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# When Vultures Attack

## BALANCING THE RIGHT TO IMMUNITY AGAINST RECKLESS SOVEREIGNS

### INTRODUCTION

As the global economy slowly transitions from recession to recovery,<sup>1</sup> a critical question remains: what (or who) caused the Great Recession? Michael Lewis's *Boomerang* documented the ensuing blame game in the United States:

[Americans had] been conditioned to grab as much as they could, without thinking about the long-term consequences. Afterward, the people on Wall Street would privately bemoan the low morals of the American people who walked away from their subprime loans, and the American people would express outrage at the Wall Street people who paid themselves a fortune to design bad loans.<sup>2</sup>

While some might be quick to identify such greed and dysfunction as uniquely American, Lewis highlighted a similar search for answers elsewhere:

[By summer of 2011,] the Greek parliament debated and voted on a bill to [cut government benefits]. Thousands [took] to the streets to protest the bill [including] tax collectors on the take, public-school teachers who don't really teach [and] state hospital workers bribed to buy overpriced supplies . . . *Here they are, and here we are: a nation of people looking for anyone to blame but themselves.*<sup>3</sup>

Faced with a global recession, opposing political parties, different social classes, and entire nations were quick to blame one another for the ensuing economic chaos. When economic uncertainty impacts highly sophisticated financial transactions and disputes arise that cannot be resolved voluntarily, the parties may end up in court.

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<sup>1</sup> See generally Barbara Kollmeyer, *Post-Recession Recovery Is Taking A Lot Longer this Time, Says OECD*, MARKETWATCH (Nov. 27, 2012), <http://blogs.marketwatch.com/thetell/2012/11/27/post-recession-recovery-is-taking-a-lot-longer-this-time-says-oecd/> (last visited Feb. 17, 2013).

<sup>2</sup> MICHAEL LEWIS, *BOOMERANG: TRAVELS IN THE NEW THIRD WORLD* 202 (2011).

<sup>3</sup> *Id.* at 79-80 (emphasis added).

In the July 2011 decision of *NML Capital, Ltd. v. Banco Central de la República Argentina (NML Capital)*,<sup>4</sup> the U.S. Court of Appeals for the Second Circuit reminded a pair of hedge funds,<sup>5</sup> EM Ltd. and NML Capital, Ltd., of the risks of engaging in cross-border transactions with foreign governments. These particular hedge funds, known as “vulture funds” for their aggressive investment and litigation tactics,<sup>6</sup> attempted to attach<sup>7</sup> \$105 million in Argentine assets<sup>8</sup> to satisfy almost \$2.4 billion in judgments that had already been entered against the Republic of Argentina (Republic).<sup>9</sup> The assets were deposited in the account of the Central Bank of Argentina (BCRA) at the Federal Reserve Bank of New York (FRBNY)<sup>10</sup> and, pursuant to the terms of the transactions at issue,<sup>11</sup> the vulture funds brought suit against both the Republic and the BCRA in the U.S. District Court for the Southern District of New York.

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<sup>4</sup> 652 F.3d 172 (2d Cir. 2011).

<sup>5</sup> A hedge fund is “an investing group usually in the form of a limited partnership that employs speculative techniques in the hope of obtaining large capital gains.” *Hedge Fund Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/hedge%20fund> (last visited Dec. 30, 2011).

<sup>6</sup> See Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Sovereign Immunities Act*, 21 N.Y. INT’L L. REV. 1, 2 n.7 (2008) (“Vulture funds are companies that purchase the debt of poorer countries at reduced rates then sue that nation for the full value of the debt plus interest.”). For a history of how the secondary market for sovereign debt emerged and the problems it created, see Elizabeth Broomfield, Survey, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUM. BUS. L. REV. 473, 483-85 (2010).

<sup>7</sup> Attachment is “[t]he seizing of a person’s property to secure a judgment or to be sold in satisfaction of a judgment.” BLACK’S LAW DICTIONARY 145 (9th ed. 2009). Execution is the “[j]udicial enforcement of a money judgment, usu[ally] by seizing and selling the judgment debtor’s property . . .” *Id.* at 650.

<sup>8</sup> *NML Capital*, 652 F.3d at 178 (“[W]hen plaintiffs moved, for the first time, to attach the . . . funds [Argentina] maintained approximately \$105 million in its account at the [Federal Reserve Bank of New York].”)

<sup>9</sup> For a list of the judgments entered in favor of NML Capital, Ltd. and EM Ltd. on principal and interest payments, see *id.* at 176 n.6.

<sup>10</sup> *EM Ltd. v. Republic of Argentina (EM II)*, 720 F. Supp. 2d 273, 274 (S.D.N.Y. 2010), *vacated sub nom. NML Capital*, 652 F.3d 172 (2d Cir. 2011). The BCRA used its FRBNY account for typical central bank functions, including maintaining “required cash reserves [of] Argentine banks,” settling foreign exchange transactions, and providing U.S. dollars to Argentine domestic banks. *Id.* at 290-91.

<sup>11</sup> See *NML Capital*, 652 F.3d at 176 n.5 (“It is undisputed that in the terms and conditions governing each of the securities at issue in this case the Republic agreed to submit to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan, The City of New York . . . over any suit, action, or proceeding against it or its properties, assets or revenues with respect to [these securities] . . .” (internal quotation marks omitted)).

The court based its analysis on the Foreign Sovereign Immunities Act of 1976 (FSIA),<sup>12</sup> codified at 28 U.S.C. § 1602 et seq.,<sup>13</sup> a federal statute that shields foreign states from being sued in U.S. courts as long as their activities are noncommercial.<sup>14</sup> However, given the fact that the work of a foreign state's central bank is commercial by nature, the FSIA includes a provision specifically preventing the attachment of foreign central bank property "held for [the foreign central bank's] own account . . . ."<sup>15</sup> To determine whether the vulture funds could attach the assets, the court dealt with two important issues: "whether the funds [were] the property of the BCRA 'held for its own account' under § 1611(b)(1)"<sup>16</sup> and whether the Republic nonetheless "explicit[ly] and unambiguous[ly]" waived the immunity of the BCRA.<sup>17</sup> The court held that the funds were the property of the BCRA "held for its own account,"<sup>18</sup> and that the Republic did not waive the BCRA's immunity in its transactions with the vulture funds.<sup>19</sup> Although the assets at issue represented less than five percent of the vulture funds' judgments,<sup>20</sup> their pursuit of assets at one of the world's most secure banks<sup>21</sup> represented a test of the practicality and efficacy of the FSIA.

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<sup>12</sup> Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. § 1602 (2006)). In this note, I will refer to this Act as the FSIA.

<sup>13</sup> See *NML Capital*, 652 F.3d at 196-97. While *sovereign immunity* refers to "[a] government's immunity from being sued in its own courts without its consent," BLACK'S LAW DICTIONARY 818 (9th ed. 2009), *foreign immunity* describes "[t]he immunity of a foreign sovereign, its agents, and its instrumentalities from litigation in [another country's] courts." *Id.* For purposes of this note, foreign sovereign immunity is synonymous with foreign immunity.

<sup>14</sup> See 28 U.S.C. § 1602 (2006).

<sup>15</sup> 28 U.S.C. § 1611(b)(1).

<sup>16</sup> *NML Capital*, 652 F.3d at 191.

<sup>17</sup> *Id.* at 197.

<sup>18</sup> 28 U.S.C. § 1611(b)(1).

<sup>19</sup> *NML Capital*, 652 F.3d at 196.

<sup>20</sup> The vulture funds had \$2.4 billion in uncollected judgments against Argentina and the BCRA only had \$105 million in the FRBNY, or about 4.4 percent of what it owed. See *supra* note 9.

<sup>21</sup> See Brief of Amicus Curiae, Federal Reserve Bank of New York at 3-4, *NML Capital*, 652 F.3d 172 (No. 10-1487-cv(L)) (describing how "[t]he FRBNY has accounts for approximately 250 foreign central banks and monetary authorities around the world" and how, "[a]s of December 31, 2009, the balances in these accounts totaled nearly \$3 trillion, which represent[ed] approximately 50% of worldwide U.S. dollar-denominated reserves"). The money at the FRBNY serves many critical functions for world financial markets: (1) most of the world holds some reserve currency here; (2) such large holdings promote the United States and New York City as financial centers; (3) the foreign investments at the FRBNY helps the United States government finance its public debt and lower interest rates; and (4) such benefits "promote the U.S. dollar as the world's main currency." *Id.* Both the FRBNY and the U.S. government wrote *amicus curiae* briefs on behalf of the Republic. See *generally id.*; Brief for the United

This note will argue that amendments to the 1976 statute might clarify its original intent: to protect foreign governments from suit when they act as sovereigns. Part I of the note sets forth the purpose and relevant provisions of the Foreign Sovereign Immunities Act. Part II recounts the extensive litigation between the Republic and the vulture funds. Part III discusses problems with the construction of the FSIA, proposes a revision, and explains the need for a special interpretation of foreign central bank assets as envisioned by the *NML Capital* decision. Finally, Part IV explains why this litigation has reached a stalemate and the impact of powerful political and economic considerations on the *NML Capital* decision.

#### I. THE FOREIGN SOVEREIGN IMMUNITIES ACT: PURPOSE AND STRUCTURE

Congress passed the Foreign Sovereign Immunities Act in 1976 as a response to the modern reality that Americans and, more importantly, American corporations were “increasingly coming into contact with foreign states and entities owned by foreign states.”<sup>22</sup> Both the House and Senate Judiciary Committees noted that the United States was behind because “[u]nlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants.”<sup>23</sup> Unsurprisingly, the bill’s congressional hearings focused on the legislation’s benefits for constituents with colorable claims against foreign states, which included obtaining “satisfaction of [a] judgment through execution against ordinary commercial assets.”<sup>24</sup> On the other hand, some of the bill’s most powerful provisions—and those at issue in *NML Capital*—provided guidance to foreign states on asserting the sovereign immunity defense,<sup>25</sup> which helps prevent “significant foreign relations

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States of America as Amicus Curiae in Support of Reversal, *NML Capital*, 652 F.3d 172 (No. 10-1487-cv(L)). Among the reasons cited by the FRBNY for its support of shielding the assets from attachment was the FRBNY’s “substantial interest in a stable and certain legal environment for foreign central bank assets.” Brief of Amicus Curiae, Federal Reserve Bank of New York, *supra*, at 4. The FRBNY also explained that its account holders want “assurance that their accounts at the FRBNY are protected under U.S. law” and expect that their “reserves . . . [held] outside of the United States” will be protected by “reciprocal international principles of central bank immunity.” *Id.* at 4.

