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Limiting the Scope of the Foreign Sovereign Immunities Act After *Zivotofsky II*

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INTRODUCTION

On September 29, 2014, the United States District Court for the Southern District of New York held the Republic of Argentina in civil contempt of court.[1] Argentina had repeatedly violated, and made public its intent to continue to violate, court orders designed to enforce a prior judgment.[2] Argentina argued that under both international law and the Foreign Sovereign Immunities Act ("FSIA"), the court did not have the authority to hold it, a foreign sovereign, in contempt.[3] The court—despite noting that "to hold a party in contempt of court is a rare thing"—disagreed, and granted the plaintiffs' motion for a contempt order.[4] For many observers, a years-long legal battle had reached a fever pitch: Argentina had filed suit against the United States before the International Court of Justice;[5] Argentina's ambassador to the United States denounced the possibility of being held in contempt by a local court as "completely absurd";[6] and the U.N. General Assembly passed a resolution on establishing a "multilateral legal framework for sovereign debt restructuring processes."[7]

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1. Order at 3, NML Capital, Ltd. v. The Republic of Argentina, No. 08-6978 (S.D.N.Y. Sept. 29, 2014).

2. *See* Transcript of Proceedings at 2, NML Capital, Ltd. v. The Republic of Argentina, No. 08-6978 (S.D.N.Y. Sept. 29, 2014).

3. *See* Memorandum of the Republic of Argentina in Opposition to Plaintiffs' Motion to Hold Argentina in Civil Contempt and to Impose Sanctions at 2–8, NML Capital, Ltd. v. The Republic of Argentina, No. 08-6978 (S.D.N.Y. Sept. 29, 2014).

4. *See* Transcript of Proceedings at 28, NML Capital, Ltd. v. The Republic of Argentina, No. 08-6978 (S.D.N.Y. Sept. 29, 2014).

5. *See* Press Release, International Court of Justice, The Argentine Republic Seeks to Institute Proceedings Against the United States of America Before the International Court of Justice. It Requests US to Accept the Court's Jurisdiction (Aug. 7, 2014), http://www.icj-cij.org/presscom/files/4/18354.pdf.

6. Letter from Argentine Ambassador to Sec'y of State John F. Kerry (Sept. 29, 2014), http://www.economia.gob.ar/soberaniaeconomica/contenidos/wp-content/uploads/2015/07/NOTE_JOHN-KERRY_EN.pdf.

7. Press Release, General Assembly, Resolution on Sovereign Debt Restructuring Adopted by General Assembly Establishes Multilateral Framework for Countries to Emerge from Financial Commitments, U.N. Press Release GA/11542 (Sept. 9, 2014), http://www.un.org/press/en/2014/ga11542.doc.htm.

The saga began in December 2001, when the Republic of Argentina defaulted on payment of its external debt.[8] In 2005 and 2010, it restructured most of that debt through voluntary exchange offers, which most of its creditors accepted.[9] Some creditors—including a pair of hedge funds, EM Ltd. and NML Capital, Ltd.—did not participate in the exchanges.[10] Beginning in 2003, EM and NML Capital brought multiple actions against Argentina in the United States District Court for the Southern District of New York to collect on the full face value of the defaulted bonds.[11] After prevailing in all of them and winning monetary judgments totaling approximately $2.4 billion, they sought payment by attempting to execute the judgments against Argentina's property.[12] In order to do so, the plaintiffs made discovery requests in an effort to determine the location of Argentine assets around the world.[13]

In June 2014, the U.S. Supreme Court affirmed the decision of the U.S. Court of Appeals for the Second Circuit allowing the plaintiffs to access third-party records about Argentina's extraterritorial assets.[14] Specifically, this allowed the district court to compel third-party banks to turn over information about Argentine assets or accounts in their possession.[15] The Court rejected the argument that the FSIA provides a foreign sovereign with immunity from postjudgment discovery in execution proceedings.[16] The Court reasoned that, because the FSIA contains no immunity-granting provision that forbids or limits discovery in aid of execution of a foreign sovereign judgment debtor's assets, there simply is no sovereign immunity with respect to such discovery requests.[17]

Separately, the Court denied certiorari on the Second Circuit's *pari passu* holding that would allow NML Capital and other bondholders who did not participate in the 2005 or 2010 exchanges to demand payment whenever Argentina services its other, restructured debt.[18] The *pari passu* clause is a standard clause in sovereign bond issuances that establishes the equal standing of bondholders with respect to other unsecured creditors. It usually pro-

8. EM Ltd. v. Republic of Argentina, 695 F.3d 201, 203 (2d Cir. 2012), *aff'd sub nom.* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

9. *Id.*

10. These hedge funds have been commonly referred to as "vulture funds" for their practice of purchasing sovereign debt at a large discount on the secondary market, with the goal of recovering the full value of the debt through litigation. Martin F. Schubert, *When Vultures Attack: Balancing the Right to Immunity Against Reckless Sovereigns*, 78 Brook. L. Rev. 1097, 1098 (2013).

11. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2253–54 (2014).

12. *Id.*

13. *Id.*

14. *Id.* at 2254–55.

15. EM Ltd. v. Republic of Argentina, 695 F.3d 201, 204 (2d Cir. 2012), *aff'd sub nom.* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

16. *NML Capital*, 134 S. Ct. at 2257–58.

17. *Id.* at 2256.

18. NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 2819 (2014).

vides "that the bonds rank *pari passu* with each other and with other unsecured (payment) obligations of the issuer."[19] The denial of the petition for certiorari on the *pari passu* issue meant that the holdout bondholders were free to seek a remedy of specific performance—that is, payment on their bonds—whenever Argentina issued payments on the restructured bonds.[20] The Argentine government, however, continued to deny payment to the holdout bondholders and to attempt to make payments on the restructured bonds, including by passing legislation to allow restructured bondholders to be paid in Argentina instead of New York.[21] As a result of Argentina's continued failure to comply with the court order to pay the holdouts as it paid the restructured bondholders, U.S. District Judge Thomas Griesa held Argentina in civil contempt of court.[22]

Judge Griesa's decision was not the first time that a U.S. federal court has found a foreign sovereign in contempt, or sanctioned one under its contempt powers. In March 2011, the D.C. Circuit upheld for the first time a contempt sanction brought against a foreign sovereign under the FSIA.[23] The court relied on the legislative history of the FSIA to conclude that the FSIA would not preclude a court from imposing a fine on a sovereign state for failure to comply with a court order.[24] The Seventh Circuit has also held that contempt sanctions against a foreign sovereign are available under the FSIA.[25] By contrast, the Fifth Circuit has held that a district court's contempt order requiring the Republic of Congo to pay money into the court's registry was inconsistent with the FSIA because the FSIA does not grant the lower court the power to *enforce* monetary sanctions.[26]

This Note anticipates that if presented with the question, the Supreme Court will likely hold that U.S. district courts have the inherent authority to *issue* contempt sanctions against foreign sovereigns, but that under the FSIA, they have no authority to *enforce* contempt sanctions against a sovereign.[27]

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19. Rodrigo Olivares-Caminal, *The Pari Passu Clause in Sovereign Debt Instruments: Developments in Recent Litigation*, BIS Papers No. 72, 123 (2013).

20. *See NML Capital*, 699 F.3d at 262 ("Insofar as Argentina argues that a party's persistent efforts to frustrate the collection of money judgments cannot suffice to establish the inadequacy of a monetary relief, the law is to the contrary. . . . In this context, the district court properly ordered specific performance.") (citations omitted).

21. Charlie Devereux & Camila Russo, *Argentine Lower House Passes Legislation to Pay Debt Locally*, Bloomberg Bus. (Sept. 11, 2014), http://www.bloomberg.com/news/articles/2014-09-11/argentine-lower-house-passes-bill-to-pay-debt-through-local-bank.

