Don't Cry for Me Argentina: The Aftermath of *Republic of Argentina v. NML Capital* and the Uncertain Limits of Post-Judgment Attachment Discovery Against Foreign Sovereigns†

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Post-judgment discovery allows successful plaintiffs to locate the assets of a defendant who is otherwise unwilling to pay and attach those assets to satisfy a judgment. When the defendant is a foreign sovereign, the Foreign Sovereign Immunity Act immunizes most assets from attachment. However, a successful plaintiff cannot know which assets are immune from attachment without first knowing what those assets are. After the Supreme Court's ruling in Republic of Argentina v. NML Capital, *district courts have discretion to determine whether a plaintiff can order discovery over potentially immune sovereign assets. This uncertainty creates numerous risks, since different courts use entirely different considerations when deciding whether to grant discovery of sensitive sovereign assets including State secrets, diplomatic property, or even military property.*

This Note provides the first account of how district courts have evaluated post-judgment attachment discovery requests against foreign sovereigns after NML Capital. *It reveals that district courts have used a variety of methods, from approaches allowing for attachment discovery of any sovereign asset worldwide to restrictive approaches that frustrate successful plaintiffs from collecting their judgments. These extremes show the need for uniformity within the federal system, and a proportionality approach taken by the District of DC provides the best method going forward.*

INTRODUCTION

Let us start with a truism: when a court renders a judgment in favor of a plaintiff, the plaintiff is entitled to payment from the defendant. But what happens if the defendant simply refuses to pay? Ordinarily, the court could seize property owned by the defendant through attachment and auction it off to satisfy the judgment.[1] However, when that defendant is a foreign sovereign, the plaintiff's means of recourse are limited.[2] The Foreign Sovereign Immunities Act (FSIA) provides immunity from attachment for most property, with a few narrow exceptions.[3] Plaintiffs must therefore use discovery to locate the few sovereign assets that are not shielded by immunity and which the court can seize through attachment and execution.[4]

Until 2014, it was not clear whether the FSIA provided any protection against discovery of sovereign assets that might be immune from attachment.[5] The Supreme Court addressed this issue in *Republic of Argentina v NML Capital*, holding that the FSIA did not protect against attachment discovery.[6] The Court stated that "other sources of law," such as doctrines of privilege and district courts' discretionary determinations of necessity and comity, control such discovery requests.[7] Although the Court referred to traditional tools that lower courts could use to limit discovery requests, it did not establish any concrete standards.[8]

The broad discretion that *NML Capital* conferred upon district courts creates serious risks. American discovery is far more extensive and burdensome than

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[1] *See* Transcript of Oral Argument at 5, 9–10, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842).
[2] Claims against foreign sovereigns can arise in several contexts, such as unpaid debt, breach of contract, or tort claims. *See*, *e.g.*, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (concerning unpaid sovereign debt); Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011) (concerning Iran's role in sponsoring a terrorist attack in Israel); Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27 (D.D.C. 2015) (concerning breach of contract by a foreign government).
[3] *See* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 (1976).
[4] FED. R. CIV. P. 69(a) governs this process of attachment,
[5] *NML Capital*, 573 U.S. at 136.
[6] *Id*. at 146.
[7] *Id*. at 146 n.6.
[8] *See id*. at 139.

discovery in other countries.[9] When US courts issue discovery orders for assets located in foreign countries, those orders are generally met with resistance. Indeed, the reporter's notes in the Restatement (Third) of Foreign Relations Law state that "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."[10] To combat this, foreign nations can and have adopted laws imposing sanctions on parties for complying with US discovery orders.[11]

This foreign relations challenge presents particularly significant concerns when plaintiffs seek discovery from a foreign sovereign defendant, as the targeted assets may intrude upon sovereign interests such as State secrets or diplomatic or military property.[12] From a diplomatic perspective, allowing discovery of such sensitive assets may be disastrous for American foreign policy and increases the likelihood of adverse treatment of the US government in foreign courts.[13] Given these concerns, how have district courts analyzed attachment discovery requests against foreign sovereigns post-*NML Capital*?

Part I of this Note briefly discusses the history of sovereign immunity in American jurisprudence and the introduction of the FSIA. Part II provides background on the Second and Seventh Circuits' differing approaches to post-judgment attachment discovery prior to *NML Capital*, which created a circuit split. Part II also examines *NML Capital*'s holding, which provided minimal guidance as to how district courts should approach post-judgment attachment discovery requests. Part III tracks the various approaches district courts have taken in the wake of *NML Capital* and identifies three general approaches: limiting discovery through comity considerations; using relevance as a limiting principle; and allowing broad general asset discovery with minimal interference. Part IV highlights a superior approach, adopted by the District of DC after the 2015 amendments to the Federal Rules of Civil Procedure, which utilizes the proportionality analysis in Rule 26(b)(1).

Most importantly, this Note provides the first account of how district courts have evaluated post-judgment attachment discovery requests against foreign sovereigns after *NML Capital*. It reveals that district courts have interpreted the Supreme Court's directive to allow for a great variety of approaches, from

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[9] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 542 (1987); Keith Y. Cohan, Note, *The Need for a Refined Balancing Approach When American Discovery Orders Demand the Violation of Foreign Law*, 87 TEX. L. REV. 1009, 1010 (2009).

[10] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 442 Reporters' Note 1 (AM LAW. INST. 1987).

[11] Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT'L L. 157, 167–71 (2016) (identifying blocking statutes in countries such as France, Japan, Switzerland, and Brazil).

[12] *See* Mallory Barr, *The Litigation Tango of La Casa Rosada and the Vultures: The Political Realities of Sovereign Debt, Vulture Funds, and the Foreign Sovereign Immunities Act*, 14 SANTA CLARA. J. INT'L L. 567, 584–86 (2016).

[13] *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 15 (1987)

attachment discovery of any sovereign asset worldwide[14] to workarounds designed to achieve the restrictive approach that the Court rejected in *NML Capital*.[15] These extremes show the need for uniformity within the federal system, and the District of DC's proportionality approach may prove the best method going forward.

I. SOVEREIGN IMMUNITY

A. History

Foreign sovereign immunity in US jurisprudence has its roots in *Schooner Exchange v. McFaddon*, which the Supreme Court decided in 1812.[16] In that case, the Court declined to exercise jurisdiction over French ships, even though the ships were docked in Philadelphia, based on "a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[17] Despite the fact that the jurisdiction of a nation within its own territory "is susceptible of no limitation not imposed by itself," the United States implicitly waived jurisdiction over foreign sovereigns in some circumstances.[18] While the Court limited its opinion to jurisdiction over foreign warships, later decisions extended the immunity doctrine to include a broad concept of absolute immunity for foreign sovereigns and their instrumentalities.[19] Critically, in *Schooner Exchange*, the executive branch attempted to persuade the Court to grant sovereign immunity, to the point that the Court felt obligated to disclose this attempt in its opinion.[20] Such executive influence is not inappropriate: because sovereign immunity is "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution," the Constitution leaves courts free to defer to recommendations made by the politically elected branches of government.[21]

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[14] *See infra* Section III.C.
[15] *See infra* Section III.A.
[16] 11 U.S. 116.
[17] *Id.* at 145–46; Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) ("Chief Justice Marshall's opinion in Schooner Exchange . . . is generally viewed as the source of our foreign sovereign immunity jurisprudence.").
[18] *Schooner Exchange*, 11 U.S. at 136–38; Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).
[19] *See Verlinden*, 461 U.S. at 486 ("Although the narrow holding of The Schooner Exchange was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns.").
[20] *Schooner Exchange*, 11 U.S. at 147 ("[T]here seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States."); Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 217 (2010).
[21] *Verlinden*, 461 U.S. at 486 ("[T]his Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.").

In the 1930s, the Court began giving substantial deference to the State Department's recommendations as to whether sovereign immunity was warranted in particular cases,[22] eventually concluding that it was bound by the State Department's recommendations.[23] This led to a two-step process governing requests for sovereign immunity. First, a foreign diplomat would request a "suggestion of immunity" from the State Department.[24] If the request was granted, the courts would forgo jurisdiction.[25] If the request was denied, courts would nonetheless analyze whether the grounds for immunity were similar to cases typically granted by the State Department.[26] Consequently, the results often came out the same way, regardless of whether or not the State Department provided a favorable recommendation.[27]

In 1952, the State Department abandoned its policy of granting nearly all immunity requests, instead adopting a restrictive theory of sovereign immunity.[28] The State Department's Legal Adviser issued what would become known as the "Tate Letter," which stated that immunity would henceforth be limited to foreign sovereigns' acts, with an exception for purely commercial acts.[29] As this was merely a department policy rather than an enacted law, however, it led to complications because the executive department functionally remained the primary authority for immunity determinations.[30] This meant that the executive often requested immunity when the restrictive theory would not have typically allowed it, based on political pressure or other considerations.[31] Unsurprisingly, these contrasting immunity standards resulted in a muddled doctrine. The lack of clear standards forced judges to rely upon vague factors, such as "diplomatic considerations."[32]

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[22] Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411, 424 (2015).
[23] Ex parte Republic of Peru, 318 U.S. 578, 588 (1943).
[24] Samantar v. Yousuf, 560 U.S. 305, 311–12 (2010).
[25] *Id*. at 311.
[26] *Id*. at 311–12; Republic of Mex. v. Hoffman, 324 U.S. 30, 36 (1945).
[27] *See id*. at 312 (inquiring "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize").
[28] Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Just. (May 19, 1952), 26 DEP'T ST. BULL. 984, 984 (1952) ("According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).").
[29] Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983)
[30] *See id*. at 488.
[31] *See* Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004); *see also* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2139 (2015) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964) ("Often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically.")
[32] *Verlinden*, 461 U.S. at 488.