<sup>22</sup> H.R. REP. NO. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605, 6630.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

problems” that arise upon execution against the reserves of foreign states.<sup>26</sup>

A. *Immunity as the Basic Premise of the FSIA*

The default rule for suing a foreign governmental entity is simple: it cannot be done.<sup>27</sup> The FSIA allows for exceptions to the general grant of immunity, however, which emerged from a doctrine known as “restrictive sovereign immunity.”<sup>28</sup> Under the doctrine, state acts that are “sovereign or governmental in nature” are immune from suit, but those that are commercial or normally performed by private persons are not.<sup>29</sup> As Deputy Legal Adviser of the U.S. Department of State in 1952, Jack B. Tate traced the rationale behind stripping immunity from the commercial activities of a foreign state in a letter addressed to U.S. Attorney General James McGranery<sup>30</sup>:

[T]he Department [of State] 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. For these reasons it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.<sup>31</sup>

Borne of a desire to protect the business interests of American citizens transacting with foreign states abroad, the commercial activity exception has formed one of the primary battlegrounds for claims aimed at defeating immunity and has left courts to decide the commerciality of a number of novel issues—for example, furnishing residential space to diplomats,<sup>32</sup>

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<sup>26</sup> *Id.* at 31.

<sup>27</sup> See 28 U.S.C. § 1604 (2006) (stating that a “foreign state shall be immune from the jurisdiction of the courts of the United States and of the States” subject to certain exceptions); see also *id.* § 1609 (stating that “the property in the United States of a foreign state shall be immune from attachment” subject to similar exceptions).

<sup>28</sup> *Id.* §§ 1605, 1610 (outlining the commercial activity exceptions to immunity from suit and attachment); H.R. REP. NO. 94-1487, at 14.

<sup>29</sup> H.R. REP. NO. 94-1487, at 14.

<sup>30</sup> See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976) (Letter from Jack B. Tate, Sec’y of State, to James McGranery, Attorney General (May 19, 1952)).

<sup>31</sup> *Id.* at 714.

<sup>32</sup> See *City of New York v. Permanent Mission of India to the United Nations*, No. 03-CV-3256 (RCCFM), 2004 WL 2710040, at \*1-7 (S.D.N.Y. May 11, 2000) (granting plaintiff’s discovery request for documents relating to the acquisition of real property for residential purposes in order to establish that embassy engaged in commercial activity).

discriminating against employees,<sup>33</sup> and taking hostages.<sup>34</sup> Resolving these issues has left a rich but complicated jurisprudence, especially as foreign states and their instrumentalities engage in increasingly complex financial transactions with private parties.<sup>35</sup>

*B. The Foreign Sovereign Immunities Act of 1976: Key Provisions and Jurisprudence*

1. What Is a “Foreign State”?

According to 28 U.S.C. § 1603, a “foreign state’ . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . .”<sup>36</sup> To qualify as an agency or instrumentality according to § 1603(b)(1), the governmental entity must be a “separate legal person.”<sup>37</sup> Although FSIA

<sup>33</sup> See *Shih v. Taipei Econ. & Cultural Representative Office*, 693 F. Supp. 2d 805, 811 (N.D. Ill. 2010) (concluding that employment discrimination was not “peculiar to sovereigns” and therefore constituted commercial activity).

<sup>34</sup> See *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994) (arguing that “kidnapping by itself cannot possibly be described as an act typically performed by participants in the market (unless one distorts the notion of a marketplace to include a hostage bazaar),” even though “money was allegedly sought from relatives of the hostages . . .”).

<sup>35</sup> See *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 196-97 (2d Cir. 2011) (private bondholders unsuccessfully sought attachment of Argentine central bank assets located in the United States to satisfy judgments entered against Argentina after their 2001 default on bonds purchased in the secondary market by respondents); *Wasserstein Perella Emerging Mkts. Fin., L.P. v. Province of Formosa*, No. 97-CV-793(BSJ), 2000 WL 573231, at \*8-10 (S.D.N.Y. May 11, 2000) (Argentine province’s failure to pay a Cayman Islands-based investment bank hired to raise money for a loan is commercial in character and, therefore, not subject to the FSIA).

<sup>36</sup> 28 U.S.C. § 1603(a) (2006).

<sup>37</sup> *Id.* § 1603(b):

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

For a discussion of the relevance of the other “agency or instrumentality” requirements for foreign central banks, see Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT’L L. 327, 350-60 (2003). For an in-depth discussion of the “organ of a foreign state” requirement of § 1603(b)(2), see Michael A. Granne, *Defining “Organ of a Foreign State” Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS

jurisprudence includes many cases involving monetary authorities,<sup>38</sup> the statute does not define the term *central bank*.<sup>39</sup> This omission has engendered multiple interpretations of § 1603's relevance for foreign central banks.<sup>40</sup> When a foreign central bank has the status of a separate legal person for FSIA purposes,<sup>41</sup> it confers an important benefit: it limits its own "liability for the acts of its parent government . . ." by acquiring "the sovereign character of its parent government for immunity purposes."<sup>42</sup> As such, foreign governments and their instrumentalities often argue that each entity is a separate legal person and, therefore, that one cannot be held liable for the debts of the other.<sup>43</sup>

In *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, the U.S. Supreme Court explored two circumstances in which the presumption of an instrumentality's independent legal personhood, or "separate juridical status," should be set aside—a result that would place liability on the instrumentality for the acts of its parent government.<sup>44</sup> In that case, Bancec, a short-lived foreign trade bank of Cuba in the months following the 1959 Cuban Revolution, had an agreement with Citibank, a private American bank, to ship sugar to Mississippi.<sup>45</sup> Bancec shipped the sugar and sued Citibank in New York when it failed to pay.<sup>46</sup> Citibank did not pay because the newly installed

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L. REV. 1 (2008). For purposes of clarity, the word "instrumentality" will be used instead of "agency or instrumentality." See *infra* Part III.

<sup>38</sup> See, e.g., *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 613 (1983) *LNC Invs., Inc. v. Banco Cent. de Nicaragua*, 228 F.3d 423, 423 (2d Cir. 2000) (per curiam); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 239 (2d Cir. 1994); *Banco Cent. de Reserva del Peru v. Riggs Nat'l Bank*, 919 F. Supp. 13, 15 (D.D.C. 1994).

<sup>39</sup> See Working Grp. of the Am. Bar Ass'n, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 525 (2002) [hereinafter *Working Group*] (noting that "other federal statutes and court decisions provide guidance" on defining "central bank").

<sup>40</sup> Compare *NML Capital*, 652 F.3d at 196-97 (citing section 1611(b)(1) for foreign central bank analysis under FSIA), with Lee, *supra* note 37, at 350 (arguing that such an analysis must logically begin with section 1603 because if it did not, FSIA would not apply to central banks because they would not be foreign states and, therefore, they would never qualify for immunity).

<sup>41</sup> See Lee, *supra* note 37, at 350 n.81 ("The legislative history of the FSIA reflects [the] presupposition [that] as a general matter, entities which meet the definition of an agency or instrumentality of a foreign state could assume a variety of forms, including . . . a central bank . . ." (internal quotation marks omitted)).

<sup>42</sup> See *id.* at 360. For the purposes of this note, a parent government is a foreign state as defined by FSIA that is not an instrumentality.

<sup>43</sup> See, e.g., *Bancec*, 462 U.S. 611, 617 (1983).

<sup>44</sup> *Id.* at 630.

<sup>45</sup> *Id.* at 614.

<sup>46</sup> *Id.* at 614-15.



communists in Cuba expropriated all of Citibank's property in Cuba.<sup>47</sup> As a result, Citibank brought counterclaims for an offset on the value of its Cuban property in lieu of paying Bancec for the sugar.<sup>48</sup> The Court rejected the Cuban government's argument that Bancec was legally separate from the parent government<sup>49</sup> and adhered to precedent by stating that separate juridical status would be ignored (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created[,]"<sup>50</sup> or (2) when recognition of independent legal personhood "would work fraud or injustice."<sup>51</sup>

Explaining the first prong, the Court analogized the parent government-instrumentality relationship to that of a parent corporation and its subsidiary.<sup>52</sup> Under principles of corporate law, a subsidiary<sup>53</sup> is considered legally separate from its parent corporation,<sup>54</sup> but the "corporate veil,"<sup>55</sup> which limits the corporation's liability for the subsidiary's acts, may be pierced if "[d]ominion [is] so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent."<sup>56</sup> When the principal controls the agent in this manner, courts label the agent as the

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 616.

<sup>49</sup> *Id.* at 632-33.

<sup>50</sup> *Id.* at 629 (citing *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 402-04 (1960)). It is important to not confuse the U.S. Supreme Court's reference to "agent" with the idea of "agency" as used in FSIA. When a court decides that an entity, such as a foreign central bank, is an agent of its principal (i.e., its parent government), it effectively erases the distinction between foreign states and agencies or instrumentalities and thereby creates a principal-agent relationship between the parent government and foreign central bank. See *EM II*, 720 F. Supp. 2d 273, 299 (S.D.N.Y. 2010), *vacated sub nom.* *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172 (2d Cir. 2011). When the principal-agent relationship is created, the agent becomes the alter ego of the principal and "could be liable for the debts of the [principal]." *Id.*

<sup>51</sup> *Bancec*, 462 U.S. at 629 (citing *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)).

<sup>52</sup> *Id.* at 630.

<sup>53</sup> A "subsidiary corporation" is "[a] corporation in which a parent corporation has a controlling share." BLACK'S LAW DICTIONARY 394 (9th ed. 2009).

<sup>54</sup> See, e.g., *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929).

<sup>55</sup> See generally I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 496-97 (1912) (coining the phrase "pierc[ing] the veil" to describe situations in which a corporation's separate legal status should be disregarded because the corporation attempts "to commit iniquity, to perpetrate fraud, to achieve monopoly, or to accomplish wrongs, under the guise, and hiding behind the veil, of corporate existence").

<sup>56</sup> *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 403 (1960) (quoting *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.)). See RESTATEMENT (FIRST) OF AGENCY § 219 (1933) ("[A] master is subject to liability for injuries caused by the tortious conduct of servants within the scope of their employment.").

“alter ego” of the principal, and one can be held liable for the acts of the other.<sup>57</sup>

The second prong represents general equitable principles of justice and fairness. In *Bancec*, the Cuban government used the corporate form in an attempt to avoid its obligations to Citibank.<sup>58</sup> The Court explained that it was not fair to allow Cuba to invoke American law under the FSIA to avoid Citibank’s rightful counterclaim.<sup>59</sup> The Court argued that this situation mirrored that in *National City Bank v. Republic of China*—the foreign state “wants our law, like any other litigant, but it wants our law free from the claims of justice.”<sup>60</sup> In such circumstances, the Court found it fair to ignore the corporate form.

## 2. The Commercial Activity Exceptions

The FSIA provides for two types of commercial activity exceptions: the commercial exception to immunity from suit under § 1605(a)(2)<sup>61</sup> and the commercial exception to immunity from attachment under § 1610(a)(2) and (b)(2).<sup>62</sup> The difference

<sup>57</sup> See *Zimmerman v. Puccio*, 613 F.3d 60, 75 (1st Cir. 2010) (quoting 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41.10 (2010)) (internal quotation marks omitted) (“[I]f the shareholders or the corporations themselves disregard the proper formalities of a corporation, then the law will do likewise as necessary to protect individual and corporate creditors.”).

<sup>58</sup> *Bancec*, 462 U.S. 611, 630-32 (1983).

