport System Intern.*, *supra*, n. 155.
182. California Litigation, *supra* n. 158.
183. *See* Assoc. Press, "Argentina enacts law restructuring government debt," *The Guardian*, Sep. 12, 2014, *available at* http://www.theguardian.com/world/2014/sep/12/argentina-law-restructuring-government-debt-default (last accessed Oct. 6, 2014); *see also* Bosco, *supra* n. 54, at 10.
184. This was an available option for the vulture funds due to the *pari passu* clauses in the Argentine bonds. Felix Salmon, *Hedge Fund vs. Sovereign*, FOREIGN POL'Y, June 24, 2014, *available at* http://www.foreignaffairs.com/articles/141588/felix-salmon/hedge-fund-vs-sovereign (last accessed Oct. 6, 2014); Camila Russo and Katia Porzecanski, "Argentina Declared in Default by S&P as Talks Fail," *Bloomberg*, July 30, 2014, *available at* http://www.bloomberg.com/news/2014-07-30/argentina-defaults-according-to-s-p-as-debt-meetings-continue.html (last accessed Jan. 9, 2015).

reserves to make its restructured debt payments.[185]

C. Empowering Creditors through FSIA's Exceptions and the Federal Discovery Rule

NML and EM used third-party discovery to identify vulnerable (i.e., non-immunized) sovereign assets in and passing through the United States.[186] After a creditor is emboldened with a judgment, the logical next step is to identify attachable sovereign assets to enforce the judgment. FSIA's exemptions permit attaching sovereign assets "used for a commercial activity in the United States,"[187] and/or assets of sovereign's agents or instrumentalities.[188] In the realm of international banking, banks are the obvious gatekeepers of this information, acting as instrumentalities of the debtor-state.[189] Ultimately, following a string of unsuccessful attempts to seize sovereign assets, the vulture funds sought third-party discovery of the Argentine accounts held by Bank of America.[190] Argentina moved to quash the subpoena.[191] The United States, a cautious forum state observer in this tango, filed an *amicus* brief in support of Argentina's opposition to the subpoenas.[192] In its brief, the United States emphasized the international effects that the Court's decision would have, cautioning the Court about the principles of comity and reciprocity inherent in international relations.[193]

In its opinion, the Supreme Court reiterated the limitations and exceptions of the FSIA. In its holding, the Court emphasized "any sort of immunity defense made by a foreign sovereign in an American court must stand and fall on the [FSIA]'s text."[194] After acknowledging the jurisdictional immunity waiver present in the Argentine bonds and addressing the attachment immunity provisions, the Court's decision came down to the fact that "the [FSIA] has no third provision forbidding or limiting

185. Viren Mascarenhas, *The Argentine Sovereign Debt Restructuring Saga: Understanding What Comes Next in 2015*, INT'L LAW NEWS, Spring 2015, at 26.
186. *NML Capital*, 134 S. Ct. at 2253-2254.
187. 28 U.S.C.A. § 1610.
188. *Id.*
189. This lead Argentina to pass legislation authorizing the issuance of new bonds governed by Argentine law and paid from the state-owned Banco de la Nación in exchange for the bonds subject to the injunction. Effectively, Argentina passed its own domestic law—just like the FSIA—to remove sovereign debt from the U.S. courts' jurisdiction. Mascarenhas, *supra* n. 185, at 26.
190. *NML Capital*, 134 S. Ct. at 2253-2254.
191. *Id*.
192. *Id*.
193. *Id.* at 2258 (quoting from the Brief for United States as *Amicus Curiae*); *see also* Greg Palast, "How Barack Obama could end the Argentina debt crisis," *The Guardian*, Aug. 7, 2014, *available at* http://www.theguardian.com/business/economics-blog/2014/aug/07/argentina-debt-crisis-barack-obama-paul-singer-vulture-funds (last accessed Oct. 6, 2014).
194. *NML Capital*, 134 S. Ct. at 2252.