B. The Foreign Sovereign Immunities Act

To remedy uncertainty in the immunity doctrine, Congress enacted the FSIA in 1976, codifying the State Department's restrictive theory of sovereign immunity.[33] This alleviated the political pressures the State Department faced by transferring the responsibility for immunity determinations from the executive branch to the judiciary.[34] Congress intended for the bill to provide a comprehensive set of legal standards governing sovereign immunity.[35]

The act provided two types of immunity: jurisdictional immunity[36] and execution immunity.[37] Jurisdictional immunity precludes foreign sovereign liability in US courts except in instances such as waiver, actions arising out of a commercial activity within the United States, or injuries caused by terrorism.[38] Execution immunity, by contrast, prevents courts from attaching and executing property within the United States in order to enforce a judgment unless the property was used for a commercial activity within the United States and meets one of the specific exceptions in Section 1610,[39] or the property meets one of the exceptions in Section 1611, such as military property.[40] Despite these immunities, the FSIA allows private parties greater access to the courts in suits against foreign sovereigns through its codified exceptions, and ensures that the grounds for denying judgment are legal rather than political.[41] Its passage was both an attempt to depoliticize immunity decisions and a judgment that courts possessed greater institutional competence to make these determinations than the State Department.[42]

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[33] 28 U.S.C. § 1330, 1602

[34] *See* 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States."); H.R. REP. NO. 94-1487, at 7 (1976).

[35] *See Altmann*, 541 U.S. at 691 (quoting *Verlinden*, 461 U.S. at 488) ("[B]y enacting the FSIA, a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'"); H.R. REP. NO. 94-1487, at 12–13 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states.").

[36] 28 U.S.C. § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

[37] 28 U.S.C. § 1609 ("[T]he property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."); *see also* 28 U.S.C. §1610 (listing exceptions to attachment immunity including waiver or property used for commercial activities).

[38] 28 U.S.C. §§ 1605, 1605A.

[39] 28 U.S.C. § 1610(a)(1)–(7) (examples of exceptions include waiver or violations of international law).

[40] 28 U.S.C. § 1611. However, note that the Terrorism Risk Insurance Act overrides Section 1611's immunities in cases involving terrorism. *See* Weininger v. Castro, 462 F. Supp. 2d 457, 498–99 (S.D.N.Y. 2006).

[41] H.R. REP. NO. 94-1487, at 45 (communication from the State Department to the House); *see also* Chilton & Whytock, *supra* note 22, at 430.

[42] *See* Chilton & Whytock, *supra* note 22, at 430.

II. DISCOVERY AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

It is unclear whether the FSIA provides protections against discovery. While the FSIA establishes protections for attachment and execution, it does not deal with questions of discovery at all; in fact, discovery is mentioned only once.[43] This Part will discuss how the resulting open-endedness culminated in the Supreme Court's decision in *NML Capital*. Section A will explain how attachment discovery against foreign sovereigns differs from jurisdictional discovery. Section B will discuss the circuit split that arose out of the Second and Seventh Circuits' differing interpretations of how the FSIA governs discovery. Section C will then discuss how the Supreme Court came to adopt the Second Circuit's view that the FSIA itself provides no protection against discovery.

A. Distinguishing Attachment Discovery

Courts generally agree that a foreign sovereign's jurisdictional immunity limits a party from seeking discovery to determine whether a court can properly exercise jurisdiction over a sovereign.[44] While courts use various approaches to make determinations regarding jurisdictional discovery, they usually require some sort of heightened pleading standard.[45] The most commonly cited standard, which originated in the Fifth Circuit, provides that "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination."[46] The Second Circuit interpreted this test as requiring a balancing of expectations, taking into account the FSIA's statutory exceptions and the sovereign's claims of immunity.[47] This balancing, in turn, requires the party seeking discovery to show a "reasonable basis" for assuming jurisdiction before any discovery, other than the bare minimum that is necessary to make an initial jurisdictional determination, can be granted.[48] Most courts follow some variant of the Fifth Circuit's approach.[49]

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[43] *See* 28 U.S.C. § 1605(g). The House Report even explicitly highlighted the fact that the FSIA "does not attempt to deal with questions of discovery." H.R. REP. NO. 94-1487, at 23. The House Report also clarified that other areas of law provided sufficient protection against inappropriate discovery requests, such as various types of privilege and immunity. *Id*.

[44] *See* Steven R. Swanson, *Jurisdictional Discovery under the Foreign Sovereign Relations Act*, 13 EMORY INT'L L. REV. 445 (1999) (providing case-by-case analysis of courts' approaches to jurisdictional discovery); Joseph M. Terry, Comment, *Jurisdictional Discovery Under the Foreign Sovereign Relations Act*, 66 U. CHI. L. REV. 1029 (1999) (tracking the Second, Fifth, and DC Circuits' approaches to jurisdictional discovery).

[45] Terry, *supra* note 44, at 1047.

[46] Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992).

[47] *See* First City, N.A. v. Rafidain Bank, 150 F.3d 172, 176 (2d Cir. 1998).

[48] *Id*.

[49] *See* Gabay v. Mostazafan Foundation of Iran, 151 F.R.D. 250, 256–57 (S.D.N.Y. 1993); *Terry*, *supra* note 44, at 1047–48. For a more complex standard, see Millicom Int'l Cellular v. Costa Rica, No. Civ.A.96-315(RMU), 1997 WL 527340 at *1 (D.D.C. Aug. 18, 1997) ("If plaintiffs set forth non-conclusory allegations that, if supplemented with additional evidence, would materially affect the court's analysis vis-a-vis the FSIA, then the court should permit limited discovery.").

Despite this relatively consistent approach to pretrial discovery, courts did not approach post-judgment attachment discovery under the FSIA in a similarly unified manner prior to *NML Capital*. Attachment discovery takes place in post-judgment proceedings in an attempt to locate resources from a losing defendant who refuses to pay. Attachment discovery is governed by Rule 69 of the Federal Rules of Civil Procedure, which states that a judgment creditor may obtain discovery "as provided in these rules or by the procedure of the state where the court is located."[50] If the plaintiff successfully locates assets, the court can issue a writ of execution against those assets if the court has jurisdiction over the assets and they are not barred by statute or immunity.[51]

The goals of jurisdictional discovery (or pretrial discovery in general) and post-judgment discovery are quite different.[52] Pretrial discovery serves to narrow possible issues at trial or during settlement negotiations.[53] To curb potential abuse, the Supreme Court raised pleading standards at this stage to protect defendants from being pressured into early settlements by the cost of discovery.[54] Attachment discovery, however, exists to protect the successful litigant from an evasive debtor who simply refuses to pay.[55]

The FSIA provides significant immunity protections against attachment and execution, with minimal exceptions, but it does not mention attachment discovery.[56] Since the FSIA does not elaborate on any potential discovery limitations, it is unclear what limitations exist when a successful plaintiff seeks post-judgment discovery of a foreign sovereign's assets. Moreover, it is unclear whether the analysis changes if all, some, or any of the assets sought are immune from execution.

B. Restrictive vs. Expansive Attachment Discovery: A Circuit Split

1. The Seventh Circuit's Restrictive Approach

The Seventh Circuit interpreted the FSIA as providing significant protection against discovery requests. In 2011, the Seventh Circuit prohibited general post-

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[50] FED. R. CIV. P. 69(a)(2).
[51] FED. R. CIV. P. 69(a)(1); Robert K. Kry, *Asset Discovery Against Foreign Sovereigns After NML*, 86 N.Y. ST. B. A. J. 40, 40–41 (2014).
[52] Professor Aaron Simowitz articulated the difference between jurisdictional discovery and post-judgment discovery, arguing that they are fundamentally different and thus require different standards of analysis, especially in the transnational context. *See* Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293, 3320–24 (2015).
[53] *Id*. at 3304–05.
[54] *See* Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369, 379 (2016) ("The Court's opinions in the two cases themselves [Twombly and Iqbal] raise policy concerns related to the discovery burdens that defendants face.").
[55] *See* Simowitz, *supra* note 52, at 3304. *See generally* Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968) (exploring the recognition of foreign judgments).
[56] *See supra* notes 36–40 and accompanying text.

judgment attachment discovery against foreign sovereigns in *Rubin v. Islamic Republic of Iran*, holding that the FSIA requires a judgment creditor to show that the assets sought are actually attachable under an exception to the FSIA's general execution immunity.[57] The *Rubin* plaintiffs sought a general-asset discovery order for any Iranian assets located within the United States, regardless of whether or not those assets could be attached.[58] The court cited jurisdictional discovery precedent in its opinion, reasoning that the two types of discovery were similar enough that the rationales for only ordering jurisdictional discovery "circumspectly" applied to post-judgment discovery as well.[59] In doing so, the court noted that one of the primary purposes of sovereign immunity is to protect foreign sovereigns from the burdens of litigation, particularly burdens associated with costly and intrusive American discovery.[60] The Seventh Circuit also interpreted the FSIA as incorporating the common law presumption against attachment and execution of a foreign sovereign's property.[61] This put the burden on the plaintiff judgment creditor to show that property sought in discovery met a statutory exception to immunity, rather than requiring the foreign sovereign to make a showing of immunity.[62] The Seventh Circuit's rule effectively meant that judgment creditors bore the cost of being unable to collect on their judgments against sovereigns.

2. The Second Circuit's Expansive Approach

A year after the Seventh Circuit's decision in *Rubin*, the Second Circuit rejected the Seventh Circuit's restrictive approach, holding in *EM Ltd. v. Republic of Argentina* that immunity from attachment did not per se prohibit discovery of any particular asset.[63] *EM Ltd.* arose out of Argentina's failure to pay its creditors

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[57] *See* Rubin v. Islamic Republic of Iran, 637 F.3d 783, 799 (7th Cir. 2011) ("[U]nder the FSIA a plaintiff seeking to attach the property of a foreign state in the United States must identify the specific property that is subject to attachment and plausibly allege that an exception to § 1609 attachment immunity applies."). These exceptions include commercial property used within the United States and any property of a sovereign that aided in a terrorist attack. *See* 28 U.S.C. §§ 1610, 1611 (2012).