<sup>59</sup> *Id.* at 630.

<sup>60</sup> *Id.* at 632 (quoting *Nat’l City Bank v. Republic of China*, 348 U.S. 356, 361-62 (1955)) (internal quotation marks omitted).

<sup>61</sup> See 28 U.S.C. § 1605(a)(2) (2006):

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

....

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign states; or upon an act performed in the United States in connection with a commercial activity of a foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign states elsewhere and that act causes a direct effect in the United States . . . .

<sup>62</sup> See *id.* § 1610(a)(2):

(a) The property in the United States of a foreign state, as defined in section 1603(a) . . . , used for a commercial activity in the United States, shall not be immune from attachment . . . upon a judgment entered by a court of the United States or of a State . . . if—

....

between immunity from suit and immunity from attachment is important: the latter will only apply if plaintiffs successfully bring the defendant foreign state within the court's jurisdiction *and* obtain a judgment.<sup>63</sup>

Section 1605(a)(2) strips a foreign state of its immunity when state action is "based upon a commercial activity . . . ."<sup>64</sup> Under § 1603(d), commercial activity "means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."<sup>65</sup> While the statute clearly demands that courts determine commerciality by looking at the foreign state's actions rather than its motives, the statute leaves a critical word, *commercial*, undefined.

*Republic of Argentina v. Weltover, Inc.*<sup>66</sup> filled this statutory gap. To encourage international trade, Argentina offered a program to its domestic businesses whereby the government would provide them with U.S. dollars in exchange for Argentine pesos.<sup>67</sup> When the program failed as a result of Argentina's insufficient U.S. dollar reserves, Argentina refinanced the foreign exchange agreements by issuing bonds

(2) the property is or was used for the commercial activity upon which the claim was based . . . .

. . . .

(b) In addition to subsection (a), any property in the United States of an . . . instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment . . . upon a judgment entered by a court of the United States or of a State . . . if—

. . . .

(2) the judgment relates to a claim for which the . . . instrumentality is not immune by virtue of section 1605(a)(2) . . . regardless of whether the property is or was involved in the act upon which the claim is based . . . .

(emphasis added); see also *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 254-55 (5th Cir. 2002) (explaining some of the differences between sections 1605 and 1610).

<sup>63</sup> See *Lee*, *supra* note 37, at 375 (noting that "[i]t is one thing to obtain a judgment against a foreign state or agency or instrumentality, but quite another to recover on it").

<sup>64</sup> 28 U.S.C. § 1605(a)(2).

<sup>65</sup> *Id.* § 1603(d).

<sup>66</sup> 504 U.S. 607 (1992).

<sup>67</sup> *Id.* at 609 (describing how this policy would stimulate international trade because "Argentina's currency is not one of the mediums of exchange accepted on the international market" and, therefore, Argentine businesses engaging in foreign transactions needed U.S. dollars).

that guaranteed repayment to all affected foreign creditors.<sup>68</sup> But as the repayment date approached, Argentina concluded that it could not pay on the bonds, so it unilaterally extended the time for payment and issued another round of agreements promising future payment.<sup>69</sup> Foreign creditors refused, however.<sup>70</sup> Instead, the foreign creditors sued Argentina under § 1605(a)(2), arguing that these transactions were commercial activities.<sup>71</sup>

The Supreme Court sided with the foreign creditors, finding that Argentina's borrowing activity was commercial under the FSIA because it acted as "a private player within [a market]" rather than as a regulator.<sup>72</sup> By focusing on the nature rather than the purpose of a transaction, the Court broadened the commercial activity exception and brought an arguably governmental program within the exception. In effect, it no longer mattered "*why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so."<sup>73</sup>

### 3. The Waiver Exceptions

Section 1605(a)(1) brings a foreign state under the jurisdiction of the U.S. courts if the foreign state waived its immunity "either explicitly or by implication."<sup>74</sup> But "[i]mplicit waiver . . . is a second best approach, and a distant second at that."<sup>75</sup> Courts' tendencies to reject anything but an explicit

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 610.

<sup>70</sup> *See id.* The foreign creditors who brought the suit were two Panamanian corporations and a Swiss bank, who were able to sue in New York because the bond agreements "provide[d] for payment of interest and principal in United States dollars . . . through transfer on the London, Frankfurt, Zurich, or New York market . . ." *Id.* at 609-10.

<sup>71</sup> *See id.* at 612.

<sup>72</sup> *Id.* at 620.

<sup>73</sup> *Id.* at 608.

<sup>74</sup> 28 U.S.C. § 1605(a)(1) (2006).

<sup>75</sup> Lee, *supra* note 37, at 339; *see also* H.R. REP. NO. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617 (considering explicit and implicit waivers of immunity by the foreign state. An explicit waiver would most likely be included in the plain language of a contract. Implicit waivers may be found in cases "where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract."); George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 676 (2008) ("Explicit waivers are often found in a contract between the sovereign and the creditor that predates the dispute. Such a waiver can be of great value at the enforcement stage, should a dispute ever arise, so it is always good practice for an investor to seek to include such a provision when negotiating a contract with a foreign sovereign.")

waiver corroborate this perspective.<sup>76</sup> Waiver issues are often litigated concurrently with “alter ego” arguments, and a finding that an instrumentality is the “alter ego” of the parent government would mean that the parent government might have waived its immunity through the instrumentality, as well.<sup>77</sup> As a result, courts often favor a “clear and unambiguous” approach to drafting waivers,<sup>78</sup> which explicitly names any agencies or instrumentalities that are subject to the waiver of immunity.<sup>79</sup>

### C. *Implications for Foreign Central Banks*

For a variety of arguably noncommercial, governmental transactions, *Weltover* casts doubt on a foreign central bank’s ability to act “as financial agent for the government” without subjecting itself to the commercial activity exceptions to immunity from suit and attachment.<sup>80</sup> One court stepped even further by stating “[a] contract, implied or otherwise, is inherently commercial, even when the ultimate purpose behind it is governmental regulation.”<sup>81</sup> Considering the pervasiveness of contracts in the public sector, this view would swallow the general rule of sovereign immunity.

*Weltover*’s broad interpretation of commerciality for purposes of immunity from suit also has implications for enforcement of judgments through attachment of property,

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<sup>76</sup> See, e.g., *Eaglet Corp. v. Banco Cent. de Nicaragua*, 839 F. Supp. 232 (S.D.N.Y. 1993) *aff’d*, 23 F.3d 641 (2d Cir. 1994); *Creighton Ltd. v. Gov’t of State of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999).

<sup>77</sup> See, e.g., *EM II*, 720 F. Supp. 2d. 273, 303-04 (S.D.N.Y. 2010) *vacated sub nom.* *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172 (2d Cir. 2011).

<sup>78</sup> See *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 (2d Cir. 2010).

<sup>79</sup> *NML Capital*, 652 F.3d at 195-96 (holding that despite the Republic’s broadly worded waiver of immunity in the bond instruments that plaintiffs purchased, “it does not appear to clearly and unambiguously waive BCRA’s immunity . . .”).

<sup>80</sup> See *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 243-44 (2d Cir. 1994) (state-owned Iraqi bank not immune from suit when it did not honor its loan guarantee); *Weston Compagnie de Fin. et D’Investissement, S.A. v. La República del Ecuador*, 823 F. Supp. 1106, 1115 (S.D.N.Y. 1993) (*Banco Central del Ecuador* not immune from suit after it defaulted on loan agreements with its Swiss creditor, a financial institution which purchased Swiss debt); see also *Shapiro v. Republic of Bolivia*, 930 F.2d 1013 (2d Cir. 1991) (government financing for the purchase of military aircraft considered commercial). *But see De Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1394-95 (5th Cir. 1985) (adopting a pre-*Weltover* consideration of the underlying purpose of the transaction to hold that the Central Bank’s issuance of a check was governmental even though check writing is private-like in nature).

<sup>81</sup> *Chisholm & Co. v. Bank of Jamaica*, 643 F. Supp. 1393, 1400 (S.D. Fla. 1986) (citations omitted).

especially for central banks. Since central banks typically qualify as instrumentalities under § 1603(b),<sup>82</sup> it would appear that

Congress chose to provide a special rule for certain assets of a foreign central bank. Section 1611(b)(1) provides that, *notwithstanding the provisions of § 1610*, the property of a foreign bank or monetary authority “held for its own account” is immune from attachment . . . unless the central bank or monetary authority or its parent foreign government has explicitly waived its immunity from attachment . . . .<sup>83</sup>

The interplay between the commerciality of central bank activities, the special protection from attachment the FSIA affords foreign central bank property “held for its own account,”<sup>84</sup> and waivers of immunity set the stage for over ten years of litigation between the Republic of Argentina and the vulture funds.

## II. ARGENTINA’S DEFAULT AND SECOND CIRCUIT FSIA INTERPRETATION: 2001–2011

Founded in 1935, the BCRA, by Argentine law, is “a self-administered institution of the [Argentine] State,” charged with representing the Republic’s financial interests with foreign entities and regulating Argentina’s domestic banking and financial sectors.<sup>85</sup> These functions included a BCRA bank account at the FRBNY for the management of the Republic’s dollar reserves.<sup>86</sup> When the Republic defaulted on \$80 billion of foreign-owned debt in 2001, it stopped principal and interest payments on that debt.<sup>87</sup> Although the economic situation in Argentina following the 2001 default was extremely severe,<sup>88</sup>

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<sup>82</sup> See *supra* Part I.B.1.

<sup>83</sup> See Lee, *supra* note 37, at 376 (emphasis added) (footnote omitted). Although instrumentalities enjoy sovereign-like immunity, an “instrumentality enjoys immunity from attachment and execution on terms less generous than those applicable to the [parent government] itself.” *Id.* at 360; see also 28 U.S.C. § 1610(a)(2), (b)(2) (2006) (allowing creditors to attach property of a parent government “used for the commercial activity upon which the claim is based . . .” and expanding that attachment right against instrumentalities “regardless of whether the property is or was involved in the act upon which the claim is based”); *id.* § 1611(b)(1) (the special central bank immunity provision).

<sup>84</sup> 28 U.S.C. § 1611(b)(1).

<sup>85</sup> *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 177 (2d Cir. 2011) (alteration in original) (internal quotation marks omitted).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 175.

<sup>88</sup> See Charles Newbery & Alexei Barrionuevo, *As Greece Ponders Default, Lessons from Argentina*, N.Y. TIMES, (June 23, 2011), [http://www.nytimes.com/2011/06/24/business/global/24peso.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2011/06/24/business/global/24peso.html?_r=1&pagewanted=all) (“[In 2001], as Argentina slid

some questioned Argentina's claims that it could not pay its debt in subsequent years, citing the fact that the Republic ran surpluses in certain years following the default.<sup>89</sup>

Rather than participate in the Republic's global exchange offers between 2005 and 2010,<sup>90</sup> which offered creditors new securities for the nonperforming bonds on less favorable terms,<sup>91</sup> the vulture funds<sup>92</sup> pursued claims for full recovery on the original bond terms.<sup>93</sup> The litigation against the Republic and the BCRA in the U.S. District Court for the Southern District of New York<sup>94</sup> resulted in unpaid judgments of almost \$2.4 billion against the Republic since 2003.<sup>95</sup> Saddled with these interest-accruing judgments, a devalued Argentine peso, and \$9.8 billion in debts due to the International Monetary Fund (IMF), the Republic moved more than \$32 billion out of its FRBNY account between 2001 and 2005 in an

toward financial collapse, banks barricaded themselves behind sheet metal to keep out protesters demanding access to their life savings.”)