22. Order at 3, NML Capital, Ltd. v. The Republic of Argentina, No. 08-6978 (S.D.N.Y. Sept. 29, 2014).

23. FG Hemisphere Associates, LLC v. Dem. Rep. Congo, 637 F.3d 373, 378 (D.C. Cir. 2011).

24. *Id.*

25. Autotech Techologies LP v. Integral Research & Development Corp., 499 F.3d 737, 743–45 (7th Cir. 2007).

26. Af-Cap, Inc. v. Dem. Rep. Congo, 462 F.3d 417, 428 (5th Cir. 2006).

27. *See infra* Part I.D.–F. A court can easily issue an order stating that a foreign sovereign party is in contempt of court and can issue concomitant sanctions: for example, a daily monetary fine for every day that the sovereign remains in violation of the court's orders. Enforcement of a monetary sanction, however, would require execution against the sovereign's (commercial) assets. The FSIA allows for execution,

This Note argues that, in fact, the FSIA should *not* be read to allow courts to impose contempt sanctions against foreign sovereigns, in part because they are unenforceable, but more so because this practice contravenes constitutional principles regarding the primacy of the executive branch in the conduct of foreign affairs.[28]

Consistent with its reasoning in *Zivotofsky v. Kerry* ("*Zivotofsky II*"), the Court should limit the scope of the contempt power under the FSIA.[29] In *Zivotofsky II*, the Court reaffirmed the practical importance of a broad executive power in the field of foreign affairs. The Court held that while the President is not free from congressional lawmaking power in the field of international relations, Congress may not "aggrandiz[e] its power at the expense of another branch" by requiring the President to contradict executive policy with respect to recognition of foreign governments.[30] Although the issuance of contempt sanctions does not necessarily infringe on an exclusive executive power, it has the potential to interfere with the Executive's ability to conduct foreign relations. The judicial branch, unlike Congress, has no constitutional authority over the conduct of foreign affairs. Therefore, courts should hesitate to read powers into their authority that may infringe upon the Executive's ability to speak with "one voice" as the representative of the United States in the field of foreign affairs.[31] Moreover, because judicial contempt orders and enforcement of monetary sanctions against foreign sovereigns are contrary to international custom, raise reciprocity concerns, and are not likely to vindicate plaintiffs' rights effectively, courts should refrain from reading this judicial power into the FSIA.

Part I provides an overview of the FSIA, provides background on the Argentine sovereign debt litigation, and analyzes past cases in which U.S. courts have issued contempt orders against foreign sovereigns. Part II provides an overview of constitutional doctrine regarding the primacy of the Executive in foreign relations, and why a broad reading of courts' powers under the FSIA contravenes that principle. Part III explains why the Supreme Court should, consistent with other, non-constitutional concerns, deny this power to courts under the FSIA and restrict the power to issue sanctions against foreign states to the prerogative of the Executive.

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or attachment in aid of execution, against a foreign sovereign's (commercial) assets only for the purposes of enforcing a judgment. 28 U.S.C. § 1610(a) (2015).

28. *See also* Adam DiClemente, Note, *Foreign Governments in Contempt? A Case for Limiting the Contempt Power Under the Foreign Sovereign Immunities Act*, 51 COLUM. J. TRANSNAT'L L. 177, 181–85 (2012) (discussing the source and authorization of the contempt power).

29. Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076, 2096 (2015). In *Zivotofsky I*, the Supreme Court declined to apply the political question doctrine to bar review of Zivotofsky's claim, noting that it is "'emphatically the province and duty' of the Judiciary to determine the constitutionality of a statute." Zivotofsky *ex rel.* Zivotofsky v. Clinton (*Zivotofsky I*), 132 S. Ct. 1421, 1424 (2012).

30. *Zivotofsky II*, 135 S. Ct. at 2096 (internal citations omitted).

31. American Insurance Ass'n v. Garamendi, 539 U.S. 396, 424 (2003).

I. The Foreign Sovereign Immunities Act and the Contempt Power

A. History of the FSIA

Customary international law accords sovereign states immunity from suit in the courts of another sovereign state.[32] However, because no global treaty widely in force codifies customary international law in this area,[33] each country's national laws determine the law of foreign sovereign immunity.[34] In the United States, throughout the majority of the 19th century and the first half of the 20th century, the doctrine of "absolute immunity" reigned: foreign sovereigns and their organs, agents, or instrumentalities[35] were completely immune from the jurisdiction of U.S. courts unless they had specifically consented otherwise.[36] This accorded with centuries-long international custom, according to which sovereign immunity was absolute, as a reflection of the fundamental principles of state sovereignty in the international system.[37]

In the early 20th century, some Western states began to move toward the restrictive theory of sovereign immunity, according to which a state, by entering the marketplace and behaving like a commercial actor, would lose its sovereign immunity.[38] In accordance with this gradual international shift, U.S. courts began to apply some version of the restrictive theory based on whether a state was acting in a "private" manner or in a "political" manner.[39] Courts deferred to the U.S. Department of State's recommendations on whether immunity should apply, and in the absence of guidance from the executive branch, granted or withheld immunity based on what they believed the Executive would advocate.[40]

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32. Sean D. Murphy, Principles of International Law 303 (2d ed. 2012).

33. In 2004, the U.N. General Assembly adopted the U.N. Convention on Jurisdictional Immunities of States and Their Property, which recognizes general immunity for states and their various organs, as well as certain exceptions, including a commercial activity exception. While the convention has been open for adherence since January 2005, only nineteen states have ratified it as of November 2015, and it has not entered into force. U.N. GAOR, 59th Sess., Convention on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/Res/59/508 (Dec. 2, 2004). *See also* Murphy, *supra* note 32, at 304.

34. Murphy, *supra* note 32, at 304.

35. For ease of exposition, throughout this piece I will use the terms state, sovereign, foreign government, and country interchangeably and without regard to whether the case concerned a state or its agency or instrumentality, unless that distinction is relevant.

36. *See* Murphy, *supra* note 32, at 305. *See, e.g.*, The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 117 (1812) (Chief Justice Marshall, noting the "perfect equality and absolute independence of sovereigns," observed that a "foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation . . . .").

37. Murphy, *supra* note 32, at 304–05.

38. *See* Jasper Finke, *Sovereign Immunity: Rule, Comity, or Something Else?* 21 Eur. J. Int'l Law 853, 858 (2011).

39. *Id.* at 859. *See also* Murphy, *supra* note 32, at 305.

40. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945) ("In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves

In 1952, in an effort to standardize the State Department's approach to sovereign immunity issues, the Department announced—via the "Tate Letter"—its official adoption of the restrictive theory of foreign sovereign immunity.[41] Under this approach, the Department of State would remain the governmental body responsible for deciding sovereign immunity claims, but would recommend immunity only when a case involved the public, or governmental, acts of a foreign state (*jure imperii*), and not when it involved the commercial, or private, acts of a foreign state (*jure gestionis*).[42] However, because the State Department remained subject to political pressures regarding foreign sovereign immunity claims, it did not apply the principles of the Tate Letter objectively and consistently.[43] As a result, Congress passed the FSIA in 1976 in order to "codify the . . . 'restrictive' principle of foreign sovereign immunity,"[44] whereby "a foreign state is entitled to immunity only with respect to its public acts, not with respect to its commercial or private acts."[45]

Around the same time that the United States was adopting as an official matter the restrictive theory of foreign sovereign immunity—reflected in both the Tate Letter and the FSIA—many other Western states took similar steps.[46] The 1972 European Convention on State Immunity reflected the principle of denying foreign states immunity for their commercial or other "non-sovereign" acts, and several European countries reformed their foreign sovereign immunity legislation accordingly.[47] Many non-Western states, led in part by the Soviet Union, resisted the evolution of this doctrine, arguing that all conduct by a sovereign state is sovereign conduct and merits immunity.[48] Since then, however, resistance to the restrictive theory's conception of foreign sovereign immunity has largely eroded. In 2004, the U.N. General Assembly adopted the U.N. Convention on Jurisdictional Immunities of States and Their Property, which adopts the restrictive theory of foreign sovereign immunity and confirms the obsolescence of the absolute theory in international law.[49]

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whether all the requisites of immunity exist . . . in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations.").

41. Ernesto J. Sanchez, American Bar Association, The Foreign Sovereign Immunities Act Deskbook 24 (2013); *see* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General ("Tate Letter") (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984–85 (1952).