[58] *See Rubin*, 637 F.3d at 785.

[59] *See id.* at 796–97 (citing the Fifth Circuit's language from *Arriba*, 962 F.2d at 534, a jurisdictional discovery case). The court found that the same tension existed in balancing a plaintiff's need for discovery to prove that they could meet one of the FSIA's exceptions and the sovereign's claim of immunity in any discovery case, regardless of when discovery occurred in the proceeding. The Seventh Circuit reasoned that exceptions to attachment discovery in Section 1609 are narrower than the jurisdictional discovery exceptions in Section 1604. The court also cited the Second Circuit's "circumspectly" language from *EM Ltd. v Republic of Argentina*, 473 F.3d 463, 486 (2d Cir. 2007), an attachment case, but one where the judgment creditor had not shown a reasonable basis for assuming jurisdiction over the third-party bank from whom discovery was sought. *See Rubin*, 637 F.3d at 796.

[60] *Id.* at 795.

[61] *Id.* at 796.

[62] *Id.*

[63] EM Ltd. v. Republic of Arg., 695 F.3d 201, 208–09 (2d. Cir. 2012); LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 54 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

back for bonds it had previously sold.[64] Because Argentina had waived jurisdictional immunity as a condition of sale, the only source of protection from discovery that Argentina could seek was through execution immunity, which the Seventh Circuit had read into Section 1609 of the FSIA. The Second Circuit found that the Seventh Circuit's approach had no textual basis in the FSIA.[65] Moreover, the Second Circuit concluded that reading in a protection would force the district court to serve as a "clearinghouse for information," evaluating foreign sovereigns' assets and making individual determinations as to which assets were immune from execution under FSIA.[66]

In *EM Ltd*., NML Capital and EM Ltd., vulture funds and owners of Argentine bonds, sued Argentina in the Southern District of New York to collect on their debt once Argentina defaulted on its $100 billion debt.[67] The funds prevailed on all of their claims, but were unable to collect damages because Argentina refused to pay.[68] The Southern District of New York, later affirmed by the Second Circuit, issued an injunction preventing Argentina from making any further payments to bondholders who had agreed to discounted payments until it paid plaintiffs their holdout debt of $1.33 billion.[69] To avoid payment and maintain its leverage over bondholders, Argentina subsequently transferred assets outside the United States to avoid attachment, since US courts generally lack the authority to attach assets outside the country.[70] In response, the vulture funds attempted to locate Argentine assets worldwide, eventually serving subpoenas on Argentina's investment assets and even traditional sovereign assets such as war ships and planes.[71]

Upholding NML Capital's discovery request, the Second Circuit first noted that post-judgment attachment discovery was typically broad under both Rule 69 of the Federal Rules of Civil Procedure and New York law.[72] The Southern District of New York had limited the subpoenas and removed any assets within Argentina, since no Argentine court would allow attachment.[73] However, the

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[64] *EM Ltd*., 695 F.3d at 209.
[65] *Id*.
[66] *Id*. at 204.
[67] John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIF. L. REV. 1671, 1688 (2014).
[68] *EM Ltd*., 695 F.3d at 203.
[69] NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 265 (2d Cir. 2012) (affirming Judge Gresia's injunctions because of the pari passu clause in the vulture funds' bonds preventing them from being subordinated in repayment).
[70] *Foreign Sovereign Immunities Act of 1976 – Postjudgment Discovery – Republic of Argentina v. NML Capital Ltd*., 128 HARV. L. REV. 381, 381 (2014); *see also* 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3013, p. 156 (2d ed. 1997) ("a writ of execution . . . can be served anywhere within the state in which the district court is held").
[71] *See* Barr, *supra* note 12, at 585–86.
[72] *EM Ltd*., 695 F.3d at 207 (citing DAVID D. SIEGEL, NEW YORK PRACTICE § 509 (5th ed. 2011) ("[T]he 'judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment.'").
[73] *Id*. at 204–05.

district court refused to provide the same protection against discovery that the Seventh Circuit had provided, noting that just because an asset is immune from execution does not mean it is immune from discovery in aid of execution.[74] The Second Circuit acknowledged that it would not be able to execute on nonimmune assets abroad since the laws of the countries where the property was located typically governed, but found this inapplicable to the discovery inquiry.[75] Importantly, the Second Circuit found that the rationale of sovereign immunity—to protect sovereigns from the expense and intrusiveness of litigation and discovery—did not apply when it was clear that the court already had jurisdiction over the sovereign.[76] In this case, Argentina had waived jurisdictional immunity in its bond agreements.[77]

C. From the Second Circuit to the Supreme Court: Expansive Attachment Discovery Prevails in NML Capital

The Supreme Court granted certiorari in *NML Capital* to determine whether the FSIA provided any protection against attachment discovery.[78] The Court emphasized that the FSIA provided comprehensive standards for resolving sovereign immunity issues, meaning that any protection must come from the FSIA itself, rather than the former, disjointed common law scheme.[79] Consequently, the Court held that because the FSIA contained no textual protections mentioning discovery, there were no restrictions on discovery of a sovereign's assets, even assets that were immune from execution.[80] Writing for the majority, Justice Scalia emphasized that a prevailing party attempting to enforce a judgment could not

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[74] *Id*. at 209. The court clarified that the Seventh Circuit was mistaken in relying on the Second Circuit's prior opinion in *EM Ltd*., 473 F.3d at 486, which applied the "circumspectly" standard, since jurisdiction had not yet been established in that case and the rationales for using a pre-judgment discovery standard were thus warranted. See *id*.; *see also* Thai Lao Lignite Co., Ltd. v. Government of Lao People's Democratic Republic, 924 F. Supp. 2d 508, 522 (S.D.N.Y. 2013) (allowing discovery, but clarifying that discovery must be circumspect because the court had not yet established jurisdiction over the party).

[75] *EM Ltd*., 695 F.3d at 208.

[76] *See id*. at 210.

[77] *Id*. at 209. Additionally, while US pre-judgment discovery is exceptional in its breadth, the United States is not alone in allowing for broader post-judgment discovery. Many other countries impose more robust enforcement duties upon debtors than they do for traditional merits or jurisdictional discovery, often with harsher penalties for failure to comply. *See* Simowitz, supra note 52, at 3322–23 (illustrating the enforcement approaches of the United Kingdom, Switzerland, Germany, and Portugal).

[78] 573 U.S. 134.

[79] *Id*. at 2255–56 ("[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand or fall on the Act's text."). This contradicted the Seventh Circuit's claim in *Rubin*, which held that the FSIA incorporated former common law protections with it, including that foreign sovereign property was presumptively immune from attachment, and therefore discovery. 637 F.3d at 798–99.

[80] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 143 (2014) ("[T]he Act says not a word on the subject [discovery].").

know what assets were executable without first knowing what assets existed.[81] The Court found that potential burdens to sovereigns or invasions of their privacy were irrelevant, but noted that despite the FSIA's lack of protections, other safeguards remained effective:

> "[O]ther sources of law" ordinarily will bear on the propriety of discovery requests of this nature and scope, such as "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state."[82]

These "other sources of law," particularly judicial discretion, strongly empower district courts to shape the scope of discovery.

Dissenting, Justice Ginsburg declined to follow the Seventh Circuit's assessment that the FSIA includes common law presumptions of immunity.[83] Rather, she argued that a judgment creditor had to show the relevance of any discovery request to enforce a judgment.[84] Therefore, assets immune from execution could not be discovered because they would not be relevant to the enforcement of the judgment.[85] This would be more complicated when dealing with extraterritorial assets, since the laws of the country or countries where the assets were located would presumably govern attachment and might require a district judge to evaluate several sources of law to determine the relevance of a debtor's various assets.[86] Justice Ginsburg would have resolved the issue by limiting discovery to the commercial activities exception in Section 1610 of the FSIA.[87] Thus, Justice Ginsburg's test would have allowed for extraterritorial discovery of assets relating to commercial activity within the United States, and immunized other assets from discovery because they would be presumptively immune from attachment.

The majority in *NML Capital* did not delineate the precise scope of Rule 69 of the Federal Rules of Civil Procedure, opting only to decide whether discovery

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[81] *Id*. at 144. During oral argument, Justice Scalia analogized the process of discovery and attachment of extraterritorial assets to intrastate attachment. A New York court's writ of execution does not run to Florida, but the court can still order discovery of a "deadbeat defendant's" assets in Florida. Once those assets were located, the plaintiff would have to take the New York judgment to a Florida court and bring another cause of action in Florida to enforce that judgment. Similarly, a successful plaintiff could take their New York judgment to another country such as France and see if French courts would enforce that judgment under French law. Transcript of Oral Argument at 5, 9–10, *NML Capital*, 573 U.S. 134.

[82] *NML Capital*, 573 U.S. at 146 n.6.

[83] *Id*. at 147 (Ginsburg, J., dissenting).

[84] *Id*.

[85] *Id*.

[86] *See* Transcript of Oral Argument at 12–13, *NML Capital*, 573 U.S. 134 (Justice Alito's questions regarding a district court's approach).