<sup>89</sup> See *EM II*, 720 F. Supp. 2d 273, 301 (S.D.N.Y. 2010) (“The court must also take into account the bad faith of the Republic following the default . . . . Indeed, the record shows that during certain of [the ensuing] years the Republic ran a surplus.”), *vacated sub nom. NML Capital*, 652 F.3d at 172.

<sup>90</sup> See *NML Capital*, 652 F.3d at 176 n.4 (explaining the terms of the 2005 and 2010 “global exchange offers”).

<sup>91</sup> See Drew Benson & Eliana Raszewski, *Argentina Offers 66% Haircut on Defaulted Bonds*, BLOOMBERG (Apr. 15, 2010, 7:23 PM), <http://www.bloomberg.com/news/2010-04-15/argentina-offers-new-bonds-to-holders-of-20-billion-debt-to-end-default.html> (reporting that the 2005 and 2010 restructurings offered similar terms, with creditors receiving approximately thirty-four cents on the dollar).

<sup>92</sup> See 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, 6:50 PM), <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/> (identifying NML Capital as “a subsidiary of U.S. billionaire Paul Singer's Elliott Capital”); see also Karen De Witt, *Exile's Effort to Return Puts Focus on Tax Loophole*, N.Y. TIMES, Oct. 1, 1995, at 14, available at <http://www.nytimes.com/1995/10/01/us/exile-s-effort-to-return-puts-focus-on-tax-loophole.html> (describing Kenneth Dart, funder of EM Ltd., and his plan to return to the U.S. as consul for Belize, his adopted country, after he renounced his American citizenship to avoid capital gains and estate taxes).

<sup>93</sup> *NML Capital*, 652 F.3d at 176 n.6 (listing the various suits and judgments between the vulture funds and the Republic).

<sup>94</sup> See *id.* at 176 n.5 (“It is undisputed that in the terms and conditions governing each of the securities at issue in this case the Republic agreed to submit to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan, The City of New York . . . over any suit, action, or proceeding against it or its properties, assets, or revenues with respect to [these securities] . . . .” (internal quotation marks omitted)); see also 28 U.S.C. § 1605(a)(1) (2006) (allowing explicit waivers of jurisdictional immunity).

<sup>95</sup> *NML Capital*, 652 F.3d at 176 n.3 (aggregating judgments on principal and interest payments).

attempt to shield assets from its creditors.<sup>96</sup> When the Republic transferred \$2.1 billion to its Swiss bank account within three months,<sup>97</sup> the vulture funds realized they were in danger of failing to collect on their judgments and moved to attach the \$105 million in BCRA assets remaining in the BCRA's FRBNY account.<sup>98</sup> These actions represented the beginning of a prolonged legal battle between the Republic and vulture funds, highlighted by two legal decisions: *EM Ltd. v. Republic of Argentina (EM I)*<sup>99</sup> and *NML Capital, Ltd. v. Banco Central de la República Argentina (NML Capital)*.<sup>100</sup>

A. *The EM I Litigation: 2005–2007*<sup>101</sup>

On December 30, 2005, the vulture funds successfully moved to freeze the FRBNY funds through an *ex parte* proceeding,<sup>102</sup> but Judge Thomas P. Griesa of the U.S. District Court for the Southern District of New York vacated the decision two weeks later.<sup>103</sup> On appeal from the order vacating the attachment orders, the vulture funds argued that the Kirchner Decrees, two emergency executive decrees issued by Argentina's then-president Néstor Kirchner on December 15, 2005, effectively transferred ownership of the BCRA's FRBNY

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<sup>96</sup> See *id.* at 178 (attributing the depletion of FRBNY assets to the cost of “prop[ping] up” the value of the Argentine peso through the purchase of pesos with \$20 billion and transfers of excess funds to “more protective jurisdictions . . . as a preventive measure against possible wrongful attachment efforts by creditors of the Republic” (internal quotation marks omitted)).

<sup>97</sup> See *id.* at 177-78 (chronicling the BCRA's account transfers); see also *NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 8845 (TPG), 2011 WL 3897828, at \*2 (S.D.N.Y. Sept. 2, 2011). The Bank for International Settlements (BIS) was founded in Switzerland in 1930 and “consists of 56 central banks or national monetary authorities.” *Id.* It offers its accountholders “virtually absolute immunity from attachment . . . under Swiss law” and does not accept deposits from national governments, private individuals or corporations. *Id.*

<sup>98</sup> See *NML Capital*, 652 F.3d at 178.

<sup>99</sup> *EM I*, 473 F.3d 463, 480-85 (2d Cir. 2007).

<sup>100</sup> *NML Capital*, 652 F.3d at 172.

<sup>101</sup> In its 2011 decision *NML Capital*, the Second Circuit refers to its 2007 decision as *EM I*. The *EM I* designation is helpful because the 2010 District Court case was decided under the name *EM Ltd.* as well. The author will refer to the 2011 District Court case, reversed by the *NML Capital* decision, as *EM II* in order to distinguish the 2007 Second Circuit case from the 2011 District Court case.

<sup>102</sup> *EM I*, 473 F.3d at 468-69.

<sup>103</sup> See *EM II*, 720 F. Supp. 2d 273, 274-75 (S.D.N.Y. 2010) (explaining that an earlier December 30, 2005 decision was reversed because (1) payments to the IMF were not commercial activity and (2) the BCRA did not waive its immunity), *vacated sub nom. NML Capital*, 652 F.3d 172 (2d Cir. 2011).



assets to the Republic.<sup>104</sup> If plaintiffs had succeeded in this argument, they would have been able to escape the broad grant of immunity to central banks in § 1611(b)(1) of the FSIA because the property would now be considered that of the Republic, not the BCRA.<sup>105</sup> As such, if the foreign state had waived its immunity or the property had met the commercial activity exception, the property would have been attachable under § 1610.<sup>106</sup>

But the *EM I* court held otherwise, basing its decision on three factors: (1) the distinction between the Republic's control over the BCRA and the BCRA's control over the assets; (2) the noncommercial nature of debt repayments to the IMF from the BCRA's FRBNY account; and (3) the subtle distinction regarding the applicability of waivers of immunity.<sup>107</sup> First, the court explained that plaintiffs could not attach funds at the FRBNY because the funds were held in the BCRA's name, and therefore the BCRA, not the Republic, possessed the property.<sup>108</sup> Even if, as plaintiffs argued, the Kirchner Decrees had made it possible for the President of the Republic "to appropriate (or borrow) the [BCRA funds at the FRBNY] to pay Argentina's debts and then direct when and how the payment should be made . . . ,"<sup>109</sup> the Second Circuit explained that "the Republic's ability and willingness to control BCRA" did not necessarily mean that the Republic controlled decisions over which assets the BCRA would use to repay the IMF debt.<sup>110</sup> Rather, the court stated that the BCRA had discretion over the "specific funds" that would service the debt.<sup>111</sup>

Even if the court accepted plaintiffs' arguments about a conversion of ownership from the BCRA to the Republic, the court held that the commercial activity exception for foreign states in § 1610(a)(2) did not apply because the use of the

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<sup>104</sup> See *EM I*, 473 F.3d at 468 (explaining that the Kirchner Decrees directed the Ministry of Economy and Production to issue a resolution to BCRA requiring it to repay the Republic's debt to the IMF).

<sup>105</sup> See 28 U.S.C. § 1611(b)(1) (2006) (applying special immunity provision to central banks only, not other foreign states or instrumentalities).

<sup>106</sup> See *id.* § 1610(a)(1)-(2).

<sup>107</sup> See *EM I*, 473 F.3d at 475-86.

<sup>108</sup> See *id.* at 474 & n.10 (explaining that under New York law "[w]hen a party holds funds in a bank account, possession is established, and the presumption of ownership follows").

<sup>109</sup> *Id.* at 474.

<sup>110</sup> *Id.* at 475.

<sup>111</sup> *Id.* For a more detailed discussion of the lack of central bank independence in Latin America, see Harout Jack Samra, *Central Bank Autonomy in Latin America: A Survey and Case Studies*, 13 CHAP. L. REV. 63 (2009).

FRBNY's monetary reserves to repay debt to the IMF was not commercial activity.<sup>112</sup> Here, the court distinguished IMF payments from the “commercially-available debt instruments” sold by Argentina to creditors in *Weltover*,<sup>113</sup> where the Supreme Court considered the debt instruments to be commercial because they “may be held by private parties; they are negotiable and may be traded on the international market . . . ; and they promise a future stream of cash income.”<sup>114</sup> In contrast, the Second Circuit explained that the relationship of Argentina to the IMF lacked these private-like qualities because IMF membership extends only to sovereign nations; the IMF's mission is preservation of a stable international monetary system; and IMF loans “are not available in the commercial market.”<sup>115</sup> In other words, even if past funds at the FRBNY had serviced Argentina's debt to the IMF, plaintiffs had not shown that the \$105 million of BCRA assets still in deposit at the FRBNY were designated for IMF debt payments.<sup>116</sup>

Finally, mirroring *LNC Investments, Inc. v. Banco Central de Nicaragua*,<sup>117</sup> the Second Circuit addressed the Republic's explicit waiver of immunity from jurisdiction and attachment, as well as the waiver's applicability to the BCRA.<sup>118</sup> In *LNC Investments*, a creditor sought to execute on the assets of the Central Bank of Nicaragua.<sup>119</sup> The court held that a central bank's assets could not be used to satisfy a judgment against a parent government, even if the parent government “waive[s] the immunity of its central bank pursuant to § 1611.”<sup>120</sup> The court reasoned that § 1611 permits attachment of such assets “when, and only when, the central bank or its parent government has made an *explicit* waiver of the bank's immunity.”<sup>121</sup> By raising this point, the court stated that plaintiffs

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<sup>112</sup> See *EM I*, 473 F.3d at 480-85.

<sup>113</sup> *Id.* at 482-85.

<sup>114</sup> Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607, 615 (1992).

<sup>115</sup> *EM I*, 473 F.3d at 482-84. The court also addressed the commercial question in the alternative, noting that it “would be required to hold that, on the present record, the FRBNY Funds are not available for attachment under § 1610 because the FRBNY Funds were never *used for* commercial activity . . . .” *Id.* at 484.

<sup>116</sup> See *supra* text accompanying notes 7-9.

<sup>117</sup> 115 F. Supp. 2d 358 (S.D.N.Y. 2000), *aff'd*, 228 F.3d 423 (2d Cir. 2000) (per curiam).

<sup>118</sup> *EM I*, 473 F.3d at 485-86.