discovery in aid of execution of a foreign sovereign judgment debtor's assets. . . . [T]he Act says not a word about postjudgment discovery in aid of execution."[195] While the Court recognized Congress's intent in passing the FSIA and conceded that such post-judgment discovery may have international policy implications, the Court plainly deferred those matters to the political branches; as far as the contract issues were concerned, NML and EM were within the legal avenues afforded to them through—or in absence of—the language of the FSIA.[196]

NML's initial subpoenas were overly broad, seeking discovery of Fernández de Kirchner's own assets and transactions in addition to potentially vulnerable sovereign assets.[197] The resulting decision made the FSIA irrelevant when judgment-creditors are using post-judgment discovery to identify attachable sovereign assets in order to execute a judgment. Vulture funds can wield the full strength of federal post-judgment discovery rules against debtor-sovereigns through third-party discovery, including a broad approach to gathering potentially relevant information.[198] This is a powerful tool for creditors in exposing the economic health of a debtor-state because sovereign debt inherently requires employing banks, which are not protected by sovereign immunity.

Above all, this broad reach for asset discovery available to judgment-creditors acts as a deterrent for opportunistic defaults. Debtor-states with healthy economies have increased exposure when their banking records are subject to discovery, potentially leading to asset-attachment. In theory and following the Peru case, this should increase most debtor-states' desire to settle claims with vulture funds and is one more litigation tool to leverage. However, the real strategic leverage tool is political pressure because of the inherent ambiguities in determining what is and what is not protected under sovereign immunity.

D. The Dance Partners' Political Realities: Pressure and Response

The FSIA exceptions and workarounds are valuable litigation tools, but, ultimately, the real leverage is political pressure. As with any issue involving a sovereign state, there are domestic and international pressures for all parties involved. In the tango of sovereign debt litigation, this is especially pronounced. Parties often are simultaneously balancing competing political interests, which can be exploited either to force settlement or intervention.

195. *Id.*
196. *Id.* at 2258.
197. *Id.*
198. *NML Capital*, 134 S. Ct. at 2258.

1. Sovereign Debtors: Domestic, Regional, and International Considerations

Sovereign debtors have domestic and international political considerations that can cut both ways, as the case with Argentina demonstrates. Unlike the acquiescence forced on Peru by a threatened default, Argentina seemed to revel in their defaults. The 2001 historic default instilled a sense of national pride in the populace. Their president's refusal to honor crippling loan repayments was a show of defiance to the international markets.[199] Unlike dictatorial Zambia, democratic Argentina used the money saved on loan repayments to institute domestic economic policies, which improved the quality of life for the Argentinian people. As a result, there was a positive economic cycle that benefitted both the Argentinian people and their leaders. Such a cycle would not have been possible without the default and would have been unsustainable if the debt had been collected in full.

In the long run as well, sovereigns like Argentina are not inclined to totally repudiate their debts.[200] Their reputation and status as a sovereign, however tarnished it may be, still is their primary leverage in obtaining large amounts of credit. This credit enables leaders to spend and invest in their electorate. This, in turn, creates a favorable electorate. Particularly for democratically elected leaders, credit is necessary to maintain domestic support. This explains why Argentina has not completely turned its back on international investors. By offering restructurings—however unpalatable they may be to the vulture funds' bottom line—Argentine leadership has presented itself as cooperative and mindful of its obligations.