42. Murphy, *supra* note 32, at 305.

43. *Id.* at 306.

44. H.R. Rep. No. 94-1487, at 7 (1976).

45. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the H. Subcomm. on Admin. & Gov't Relations of the H. Comm. on the Judiciary*, 94th Cong. 25 (1976) (statement of Monroe Leigh, Legal Adviser, State Dep't).

46. Gary Born, International Civil Litigation in United States Courts 235 (5th ed. 2011).

47. *Id.*

48. *Id.*

49. *Id.* Although only seventeen states have ratified the Convention, the overwhelming majority of states support a restrictive doctrine as a matter of their domestic law. Hazel Fox, The Law of State Immunity 321 (3d ed. 2013).

B. Mechanics of the FSIA

Today, the FSIA functions as the sole basis for obtaining jurisdiction over a foreign state in U.S. courts.[50] The FSIA provides that, "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act 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."[51] That is, the default rule under the FSIA is that all foreign sovereigns are immune from jurisdiction. A foreign sovereign will lose its presumptive sovereign immunity if it qualifies for one of the exceptions to immunity—for example, if the state has "waived its immunity either explicitly or by implication,"[52] or if the case concerns a foreign sovereign's commercial activity that relates to the United States.[53]

The FSIA thus grants U.S. courts subject-matter jurisdiction under 28 U.S.C. § 1330(a) for "any nonjury civil action against a foreign state" in which the foreign state is not entitled to immunity,[54] and automatically confers personal jurisdiction so long as the court has subject-matter jurisdiction.[55]

C. The Argentine Litigation

Following the enactment of the FSIA, most sovereign bond issuances that were governed by New York law or listed on the New York Stock Exchange began to include waivers of immunity from suit.[56] Even where a sovereign bond issuance does not contain an explicit immunity waiver, since 1992, courts have held that bond issuances constitute "commercial activity," thus stripping the foreign sovereign of immunity in U.S. courts.[57]

In the cases brought by EM and NML Capital against Argentina, the district court's jurisdiction rested on Argentina's waiver of immunity contained in its bond indenture agreement, which states:

> To the extent that [Argentina] or any of its revenues, assets or properties shall be entitled . . . to any immunity from suit . . . from attachment prior to judgment . . . from execution of a judgment or from any other legal or judicial process or remedy, . . .

50. MURPHY, *supra* note 32, at 306.
51. 28 U.S.C. § 1604 (2012).
52. *Id.* § 1605(a)(1).
53. *Id.* § 1605(a)(2).
54. *Id.* § 1330(a).
55. *Id.* § 1330(b).
56. W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt,* U. ILL. L. REV. 67, 70–71 (2014).
57. Republic of Argentina v. Weltover, 504 U.S. 607, 614–15 (1992) ("[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA . . . . There is . . . nothing distinctive about the state's assumption of debt . . . that would cause it always to be classified as *jure imperii* . . . .").

> [Argentina] has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the [FSIA] to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .[58]

Here, Argentina explicitly waived sovereign immunity in two respects. First, it granted U.S. federal district courts personal and subject-matter jurisdiction over NML Capital's claim against it under section 1605 of the Act.[59] Second, Argentina waived immunity from attachment or execution of its property in the United States under section 1610 of the Act, which allows a court to attach property so long as it was also used for a commercial activity in the United States.[60] Argentina had not, however, explicitly waived immunity with respect to postjudgment execution discovery orders, nor does the Act explicitly confer upon sovereigns immunity in this respect. Drawing from the Act's silence on this issue, Argentina argued that "[b]ecause the [FSIA] gives 'no indication that it was authorizing courts to inquire into state property beyond the court's limited enforcement authority,' . . . discovery of assets that do not fall within an exception to execution immunity . . . is forbidden."[61]

The Supreme Court disagreed, holding that the FSIA does not prevent this kind of third-party discovery in aid of execution.[62] The Court first reasoned that section 1609 of the Act only confers immunity from execution on a sovereign's property *within* the United States. The court then concluded that even assuming that the grant of immunity extends to immunity from discovery in aid of execution—which the Court did not concede—this immunity would not shield a foreign sovereign's assets *outside* the United States from discovery.[63]

Meanwhile, the Supreme Court's cert denial on the *pari passu* issue left intact the Second Circuit's holding that Argentina could not make payments to the exchange bondholders without also paying the holdout bondholders.[64] Argentina responded by seeking various work-around solutions. For example, Argentina rerouted payments to the exchange bondholders to escape jurisdiction in New York, and invited the exchange bondholders to remove the Bank of New York Mellon as trustee for the exchange bonds and replace it with the Argentine national bank. This allowed the exchange bondholders

58. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2253 n.1 (2014).
59. *Id.*
60. NML Capital, Ltd. v. Republic of Argentina, 680 F.3d 254, 257 (2d Cir. 2012).
61. *NML Capital*, 134 S. Ct. at 2257.
62. *Id.*
63. *Id.*
64. NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012); NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230 (2d Cir. 2013), *cert. denied sub nom.* Exch. Bondholder Grp. v. NML Capital, Ltd., 134 S. Ct. 2819 (2014).

to swap the exchange bonds for local ones and get paid in Argentina.[65] In response to these actions, plaintiffs EM and NML Capital moved that Argentina be held in contempt, and U.S. District Judge Thomas Griesa granted the motion.[66] Following the contempt order, the court ordered Argentina to

> reverse entirely the steps which it has taken constituting the contempt, including, but not limited to, re-affirming the role of the Bank of New York Mellon as the indenture trustee and withdrawing any purported authorization of Nación Fideicomisos, S.A. to act as the indenture trustee, and complying completely with the February 23, 2012 injunction.[67]

The contempt order did not, however, impose monetary sanctions, and plaintiffs have not since renewed their request for a daily monetary fine of $50,000 until Argentina ceased to be in violation of the court's orders.[68]

D. Contempt Sanctions Under the FSIA

At least two circuit courts in the United States agree that the FSIA allows a court to exercise its contempt power over a foreign sovereign.[69] In 2011, in *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, the D.C. Circuit upheld for the first time a district court's imposition of contempt sanctions against a foreign sovereign. In that case, the district court had issued contempt sanctions against the Democratic Republic of the Congo ("DRC") for failing to respond to court-ordered discovery when a judgment creditor (Hemisphere) sought to enforce writs of execution after having confirmed an arbitral award under the immunity exception in section 1605(a)(6).[70] After the DRC neglected to produce documents in accordance with the court's discovery order for more than two years, the district court found the DRC in civil contempt.[71] The court issued sanctions in the form of a fine payable to Hemisphere in the amount of $5,000 per week, doubling every four weeks until reaching a maximum of $80,000 per week, until the DRC satisfied its discovery obligations.[72]

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65. Anna Gelpern, *Escalating to Nowhere?*, CREDIT SLIPS (Aug. 20, 2014, 12:54 PM), http://www.creditslips.org/creditslips/2014/08/escalating-to-nowhere.html.

66. Order of September 29, 2014 (Document 687), NML Capital, Ltd. v. The Republic of Argentina, No. 08-6978 (S.D.N.Y. filed Nov. 12, 2014).

67. Order of October 3, 2014 (Document 693), NML Capital, Ltd. v. The Republic of Argentina, No. 08-6978 (S.D.N.Y. filed Nov. 12, 2014).

68. *Id.*; Plaintiff's Memorandum of Law in Support of Motion to Hold the Republic of Argentina in Civil Contempt and to Impose Sanctions (Document 677), NML Capital, Ltd. v. The Republic of Argentina, No. 08-6978 (S.D.N.Y. filed Nov. 12, 2014).

69. For a brief history of the contempt power of the judicial branch in the United States, *see* DiClemente, *supra* note 28, at 181–85.

70. FG Hemisphere Associates, LLC v. Dem. Rep. Congo, 637 F.3d 373, 375–76 (D.C. Cir. 2011).

71. *Id.* at 376.