<sup>119</sup> *Id.* at 361.

<sup>120</sup> *Id.* at 486.

<sup>121</sup> *Id.* (emphasis added) (quoting *LNC Invs., Inc.*, 115 F. Supp. 2d at 362-63).

should have relied on “well-established” *Bancec* principles rather than focusing on commerciality and waiver arguments.<sup>122</sup>

Rather than suing the Republic and arguing that ownership of the BCRA assets at the FRBNY had transferred to the Republic, the court hinted that the plaintiffs should have argued that the BCRA was the “alter ego” of the Republic, thereby defeating the presumption that the BCRA deserved “separate juridical status” and stripping it of the § 1611(b)(1) central bank immunity.<sup>123</sup> Under these circumstances, the Republic’s waiver of immunity from attachment would apply to the BCRA because the bank and parent government would be “alter egos” of one another.<sup>124</sup>

### B. *The NML Capital Decision (2006–2010)*

Apparently the vulture funds had recognized the efficacy of the “alter ego” argument before the 2007 *EM I* opinion, because they filed a new action in 2006 “seeking a declaratory judgment to the effect that BCRA is the alter ego of the Republic.”<sup>125</sup> Once again, Judge Thomas P. Griesa of the U.S. District Court for the Southern District of New York presided, holding that the BCRA was not entitled to separate juridical status under *Bancec*.<sup>126</sup> Under *Bancec*’s first prong,<sup>127</sup> the court found that the BCRA was, in fact, the “alter ego” of the Republic because the Republic expressly directed the BCRA to pay the Republic’s IMF debt, the Republic was able to “draw on the resources of the BCRA at will,” and the BCRA ignored its mandate to operate independently of the Republic.<sup>128</sup> Under *Bancec*’s second prong,<sup>129</sup> the court found such use of the BCRA funds “contributed to fraud and injustice perpetrated . . . on the bondholders” because the bonds gave rights of attachment and

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<sup>122</sup> *Id.* at 476-77.

<sup>123</sup> *Id.* at 477-78.

<sup>124</sup> For a discussion of the “alter ego” analysis, see *Bancec*, 462 U.S. 611, 617-18 (1983).

<sup>125</sup> *EM II*, 720 F. Supp. 2d 273, 275-76 (S.D.N.Y. 2010), *vacated sub nom.* NML Capital, Ltd. v. Banco Cent. de la República Argentina, 652 F.3d 172 (2d Cir. 2011).

<sup>126</sup> *Id.* at 273-74, 297-302.

<sup>127</sup> See *supra* Part I.B.1.

<sup>128</sup> *EM II*, 720 F. Supp. 2d at 299-300. The court accurately described the Republic’s control over the BCRA. The BCRA featured three “short-term governors . . . marked by disagreement with the Republic over the BCRA’s independence.” *Id.* at 281. The Argentine government since 2001 had enacted laws giving the Republic increasing control over the BCRA. *Id.* at 284.

<sup>129</sup> See *supra* Part I.B.1.

execution that the Republic refused to honor.<sup>130</sup> Accordingly, the court held that the separate juridical status of the BCRA should be disregarded because the Republic had explicitly waived its immunity from suit and attachment, refused to pay its debts in full, and then argued that its waiver did not apply to the BCRA.<sup>131</sup>

Since the BCRA was the “alter ego” of the Republic, a waiver of the Republic’s immunity would also apply to the BCRA because the funds now belonged to the Republic, rather than to the BCRA’s account.<sup>132</sup> Attachment of the Republic’s assets would be proper under § 1610(a), however, only if such property was “used for a commercial activity” as interpreted by *Weltover*.<sup>133</sup> The court found that the \$105 million on deposit at the FRBNY had “the ability to earn a certain amount of income on balances”<sup>134</sup>—a commercial activity “by which a private party engages in trade and traffic or commerce.”<sup>135</sup> Since the BCRA and the Republic were “alter egos” under *Bancec* analysis, the BCRA was no longer eligible for the special foreign central bank immunity protection of § 1611(b)(1) and, instead, fell under the attachment exceptions that would normally apply only to the Republic’s commercial property in the United States.<sup>136</sup> Since the district court had considered the FRBNY accounts to be commercial and the Republic had explicitly waived all immunity, it concluded that the funds at the FRBNY were subject to attachment.<sup>137</sup>

The Second Circuit vacated on appeal,<sup>138</sup> focusing its analysis on the statute itself, rather than on the *Bancec*

<sup>130</sup> *EM II*, 720 F. Supp. 2d at 301.

<sup>131</sup> *Id.* at 303-04.

<sup>132</sup> *Id.* at 300-01.

<sup>133</sup> *Id.* at 303; *see also* 28 U.S.C. § 1610(a) (2006); Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607, 614-15 (1992).

<sup>134</sup> *EM II*, 720 F. Supp. 2d at 303.

<sup>135</sup> *Id.* (internal quotation marks omitted) (quoting *Weltover*, 504 U.S. at 614).

<sup>136</sup> *Id.* at 303-04.

<sup>137</sup> *See id.* at 303 (granting motions for attachment).

<sup>138</sup> *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 197 (2d Cir. 2011). Circuit Judge José A. Cabranes, who wrote the 2007 *EM I* decision with Circuit Judges Ralph K. Winter and Rosemary S. Pooler, *see EM I*, 473 F.3d 463 (2d Cir. 2007), also wrote the 2011 *NML Capital* decision, this time with Circuit Judge Roger Miner and Senior Circuit Judge Chester J. Straub. *NML Capital*, 652 F.3d at 174. In *NML Capital*, the Second Circuit upheld the District Court’s rationale regarding claim preclusion. *See id.* at 185 (quoting *Dayco Corp. v. Foreign Transactions Corp.*, 705 F.2d 38, 39 (2d Cir.1983)). The District Court had held that claim preclusion did not apply because “[t]he motions for attachments . . . made in December 2005 were part of an ongoing process . . . [,] had no independent status as actions for lawsuits . . . [,] did not lead to independent judgments. . . [, and] were nothing more nor less than motions [without] final disposition . . . .” *EM II*, 720 F. Supp. 2d. at 295. The

precedent.<sup>139</sup> In fact, the court rejected the idea of a *Bancec*-like “independence requirement for the immunity of central bank assets,”<sup>140</sup> arguing instead that “the only qualification for immunity under § 1611(b)(1) is whether the property of the central bank is ‘held for its own account.’”<sup>141</sup> First, the court presumed that the funds at the FRBNY were held for the BCRA’s own account because the account was “in the name of a central bank.”<sup>142</sup> But this presumption could be rebutted by a showing that the FRBNY funds were “not being used for central banking functions as such functions are normally understood, irrespective of their ‘commercial’ nature.”<sup>143</sup>

Although the FSIA does not mention the concept of “normally understood . . . central bank[] functions,”<sup>144</sup> the court adopted a “modified test”—combining analysis of the “plain language” of the statute with the “central bank activities test”—to determine whether central bank property is ‘held for its own account.’<sup>145</sup> Here, the parties had stipulated in March 2009 that the BCRA derived the FRBNY-held funds, in part, from accumulating foreign exchange reserves to regulate the Argentine peso and regulating “the custody of cash reserves of commercial banks,” both of which are “paradigmatic central banking functions.”<sup>146</sup> As a result, the court ruled that these

appellate court also addressed issue preclusion, holding that it did not apply because “the legal and factual issues presented in the two cases are very different.” *NML Capital*, 652 F.3d at 186. While *EM I* focused on asset ownership and the non-commercial nature of IMF debt, 473 F.3d at 476-85, the *Bancec* motions of *NML Capital* dealt with plaintiffs’ “alter ego” theory and “[were] not litigated, much less decided . . . , by a court of competent jurisdiction . . . .” *NML Capital*, 652 F.3d at 186 (citations omitted).

<sup>139</sup> *NML Capital*, 652 F.3d at 188.

<sup>140</sup> *Id.*; see also *id.* at 190 (citations omitted) (explaining that when the FSIA was passed in 1976, central banks were more dependent on their parent governments).

<sup>141</sup> *Id.* at 188.

<sup>142</sup> *Id.* at 194.

<sup>143</sup> *Id.*; see also *id.* at 194 n.20 (explaining that the court “recognize[s] that there is no definitive list of activities ‘normally understood’ to be central banking functions . . . , [but] even in unusual circumstances it is not difficult to tell whether a central bank is engaged in a function characteristic of central banks”).

<sup>144</sup> See Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. ILL. L. REV. 265, 274, 277 (1982) (regarding “central bank activities” to include: “(1) issue of notes, coin, and legal tender, (2) custody and administration of the nation’s monetary reserves through the holding of gold, silver, domestic and foreign securities, foreign exchange, . . . and other credit instruments . . . , (3) establishment and maintenance of reserves of depository institutions, (4) discounts and advances to depository institutions, (5) receipt of deposits from the government, international organizations, depository institutions, and in special cases, private persons, (6) open market operations, (7) credit controls, and (8) licensing, supervision, and inspection of banks”).

<sup>145</sup> *NML Capital*, 652 F.3d at 194 (internal quotation marks omitted).

<sup>146</sup> *Id.* at 195.

assets were “held for [the BCRA’s] own account” under § 1611(b)(1) because, regardless of their commerciality, both activities were typical of central banks.<sup>147</sup>

Finally, the court concluded that although the Republic waived its FSIA immunity, its waiver “did not mention the [Republic’s] instrumentalities . . . or the BCRA in particular . . . .”<sup>148</sup> Since the Republic’s waiver was “worded broadly, it d[id] not appear to clearly and unambiguously waive BCRA’s immunity from attachment, as it must do in order to be effective.”<sup>149</sup> Therefore, the court held that the remaining \$105 million in FRBNY funds were immune from attachment by the vulture funds.<sup>150</sup>

### III. FSIA: PROBLEMS AND SOLUTIONS

After more than thirty years of FSIA litigation, FSIA jurisprudence remains uncertain.<sup>151</sup> After the *NML Capital* decision, key terms in the FSIA are still subject to various judicial interpretations, and the rights and obligations of debtors and creditors under the FSIA remain ambiguous.<sup>152</sup> Although some of this confusion may be attributed to the fact that most FSIA cases implicate cross-border transactions of significant financial and political complexity, the ambiguity of certain provisions of the statute, especially the definition of key terms in § 1603, makes interpretation more difficult.

#### A. *The Confusion*

The distinction between a “foreign state” and an “agency or instrumentality” is important because § 1610 makes it easier to attach the property of an agency or instrumentality than the property of a foreign state.<sup>153</sup> However, § 1603 does not

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<sup>147</sup> *Id.* at 194-95.

<sup>148</sup> *Id.* at 196.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See generally, e.g., *Working Group*, *supra* note 39, at 595-617.

<sup>152</sup> For a broader perspective on the uncertain role of FSIA in cross-border restructuring disputes, see Steven M. Davidoff, *In Court Battle, a Game of Brinkmanship with Argentina*, N.Y. TIMES (Nov. 27, 2012, 5:02 PM), <http://dealbook.nytimes.com/2012/11/27/in-court-battle-a-game-of-brinkmanship-with-argentina/>.