[87] *See NML Capital*, 573 U.S. at 147 (Ginsburg, J., dissenting) ("A court . . . has no warrant to indulge the assumption that, outside our country, the sky may be the limit for attaching a foreign sovereign's property in order to execute a U.S. judgment against the foreign sovereign.").

violated the FSIA.[88] However, given the textualist nature of the majority's approach in *NML Capital*, the most logical interpretation of Rule 69 would be to establish whether Rule 26, the rule that governs the scope of discovery generally, or the state law of the proceeding allowed such discovery. Other potential approaches include: (1) Justice Ginsburg's idea of extending domestic exemptions abroad, requiring a plaintiff to show that an asset may be executed upon before allowing discovery of that asset; (2) placing the burden on the debtor to show that foreign exemptions would bar execution; or (3) returning to a system that defers to the executive branch, either by deferring to the State Department's recommendations or by actively seeking those recommendations.[89] Regardless, *NML Capital* established that the FSIA provides no protection against discovery in aid of execution against a foreign sovereign's property, that any protection must come from other sources of law, and that district courts possess significant discretion when determining the scope of post-judgment discovery.

III. THE FALLOUT FROM NML CAPITAL AND LOWER COURTS' CURRENT APPROACHES

Potentially unchecked asset discovery against a foreign sovereign raises significant problems and could severely threaten State secrets. Left unchecked, court-ordered discovery against foreign sovereigns could put an enormous strain on the diplomatic relations between the United States and those sovereigns. For example, during oral argument in *NML Capital*, the Justices expressed concerns regarding the discovery of potential military assets such as fighter jets.[90] Justice Breyer assumed as a baseline that discovery of military assets was off the table, even though the FSIA itself does not bar it.[91] The majority's opinion also acknowledged these problems, and suggested that litigants take the issues up with Congress.[92]

As a result of these sovereignty concerns, reactions to the *NML Capital* decision have been mixed. Positive responses have noted that the Court correctly applied statutory interpretation just as it would for domestic law matters, a trend that is becoming more common in foreign relations law.[93] Moreover, allowing

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[88] *Id*. at 140.

[89] Transcript of Oral Argument at 7, *NML Capital*, 573 U.S. at 134. Justice Breyer posited the possible approaches to post-judgment discovery in general as to either (1) allow it; (2) prohibit it; (3) ask the State Department to make sure it would not offend foreign policy concerns; or (4) have the State Department come in when the discovery *would* affect foreign policy concerns.

[90] *Id*. at 35. Of course, this worry was especially acute because NML attempted to seize an Argentine warship and the Argentine presidential airplane. Barr, *supra* note 12, at 586.

[91] *See id*.

[92] *NML Capital*, 573 U.S. at 146 (stating that Argentina should take its objections to "that branch of government with authority to amend the Act.").

[93] *See* Ellen Ginsberg Simon & Q. Monty Crawford, *The Impact of* Republic of Argentina v. NML Capital, LTD.*: Why the Supreme Court's Ruling Against Argentina Avoided a Host of Unintended, Negative Consequences*, 30 MD. J. INT'L L. 55, 58–59 (2015). *See generally* Ganesh Sitaraman &

discovery gives injured Americans the ability to discover executable assets against a State that sponsors international terrorism, which is one of the purposes that the FSIA was specifically designed to provide a cause of action for.[94] Victims are ill-suited to bear the cost of identifying attachable sovereign assets without discovery. The decision also arguably encourages trade in the New York markets, since it provides investors with confidence that the bonds they purchase from foreign sovereigns will be enforceable.[95]

Criticism of the decision has centered on the foreign policy difficulties involved in discovery. To start, critics have argued that the Court's formalistic textualism ignored real-world policy concerns about the extraterritorial applications of US law.[96] Another significant concern with all matters regarding international comity is that expansive burdens from litigation in US courts could lead to reciprocal treatment abroad.[97] Further, the Court's opinion raised as many questions as it answered. First, questions of relevance went largely unanswered; Justice Scalia alluded to the fact that Rule 26 of the Federal Rules of Civil Procedure and state rules might provide a relevance limiting principle in attachment discovery, but then endorsed general worldwide asset discovery even though such discovery would turn up those same nonattachable, and therefore irrelevant, assets.[98] Other countries have already objected to discovery of this breadth, which many see as American judicial imperialism.[99] Additionally, the "other sources of law" that provide protection against intrusive discovery requests

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Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015) (describing the trend of treating foreign relations law like domestic law).

[94] *See* 28 U.S.C. §§ 1605A, 1610 (providing a terrorism exception to jurisdictional immunity, but noting that President may waive attachment); Simon & Crawford, *supra* note 93, at 63–64 (providing examples of "international bad actors" that would be able to escape judgment if protected from discovery, such as Sudan for its role in funding al Qaeda in the 9/11 attack and Sudan and Iran for aiding the 1998 US embassy attacks in Kenya and Tanzania). Indeed, the Seventh Circuit's opinion in *Rubin v. Islamic Republic of Iran*, which led to the circuit split, involved attempting to enforce a judgment against Iran for its role in a Hamas suicide bombing in Jerusalem that injured eight American citizens. 830 F.3d 470, 473 (7th Cir. 2016).

[95] Simon & Crawford, *supra* note 93, at 65.

[96] Karen Halverson Cross, *The Extraterritorial Reach of Sovereign Debt Enforcement*, 12 BERKELEY BUS. L.J. 111, 142–43 (2015) (arguing that enforcing discovery orders raises the same foreign policy concerns that the Supreme Court was worried about in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), when it decided to reject applying the Alien Tort Statute extraterritorially, and that applying the FSIA mechanically ignored those larger foreign policy concerns).

[97] Adriana T. Ingenito & Christina G. Hioureas, *Carving Out New Exceptions to Sovereign Immunity: Why the NML Capital Cases May Harm U.S. Interests Abroad*, MD. J. INT'L L. 118, 130–31 (2015).

[98] Justice Scalia hinted at this relevance limitation mentioned by Justice Ginsburg's dissent briefly, but disagreed that a judgment creditor would have to prove that any assets sought were attachable up front. This leaves open the question of how such a relevance challenge would be brought. Presumably, the burden would be on the sovereign to make a showing to the district court regarding which of their assets were not executable. This still does not fully mitigate the foreign policy concerns of broad discovery, since it would force the sovereign to disclose highly secret assets to a U.S. district court judge. *NML Capital*, 573 U.S. at 144–45.

[99] Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism,"* 73 WASH. & LEE L. REV. 653, 700–01 (2016).

are murky. For example, district courts "may appropriately consider" the scope of discovery, taking into account international comity and the burden to the foreign State.[100]

This vague directive leaves district courts with broad discretion to dictate post-litigation attachment discovery, as evidenced by the numerous approaches courts have taken after *NML Capital*.[101] Some have used concerns of international comity or relevance to limit discovery, while others have seized upon the opportunity to serve as clearinghouses of information and place minimal restrictions on discovery requests. This Section considers these varying approaches in more detail. Part A tracks courts that have used an international comity analysis. Part B looks at courts that have used relevance as a limiting factor, and Part C evaluates courts that place little or no restrictions on discovery requests.

A. Discovery Limitations Through Considerations of International Comity

As Justice Scalia suggested, courts can and often do take international comity concerns into account when making discretionary determinations on discovery questions against a foreign sovereign's assets. However, due to the breadth of judicial discretion in comity determinations, the amount of protection afforded varies.

1. Background on Comity

US courts use international comity to demonstrate respect for foreign laws and judgments.[102] Comity is often interpreted as the judiciary's means of conducting diplomacy.[103] There are mutual conveniences for countries that agree to enforce the judgments of each other's courts.[104] These conveniences include avoiding double liability in multiple countries, promoting international commerce, avoiding the burdens of litigating in the United States for foreign

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[100] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 146 n.6 (2014).

[101] *See*, *e.g.*, In re Ohntrup, 628 Fed. Appx. 809, 810–11 (3d Cir. 2015); Leibovitch v. Islamic Republic of Iran, 188 F. Supp. 3d 734, 759 (N.D. Ill. 2016); Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27 (D.D.C. 2015).

[102] American endorsement of international comity can be traced back throughout the writings of American jurisprudence, including in Justice Gray's opinion in *Hilton v. Guyot*: "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." 159 U.S. 113, 163–64 (1985).

[103] Zambrano, *supra* note 11 at 162.

[104] Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 30 (1834).

parties, and considerations of reciprocity in having US judgments recognized abroad.[105]

American discovery poses comity concerns, since foreign laws usually have much greater restrictions on the scope of discovery.[106] Many countries abhor the liberal discovery afforded by US courts, and some have enacted laws known as "blocking statutes" that prohibit the disclosure of certain property.[107] In 1968, to remedy these conflicts, the Hague Convention established the Letters of Request system as a means of obtaining information from foreign jurisdictions.[108] However, it was unclear whether this system superseded the US Federal Rules of Civil Procedure in suits against foreign parties, or whether it simply provided an alternative process.[109]

The Hague Convention's Letters of Request system was short-lived in US courts. Soon after its development, the Supreme Court announced the modern method for addressing issues of comity in conflict of laws cases in *Société Nationale Industrielle Aéropostiale v. U.S. Dist. Ct. for the Southern Dist. of Iowa*.[110] In *Aéropostiale*, the Court adopted the Restatement of Foreign Relation Law's multifactor balancing test for discovery requests, requiring courts to consider: (1) the importance of the documents to the litigation; (2) the specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of obtaining the information; and (5) the interests of the United States and the country where the information at issue is located.[111] The *Aéropostiale* balancing test remains the tool US district courts use to evaluate concerns of international comity, rendering the Hague Convention's Letters of Request system a relatively unused alternative.[112]

2. International Comity as Applied to Post-Judgment Discovery Requests Against Foreign Sovereigns

So far, the Northern District of Illinois is the only court to fully embrace the use of international comity to severely restrict post-judgment discovery against foreign sovereigns.[113] This is unsurprising, as the Seventh Circuit prohibited post-judgment attachment discovery by reading protections into the FSIA prior to the

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[105] Zambrano, *supra* note 11, at 162.
[106] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 Reporters' Note 1 (AM. LAW INST. 1987) (noting that "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.").
[107] *See* Zambrano, *supra* note 11, at 167–71 (highlighting blocking statutes in France, Japan, Switzerland, Brazil, and other countries).
[108] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *adopted* Mar. 18, 1970, 23 U.S.T. 2555.
[109] *Société Nationale Industrielle Aéropostiale*, 482 U.S. at 533.
[110] *Id*. at 522.
[111] *Id*. at 544 n.28.
[112] Zambrano, *supra* note 11, at 176.
[113] *See* Leibovitch v. Islamic Republic of Iran, 188 F. Supp. 3d 734, 759 (N.D. Ill. 2016).