72. *Id.*

On appeal, the D.C. Circuit held that the FSIA does not limit a federal court's "inherent contempt power . . . [which] runs with a court's jurisdiction."[73] The court reasoned that while Congress can limit that contempt power, it "must do so through a 'clear and valid legislative command,'"[74] which is present neither in the text of the FSIA nor in the legislative history of the Act.[75] In fact, the court said, the House Report to the FSIA made clear that Congress intended for a court's normal discovery apparatus to remain intact, stating:

> [If] a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply. Or if a plaintiff sought to depose a diplomat in the United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. *However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.*[76]

The District Court for the District of Columbia relied on this case when, in 2013, it issued contempt sanctions against the Russian Federation and several Russian state agencies for failing to comply with a judgment requiring them to return to a Jewish nonprofit, Chabad, collections of Jewish religious books, manuscripts, and other documents.[77] The court ordered that Russia pay $50,000 for every day that it remained in violation of the 2010 judgment.[78]

In 2007, the Seventh Circuit also held that the FSIA allows a court to issue a contempt order against a foreign sovereign, although it ultimately vacated the contempt order for other reasons.[79] The court reasoned that "once a court is entitled to exercise subject-matter jurisdiction over the suit, it has the full panoply of powers necessary to bring that suit to resolution and to enforce whatever judgments it has entered."[80] The opinion noted that "[n]othing in the text of the FSIA comes close to suggesting that the FSIA was designed to abrogate or limit this essential power, or even that a separate jurisdictional showing is necessary for a contempt proceeding that arises within a case properly brought under the FSIA."[81]

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73. *Id.* at 377.
74. *Id.* at 378 (citing Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).
75. *Id.*
76. *Id.* (citing H.R. Rep. No. 94-1487, at 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621–22).
77. Chabad v. Russian Fed'n, 915 F. Supp. 2d 148 (D.D.C. 2013).
78. *Id.* at 155.
79. Autotech Technologies LP v. Integral Research & Dev. Corp., 499 F.3d 737, 739–40 (7th Cir. 2007).
80. *Id.* at 744.
81. *Id.*

The Second Circuit will likely rule this year on the same issue, in the case of *Servaas v. Republic of Iraq*.[82] On January 24, 2014, U.S. District Judge for the Southern District of New York Richard M. Berman found the Republic of Iraq, the Ministry of Industry of the Republic of Iraq, and the attorneys for the Republic and the Ministry in contempt of court for failure to comply with a discovery order dated August 29, 2012.[83] The court imposed on Iraq a sanction of $2,000 per day for every day that it continued to fail to comply with the discovery order.[84]

By contrast, in 2006, the Fifth Circuit vacated a district court's contempt order and monetary sanctions against the Republic of the Congo on the ground that the FSIA prohibits such remedies. The court reasoned that the FSIA includes only two sections, section 1610 and section 1611, that discuss available methods of attachment and execution against foreign states' property, and these sections do not provide for the possibility of monetary sanctions.[85] The D.C. Circuit in *FG Hemisphere* criticized the Fifth Circuit's conclusion, suggesting that it had—erroneously—conflated the power to impose a contempt sanction with the authority to enforce it.[86] The Fifth Circuit, for its part, based its reasoning on a position that the U.S. government has advocated—because the FSIA does not allow a district court to enforce contempt sanctions against a foreign sovereign, it should not be read to allow a district court to issue a contempt order in the first instance.[87]

E. Applying NML Capital to Contempt

Although the Supreme Court has not yet addressed the question of judicial sanctions under the FSIA, its decision in *NML Capital* suggests that it would likely side with the D.C. Circuit and Seventh Circuit. In *NML Capital*, the Court held that the FSIA allows a court to compel third parties to disclose information about that foreign state's assets in the United States as part of a postjudgment execution discovery order—despite the fact that the FSIA is silent on the question of these orders.[88] The FSIA is similarly silent on the question of judicial sanctions, but the Court would likely rely on the same reasoning of *NML Capital* to conclude that the FSIA allows a district court to hold a foreign state in civil contempt of court and issue concomitant sanctions.

The Court reasoned in *NML Capital* that even though the FSIA did not address the question of postjudgment discovery, it also did not contain a

82. Servaas Inc. v. Republic of Iraq, No. 09 Civ. 1862 RMB, 2014 WL 279507 (S.D.N.Y. Jan. 24, 2014).

83. *Id.* at *1.

84. *Id.* at *5.

85. Af-Cap, Inc. v. Republic of Congo, 462 F.3d 417, 428–29 (5th Cir. 2006).

86. FG Hemisphere Associates, LLC v. Dem. Rep. Congo, 637 F.3d 373, 379 (D.C. Cir. 2011).

87. Brief of the United States as Amicus Curiae in Support of Defendant-Appellant at 3, Af-Cap, Inc. v. Republic of Congo, 462 F.3d 417 (No. 05-51168) [hereinafter Af-Cap Brief].

88. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2255 (2014).

"plain statement" that the Act would preclude, or alter, the federal rules of discovery—under which it was assumed the district court would have been within its discretion to issue the discovery order against third-party banks[89]—because one of the parties to the suit is a foreign sovereign.[90] In other words, unless the FSIA specifically states that the normal rules of the game—here, the Federal Rules of Civil Procedure—do not apply, or only apply in some limited manner, then once a foreign state is subject to the jurisdiction of the court, it is "liable in the same manner and to the same extent as a private individual under like circumstances."[91]

The Court's application of the FSIA in this manner tracks closely the Second Circuit's reasoning on the *pari passu* issue in the Argentine litigation. In that case, the Second Circuit—after affirming the district court's holding that Argentina had violated the *pari passu* clause in the bond agreements—upheld permanent injunctions requiring Argentina to pay the defaulted bondholders in accordance with payments to restructured bondholders. The court's conclusion rested on its assumption that "the FSIA imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign, at least where the district court's use of its equitable powers does not conflict with the separate execution immunities created by [section] 1609."[92] Thus, the Second Circuit's reasoning strongly echoes that of the D.C. and Seventh Circuits: unless the FSIA specifically limits a court's power in a suit involving a foreign sovereign, the court will assume to have all the powers it normally would if the party to the suit were a private party.

Moreover, unlike the postjudgment discovery order sought by the *NML Capital* plaintiffs,[93] a district court's contempt power forms a part of the ordinary Federal Rules of Civil Procedure.[94] Lower federal courts possess the "inherent power to enforce compliance with their lawful order[s] through civil contempt,"[95] and although that "inherent power . . . can be limited by statute and rule,"[96] the FSIA has not clearly done so. The text of the FSIA does not indicate that Congress intended to place limits on a court's con-

89. *Id.* ("We thus assume without deciding that, as the Government conceded at argument . . . and as the Second Circuit concluded below, 'in a run-of-the-mill execution proceeding . . . the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States.'").

90. *Id.* at 2256–57 ("Far from containing the 'plain statement' necessary to preclude application of federal discovery rules, the Act says not a word on the subject.") (citation omitted).

91. *Id.* at 2256 (citing 28 U.S.C. § 1606 (2002)).

92. NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 263 (2d Cir. 2012).

93. In *NML Capital*, the Court appeared to hint that there *may* have been a valid challenge as to whether the district court had acted within its discretion when it ordered the discovery from third-party banks regarding Argentina's extraterritorial assets. However, because Argentina had not put in contention the application of the rules governing discovery in postjudgment execution proceedings in this manner, the Court assumed (without deciding) that the district court's order would have been within its discretion. *NML Capital*, 134 S. Ct. at 2255; *see also supra* note 89.

94. *See* Fed. R. Civ. P. 70(e) ("The court may also hold the disobedient party in contempt.").

95. Shillitani v. United States, 384 U.S. 364, 370 (1966).

96. Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991).

tempt power, which may be a noteworthy omission when viewed with reference to the other sections of the statute that explicitly limit or suspend normal discovery practices.[97]

Thus, the Supreme Court's most recent decision concerning application of the FSIA in the Argentine case suggests strongly that the Court would uphold the use of contempt orders against foreign sovereigns. However, even assuming the Court would endorse the use of contempt orders and issuance of contempt sanctions against a foreign sovereign under the FSIA, it does not resolve the question whether a court has the authority to enforce those sanctions.