In addition to the domestic economic benefits, the default also generated a great deal of intangible political power for Argentina. For a region that has long felt victimized by U.S. economic policies, Argentina's stand against American vulture funds was a show of defiance that was applauded domestically and regionally.[201] While the Second Circuit has chastised Argentina's actions, calling the sovereign a "pathological and recalcitrant deadbeat,"[202] Argentinians largely supported Fernández de Kirchner's defiance of the U.S. court's injunction.[203]

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199. *See* Barry Eichengreen, "Argentina's battle with vulture funds highlights a desperate need to reform international debt markets," *The Guardian*, Sep. 9, 2014, *available at* http://www.theguardian.com/business/2014/sep/09/restructuring-debt-restructuring-barry-eichengreen (last accessed Oct. 6, 2014).
200. Scott, *supra* n. 53, at1190-1191.
201. *See* Bosco, *supra*, n. 54, at 6.
202. Pete Brush, "2nd Cir. Wonders if Argentina Debt-Dodging Is 'Pathological,'" *Law360*, Dec. 17, 2014, *available at* http://www.law360.com/articles/605647/2nd-circ-wonders-if-argentina-debt-dodging-is-pathological- (last accessed Jan. 9, 2015) (internal quotations omitted).
203. *See* Rosenheck, *supra*, n. 1.

There was additional, albeit limited, political leverage for Argentine leadership because the 2014 default was directly caused by the American court's injunction preventing Argentina from making its restructured payments. For those Argentinians weary of yet another default by their government, *La Casa Rosada* legitimately claimed that the country was able and tried to make the restructured debt payments, but a minority of uncooperative holdouts prevented it; the default was not a result of mismanagement or corruption.[204] This is in fact the exact argument made by President Fernández de Kirchner when the Argentina Congress voted to change its own domestic laws in response to the New York Court's injunction, allowing the government to pay bondholders locally instead of through the U.S.[205] Argentina's response to a restrictive order under an American law was to pass its own law circumventing the order.[206] At the same time, *La Casa Rosada* spun this as trying to cooperate, but there was no mutual respect between the parties after the private creditors threatened the nation's sovereignty, and a show of force was the necessary response.

Ultimately, Fernández de Kirchner's hard line negotiation tactics were rejected by her own electorate. President Marci's election was a repudiation of *Las Casa Rosada*'s approach to date and allowed for the new leadership to both reenter the capital markets and negotiate with the hold outs. At the end of the fourteen years of litigation, Argentina gained more than it lost with its 2014 default and still achieved a favorable settlement.

2. Private Creditors and Forum States: Contract Law Tempered by Foreign Policy

Private creditors may not be as susceptible to political pressures as the sovereign debtors, but they are skilled in using political pressure as leverage. Therefore, litigation has become an effective tool in collecting on sovereign debt. Vulture funds are hardly unsophisticated parties; they are well aware of the risk of

204. Although, there is a case to be made that Argentine economic figures have been manipulated long before the injunction. Furthermore, the vulture funds did go back to court to allow some debt payments to be made. Alexandra Stevenson, "Judge Grants Temporary Stay in Argentina Default Case," *The New York Times*, Sep. 26, 2014, at B2, *available at* http://dealbook.nytimes.com/2014/09/26/judge-grants-temporary-stay-in-argentina-default-case/?_php=true&_type=blogs&_r=0 (last accessed October 6, 2014).

205. Mascarenhas, *supra,* n. 186; "Argentina enacts law restructuring government debt," *supra*, n. 183 (quoting Fernández de Kirchner, "Argentina wants to pay, can pay and is going to pay all its debts to all bondholders."); Joseph Ax and Hugh Bronstein, "Argentina says US contempt sanctions over debt would be illegal," *Reuters*, Sep. 29, 2014 *available at* http://www.reuters.com/assets/print?aid=USL6N0RU45920140929 (last accessed Jan. 9, 2015).

206. "Argentina enacts law restructuring government debt," *supra*, n. 183.

default.[207] In fact, the default is the reason they bought the investment in the first place. While their clinging to a contract-based "rule of law" argument is important in business jurisprudence, vulture funds' real objective is to turn a profit on the distressed debt they have purchased. By tying up foreign assets and blocking payments to other creditors, vulture funds force sovereigns, like Peru and Zambia, to pay on debt that has largely been written off by all other creditors.