NML Capital decision.[114] Instead, the Northern District of Illinois chose a route that left it significant discretion: *Aéropostiale*'s multi-factor balancing test.[115]

In *Leibovitch v. Islamic Republic of Iran*, the Northern District of Illinois declined to grant post-judgment asset discovery from nonparty banks (Bank of Tokyo and BNP Paribas) that had branches in Chicago to locate Iran's assets.[116] Like *Rubin v. Islamic Republic of Iran*, the Seventh Circuit's pre-*NML Capital* decision, *Leibovitch* involved victims seeking recompense from Iran for its support of terrorist attacks in Israel.[117] The Northern District of Illinois found that it did not have personal jurisdiction over the third-party banks due to modern restrictions on general jurisdiction that the Supreme Court established in *Daimler AG v. Bauman*.[118] Nevertheless, the court clarified that even if it had personal jurisdiction, it would not grant discovery due to international comity concerns.[119] Applying the *Aéropostiale* factors, the court found that the civil liabilities that the banks would face in Japan by disclosing Iran's assets and the availability of alternative means of obtaining discovery (e.g., Letters of Request through the Hague Convention) outweighed the victims' interest in obtaining discovery to enforce their judgment.[120] The court followed Justice Ginsburg's *NML Capital* dissent in its analysis, refusing to serve as a "clearinghouse for information" on Iran's property to determine which assets would be immune from execution under the FSIA.[121] The court also refused to allow for jurisdictional discovery regarding the banks, effectively ending any chance for the plaintiffs to discover Iran's assets.[122]

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[114] *See* Rubin v. Islamic Republic of Iran, 637 F.3d, 783, 800–01 (7th Cir. 2011).

[115] *See* Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat., 902 F.2d 1275, 1283–84 (7th Cir. 1990) (Easterbrook, J., concurring) (criticizing the Third Restatement's balancing test, which the Court adopted in *Aéropostiale*).

[116] *Leibovitch*, 188 F. Supp. 3d at 740–41.

[117] *Leibovitch*, 188 F. Supp. 3d at 740–41.

[118] *See id*. at 750; *see also* Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) (restricting general jurisdiction over corporations to only instances where the corporation's "affiliations with the state are so continuous and systematic as to render it essentially at home in the forum State" (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011))). This was a rather harsh ruling considering that the litigation had been ongoing for years and *Daimler* was only decided during proceedings. Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 PENN ST. L. REV. 617, 655 n.215 (2017).

[119] *Leibovitch*, 188 F. Supp. 3d at 759.

[120] The court also cited prior Seventh Circuit precedent suggesting that a party seeking discovery has less of an interest in discovery when the matter is post-judgment rather than toward the merits of the case. *See* Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat., 902 F.2d 1275, 1280 (7th Cir. 1990).

[121] *See Leibovitch*, 188 F. Supp. 3d at 758 ("As Justice Ginsburg has noted, there is little legal basis for a court in the United States to 'become a clearinghouse for information about any and all property held by [a foreign state] abroad.'" (quoting *NML Capital*, 573 U.S. at 147 (Ginsburg, J., dissenting))). The court's conclusion that there is "little legal basis" for serving as a clearinghouse seems a bit conclusory, particularly since the majority opinion in *NML Capital* effectively endorsed such an approach by a 7-1 vote.

[122] *Id*. at 760 n.18.

However, the Northern District of Illinois has not used comity to prevent all discovery requests against the property of foreign sovereigns. Two years after denying the plaintiffs' discovery request in *Leibovitch*, the court granted a narrowed discovery request that sought information from the Boeing Company regarding a contract they had with Iran to provide eighty commercial planes.[123] The court granted this request because unlike the banks in *Leibovitch*, Boeing was an American corporation and the property was in the United States, which meant that Boeing would not face civil liability elsewhere.[124] This decision indicates that the Northern District of Illinois is at least willing to entertain discovery requests served on American companies for property located within the United States that would not trigger civil liability in another country.

Other courts mentioned international comity in throwaway comments, raised comity as a tacked on justification for overly broad discovery requests, or used comity to limit the most intrusive forms of discovery, such as discovery against military and diplomatic property.[125] However, none were nearly as restrictive as the Seventh Circuit, which, in accordance with its practice prior to *NML Capital*, used comity and other means to avoid conducting general asset discovery, at least when targeted at foreign corporations.[126] Using comity to prevent the burdens of general asset discovery on foreign sovereigns follows a trend of decisions attempting to restrain US courts from imposing on foreign parties more generally.[127] Restrictions include areas like personal jurisdiction[128] and the extraterritoriality of US laws.[129]

Professor Diego Zambrano has distilled many of the justifications for limiting the reach of US jurisdiction—and by extension the burdens of

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[123] Leibovitch v. Islamic Republic of Iran, 297 F. Supp. 3d 816, 822–23 (N.D. Ill. 2018).
[124] *Id*. at 829–30.
[125] *See* Aurelius Capital Master, Ltd. v. Republic of Arg., 589 Fed. App'x. 16, 18 (2d Cir. 2014) (urging the district court to consider a foreign sovereign's interest when targeting diplomatic and military assets because sovereigns are "entitled to a degree of grace and comity"); Ladjevardian v. Republic of Arg., 06-cv-3276 (TPG), 2016 WL 3039189, at *5 (S.D.N.Y. May 26, 2016) ("If plaintiffs truly wish to seek discovery and a restraining order, they should do so through the proper procedures rather than in such a throwaway fashion . . . it seems unlikely that such speculative discovery requests would be 'reasonably related to the discovery of attachable assets.'"); *see also* Amduso v. Republic of Sudan 288 F. Supp. 3d 90, 98 (D.D.C. 2017) (treating comity as only one factor among many when considering post-judgment discovery requests against a foreign sovereign).
[126] *See* Rubin v. Islamic Republic of Iran, No. 03 C 9370, 2016 WL 3940034, at *4 (N.D. Ill. July 21, 2016) (finding discovery appropriate after a case was closed but denied for improper service); *see also* Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado, 771 F.3d 980, 986 (7th Cir. 2014) (finding a pre-judgment security under Illinois law to be an attachment under the FSIA and therefore prohibited).
[127] *See* Zambrano, *supra* note 11, at 180–94 (Section III. The Return of International Comity: *Daimler*, *Gucci*, and *Motorola* Establish a New Paradigm).
[128] Daimler AG v. Bauman, 571 U.S. 117, 141 (2014) (limiting the scope of general jurisdiction and chiding the Ninth Circuit for giving "little heed to the risks to international comity its expansive view of general jurisdiction posed.").
[129] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115–16 (2013), (holding that the Alien Tort Statute does not apply extraterritorially); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269 (2010) (holding that the Securities Exchange Act does not apply extraterritorially).

discovery—to two central themes: avoiding reciprocal treatment abroad and protecting the international economy.[130] For instance, European countries enacted retaliatory laws in response to intrusive US discovery, such as blocking statutes, which subject defendants to double liability for complying with discovery orders.[131] Litigation even caused enough foreign relations embarrassment to prompt the State Department to write amicus briefs on behalf of foreign parties.[132] Comity also promotes the international economy by ensuring less redundancy between international legal systems and encouraging foreign parties (and sovereigns) to invest in US markets.[133] Importantly, US discovery is by far the most problematic aspect of the American justice system with respect to its foreign policy implications and is a feature often derided as American "judicial imperialism."[134]

However, the Northern District of Illinois' approach is not without problems. The *Aéropostiale* test can be difficult to evaluate without a predetermined desired outcome, as it involves weighing exceptionally difficult questions of foreign policy and balancing different sovereigns' interests.[135] Judge Easterbrook of the Seventh Circuit has criticized the test for requiring judges to balance "incommensurables," as judges are not in the best position to evaluate policy determinations such as whether one sovereign has a greater interest in a discovery dispute than another.[136] Denying discovery in aid of execution under the guise of comity also discourages investors from purchasing sovereign bonds, as in Argentina's case, or forces them to discount the value for the risk that the sovereign refuses to pay.[137]

Furthermore, it is unclear what deference should be given to either the State Department or foreign governments when they submit amicus briefs stating the importance of sovereign or foreign policy interests. Clearly, courts are not meant to defer to the executive branch as they did in the pre-FSIA landscape,[138] but it would be irresponsible to entirely disregard the State Department's positions. Likewise, it may be difficult for courts to determine whether sovereigns are articulating their interests in resisting asset discovery in good faith. Because of

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[130] Zambrano, *supra* note 11, at 194.
[131] *Id*. at 169–71.
[132] *Id*.
[133] *Id*. at 197.
[134] Buxbaum, *supra* note 99, at 700–01.
[135] *See* Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat., 902 F.2d 1275, 1283–84 (7th Cir. 1990) (Easterbrook, J., concurring)
[136] *Id*. at 1284.
[137] Simon & Crawford, *supra* note 93, at 66.
[138] *See* Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2004); Transcript of Oral Argument at 17, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842) ("I thought that the whole purpose of the Foreign Sovereign Immunities Act was to protect us from you, from the State Department and the government coming in and saying, Oh, you know, in this case, grant this one, deny that one. I thought the whole purpose of the FSIA was to enable us to look at the case and decide it on the basis of the statute.").

the significant discretion the *Aéropostiale* test gives judges, there is less predictability and uniformity within the federal system.