F. The Problem of Enforcement

In *NML Capital*, the Court endorsed the use of postjudgment execution discovery orders designed to elicit information about Argentina's worldwide assets. The Court based its decision on the FSIA's silence on the matter, and despite the fact that no information acquired on Argentina's extraterritorial assets would be actionable in U.S. courts. That is, the plaintiffs were seeking information on Argentina's assets around the world, in order to attempt to execute their U.S. court judgment against those assets. To execute against extraterritorial assets, the plaintiffs would have to go to the courts of the foreign state in which those assets were held and attempt to attach that property to execute their judgment based on the attachment and execution laws of that jurisdiction. That the discovery orders—while enforceable against banks in the United States—would not create enforceable attachment rights in U.S. courts did not prevent the Court from affirming the courts' authority to issue the discovery orders under the FSIA.

As explained above, the Court's reasoning in *NML Capital* suggests strongly that it would also uphold the authority of courts to issue contempt orders under the FSIA. As with postjudgment execution discovery orders, the FSIA does not specifically provide for sovereign immunity with respect to contempt orders, and a contempt order against a foreign sovereign does not create new enforceable rights in U.S. courts. However, because the FSIA does not allow a court to execute on a sovereign's property to enforce a contempt sanction, the Supreme Court likely will not find that a lower court may *enforce* contempt sanctions against a foreign sovereign.

In both *FG Hemisphere* and *Chabad v. Russian Federation*, the U.S. government filed amici curiae in which it argued that the FSIA did not allow a court to issue contempt sanctions against a foreign sovereign, at least in part because the court does not have the authority under the FSIA to enforce the

97. *NML Capital*, 134 S. Ct. at 2256 ("The Act speaks of discovery only once, in a subsection requiring courts to stay discovery requests directed to the United States that would interfere with criminal or national security matters, § 1605(g)(1). And that section explicitly suspends certain Federal Rules of Civil Procedure when such a stay is entered, see § 1605(g)(4).").

sanctions.[98] The U.S. government position was that the FSIA does not allow for the *enforcement* of contempt sanctions. It argued that (1) under the FSIA, a court is more limited in *executing* a judgment against a foreign sovereign than in issuing a judgment, and (2) no provision of the Act explicitly permits a plaintiff to execute on a sovereign's assets to enforce a contempt order (while it does explicitly allow for execution on certain sovereign assets to enforce a judgment).[99] Thus, the FSIA could not allow for the imposition of contempt sanctions in the first instance.[100] In both cases, however, the courts rejected this argument on the basis that no attempt was being made at that time to enforce the contempt sanctions; therefore, the only question to answer was whether the FSIA allowed a court to issue contempt sanctions, which, they concluded, it did.[101]

Nevertheless, the D.C. Circuit in *FG Hemisphere* appeared to accept the U.S. government's construction of the statute, noting:

> The FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution . . . . Otherwise a plaintiff must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment. Therefore, it is not anomalous to divide . . . the question of a court's power to impose sanctions from the question of a court's ability to enforce that judgment through execution.[102]

The statute's "unusual" nature stems here from the fact that it grants jurisdiction over a foreign sovereign more broadly than it grants authority over that sovereign's property for the purposes of enforcing judgments. Even if a court has obtained subject-matter jurisdiction over the dispute and personal jurisdiction over the foreign sovereign via one of the immunity exceptions in section 1605, in order to enforce a judgment against that sovereign via attachment or execution, the property against which enforcement is sought must separately fall under one of the immunity exceptions in section 1610, which require, *inter alia*, that property be both "in the United States" *and* "used for a commercial purpose in the United States."[103] The comparatively stricter limitations on enforcing judgments against a foreign state's property are likely intended to reflect the fact that "at the time the FSIA

98. Brief for the United States as Amicus Curiae Supporting Appellants at 7–8, FG Hemisphere Associates, LLC v. Dem. Rep. Congo, 637 F.3d 373 (D.C. Cir. 2011) (No. 10-7046); Brief for the United States as Amicus Curiae Supporting Respondents, Chabad v. Russian Fed'n, 915 F. Supp. 2d 148 (D.D.C. 2013) (No. 1:05-cv-01548).

99. *Id.* at sources cited therein.

100. *Id.*

101. *Id.*

102. FG Hemisphere Associates, LLC v. Dem. Rep. Congo, 637 F.3d 377, 377 (D.C. Cir. 2011).

103. 28 U.S.C. § 1610(a) (2012).

was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action."[104]

Moreover, the sections of the statute that create immunity exceptions for a sovereign's property refer almost exclusively to immunity "from attachment in aid of execution, or from execution, *upon a judgment* entered by a court of the United States or of a State."[105] By contrast, the section that grants immunity from attachment and execution does not cabin immunity from attachment or execution with reference to *enforcement* of a judgment.[106] Furthermore, there is no reference to attachment in aid of execution upon a contempt sanction. Because the exceptions to immunity from attachment or execution are generally limited to situations in which execution is being sought in order to enforce a judgment, the statute suggests that the grant of immunity from attachment or execution includes *all* situations in which attachment or execution is sought.[107] That is, the FSIA creates broad immunity for a foreign sovereign's property from attachment and execution, and then creates exceptions to that immunity when attachment or execution is sought upon a judgment.[108]

The FSIA only waives immunity for attachment or execution against a sovereign's property in the United States *prior to* the entry of a judgment if "the foreign state has explicitly waived its immunity from attachment prior to judgment"[109] *and* "the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction."[110] Thus, even assuming that the foreign state against which the contempt sanction had been imposed had commercial property in the United States against which the court could attempt to execute a contempt sanction, *and* the state had explicitly waived immunity from attachment prior to judgment, under the terms of the FSIA, a court could not order execution upon that property unless it were for the satisfaction of a judgment.

In fact, a U.S. court has yet to enforce contempt sanctions against a foreign sovereign after the sovereign failed to pay the monetary fine. However, some plaintiffs have seemingly devised a work-around that could coax courts into enforcing sanctions. In *Chabad v. Russian Federation*, when the U.S. District Court for the District of Columbia in 2013 imposed civil contempt

104. Conn. Bank of Com. v. Republic of Congo, 309 F.3d 240, 255–56 (5th Cir. 2002).

105. 28 U.S.C. § 1610(a) (2012) (emphasis added).

106. *Id.* § 1609 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act . . . the 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.").

107. *Id.* §§ 1609–10.

108. *Id.*

109. *Id.* § 1610(d)(1).

110. *Id.* § 1610(d)(2).

sanctions against Russia in the amount of $50,000 per day until it complied with the court order, Russia neither entered into compliance nor paid the consequent fines. In January 2014, the plaintiff, Chabad, moved for an interim judgment in the amount of the total accrued fines at that time, and in September of this year the District Court granted the motion.[111] This represents a novel attempt to get around the FSIA's text, which, again, only grants a court attachment and execution authority for enforcement of judgments, and not for enforcement of contempt sanctions. In addition, following the *NML Capital* ruling in June 2014, Chabad announced that it intended to issue subpoenas to discover Russian assets in order to seek enforcement of both the court's original judgment and the contempt sanction against those assets subject to attachment and execution in the United States or abroad.[112] In so doing, Chabad will rely upon the *NML Capital* holding, which upheld the use of discovery orders to find sovereign assets abroad to execute against a *judgment* but not to execute against a contempt sanction.[113] Thus, by turning the contempt sanction into a judgment, a plaintiff can, at least in theory, access the mechanisms available under the FSIA for enforcement of judgments.

However, in many situations involving forms of equitable relief, the enforceability of a court order is relevant to whether a court should use its discretion to issue the order in the first place.[114] Thus, it is plausible that when faced with the question, the Supreme Court would rule that precisely because a monetary contempt sanction is unenforceable against a foreign sovereign's property, it is an abuse of the court's discretion to issue the contempt order in the first instance.[115]

The D.C. Circuit was likely trying to preempt this concern when it said that the FSIA is an "unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution."[116] Thus, it would "not [be] anomalous to divide . . . the question of a court's power to impose sanctions from the question of a court's ability to enforce that judgment through execution."[117] Furthermore, in its *NML Capital* decision, the Supreme Court appeared to

111. Plaintiff's Motion for Interim Judgment of Accrued Sanctions, Chabad v. Russian Fed'n, No. 1:05-cv-01548 (D.D.C. Jan. 28, 2014), ECF No. 127. In September 2015, the court entered an interim judgment in the amount of $43,700,000, and put forth a schedule of additional judgments should Russia remain in violation of the earlier order. Order, Chabad v. Russian Fed'n, No. 1:05-cv-01548 (D.D.C. Sept. 10, 2015), ECF No. 144.