<sup>153</sup> Compare 28 U.S.C. § 1610(a)(2) (2006) (permitting an exception to immunity from attachment of foreign state property in the United States used for a commercial activity if “the property is or was used for the commercial activity upon which the claim was based” (emphasis added)), with § 1610(b)(2) (permitting an exception to immunity from attachment of the property in the United States of a commercially-engaged agency or instrumentality of the agency “regardless of whether the property is or was involved in the act upon which the claim is based” (emphasis

adequately define “foreign state,” mentioning only that it “includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . .”<sup>154</sup> Such fact-specific inquiries into the internal governance structures of foreign nations could be complex and delicate from the perspective of foreign relations.<sup>155</sup>

The ambiguity of what constitutes a “political subdivision” and the status of an agency or instrumentality as a foreign state may also create legal arguments that Congress did not intend. For example, a sovereign defendant could argue that even though Congress drafted specific attachment provisions for agencies and instrumentalities, the broader attachment immunity granted to foreign states should apply to agencies and instrumentalities.<sup>156</sup> As a result, any strategy aimed at clarifying the FSIA would need to be both specific and flexible.<sup>157</sup>

## B. *Potential Solutions*

### 1. Drop “Agency”

The term “agency” is misleading and should be dropped in favor of “instrumentality” alone.<sup>158</sup> The confusion over the meaning of “agency” derives from two sources. First, and not surprising given that the current definition of foreign state includes agencies and instrumentalities,<sup>159</sup> “the use of the term ‘agency’ . . . appeared to include departments or ministries that were intended to be part of the foreign state.”<sup>160</sup> Second, the distinction between foreign states and agencies or

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added)); *see also Working Group, supra* note 39, at 585 (noting that § 1610(a)(2) is unnecessarily difficult because “[o]nly in rare instances would a foreign state have property in the United States . . . ‘used’ for the activity giving rise to the claim . . . [because] [i]n many cases, such as those involving a foreign state’s failure to pay for U.S. goods or services or breach of an employment contract or lease, no property of the foreign state related to the claim exists at all, much less in the United States”).

<sup>154</sup> 28 U.S.C. § 1603(a).

<sup>155</sup> *See Heroth v. Kingdom of Saudi Arabia*, 565 F. Supp. 2d 59, 64 (D.D.C. 2008) (explaining that the Saudi Arabian National Guard “is considered a political subdivision of [a] foreign state under the [FSIA]”); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 150 (D.C. Cir. 1994) (holding that “the Bolivian Air Force is a ‘foreign state or political subdivision’”).

<sup>156</sup> The statute again highlights this confusion by stating that the more narrow immunity afforded to agencies and instrumentalities by section § 1610(b) governs “[i]n addition to [the more broad immunity granted by] subsection (a).” 28 U.S.C. § 1610(a)-(b).

<sup>157</sup> *See Working Group, supra* note 39, at 508.

<sup>158</sup> *See id.*

<sup>159</sup> 28 U.S.C. § 1603(a).

<sup>160</sup> *See Working Group, supra* note 39, at 508.

instrumentalities partially rests on whether the agency or instrumentality is a legal person separate from its parent government.<sup>161</sup> To determine whether the presumption of separate legal personhood has been overcome, the *Bancec* Court outlined an “alter ego” test,<sup>162</sup> which would create a principal-agent relationship if satisfied.<sup>163</sup> This is confusing because the FSIA uses “agency” to mean a legally separate entity while *Bancec* uses the term “agent” to refer to a non-legally separate entity.<sup>164</sup> Dropping “agency” in favor of the term “instrumentality” would resolve this confusion.<sup>165</sup>

## 2. The “Core Function Test”

One group of scholars has identified a pattern whereby courts applied either a “core function test” or a “legal characteristics test” to distinguish a foreign state from an instrumentality.<sup>166</sup> The former test, applied in *Transaero, Inc. v. La Fuerza Aerea Boliviana*,<sup>167</sup> looks at the “core function” of the entity: if the core function is governmental, the entity is a foreign state; if the core function is commercial, the entity is an instrumentality.<sup>168</sup> A report published by the American Bar Association (ABA Report) rightly criticized this approach because it was “duplicative of the commercial activity analysis required at a later stage of litigation . . . .”<sup>169</sup> Since the core function test would have already classified governmental, noncommercial entities as foreign states, the test would defeat all subsequent FSIA commercial activity provisions for foreign states. As such, the statute would rarely subject a foreign state to a commercial activity exception to immunity because foreign states are rarely, if ever, commercial under the test. The statute includes commercial activity exceptions for foreign states, and therefore, application of the core functions test would defeat statutory intent.

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<sup>161</sup> 28 U.S.C. § 1603(b).

<sup>162</sup> See *Bancec*, 462 U.S. 611, 629 (1983).

<sup>163</sup> See *id.*; *supra* Part I.B.1.

<sup>164</sup> Compare 28 U.S.C. § 1603(b), with *Bancec*, 462 U.S. at 629.

<sup>165</sup> See *Working Group*, *supra* note 39, at 508.

<sup>166</sup> *Id.* at 509.

<sup>167</sup> 30 F.3d 148, 151 (D.C. Cir. 1994).

<sup>168</sup> See *id.* at 153 (applying the core functions test to hold that the Bolivian Air Force was a foreign state because it was “so closely bound up with the structure of the state that they must in all cases be considered as the ‘foreign state’ itself, rather than a separate ‘agency or instrumentality’ of the state”).

<sup>169</sup> *Working Group*, *supra* note 39, at 514.



### 3. The “Legal Characteristics Test”

The “legal characteristics test,” which analyzes the legal rights of governmental entities, is a better alternative in light of its case-by-case approach.<sup>170</sup> If the entity is able to “sue and be sued, own property, and contract, all in its own name,”<sup>171</sup> it is an instrumentality.<sup>172</sup> Other legal characteristics analyzed may include “whether the entity maintains a distinct personality, was sufficiently capitalized, observes corporate formalities, [and] maintains corporate records . . . whether and to what extent the entity provides its own financing or receives government appropriations, and whether the entity hires public employees.”<sup>173</sup>

The ABA Report, however, recommends weighing an additional factor better left out of any proposed revision to the FSIA. The report includes “whether the state’s assets would be subject to execution if the plaintiff obtained judgment against the foreign entity” as a relevant factor.<sup>174</sup> Such a determination would require courts to analyze the attachment provisions of § 1610, which differ for foreign states and instrumentalities.<sup>175</sup> In other words, resolving entity status ought not to rest on a factor partially dependent on that very same decision.

### 4. One Proposed Revision

Despite this complication, the fact-intensive “totality of the circumstances” approach of the “legal characteristics test” should be codified in the statute. The relevant § 1603 provisions, as envisioned by the ABA Report’s amendments, would read:

For purposes of this chapter—

(a) A “foreign state” includes its government and political subdivisions, departments, ministries, armed services, and independent regulatory agencies. . . . Foreign state does not include an instrumentality of the state.

(b) An “instrumentality” of a foreign state means any entity that—

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<sup>170</sup> *Id.*

<sup>171</sup> *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 685 (S.D.N.Y. 1996) (holding that Finland’s Government Guarantee Fund was an instrumentality because, among other characteristics, it “may own shares in deposit banks and asset management companies”).

<sup>172</sup> *See Working Group, supra* note 39, at 512 (citing *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 398 (E.D. Va. 1984)).

<sup>173</sup> *Id.* at 515.

<sup>174</sup> *Id.*

<sup>175</sup> *See* 28 U.S.C. § 1610 (2006).

- (1) is a separate legal person, corporate or otherwise, and
- (2) is an organ of a foreign state or has a majority of its shares or other ownership interest owned directly, or indirectly through one or more other instrumentalities, by one or more foreign states, and
- (3) is created under the laws of one or more of the states to which section 1603(b)(2) refers and is not a citizen of a State of the United States as defined in section 1332(c) and (d) of this title.<sup>176</sup>

Since foreign central banks do not fit into any of the categories outlined in revised subsection (a), it seems clear that foreign central banks would be instrumentalities, especially in light of the legislative history of the FSIA and modern central bank practice.<sup>177</sup> Nevertheless, the court in *NML Capital* disagreed.<sup>178</sup>

### C. *The FSIA for Foreign Central Banks: Where to Start?*

The term “central bank” is neither defined in § 1603 nor explicitly included in the definitions of “foreign state” or “instrumentality.” Parties to the *NML Capital* decision did not disagree that the BCRA was an instrumentality, because the BCRA *needed* to be an instrumentality in order to decide the *Bancec* motions before the court.<sup>179</sup> Instead, the parties argued

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<sup>176</sup> *Working Group, supra* note 39, at 597-98. The phrase “or instrumentality” would also need to be inserted after the term “a foreign state” in §§ 1604, 1605, and 1609, to ensure that instrumentalities qualify for the general grants of immunity and the jurisdictional exceptions. *See id.* at 599, 611.

<sup>177</sup> *See Lee, supra* note 37, at 350 n.81 (quoting the FSIA legislative history, H.R. REP. NO. 94-1487, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. at 6614, which states that entities defined as instrumentalities “could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, [or] a central bank . . .”).

It is possible, but unlikely, that in a particular instance a foreign central bank might be deemed to be part of the foreign state itself, comparable to the case of a ministry of finance or treasury. In modern practice, a central bank is much more likely to be organized as a separate entity, at least in part because some degree of separation from the government is perceived as important to the credible conduct of monetary policy by a central bank.

*Id.*

<sup>178</sup> *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 187-88 (2d Cir. 2011) (arguing that foreign central banks do not need instrumentality-like independence as described in *Bancec* in order to be immune from attachment).

<sup>179</sup> *Compare* Brief for Plaintiffs-Appellees EM Ltd. and NML Capital, Ltd. at 64-65, *NML Capital*, 652 F.3d at 172 (No. 10-1487-cv(L)) [hereinafter Brief for EM & NML Capital] (inferring that the BCRA is an instrumentality under *Bancec*), *with* Brief for Defendant-Appellant The Republic of Argentina at 3, *NML Capital*, 652 F.3d at 172 (No. 10-1487) [hereinafter Brief for Republic of Argentina] (“BCRA is an agency or instrumentality of the Republic . . .”).

over whether the Republic, indisputably a “foreign state,”<sup>180</sup> avoided its “obligations by engaging in abuses of corporate form”<sup>181</sup> such that the judicial separateness of the BCRA, indisputably an “instrumentality,”<sup>182</sup> should be set aside under *Bancec*. Despite the fact that the BCRA’s instrumentality status was not in dispute, the court distinguished “generic” from “special” instrumentalities:

We hold that the plain language, history, and structure of § 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account *without regard to whether the bank or authority is independent from its parent state pursuant to Bancec* . . . . [F]oreign central banks are not treated as generic “agencies and instrumentalities” of a foreign state under the FSIA; they are given “special protections” befitting the particular sovereign interest in preventing the attachment and execution of central bank property.<sup>183</sup>

The court’s interpretation meant that the immunity-from-attachment analysis for a foreign central bank was fundamentally different from the analysis for another instrumentality. The court noted that, by including § 1611(b)(1), the statute treats central banks differently from other instrumentalities by not making the “immunity of a central bank’s property contingent on the independence of the central bank.”<sup>184</sup>

By beginning the analysis with § 1611(b)(1) instead of a *Bancec* analysis, the court injected new force into that provision and effectively protected central banks’ assets from attachment as long as (1) the foreign central bank or parent government had not explicitly waived the central bank’s

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<sup>180</sup> Compare Brief for EM and NML Capital, *supra* note 179, at 54-55 (inferring that the Republic is a foreign state under *Bancec*), with Brief for Republic of Argentina, *supra* note 179, at 29 (“BCRA is an ‘agency or instrumentality’ of the Republic . . .”).