However, the vulture funds should be cautious of their own success. As the U.S. warned in its *amicus* brief, the principles of comity and reciprocity permeate all international relations.[208] Indeed, the international community has taken note of the *NML Capital* litigation.[209] The more successful vulture funds are in litigation, the less incentive creditors have to participate in restructuring negotiations.[210] The FSIA was not meant to encourage private creditors to holdout from necessary and productive restructuring negotiations. U.S. courts should not be burdened by a party's refusal to work with a sovereign; alternative dispute resolutions should be leveraged before resulting to costly litigation.

Sovereign debtors are unable to withdraw more credit from financiers and are less likely to keep their assets in U.S. banks when they encumbered by oppressive debt and their assets tied up with injunctions. This is where forum-states have a vested interest in balancing the effects of decisions like *NML Capital*.[211] Domestic statutes, like the FSIA, should be sufficiently empowering for citizens to feel confident in their investments and dealings with foreign governments. However, larger considerations that require government oversight include the creation and maintenance of friendly environments for sovereigns to keep their assets, especially in the New York-based Federal Reserve.

While the FSIA was a codification of the State Department's desire to delegate authority to the courts to determine sovereign immunity, an increasingly globalized economy requires political temperance not likely to be found among the private sector's vulture funds. Vulture funds cannot be allowed to use American courts to effectively dictate a sovereign's monetary policy so that they turn a profit. Indeed, the imminent lifting of Judge Grisea's injunction forced the vulture funds to reenter negotiations with Argentina to settle the $100 billion debt for far less.

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207. *See* Rosenheck, *supra*, n. 1.
208. Brief for the United States as Amici Curiae, at 19, *NML Capital*, 134 S. Ct. 2250 (2014).
209. The United Nations' General Assembly adopted Resolution 63/804 in September 2014 in response to the *NML* litigation. The resolution seeks to create a multilateral legal framework for the sovereign debt restructuring process.
210. *See generally* Eichengreen, *supra*, n. 199.
211. *See* Rosenheck, *supra*, n. 1.

VI. Conclusion

Sovereign debt litigation is a unique courtroom tango for the sovereign-debtor, the private-creditor, and the forum state. Argentina's historic 2001 default, while both opportunistic and necessary, set the stage for empowered vulture funds to bring a myriad of enforcement suits. As a result, Argentina and the vulture funds tangoed around the U.S. courtrooms, litigating their way to various strategic political positions.

The limitations of and exceptions to the FSIA were the issues most danced around because they are the primary means to bring the parties to the courtroom-turned-dance floor. In particular, the FSIA's exceptions were circumvented by the federal discovery rules and the ability to subpoena relevant third parties in sovereign debt transactions. This is a valuable legal tool for creditors, especially for identifying vulnerable assets and further forcing sovereigns to settle and avoid future default.

Vulture funds will continue to decry the ineffectiveness of the FSIA in enforcement proceedings. However, the FSIA is not an enforcement mechanism. The FSIA does not insulate vulture funds from the risk of investing in defaulted debt. Also, most importantly, the FSIA does not strip a sovereign of its long-held immunity or the benefits entitled to that immunity because a U.S. citizen made a risky investment. No limited waiver of sovereign immunity can ever be a full waiver of the state's sovereignty.

As the Peru, Zambia, and Argentina cases show, the final resolution of sovereign debt litigation is and should be left to political dances outside the courtroom. In each of those cases, litigation was a tool to gain political leverage. In some countries, the litigation exposed the sovereigns' political weaknesses, including a desire to avoid default in Peru and corruption in Zambia. For other countries, such as Argentina, litigation entrenches stalwarts and exposes the growing difficulties in distinguishing what is and what is not protected by sovereign immunity. The end result is a delay in the resolution of these difficult issues. While the FSIA is a valuable legal tool, it is not meant to be a punitive private right of action to complicate international relations. The litigation dance floor for sovereign debt is merely a glimpse of the larger political issues at stake.