112. Plaintiff's Notice of Supplemental Authority, Chabad v. Russian Fed'n, No. 1:05-cv-01548 (D.D.C. Aug. 22, 2014), ECF No. 137.

113. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2250 (2014).

114. *See In re* Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539, 548 (9th Cir. 1996) (holding that where a court was without power to enforce an injunction against a foreign sovereign, the court "abused its discretion by issuing a futile injunction.").

115. *See* DiClemente, *supra* note 28, at 198–203.

116. FG Hemisphere Associates, LLC v. Dem. Rep. Congo, 637 F.3d 377, 377 (D.C. Cir. 2011).

117. *Id.*

endorse this distinction between the permissibility of a court's order and its ability to enforce it: without countering Argentina's claim that the Act gives "no indication that it was authorizing courts to inquire into state property beyond the court's limited enforcement authority,"[118] the Court nevertheless rejected the argument that the Act limits discovery to only assets also subject to execution in U.S. courts.[119] Therefore, under a reading of the FSIA like the one employed by the Court in *NML Capital*, the issuance of contempt sanctions against a foreign sovereign may well be upheld, while the enforcement of monetary sanctions via execution will almost certainly not be approved.[120]

II. The Primacy of the Executive in Foreign Affairs

A. The President as the "Sole Organ"

Under the U.S. Constitution, the President is generally understood to have tremendous power over the conduct of foreign affairs. Some scholars have based this understanding on a textual reading of the Constitution: the President holds a "residual" foreign affairs power by virtue of her Article II, section 1 "executive Power."[121] Others, like Justice Jackson in his concurring opinion in the 1952 *Youngstown* case, reached a similar conclusion through a functionalist reading of the Constitution,[122] motivated with reference to norm-driven "quasi-constitutional custom."[123]

In *Youngstown*, when President Truman attempted to invoke "emergency powers" to seize domestic steel mills whose workers had gone on strike during the Korean War, the Court invalidated the exercise of this unenumerated power.[124] Justice Jackson's concurrence is widely referenced as providing the doctrinal framework for analyzing the President's foreign affairs power in the modern era.[125] Jackson articulated a three-part framework for the exercise of executive power under the Constitution, according to which "[p]residential powers are not fixed but fluctuate, depending upon

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

119. *Id.*

120. As in the *Chabad* case, this may not be the case if a court awards the accrued sanctions in the form of an interim judgment. This also assumes that there are assets subject to execution in the United States, which is rarely the case.

121. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 234 (2001). *See also* Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 664 (1994) (arguing that the executive power is quintessentially about the power to execute the law).

122. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

123. Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs,* 97 Yale L.J. 1255, 1282 (1988).

124. *Id.* at 1283.

125. *See* Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law 174 (2d ed. 2006).

their disjunction or conjunction with those of Congress."[126] The President exercises her maximum authority when she acts according to the express or implied will of Congress. When she acts in the absence of either a congressional grant or denial of authority, she can only rely upon her independent powers. When she takes measures against the express or implied will of Congress, her authority is at a minimum and she can only rely upon her own exclusive constitutional powers.[127] Although Jackson rejected the notion that foreign policy is so unique that courts must always defer to the President in this context, he did put forth a framework under which the President has since asserted a wide range of independent powers over foreign affairs.

Courts have expanded the executive power in foreign relations even with reference to Justice Jackson's three-part framework, in part because they continue to give deference to the notion that the President possesses "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations."[128] This doctrine, commonly referred to as the "sole organ" doctrine, predates *Youngstown* and draws from a statement by John Marshall in 1800 that "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[129] In *United States v. Curtiss-Wright Export Corp.*, the Court invoked the "sole organ" doctrine to uphold the imposition of an arms embargo by the President, and noted that the President's authority to act stemmed in part from her role as "the constitutional representative of the United States with regard to foreign nations."[130] This doctrine helps explain why, even when Congress has attempted to limit or refused to endorse presidential power in the field of foreign affairs, courts have upheld unilateral presidential action.[131] That is, the "sole organ" doctrine has been invoked to uphold broad executive power relative to legislative power in the field of foreign affairs.

During the Iran Hostage Crisis, even absent the express or implied will of Congress, the Supreme Court upheld President Carter's, and then President Reagan's, suspension of private civil claims against Iran.[132] The Court concluded that the President "was authorized" to suspend pending claims, in part because "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by §1 of Art.

126. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).
127. *Id.* at 635–37.
128. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).
129. 10 ANNALS OF CONG. 613 (1800).
130. *Curtiss-Wright*, 299 U.S. at 320 (internal citations omitted).
131. *See generally* Koh, *supra* note 123.
132. Dames & Moore v. Regan, 453 U.S. 654 (1981).

II."[133] Thus as a general matter, and drawing from both the functionalist underpinnings of Justice Jackson's *Youngstown* concurrence as well as the "sole organ" doctrine as articulated in *Curtiss-Wright*, courts have construed statutory authorizations and delegations more broadly, and statutory restrictions more narrowly, when they relate to presidential power in foreign affairs.[134]

Most recently, the Supreme Court has analyzed the scope of the President's power in the foreign affairs context in *Zivotofsky II*.[135] Since 1948, U.S. foreign policy has been to recognize no state as sovereign over the city of Jerusalem.[136] Accordingly, U.S. passport holders born in Jerusalem have listed only "Jerusalem" as their place of birth.[137] In 2003, Congress enacted section 214 of the Foreign Relations Authorization Act, which allowed citizens born in Jerusalem to request that their official documents—including passports—record their state of birth as Israel.[138] After Zivotofsky challenged the refusal of both President Bush and President Obama to enforce the Act, the Supreme Court concluded that because the nation must "speak . . . with one voice" regarding recognition of foreign governments, Congress may not "'aggrandiz[e] its power at the expense of another branch' by requiring the President to contradict an earlier recognition determination in an official executive branch document."[139]

Although *Zivotofsky II* is nominally a case about the President's recognition power, its reasoning extends to other areas of foreign affairs. That is, while the Court's opinion rests on the ultimate conclusion that the President's recognition power is exclusive and conclusive with respect to Congress,[140] the Court emphasized that the "Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not" and the "one voice" of the Nation on this "must be the President's."[141] The Court noted that Congress, in contrast to the President, "has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation"; it may only "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "declare War," "grant Letters of Marque and Reprisal," and "make Rules for the Government and Regulation of the land and naval Forces."[142] While Congress also has the power to enact the laws,

133. *Id.* at 686 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (Frankfurter, J., concurring)).

134. *See id.*; *see also Curtiss-Wright*, 299 U.S. at 304.

135. *Zivotofsky II*, 135 S. Ct. at 2078.

136. *Id.*

137. *Id.* at 2082.

138. *Id.*

139. *Id.* at 2096 (quoting Freytag v. Commissioner, 501 U.S. 868, 878 (1991)).

140. *Id.* at 2083–84.

141. *Id.* at 2086 (quoting American Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003)).

142. *Id.* at 2087; *see generally* U.S. Const. art. I, § 8.

including "all Laws which shall be necessary and proper for carrying into Execution" the powers of the Federal Government,[143] including in the field of international relations,[144] the Court ultimately concluded that it was improper for Congress to expand the scope of its powers at the expense of the President's by attempting to require the President to contradict an earlier recognition determination, and that section 214(d) was unconstitutional.[145] The Court's opinion is particularly noteworthy in that it represents the very first time the Court considered an express Jackson Category 3 case—that is, a case in which the President and Congress expressly disagreed with each other—and sided with the President.[146] By emphasizing the functional advantages of the President in the field of foreign relations—for example, the ability to speak with "one voice"—the Court's reasoning supports a broad understanding of exclusive, or near-exclusive, Presidential power in the field of foreign relations.[147]

The Court in *Zivotofsky II*—as in prior doctrinal cases analyzing the scope of the President's foreign affairs power, including *Youngstown* and *Curtiss-Wright*—answered a question about the scope of the President's power *relative to Congress's power*. This is because the Constitution divides up the enumerated foreign affairs powers between the political branches,[148] and some scholars maintain that other, residual foreign affairs powers remain with the executive branch.[149] Congress may thus choose foreign policy through its lawmaking power, and the President may execute those policies by virtue of her vested executive power.