<sup>181</sup> Brief for EM and NML Capital, *supra* note 179, at 54-55 (quoting *De Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984)) (internal quotation marks omitted).

<sup>182</sup> Compare *id.* at 64-65 (inferring that the BCRA is an instrumentality under *Bancec*), with Brief for Republic of Argentina, *supra* note 179, at 3 (“BCRA is an agency or instrumentality of the Republic . . .”); see also Brief for Republic of Argentina, *supra* note 180, at 29 (“It also cannot be disputed that BCRA is an ‘agency or instrumentality’ of the Republic under 28 U.S.C. § 1603(b). . .”); *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 414 (2d Cir. 1983) (“State-owned central banks indisputably are included in the [FSIA’s] definition of ‘agency or instrumentality.’” (quoting *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412, 428 (S.D.N.Y. 1981))).

<sup>183</sup> *NML Capital*, 652 F.3d at 187-88 (emphasis added).

<sup>184</sup> *Id.* at 190.

immunity,<sup>185</sup> and (2) the foreign central bank “held [the assets in question] for its own account,”<sup>186</sup> which the court interpreted to mean “traditional activities of central banks.”<sup>187</sup> In effect, the court’s interpretation made §§ 1603 and 1610 much less relevant for foreign central bank immunity from attachment.<sup>188</sup> While foreign central banks continued to be instrumentalities, they were special because § 1611(b)(1) protected foreign central bank property “[n]otwithstanding the [attachment] provisions of section 1610.”<sup>189</sup> The weight of this phrase is strong, eliminating the need to analyze the commerciality of central bank property, so long as such property is “held for [the foreign central bank’s] own account.”<sup>190</sup> As a result, the court successfully crafted a fine judicial distinction between central banks and other instrumentalities, while accurately interpreting the FSIA’s plain language in the process.

#### IV. STALEMATE

For more than ten years, Argentina and its creditors have battled in domestic courts around the world and through international dispute resolution forums with no end in sight.<sup>191</sup>

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<sup>185</sup> See 28 U.S.C. § 1611(b)(1) (providing foreign central bank property is immune from attachment “unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment”).

<sup>186</sup> *NML Capital*, 652 F.3d at 195.

<sup>187</sup> See *id.* at 191-95 (citing Patrikis, *supra* note 144, at 274 n.37, and employing Patrikis’s concept of normally understood central banking functions).

<sup>188</sup> See *id.* at 197 (summarizing the court’s holdings without reference to §§ 1603 and 1610).

<sup>189</sup> 28 U.S.C. § 1611(b)(1).

<sup>190</sup> *Id.*

<sup>191</sup> \$2.6 billion of judgments have been entered in both New York State and U.S. federal courts, and most remain unpaid. See *NML Capital*, 652 F.3d at 176 n.6. After *NML Capital*, the highest court in Switzerland held that Argentine funds moved from the FRBNY to the Bank for International Settlements (BIS) in Basel, Switzerland were immune from attachment. See *Argentina’s Debt Default: Gauchos and Gadflies*, *ECONOMIST*, Oct. 22, 2011, at 91, available at <http://www.economist.com/node/%21533453> [hereinafter *Gauchos and Gadflies*]. Responding to the adverse Swiss judgment, the vulture funds “have brought a case against Switzerland at the European Court of Human Rights, under Article 6 of the human-rights convention, which guarantees the right to a fair hearing.” *Id.*

Because Argentina has not recognized these judgments, the U.S. government has refused to consider a restructuring of its own credit arrangements with Argentina until the ICSID and U.S. court judgments are paid. See *Sens. Rubio (R-FL), Gillibrand (D-NY) and Menendez (D-NJ) Urge U.S. Treasury to Accord Equal Importance to Argentine Debts Owed to Paris Club Governments and Private U.S. Lenders*, *PR NEWswire* (Jan. 9, 2012), <http://www.prnewswire.com/news-releases/sens-rubio-r-fl-gillibrand-d-ny-and-menendez-d-nj-urge-us-treasury-to-accord-equal-importance-to-argentine-debts-owed-to-paris-club-governments-and-private-us-lenders-136963093.html> (“Following the Obama Administration’s announcement that it would oppose new loans

While the vulture funds have had modest successes in their attachment efforts,<sup>192</sup> it would be a stretch to call their efforts successful.<sup>193</sup> On the other side, Argentina has damaged its reputation as a responsible financial partner.<sup>194</sup> Courts in the United States and abroad are caught in the middle of these disputes and often reach incongruous results, even within the same jurisdiction. While the Second Circuit's *NML Capital* decision protected Argentine assets from creditors, the same court's recent interpretation of *pari passu* clauses in Argentine bond documents constituted a victory for holdout creditors such as the vulture funds.<sup>195</sup> Rather than clarifying the murkier waters of global finance, the various interpretations of the

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to Argentina, American Task Force Argentina (ATFA) today applauded Senators Marco Rubio (R-FL), Kirsten Gillibrand (D-NY) and Robert Menendez (D-NJ) for urging the U.S. Treasury to formally adopt the policy of withholding approval of a Paris Club deal for Argentina until Argentina has satisfied all awards under bilateral investment treaties and outstanding U.S. court judgments." (internal quotation marks omitted). ATFA is a creditors' lobby devoted to pursuing "a just and fair reconciliation" of the 2001 Argentine debt default. *About Us*, AM. TASK FORCE ARGENTINA, <http://www.atfa.org/about-us/> (last visited Feb. 22, 2013).

<sup>192</sup> See *Argentines Wielded Guns to Stop Moving of Ship in Ghana-Report*, REUTERS (Nov. 9, 2012, 4:07 PM), <http://www.reuters.com/article/2012/11/09/argentina-bonds-ghana-ship-idUSL1E8M97U520121109> (NML Capital, Ltd. successfully petitioned a Ghanaian court to allow attachment of an Argentine naval ship docked in Ghana in satisfaction of NML's outstanding judgments); see also *Gauchos and Gadflies*, *supra* note 191 ("Some \$90m was seized from the New York trustee with which shares of a privatised Argentine bank had been deposited. And a few million dollars were grabbed from a science-ministry account, used to buy telescopes, at an American branch of another bank. Among the assets that the holdouts have tried and so far failed to get are shipments of natural gas and satellites. Lawyers spent many hours arguing over whether the satellites, part of a multi-governmental project, should be considered Argentine and commercial."). On July 6, 2011, one day after the *NML Capital* decision, the United Kingdom's highest court held that one of the vulture funds' U.S. judgments was enforceable against Argentina's assets in the United Kingdom. See *NML Capital Ltd. v. Republic of Argentina*, [2011] UKSC 31. "Eager to kick up as big a stink as possible, they have even filed a criminal money-laundering complaint against unknown individuals at the BIS." *Gauchos and Gadflies*, *supra* note 191. Judgments against Argentina by American and foreign creditors have been entered through the World Bank's arbitration forum, the International Centre for the Settlement of Investment Disputes (ICSID). *Id.* "Some cases, such as the ICSID one, look set to rumble on for at least another five years." *Id.*

<sup>193</sup> See *Gauchos and Gadflies*, *supra* note 191.

<sup>194</sup> Jude Webber, *Fernández Wins Re-election in Argentina*, FIN. TIMES (Oct. 24, 2011, 6:42 AM), <http://www.ft.com/intl/cms/s/0/e26c1546-fdc5-11e0-b6d9-00144feabdc0.html> ("Though it has restructured most of its defaulted debt, Argentina's international reputation has not recovered and it may yet be blocked from returning to capital markets by litigious holdouts.").

<sup>195</sup> See Davidoff, *supra* note 152 (Elliot and Aurelius argued that "if Argentina paid any money on its new bonds [i.e., those issued post-restructuring] it also had to pay the old defaulted holders."). In essence, the holdouts want the *pari passu* clauses "interpreted in a way that secures them a 100% payout when Argentina next services its restructured debt. That would jeopardise all of the restructuring done to date." *Gauchos and Gadflies*, *supra* note 191.

FSIA, and the inability to enforce those interpretations, leave all parties at a stalemate. Consequently, neither side has leverage to negotiate, proposed solutions fail, and political and economic realities often dwarf legal considerations.<sup>196</sup>

A. *No Incentives*

Despite the legal and financial complexities of the decade-long litigation, the reason why the parties have reached an impasse is surprisingly straightforward—a lack of pressure to negotiate.<sup>197</sup> Creditors refuse to settle for less than the full amount due, while sovereign debtors demand settlement on their own terms, realizing that foreign judgments are unenforceable against them.<sup>198</sup> While sovereign debt restructurings sometimes create incentives for creditors to work with a debtor,<sup>199</sup> those incentives may be absent for lenders, such as vulture funds, who seek “the highest immediate return” on their investments, view regulation as a nuisance, and have little sympathy for their sophisticated, sovereign counterparties who claim that they cannot afford to honor their agreements.<sup>200</sup>

However, the vulture fund strategy is not without legal precedent. In *Elliot Associates L.P. v. Banco de la Nación*,<sup>201</sup> a fund associated with financier Paul Singer purchased discounted Peruvian debt and sought to enforce the original agreement’s more favorable terms.<sup>202</sup> While the district court denied Elliot’s request (because it found that the fund had the intent to sue at the time of the purchase),<sup>203</sup> the Second Circuit

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<sup>196</sup> See Davidoff, *supra* note 152 (“Hernán Lorenzino, Argentina’s economy minister, reacted angrily to the [*pari passu*] decisions, saying that they were ‘a kind of legal colonialism . . .’”).

<sup>197</sup> See Horacio T. Liendo III, *Sovereign Debt Litigation Problems in the United States: A Proposed Solution*, 9 OR. REV. INT’L L. 107, 127-8 (2007).

<sup>198</sup> *Id.* Despite the unenforceability of U.S. judgments against Argentina, Argentina’s default and its refusal to pay the holdout vulture fund creditors has affected its stock market and given the country a reputation as an untrustworthy borrower in the international capital markets. See Davidoff, *supra* note 152; Jude Webber, *Argentina’s Capital Market Challenges*, FIN. TIMES (June 22, 2010, 7:29 PM), <http://www.ft.com/cms/s/0/a9644868-7e28-11df-94a8-00144feabdc0.html#axzz2Len1mgr3>.