B. Relevance as a Limiting Principle

Some courts, led by the Third Circuit, have used relevance as a means of limiting asset discovery against foreign sovereigns.[139] Both the *NML Capital* majority and Justice Ginsburg's dissent mentioned this approach, but in differing forms.[140] The majority acknowledged that a discovery request only for property immune from execution would fail the relevance requirement of Rule 26 of the Federal Rules of Civil Procedure, but that general asset discovery that included assets that were immune from execution would be allowable.[141] Justice Ginsburg would have required the judgment creditor to show up front that the assets they sought were attachable, thus proving their relevance.[142] Neither approach, however, addressed whether assets that are immune from execution are also immune from discovery.[143] Arguably, immunity should be found in both cases because assets immune from execution are not relevant to discovery in aid of execution, since they cannot be attached.[144] The approach courts use in applying a relevancy limitation can vary. For example, a court could put the burden on the plaintiff to make an initial showing that some portion of the discovery sought could be attachable. Or a court could require the defendant to demonstrate that the specific assets sought by a general discovery order were immune from execution and therefore irrelevant.[145]

The Third Circuit took a middle ground between Justice Scalia's seemingly narrow relevance limitation—where general asset discovery is appropriate as long as it is not targeted solely at assets immune from execution—and Justice Ginsburg's limitation, which would restrict discovery to commercial property.[146] The Third Circuit's approach allows a party resisting discovery to show the district court that property sought by the judgment creditor is not attachable, but requires the resisting party to bear the burden of persuasion.[147] This requires showing specific assets that would be immune from attachment, as the possibility

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[139] Federal Rule 26 defines one of the limitations of discovery as "relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1).
[140] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 144–45 (2014)
[141] *Id*.
[142] *Id*. at 147 (Ginsburg, J., dissenting).
[143] *NML Capital*, 573 U.S. at 139–40, 140 n.2 ("[T]his is not a case about the breadth of Rule 69(a)(2)."). The District of D.C. interpreted this as signaling that the Supreme Court cast doubt on the idea that Rule 69 prohibits discovery of assets that are immune from discovery. Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 97 n.5 (D.D.C., 2017).
[144] *NML Capital*, 573 U.S. at 147 (Ginsburg, J., dissenting).
[145] *See supra* note 98 and accompanying text.
[146] *See* In re Ohntrup, 628 Fed. Appx. 809, 810–11 (3d Cir. 2015).
[147] Ohntrup v. Makina ve Kimya Endustrisi Kurumu, 760 F.3d 290, 297 n.6 (3d Cir. 2014) ("As the party objecting to the discovery, Alliant would bear the burden of persuasion on the FSIA issue.").

of an inability to discover attachable assets does not itself make the request improper.[148]

Using relevance as a limiting principle is an attractive option, but it does not solve all the problems it attempts to mitigate. Putting the burden on the judgment debtor to show that assets sought are immune from execution provides more protection for sovereigns than allowing the district court to serve as a clearinghouse for information would provide.[149] The distinction is whether the evaluation of execution immunity under the FSIA is done before discovery or during execution. A court using a relevance limitation could simply prevent discovery against categories of assets shown by a sovereign to be immune from attachment, while a court serving as a "clearinghouse" would have more discretion to allow discovery of potentially sensitive sovereign assets and limit attachment during the execution proceedings.[150] This approach still burdens the sovereign by requiring it to make an affirmative showing that certain types of assets the plaintiff seeks are immune from attachment.[151] However, it protects against the much more intrusive method of requiring a judge to evaluate sensitive State secrets and giving the plaintiff access to that property, since the sovereign must only show that the requested information is immune from attachment.[152]

Alternatively, courts could require plaintiffs to make a threshold showing of relevance by illustrating which exception to the FSIA's execution immunity the requested property fits into. Prior to *NML Capital*, requiring such a showing was fairly common.[153] Today, some district courts continue to use versions of this approach, although they generally exhibit some confusion as to what standard to use.[154] The Eastern District of California, for example, follows Justice Ginsburg's approach and limits discoverable assets only to commercial property within the United States.[155] In *Lasheen v. Loomis Company*, the Eastern District of California required the plaintiff to show which enumerated exception under Section 1610 of

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[148] *See id*. at 296 ("[P]otential inability to show that the subject property is not immune from attachment is immaterial to the question of unreasonable burden.").
[149] *See infra* Section III.C.
[150] *See infra* Section III.C.
[151] *See Ohntrup*, 760 F.3d at 297 n.6.
[152] *Id*.
[153] *See* Simowitz, *supra* note 52, at 3312–13 (providing examples of such an approach in federal and state courts) (citing Blaw Knox Corp. v. AMR Indus., Inc., 130 F.R.D. 400, 403 (E.D. Wis. 1990) *and* Ayyash v. Koleilat, 957 N.Y.S.2d 574, 576 (Sup. Ct. 2012)).
[154] Lasheen v. Loomis Co., No. 2:01–cv–0227–KJM–EFB, 2017 WL 4410167, at *3 (E.D. Cal. Oct. 4, 2017) (finding that parties seeking discovery were only entitled to information that is likely to lead to the discovery of executable assets under Rule 26(b)(1)). Oddly, the court stated that plaintiffs are limited to Rule 26 for discovery in aid of execution, when Rule 69 provides that "procedure of the state where the court is located" may be used as well. FED. R. CIV. P. 69(a)(2). While this may have been irrelevant for the case at issue, many states allow for broader discovery than the Federal Rules, which can create different outcomes even within the same circuit. *See infra* notes 184–185 and accompanying text. Other courts still cite the "circumspectly" standard provided for jurisdictional discovery despite the modern separation of the two doctrines. *See* HWB Victoria Strategies Portfolio v. Republic of Arg., No. 17-1085-JTM, 2017 WL 1738065 at *3 (D. Kan. May 4, 2017) (citing both the circumspectly standard and the Third Circuit's opinion in *Ohntrup*).
[155] *Lasheen*, 2017 WL 4410167, at *3.

the FSIA is applicable.[156] In contrast, the District of Kansas requires a more general "initial showing that an FSIA exception to foreign immunity applies."[157] The District of Kansas approach prohibits the generic asset discovery that the *NML Capital* majority suggested is appropriate.[158]

Requiring plaintiffs to make an initial showing can be difficult, particularly if they are forced to choose which enumerated exception applies without knowing what assets the debtor even possesses.[159] Moreover, the scope of Federal Rule of Civil Procedure 69, especially in 69(a)(2) discovery, is necessarily broad, because it was created to give judgments legitimacy through enforcement.[160] Both state and federal courts have historically permitted broad discovery in aid of execution for that reason, even going so far as to permit "fishing expeditions."[161] While requiring a threshold showing is within the district court's discretion to prevent discovery from unnecessarily burdening judgment creditors, the Scalia majority in *NML Capital* explicitly rejected requiring such an approach since the text of the FSIA does not mandate it.[162] The Southern District of New York and the District of DC have taken Justice Scalia's approach even further and explicitly rejected a relevance limitation.[163] Furthermore, providing such a high level of protection raises the post-judgment asset discovery close to the jurisdictional discovery standard, obscuring the distinction between the two. The District of Kansas serves as a perfect example of a court confusing the two standards: when requiring a threshold showing, the court mistakenly cited the jurisdictional standard as its authority.[164] Requiring the plaintiff to make a threshold showing of

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[156] *Lasheen*, 2017 WL 4410167, at *2; 28 U.S.C. § 1610(a)(1)–(7).
[157] *HWB Victoria Strategies*, 2017 WL 1738065, at *3.
[158] *See id*. (denying further discovery for failing to articulate "any reasonable basis" that further discovery would rebut pre-existing evidence of probable immunity).
[159] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 144 (2014)
[160] *See* Nat'l Serv. Indus. v. Vafla Corp., 694 F.2d 246, 250 (11th Cir. 1982) ("A judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located."); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE§ 3014 (2d ed. 2012) (broad post-judgment asset discovery is permissible as long as the purpose is not to harass).
[161] *See* Caisson Corp. v. Cnty. W. Bldg. Corp., 62 F.R.D. 331, 335 (E.D. Pa. 1974) ("[I]n an attempt to discover assets by which to satisfy its judgment, plaintiff is entitled to a very thorough examination of the judgment debtor."); *see also* Capital Co. v. Fox, 15 F. Supp. 677, 678 (S.D.N.Y. 1936) ("To be sure, the subpoenas are a fishing excursion, but a judgment creditor is entitled to fish for assets of the judgment debtor. Otherwise he will rarely obtain satisfaction of his judgment from a reluctant judgment debtor.") (internal citations omitted).
[162] *See NML Capital*, 573 U.S. at 145 n.4.
[163] *See* Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 97 (D.D.C. 2017) ("If Sudan ultimately believes some of the discovered assets are immune from attachment, it will have the opportunity to make that argument at the execution stage."); Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27, 35 (D.D.C. 2015) (stating that requiring a plaintiff to make a threshold showing that assets sought were not immune from execution "fundamentally unfair" and " perhaps impossible.").
[164] HWB Victoria Strategies Portfolio v. Republic of Arg., No. 17-1085-JTM, 2017 WL 1738065 at *3 (D. Kan. May 4, 2017)

relevance is nearly impossible for plaintiffs to manage, and it creates confusion as to what the appropriate standard for such a showing should be.[165]

After deciding which party bears the burden, the more difficult question becomes how a court should evaluate whether an asset, particularly an asset located abroad, is immune from execution and therefore irrelevant to discovery. In *NML Capital*, Justice Ginsburg suggested limiting extraterritorial property to commercial use to mirror the FSIA's limitations, but the majority disagreed.[166] Authority to execute upon property generally comes from the laws of the country in which the property is located.[167] However, the *NML Capital* majority also realized the difficulty of making a district judge evaluate numerous countries' laws just to determine whether every potential discoverable asset, unknown at the time, could be attached.[168] Additionally, if a country had fewer execution limitations on property than the United States, presumably more could be discovered about assets abroad than in the United States. Foreign nations, already displeased with American discovery, would certainly find providing less discovery abroad than within US jurisdiction to be emblematic of so-called American judicial imperialism.[169] Moreover, the limits of such an approach do not appear to exist. As Justice Kagan hypothesized in the *NML Capital* oral argument, if a country allowed execution upon military or diplomatic assets, discovery could even extend to those assets.[170] Using relevance as a means of limiting discovery is an effective approach when placing the burden on the sovereign resisting discovery, but it leads to complex choice of law questions the Supreme Court has not yet answered.

C. Courts as "Clearinghouses of Information"

While some courts created barriers through comity or via the imposition of a relevance limitation to protect against general asset discovery, others read *NML Capital* to suggest that since the FSIA does not provide any limitations on discovery, a sovereign's only recourse is to raise immunity defenses during execution.[171] These courts also typically constrain relevance limitations within Rule 69, since FSIA immunity determinations are more easily and accurately made during execution than before discovery, when the assets sought are not yet known.[172]

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[165] *See NML Capital*, 573 U.S. at 144; *HWB Victoria Strategies*, 2017 WL 1738065, at *3.
[166] *NML Capital*, 573 U.S. at 147 (Ginsburg, J., dissenting).
[167] *Id*. at 144.
[168] Transcript of Oral Argument at 12–13, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842) (Justice Alito questioning if a district court could be forced to evaluate as many as forty sources of law for asset discovery).
[169] Buxbaum, *supra* note 99, at 700–01.
[170] *See* Transcript of Oral Argument at 37–38, *NML Capital*, 573 U.S. 134 (No. 12-842).
[171] *See*, *e.g*., Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27, 35 (D.D.C. 2015).
[172] *Thai Lao Lignite Co., Ltd. v. Government of Lao People's Democratic Republic*, 924 F. Supp. 2d 519 (S.D.N.Y. 2013) ("Forcing Petitioners to show that property is attachable before permitting

The Second Circuit and the District of DC were among the first to adopt this approach, and other courts across the country followed.[173] The Second Circuit maintains its approach from *EM Ltd*., which specifically distinguished asset discovery from jurisdictional discovery, and thus offered no protections for sovereigns under the FSIA.[174] Indeed, the Second Circuit found that neither military nor diplomatic property are necessarily immune from discovery.[175] The Second Circuit did at least note that military and diplomatic documents may be protected by privilege or inviolability under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[176] Typical in camera review of military and diplomatic documents, or serving as a clearinghouse for information, may be undesirable from a foreign policy perspective.[177] However, the Second Circuit's approach is that "broad post-judgment discovery in aid of execution is the norm in federal law and New York state courts."[178] Even during attachment, the Southern District of New York has interpreted the commercial use requirement broadly, which is reflective of the Second Circuit's general approach to post-judgment enforcement.[179]

The problems with allowing discovery against military and diplomatic property are readily apparent. Military and diplomatic property represents the core of State secrets and allowing discovery in this sphere would be a severe intrusion into State sovereignty. At oral argument in *NML Capital*, the Justices were especially concerned with military and diplomatic property.[180] This concern stemmed from the real-world foreign policy interests surrounding that property, including: diplomatic issues between the United States and other sovereign nations; retaliatory statutes imposed by those nations to deter parties from

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them to gain any information about Respondent's assets would present an insurmountable Catch–22 for judgment creditors seeking to enforce a valid judgment.").

[173] *See Comm'ns Imp. Exp. S.A. v. Republic of Congo*, No. 2:16-CV-00404-BSJ, 2016 WL 3951080. at *4 (D. Utah Mar. 16, 2015) (granting a motion to compel requiring the Bank of Utah to disclose its information regarding a Boeing 787-8 airplane that the successful plaintiffs suspected was owned by the Republic of Congo); Motion to Compel Compliance with Subpoena Duces Tecum for Commissions Import Export S.A. at 2, No. 2:16-MC-00404, *Comm'ns Imp. Exp. S.A. v. Republic of Congo* (D. Utah June 8, 2016), ECF No. 8.

[174] EM Ltd. v. Republic of Arg., 695 F.3d 201, 209–10 (2d. Cir. 2012); *see supra* Section II.B.

[175] *See* Aurelius Capital Master, Ltd. v. Republic of Arg., 589 Fed. App'x. 16, 18 (2d Cir. 2014) ("Again, the potential immunity of property [military property] from attachment does not preclude discovery of that property; indeed, discovery may be necessary for the parties to properly litigate the existence of immunity.").

[176] *Id*. at 17.

[177] *Id*. at 17–18; *see also* Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 546–48 (2d Cir. 1991) ("In camera review is a method by which a court can confidentially review the evidence for which a privilege is claimed and determine the propriety of the assertion of the privilege.").

[178] *EM Ltd*., 695 F.3d at 207.

[179] *Thai Lao Lignite Co., v. Gov't of Lao People's Democratic Republic* (S.D.N.Y. Sept. 13, 2011) (No. 10 Civ. 5256 (KMW)(DCF)), 2011 WL 4111504, at *3–4 (finding that a sovereign's diplomatic accounts could still be subject to attachment if they were primarily used for commercial uses).

[180] *See* Transcript of Oral Argument at 38–40, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842)

complying with American courts' discovery orders; or reciprocal treatment in foreign courts.[181]

D. Rule 26 and the 2015 Amendments: A Limiting Principle?

Rule 69 states that courts may obtain post-judgment attachment discovery as provided by the Federal Rules, which means that attachment discovery can be subject to traditional Rule 26 protections.[182] The Third Circuit's relevance limitation is one example of a court using those protections, but relevance is not the only protection Rule 26 provides. The District of DC, which uses the Second Circuit's expansive "clearinghouse" approach, has suggested that general asset discovery might be allowed as long as the order does not "ask *solely* for information about a set of assets that the FSIA and international law render immune from attachment."[183] The District of DC has also found that immunity objections should be made during execution rather than during asset discovery, even for assets sought worldwide.[184] However, it has used the traditional Rule 26(b) scope limitations (privilege, relevance, and—after 2015—proportionality)[185] to analyze post-judgment discovery requests. These limitations provide more protections, particularly in the proportionality analysis that the 2015 amendments to the Federal Rules re-emphasized.[186]

The 2015 amendments to Rule 26 re-emphasized the principle of proportionality in discovery requests by adding the term "proportionality" back into the forefront in subsection (b)(1).[187] This amendment attempted to curb discovery abuses by only allowing discovery proportional to the needs of the case.[188] Rule 26(b)(1) measures proportionality through: (1) the importance of the issues at stake; (2) the amount in controversy; (3) the parties' relative access to the information; (4) the importance of discovery to resolving the issues; and (5) whether the burden of discovery outweighs its likely benefit.[189] Factors (1) through (4) do not provide much protection for foreign sovereigns, since the amount in question against a sovereign will nearly always be high, the sovereign will have a significant advantage of access, and the importance will be critical

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[181] *See supra* discussion following Part III.
[182] FED. R. CIV. P. 69(a)(2).
[183] Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 97 (D.D.C. 2017) (emphasis added).
[184] *Id*.
[185] FED. R. CIV. P. 26(b)(1).
[186] *See* FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment; Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27, 36 (D.D.C. 2015) (evaluating whether discovery was overly broad, burdensome or too costly to the sovereign).
[187] *See* 2015 Year-End Report on the Federal Judiciary, https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (Commenting on the 2015 discovery restrictions, Justice Roberts stated that "I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics.").
[188] FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment.
[189] FED. R. CIV. P. 26(b)(1).

since the only issue will be execution.[190] Conversely, factor (5) could provide protection significant for a sovereign, principally for protecting State secrets. The burden a sovereign would face by being forced to disclose the amount and location of its military assets—a clear invasion of State secrecy and sovereignty—would nearly always outweigh a judgment creditor's interest in discovering those assets, since the assets would be immune from execution anyway.[191]

The modern version of Rule 26 offers an appropriate balance of competing interests, but it is fundamentally flawed because a creditor can bypass it by using state court procedures instead. Rule 69 provides that a judgment creditor may obtain discovery under the Federal Rules, or "by the procedure of the state where the court is located."[192] In states with more expansive discovery and attachment laws than the Federal Rules, plaintiffs can effectively circumvent the Rules' limitations by using those state procedures.[193]

For example, in the aftermath of *NML Capital*, NML Ltd. searched worldwide to find property owned by Argentina, and found potentially attachable assets located in Nevada.[194] The relevant Nevada Rule allowed for discovery "regarding any matter" that is "relevant to the subject matter involved in the pending action."[195] The Nevada Supreme Court noted that the Nevada Rule was broader than the Federal Rule and found that while a request of "all records related to the judgment debtors" would be unduly burdensome under the Federal Rules, it was proper under the Nevada Rule.[196] Thus, in any state that has more expansive post-judgment discovery than the federal system, the Rule 26, protections are rendered meaningless, as plaintiffs could simply utilize the more expansive rule. This is particularly troublesome in the New York districts because New York law allows for discovery far beyond the Federal Rules, and a disproportionately high amount of litigation against foreign sovereigns takes place there.[197] New York allows discovery for "all matter[s] relevant to the satisfaction of the judgment,"

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[190] *See*, *e.g.*, Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 98 (D.D.C. 2017).

[191] For an example of a district court using 26(b)(1)'s proportionality analysis, see *Amduso*, 288 F. Supp. 3d at 90.