<sup>199</sup> See Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043, 1089 (2004) (discussing incentives to negotiation, such as desire to seek equal treatment to reduce cost and risk).

<sup>200</sup> *Id.* at 1090.

<sup>201</sup> 194 F.3d 363, 381 (2d Cir. 1999).

<sup>202</sup> See Liendo, *supra* note 197, at 125 (citing *Elliot Assocs. L.P. v. Banco de la Nación*, 948 F.3d 1203, 1205-07 (S.D.N.Y. 1996), *rev’d*, 194 F.3d 363 (2d Cir. 1999)).

<sup>203</sup> *Id.*

reversed.<sup>204</sup> And although other creditors accepted Peru's restructuring offer,<sup>205</sup> Elliot eventually "wrung a settlement from Peru [in 2000] worth five times what it had paid . . . in 1996."<sup>206</sup>

Elliot's court victory and successful holdout strategy may be the only path for holdout creditors because their other recourse, refusing to lend to untrustworthy borrowers, may "lose[] force . . . when measured against economic distress or outstanding political benefits" within the debtor nation.<sup>207</sup>

Argentina's actions in the wake of its 2001 default reinforce the idea that responding to an angry electorate at home may trump the collateral damage of diminished access to the international capital markets. Faced with high rates of unemployment and buoyed by the IMF's self-critique of its role in creating the crisis,<sup>208</sup> Argentine leaders benefited politically by (1) blaming the IMF for its role in the crisis,<sup>209</sup> and (2) maintaining a hard line against unpopular vulture funds<sup>210</sup> whose ties to the United States have soured foreign relations.<sup>211</sup> One commentator views this hard line as an effort "to discourage creditors from the conduct . . . of the creditors in *Elliot*,"<sup>212</sup>—an approach that backfired during Argentina's unilateral "take it or leave it" restructuring proposal in 2005,<sup>213</sup> which was met with lower rates of creditor acceptance than other restructuring countries<sup>214</sup> and a decade of mounting U.S.,

<sup>204</sup> *Id.*

<sup>205</sup> *See id.* at 125.

<sup>206</sup> *Gauchos and Gadflies*, *supra* note 191, at 125.

<sup>207</sup> *See* Liendo, *supra* note 197, at 132.

<sup>208</sup> *See Argentina Blames IMF for Crisis*, BBC NEWS (July 31, 2004), <http://news.bbc.co.uk/2/hi/americas/3941809.stm>.

<sup>209</sup> *See Argentina's Kirchner Boosts Approval on IMF Clashes*, BLOOMBERG (Jan. 6, 2004), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=afHs6wHOB6JL>.

<sup>210</sup> *See El Gobierno Prepara una Nueva Ofensiva contra Fondos Buitre*, DIARIO BAE (Arg.), Sept. 15, 2011, available at <http://www.diariobae.com/diario/2011/09/15/1417-el-gobierno-prepara-una-nueva-ofensiva-contra-fondos-buitre.html> (translated by the author).

<sup>211</sup> *See* Ana Baron, *Esperan Tiempos Difíciles en la Relación con el Banco Mundial*, CLARIN (Arg.) (Jan. 7, 2012, 1:30 AM), [http://www.ieco.clarin.com/economia/Esperan-dificiles-relacion-Banco-Mundial\\_0\\_623337778.html](http://www.ieco.clarin.com/economia/Esperan-dificiles-relacion-Banco-Mundial_0_623337778.html) (explaining that an American candidate to replace the World Bank Director for Argentina withdrew due to fallout from the Obama Administration's decision to deny new loans to Argentina until U.S. court and arbitration judgments are paid) (translated by the author).

<sup>212</sup> Liendo, *supra* note 197, at 134.

<sup>213</sup> *See id.* (internal quotation marks omitted).

<sup>214</sup> Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311, 326 fig.4 (2005) (chart showing that "Argentina's 76% acceptance rate [in 2005] was the lowest [by 17 points] among six countries [with restructurings] in eight years."); Liendo, *supra* note 197, at 134 n.115.

foreign, and international court judgments.<sup>215</sup> In effect, the vulture funds have decided that the only way to fully vindicate their rights is to pursue an uncompromising global litigation strategy.<sup>216</sup>

### B. *Inadequate Solutions*

One solution to the stalemate is an international bankruptcy model that has roots in the U.S. Bankruptcy Code's Chapter 11 framework for corporate restructurings.<sup>217</sup> On one level, such a framework seems necessary because no such international enforcement mechanism exists with the ability to penalize a sovereign borrower.<sup>218</sup> One of the unique features of a corporate restructuring is the debtor's ability to maintain control of the business and secure private funding for the reorganization.<sup>219</sup> A parallel path could be created for bankrupt nations in which private capital markets would finance the sovereign restructuring, preventing the "moral hazard" that may occur when sovereign debtors manage their finances irresponsibly in reliance on an eventual IMF bailout.<sup>220</sup> Though proposals for such a framework, known as the Sovereign Debt Restructuring Mechanism (SDRM), rely on a plan negotiated by a majority that would be binding on all creditors, it is likely to cause opposition by minority creditors such as the vulture funds.

Responses to the current stalemate that propose the use of voluntary exchange offers and exit consents<sup>221</sup> or contract-based collective action clauses (CACs)<sup>222</sup> are also inadequate.

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<sup>215</sup> See *Gauchos and Gadflies*, *supra* note 191.

<sup>216</sup> "Holdout litigation" may also be desirable from a market perspective. Some commentators argue that it "indirectly introduce[s] efficiencies into the restructuring process," Fisch & Gentile, *supra* note 199, at 1098, by "enhanc[ing] the operation of the sovereign debt market[] . . . [by] serv[ing] as a potential check on opportunistic defaults by sovereign debtors" threatened with litigation. *Id.* at 1099.

<sup>217</sup> See 11 U.S.C. §§ 1101-1146 (2006); see also Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956 (2000) (proposing an international bankruptcy regime).

<sup>218</sup> Liendo, *supra* note 197, at 133 (citing BOON-CHYE LEE, *THE ECONOMICS OF INTERNATIONAL DEBT RENEGOTIATION* 3 (1993)).

<sup>219</sup> See 11 U.S.C. §§ 1101-1146.

<sup>220</sup> Schwarcz, *supra* note 217, at 961-62, 987.

<sup>221</sup> "[A]n exchange offer is an offer by the sovereign to exchange new debt for old. [Since] a bondholder's decision to accept an exchange offer is voluntary," Fisch & Gentile, *supra* note 199, at 1090-91, "exit consents are designed to" pressure acceptance of the exchange offer by offering waivers of sovereign immunity and other creditor-friendly terms in exchange for a reduction in the value of the debt. *Id.* at 1091-92.

<sup>222</sup> A collective action clause "permit[s] a majority or supermajority of bondholders to change [bond] payment terms . . . despite the objections, or refusal to participate, of minority holders." *Id.* at 1093.



Argentina used exchange offers and exit consents in its 2005 and 2010 restructurings, but the vulture funds rejected any restructuring that offered less than the full value on the original terms of the bonds.<sup>223</sup> Similar to the SDRM, CACs bind minority creditors to majority decisions, an approach that does not fit the complex reality of creditor interests in the Argentine restructuring, which included 152 bond issues, seven currencies, and the laws of eight countries.<sup>224</sup>

### C. Policy Considerations

Aware of the inadequacy of these approaches, vulture funds rely on the belief that U.S. courts will vindicate their rights through the FSIA. However, Judge Thomas P. Griesa of the U.S. District Court for the Southern District of New York, who presided over most of the litigation and entered several judgments in favor of the vulture funds, has often reminded plaintiffs that “they have rights but may not have remedies.”<sup>225</sup> His words became particularly prescient when the *NML Capital* decision gave new force to foreign central bank immunity from attachment,<sup>226</sup> a position that the FRBNY and the U.S. government supported as amici curiae.<sup>227</sup> In light of the bipartisan political support for refusing to loan money to Argentina until it pays its U.S. court judgments,<sup>228</sup> the amicus briefs on Argentina’s behalf seem contradictory. While the power of the creditors’ lobby in Washington may explain recent political support,<sup>229</sup> an even more commanding influence drives in favor of protecting Argentine assets in the United States—namely, the goal of maintaining international funds in the United States.<sup>230</sup> When foreign funds at the FRBNY are placed at risk of attachment, uncertainty causes foreign officials to withdraw funds, potentially having “an unsettling effect on foreign exchange markets . . . [,] international monetary

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<sup>223</sup> See *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 176 n.4 (2d Cir. 2011) (explaining the terms of the 2005 and 2010 “global exchange offers.”).

<sup>224</sup> Fisch & Gentile, *supra* note 199, at 1093-95.

<sup>225</sup> *Gauchos and Gadflies*, *supra* note 191.

<sup>226</sup> See *NML Capital*, 652 F.3d at 196.

<sup>227</sup> See Brief of Amicus Curiae, The Fed. Reserve Bank of New York, *NML Capital*, 652 F.3d at 197 (No. 10-1487-cv(L)); see Brief for the United States of America as Amicus Curiae in Support of Reversal, *NML Capital*, 652 F.3d at 197 (No. 10-1487-cv(L)).

<sup>228</sup> *Gauchos and Gadflies*, *supra* note 191.

<sup>229</sup> See AM. TASK FORCE ARGENTINA, <http://www.atfa.org> (last visited Jan. 18, 2013).

<sup>230</sup> Patrikis, *supra* note 144, at 270.

stability,” and “the U.S. balance of payments.”<sup>231</sup> As assets leave the United States for safer jurisdictions, such as Switzerland’s attachment-proof Bank of International Settlements,<sup>232</sup> the flight may begin to affect the value and preeminence of the dollar. Although the Second Circuit based its statutory interpretation of foreign central bank immunity from attachment on the “plain language” of the FSIA,<sup>233</sup> these enormous political and economic factors can be powerful drivers behind courts’ reasoning.

#### CONCLUSION

Foreign central banks present challenging issues for purposes of sovereign immunity. As a banking entity, the central bank is commercial by nature—a fact that Congress accounted for when it drafted the special foreign central bank provisions of § 1611(b)(1).<sup>234</sup> Unless there has been an explicit waiver of a foreign central bank’s immunity, courts should follow the *NML Capital* precedent and grant broad immunity to the assets of foreign central banks in the United States. In the unlikely event that Congress moves immediately to amend the statute, there are strong legal, political, and economic arguments for interpreting § 1611(b)(1) as a bulwark against the attachment of foreign central bank assets in the United States. As disgruntled creditors begin to realize that the United States has strong incentives to protect foreign central bank assets and foreign nations start to understand the severe impact of default on their reputation as credible borrowers, each party should develop renewed incentives to negotiate disputes and continue participation in international capital markets. Until then, the blame game will continue.

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<sup>231</sup> *Id.* at 266, 270.

<sup>232</sup> See Liendo, *supra* note 197, at 138-40.

<sup>233</sup> *NML Capital*, 652 F.3d at 194.

<sup>234</sup> 28 U.S.C. § 1611(b)(1) (2006).

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