[192] FED. R. CIV. P. 69(a)(2).

[193] *See* Simowitz, *supra* note 52, at 3305, 3307–08 (finding that federal courts using state execution and post-judgment discovery rules typically apply them broadly). Another problem is that, due to the recency of the amendments, not at all federal courts even use the proportionality analysis. *See*, *e.g.*, Textron Fin. Corp. v. Gallegos, No.: 15CV1678-LAB (DHB), 2016 WL 4077505 at *3 (S.D. Cal. Aug 1, 2016). Additionally, this creates variability between states, even within the same circuit. *Compare* Lasheen v. Loomis Co., No. 2:01-cv-0227-KJM-EFB, 2017 WL 4410167 at *3 (E.D. Cal. Oct. 4, 2017) (using a relevance limitation to deny discovery), *with* NML Capital, Ltd. v. Republic of Arg., Nos. 2:14–cv–492–RFB–VCF, 2:14–cv–1573–RFB–VCF., 2015 WL 1186548 at *15 (D. Nev. Mar. 16, 2015) (using state discovery law which, unlike federal discovery, permits discovery for "all records related to judgment debtors").

[194] NML Capital, Ltd. v. Republic of Arg., Nos. 2:14–cv–492–RFB–VCF, 2:14–cv–1573–RFB–VCF., 2015 WL 1186548 at *1 (D. Nev. Mar. 16, 2015).

[195] *Id*. at *15.

[196] *Id*.

[197] N.Y. C.P.L.R. 5223 cmt. 5223:2 (McKinney 2014) (author Richard C. Reilly, recompiling David D. Siegel's commentary).

an exceptionally broad standard even noted by the Supreme Court in *NML Capital*.[198]

IV. PROPORTIONAL DISCOVERY AND SOLVING THE STATE LAW LOOPHOLE

This Note argues that the District of DC's approach, which uses proportionality as a limiting principle, provides the fairest method for evaluating attachment discovery against foreign sovereigns. The Northern District of Illinois appears to be using comity as a means of continuing the Seventh Circuit's pre-*NML Capital* practice of preventing most discovery, which ignores successful plaintiffs' interests in collecting their judgments.[199] The *Aéropostiale* test for international comity has also been the subject of heavy criticism due to its unworkability.[200] The Third Circuit's relevance limitation is more balanced, at least when placing the burden on the foreign sovereign challenging discovery to disprove relevance, but it raises complicated choice of law questions that may be too burdensome for district courts to efficiently manage.[201] Allowing general asset discovery worldwide, as the Second Circuit permits, does not give proper weight to American foreign policy concerns or the intrusiveness of American discovery.[202]

The District of DC's proportionality approach protects foreign sovereigns from the type of discovery that is the most harmful to their sovereignty — such as the discovery of diplomatic or military property — since sensitive property of that nature will rarely be proportional to the needs of a case. Additionally, this approach follows the modern trend of discovery more generally, whereby federal courts have acknowledged that unchecked discovery presents too high a burden even in the domestic context.[203] However, the District of DC's proportionality approach cannot be undertaken nationwide, as Rule 69(a)(1) states that for enforcement, courts must use the "procedure of the state where the court is located, but a federal statute governs to the extent it applies."[204] Because of this rule, courts in states with rules that allow for broad discovery, such as the Southern

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[198] *Id*. ("This is a generous standard and permits the creditor a broad range of inquiry through either the judgment debtor or any third person with light to shed on the debtor's property, present or potential.").
[199] *See Leibovitch*, 188 F. Supp. 3d at 740–41.
[200] *See* Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat., 902 F.2d 1275, 1283–84 (7th Cir. 1990) (Easterbrook, J., concurring)
[201] *See* Transcript of Oral Argument at 12–13, Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134 (2014) (No. 12-842) (Justice Alito questioning a district court's approach).
[202] *See*, *e.g*., Aurelius Capital Master, Ltd. v. Republic of Arg., 589 Fed. App'x. 16, 18 (2d Cir. 2014) (failing to prevent discovery of military property that would have been immune from execution).
[203] Michael Thomas Murphy, *Occam's Phaser: Making Proportional Discovery (Finally) Work in Litigation by Requiring Phased Discovery*, 4 STAN. J. COMPLEX LITIG. 89, 106 (2016).
[204] FED. R. CIV. P. 69(a)(1).

District of New York, cannot use the Federal Rules' proportionality limitations at all.[205]

Therefore, Congress should amend the FSIA to require courts to use the Federal Rules for discovery requests in cases against foreign nations. This would provide a baseline proportionality protection against unnecessary post-judgment attachment discovery for sovereigns while still allowing for judicial discretion. Amending the FSIA in this context would also present an opportunity to preempt another looming issue: extraterritorial attachment.[206] While judges in some cases, particularly in the Second Circuit, have offered seemingly minimal protection to foreign sovereigns, most of these instances occurred before the 2015 amendments to the Federal Rules of Civil Procedure, which went into effect eighteen months after *NML Capital*.[207] The District of DC began using the proportionality analysis after the amendments, as it had no alternative state procedures that plaintiffs could utilize instead.[208]

Setting a proportionality standard for post-judgment discovery in suits against foreign sovereigns is important because discovery is the feature of the American legal system that foreign parties, including sovereigns, find most intrusive.[209] Justice Scalia was quite aware of the concerns regarding overly intrusive discovery and signaled to the parties that their complaints would be appropriately targeted to Congress to amend the FSIA.[210] President Obama also stressed that wide-ranging discovery was a significant reason for vetoing a bill that would have expanded jurisdiction within the FSIA, since it would make cooperation with other sovereigns on national security issues difficult.[211]

Sovereigns litigating in the United States find little comfort in the FSIA's execution immunity, since the sovereign could still be forced to disclose the locations of its sensitive assets, despite litigating in federal court, simply because

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[205] See *supra* Section III.D for a discussion of this limitation. For an example of how Rule 69 lets parties circumvent Rule 26's proportionality analysis, see, e.g., NML Capital, Ltd. v. Republic of Arg., Nos. 2:14–cv–492–RFB–VCF, 2:14–cv–1573–RFB–VCF., 2015 WL 1186548 at *1 (D. Nev. Mar. 16, 2015).

[206] The Seventh and Second Circuits have split again regarding the issue of whether they can attach assets located abroad. *Compare* Peterson v. Islamic Republic of Iran, 876 F.3d 63, 89 (2d Cir. 2017) (allowing a court to recall a sovereign's extraterritorial assets held by a third party for execution evaluation under Section 1610 since the court had jurisdiction over the third party), *with* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 475 (7th Cir. 2016) (requiring that assets must be "within the territorial jurisdiction of the district court" to be subject to execution).

[207] *See, e.g.*, *Aurelius Capital Master*, 589 Fed. Appx. 16.

[208] *Compare* Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria, 308 F.R.D. 27, 35 (D.D.C. 2015) (analyzing a post-judgment discovery request prior to the 2015 amendments), *with* Amduso v. Republic of Sudan, 288 F. Supp. 3d 90, 98 (D.D.C. 2017) (using the proportionality analysis).

[209] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 Reporters' Note 1 (AM. LAW INST. 1987).

[210] Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 146 (2014).

[211] 162 Cong. Rec. H6024 (daily ed. Sept. 28, 2016) (veto message of President Obama regarding the Justice Against Sponsors of Terrorism Act).

the state where the court is located allows for broad attachment proceedings.[212] While individual states have an interest in utilizing their methods of judicial enforcement, that interest should not prevail over the United States' foreign policy interest in ensuring that parochial enforcement proceedings do not infringe upon potential allies' sovereign interests, particularly in a federal course of action. Moreover, adding discovery to the FSIA would be consistent with the FSIA's existing approach in other procedural contexts, including venue,[213] jurisdiction,[214] service of process,[215] counterclaims,[216] and attachment.[217] Additionally, unlike with many other statutes, Congress has proven willing to amend the FSIA, and did so twice in 2016: once to allow for tort suits against sovereigns, and once to prevent attachment of pieces of art on display in the United States in temporary exhibits.[218] Amending the FSIA to add discovery that mirrors the Federal Rules would set an appropriate baseline that sovereigns could rely upon when facing discovery in US courts.

CONCLUSION

NML Capital's holding provided a vague directive that gave district courts great discretion as to which standards to apply for attachment discovery requests against foreign sovereigns. This Note has provided the first account of the different approaches lower courts use when considering such discovery requests. After the 2015 amendments to the Federal Rules of Civil Procedure, the District of DC began using proportionality as a potentially new standard. This approach gives appropriate weight to plaintiffs' interests in collecting their judgments and sovereigns' interests in preventing intrusive American discovery, and it follows the modern trend of reining in discovery to protect against complete general asset discovery.

Amending the Rule 69 attachment to require execution to be governed by the Federal Rules closes the choice of law loophole that plaintiffs could otherwise use to avoid such limitations. Proportionality better accounts for plaintiff's interests than the Seventh Circuit's comity test but provides more protections against abusive discovery requests than the Second Circuit's expansive approach. Although proportionality still leaves discretion to the district judge, the proportionality standards can be borrowed from other civil contexts as well, creating a greater body of precedent to work from than the pure comity analysis.

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[212] *See*, *e.g.*, *NML Capital, Ltd. v. Republic of Arg.*, Nos. 2:14–cv–492–RFB–VCF, 2:14–cv–1573–RFB–VCF., 2015 WL 1186548 at *1 (D. Nev. Mar. 16, 2015).
[213] 28 U.S.C. § 1391(f) (2016).
[214] *Id.* § 1604.
[215] *Id.* § 1608.
[216] *Id.* § 1607.
[217] *Id.* § 1609.
[218] *See* 28 U.S.C. § 1605 (2016); 28 U.S.C. §1605B (2016).