Nevertheless, courts should consider the reasoning of *Zivotofsky II* and its progenitor case law when answering difficult interpretive questions that implicate the role of courts relative to the executive branch in the context of foreign affairs. This is because this line of case law is grounded in a funda-

143. *See* U.S. CONST. art. I, § 8, cl. 8.

144. *Zivotofsky II*, 135 S. Ct. at 2090 (quoting U.S. CONST. art I, § 8, cl. 18).

145. *Id*. at 2096 (quoting Freytag v. Commissioner, 501 U.S. 868, 878 (1991)).

146. Jack Goldsmith, *Why Zivotofsky Is a Significant Victory for the Executive Branch*, LAWFARE (Jun. 8. 2015, 3:44 PM), https://www.lawfareblog.com/why-zivotofsky-significant-victory-executive-branch.

147. *Id*.

148. Article I allocates to Congress the powers "[t]o regulate Commerce with foreign Nations," "[t]o establish an uniform Rule of Naturalization," "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," and "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. CONST. art. I, § 8. For her part, the President has certain express powers relating to foreign affairs, including the powers "by and with the Advice and Consent of the Senate" to "appoint Ambassadors," and "to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2. She is also assigned certain duties with respect to foreign affairs, including serving as "Commander in Chief of the Army and Navy of the United States," *id.*, and "receiv[ing] Ambassadors and other public Ministers," U.S. CONST. art. II, § 3. *See also Zivotofsky II*, 135 S. Ct. at 2097–98 (Thomas, J., dissenting).

149. Prakash & Ramsey, *supra* note 121, at 298–346 (arguing that the Constitution's allocation of foreign affairs powers to Congress or the Senate should be viewed as allocations away from the President's residual foreign affairs authority). *But see* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (arguing that the Vesting Clause of Article II should not be viewed as an independent source of foreign affairs authority).

mental understanding of the differing roles and powers of the branches of government with respect to foreign affairs. That is, regardless of whether one reaches the conclusion through a functionalist or textualist reading of the Constitution, the President occupies by far the dominant role of the three branches of government in the conduct of U.S. foreign relations. Although the import of this role is not sufficiently dominant to merit deference to the Executive on *all* issues relating to foreign affairs, it does merit special consideration, particularly where the Constitution has not clearly assigned foreign affairs powers to a different branch of government.

The contempt power, when directed at foreign sovereigns, may well jeopardize the President's ability to conduct sensitive diplomatic relations.[150] Therefore, when a court is interpreting the scope of its congressional grant of authority with reference to parties that are foreign sovereigns—and its interpretation could have severe consequences for the United States' diplomatic relations—it should take account of this special role of the Executive. A court should hesitate to "aggrandiz[e] its power at the expense of another branch," particularly where that other branch is the Executive as the leading representative of the United States in the world.[151]

If the FSIA had clearly authorized courts to exercise contempt power, then *Zivotofsky II* may well have no bearing: Congress's decision to maintain the courts' usual compliance powers, despite any potential negative foreign relations consequences, is not obviously unconstitutional. However, in the face of considerable ambiguity, and particularly because courts are interpreting the scope of their own authority, courts should take account of the extent to which a broad interpretation of judicial power in this regard could harm the President's ability to conduct foreign relations on behalf of the nation.

B. Traditional Judicial Deference to the Executive in Foreign Affairs

Although the "sole organ" doctrine is generally invoked for interpretive questions relating to the scope of executive power relative to legislative power in foreign relations, courts do employ other doctrinal frameworks when analyzing the scope of their own power relative to executive power in foreign relations. That is, where Congress has not spoken, certain foreign relations doctrines—the political question doctrine, the *Charming Betsy* ca-

150. *See, e.g.*, Af-Cap Brief, *supra* note 87, at 20 ("[E]ven if the order is unenforceable, it would likely be viewed by the foreign state as a suggestion of purposeful wrongdoing, and could offend the dignity of the foreign State.") (citation omitted); *In re* Papandreou, 139 F.3d 247, 251 (D.C. Cir. 1998) (contempt order against high-level Greek officials "offends diplomatic niceties even if it is ultimately set aside on appeal"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432 (1964) (questions "involving the probability of affront to another state could seriously interfere with negotiations being carried on by the [e]xecutive [b]ranch and might prevent or render less favorable the terms of an agreement that could otherwise be reached").

151. *Zivotofsky II*, 135 S. Ct. at 2090.

non, and the Act of State doctrine—guide courts in deciding cases related to the interests of foreign sovereigns or their citizens.[152]

The archetype of judicial deference to the political branches is the "political question" doctrine. Prior to *Baker v. Carr*, courts gave absolute deference to the political branches—and particularly to the executive branch—on many foreign affairs issues, including whether a foreign sovereign was still party to a treaty; U.S. recognition of foreign sovereigns; the status of conflict between foreign sovereigns; and territorial boundaries of the United States and of other foreign sovereigns.[153] In 1962, the Supreme Court abandoned the categorical approach in favor of a case-by-case test to determine whether an issue was a nonjusticiable question or not.[154] The Court held that:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[155]

In application, this test has produced many "political questions" in the field of foreign relations, where courts have effectively deferred to the Executive.[156]

Even where the political question doctrine does not apply, courts commonly defer to the views of the Executive in cases perceived as implicating foreign affairs.[157] Moreover, even where judicial doctrines in the field of for-

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152. Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1178 (2007); *see also* Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005) (noting that the Court has a "customary policy of deference to the President in matters of foreign affairs").

153. BRADLEY & GOLDSMITH, *supra* note 125, at 66–67.

154. Baker v. Carr, 369 U.S. 186, 217 (1962).

155. *Id.*

156. Posner & Sunstein, *supra* note 152, at 1201. *See, e.g.*, Goldwater v. Carr, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (addressing treaty termination); Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir. 2000) (addressing the War Powers Resolution); Schneider v. Kissinger, 412 F.3d 190, 193 (D.C. Cir. 2005) (dismissing on political question grounds a lawsuit concerning Henry Kissinger's authorization of CIA intervention in Chile).

157. *See, e.g.*, Mingtai Fire & Marine Ins. Co. v. United Parcel Serv., 177 F.3d 1142 (9th Cir. 1999) (on question whether Taiwan was bound to terms of the Warsaw Convention, the position of the Executive was "entitled to substantive deference in light of the 'primacy of the Executive in the conduct of foreign relations' and the executive branch's lead role in foreign policy"); Mora v. New York, 524 F.3d 183, 204 (2d Cir. 2008) ("We place 'great weight' on the interpretation of a treaty by the Executive of our federal government."). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE

eign affairs do not expressly or unequivocally defer to the Executive, a desire to promote comity motivates most of the judicial doctrines related to foreign affairs. Comity, the Supreme Court has stated,

> is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other . . . . [I]t 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.[158]

Comity can take the form of judicial deference to foreign legal proceedings or foreign laws, as well as abstention from deciding on an issue when alternative international efforts are being undertaken "to resolve issues related to the litigation."[159] When faced with ambiguity, courts have invoked the comity rationale to abstain from ruling in a manner that might create foreign affairs problems for the United States, including through contravention of an international norm or process.

For example, the *Charming Betsy* canon "provides that an ambiguous statute will be interpreted to avoid conflicts with international law."[160] This canon can help to determine the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe.[161] Though Congress clearly has constitutional authority to exceed those customary international law limits on jurisdiction, the courts presume Congress has not (unless it has clearly stated such an intention).[162] Similarly, the presumption against extraterritoriality reflects the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[163]

UNITED STATES § 112 cmt. c (1987) ("Courts give particular weight to the position taken by the United States Government on questions of international law because it is deemed desirable that so far as possible the United States speak with one voice on such matters.").

158. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

159. BRADLEY & GOLDSMITH, *supra* note 125, at 118.

160. Posner & Sunstein, *supra* note 152, at 1179. *See also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

161. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401–16 (1987).

162. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting). *See also* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. . . . This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow.") (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403(1)–(2) (1987)).

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

These doctrines generally reflect judicial deference to comity concerns. On one interpretation, comity as a value reflects a concern that courts will cause foreign relations problems inadvertently by becoming "entangled" in foreign affairs, including by applying U.S. laws extraterritorially and thereby interfering with a foreign sovereign's ability to regulate activity on its own soil.[164] This likely reflects the understanding that where rights of foreign sovereigns or foreign citizens are concerned, the political branches are the appropriate actors to make the kind of foreign policy judgments that may be relevant, while taking into account broader American foreign policy interests that may be in play. Even where courts do not expressly cite comity as a motivating factor, they will often defer to the Executive on matters involving foreign affairs. As described earlier, prior to the enactment of the FSIA, courts would defer to the conclusion of the Executive as to whether foreign sovereign immunity precluded suit.[165] Even where the State Department did not take a position on a particular case, courts would parse prior State Department opinions to reach a decision that aligned with executive jurisprudence.[166]

Today, courts still defer to the Executive on questions of immunity in other contexts, including diplomatic immunity. If the State Department communicates to a U.S. court that an individual is or is not a diplomatic agent, that certification binds the court.[167] The State Department maintains a Diplomatic List containing the names of all diplomatic officers and their spouses, as well as a list of all other diplomatic personnel.[168] These lists constitute presumptive evidence that a person enjoys diplomatic status, but the State Department's actual communication to the court ultimately binds.[169] Similarly, courts will often defer, or at minimum give weight to,

164. Posner & Sunstein, *supra* note 152, at 1184. *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[T]he (Judicial Branch) will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.").

165. *See supra* Part I.A.

166. *See supra* Part I.A.; *see also* Posner & Sunstein, *supra* note 152, at 1200; Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983).

167. Restatement (Third) of Foreign Relations Law of the United States § 464 reporters' note 1 (1987). *See also In re* Baiz, 135 U.S. 403, 432 (1890) (holding that courts are entitled to rely on State Department determination as to defendant's diplomatic status); United States of Mexico v. Schmuck, 294 N.Y. 265, 266 (1945); Carrera v. Carrera, 174 F.2d 496, 497 (D.C. Cir. 1949); Arcaya v. Paez, 145 F.Supp. 464, 467 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 958 (2d Cir. 1957); United States v. Coplon, 84 F.Supp. 472, 475 (S.D.N.Y. 1949).

168. Restatement (Third) of Foreign Relations Law of the United States § 464 reporters' notes 1 (1987).

169. *Id.*; *see also* Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004) (deferring to the Executive's recognition of the President of China's immunity); United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997) (deferring to the Executive's denial of immunity to former leader of Panama), Trost v. Tompkins, 44 A.2d 226 (D.C. 1945) (immunity denied despite inclusion on White List). *Cf.* United States v. Dizdar, 581 F.2d 1031 (2d Cir. 1978) (proof of entry on State Department roster not essential to support finding that representative to the United Nations was foreign official "duly notified" to United States).

the judgment of the Executive in application of the Act of State doctrine.[170] Under the Act of State doctrine, U.S. courts will decline to rule on an issue if that ruling would require them to declare illegal the acts of a foreign sovereign on their own territory, and courts will often invite comment from the State Department.[171]

Like judicial deference to the Executive relative to the Legislature (as in the *Curtiss-Wright* and *Youngstown* line of cases), functional considerations largely motivate judicial deference to the Executive in foreign relations cases.[172] The nation must speak with "one voice" in its foreign policy;[173] and the Executive has specialized expertise to determine whether certain actions will offend a foreign sovereign such that it could jeopardize cooperation that would in turn harm U.S. interests.[174] Thus, reasoning used by the courts to justify deference to the Executive relative to Congress similarly justifies judicial deference to the Executive in foreign affairs.

Of course, in the context of the FSIA, Congress may use its lawmaking power to amend the law and, for example, explicitly allow courts to use their inherent contempt power against foreign sovereigns. That is, the potential for internal conflict among the political branches remains. However, even if the political branches fight this battle, and the nation is not speaking with "one voice," the debate takes place among the political branches, which have the constitutional authority to make policy in this respect. Whether the view of the Executive would ultimately prevail over the view of Congress should not affect whether the view of the Executive should prevail over the view of the judiciary. For this reason, the Court's application of the "sole organ" doctrine in *Zivotofsky II* should inform its approach to deciding whether the FSIA permits U.S. courts to hold foreign states in contempt and to enforce contempt sanctions against them.

C. The Role of Judicial Restraint

Even if the Supreme Court—erroneously—endorses the use of contempt orders against foreign sovereigns, district courts may nevertheless exercise discretion in declining to issue them. As Adam DiClemente has persuasively argued, civil contempt sanctions against foreign sovereigns are nearly per se unenforceable, which strips them of the coercive and compensatory features that make them valuable to the judicial system in the first place:[175]

170. Posner & Sunstein, *supra* note 152, at 1201. *See* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972) (plurality opinion) (rejecting blanket deference to the Executive, but suggesting that the Executive's views are entitled to weight).

171. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 398 (1964).

172. Posner & Sunstein, *supra* note 152, at 1202.

173. American Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–14 (2003).

174. Posner & Sunstein, *supra* note 152, at 1205.

175. DiClemente, *supra* note 28, at 203.

> [Unenforceability] reduces a contempt order from a tool that protects the administration of justice to a statement of disapproval concerning the conduct of a foreign sovereign . . . . [S]tripped of coercive or compensatory force, what remains is a quasi-punitive order and public statement, issued by the judiciary, that a foreign sovereign's behavior and conduct is improper and offensive to the United States judicial system.[176]

This result runs counter to the Supreme Court's reasoning in *Zivotofsky II*, that while Congress may have power to enact passport legislation of wide scope, it may not enact passport legislation that effectively requires the President to contradict an earlier recognition determination.[177]

When a court issues contempt sanctions against a foreign sovereign, it does not, of course, require the President to contradict U.S. policy against that sovereign expressly. Nevertheless, the Constitution charges the political branches with enacting and executing foreign policy, and under the various sanctions-related legislation, the President enforces sanctions against foreign sovereigns. Therefore, this exercise of judicial authority impinges on the President's power to speak with "one voice" as to which states in the international system are at odds with the United States. Put otherwise, the President—and sometimes Congress—declares which countries are in conflict with the United States. When U.S. courts issue contempt sanctions against foreign sovereigns with whom the President has decided the United States is *not* in conflict, the United States as a whole sends mixed messages, potentially causing diplomatic tension where the national interest calls for the opposite. The State Department has regularly argued that such contempt orders, or concomitant sanctions, are "likely to be viewed as a significant affront to the dignity and sovereignty of the foreign state."[178] They have the potential to interfere with the United States' current and future diplomatic relations, and courts should refrain from issuing them.

Indeed, prior to the enactment of the FSIA, and prior to the Tate Letter (marking U.S. adoption of the restrictive theory of sovereign immunity), U.S. courts considered it their duty to resolve questions about foreign sovereign immunity in accordance with the Executive's preference.[179] In a 1945 case concerning the immunity of a Mexican steamship, the Supreme Court noted that:

> [I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. "In such cases the judicial department of this

176. *Id.*
177. *Zivotofsky II*, 135 S. Ct. at 2080 (quoting Freytag v. Commissioner, 501 U.S. 868, 878 (1991)).
178. Af-Cap Brief, *supra* note 87, at 4.
179. Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

> government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."[180]

Thus, although an interpretation of the FSIA that allows for the imposition of contempt orders may not expressly infringe on exclusive presidential power, such an interpretation carries the strong possibility of embarrassing the Executive in its conduct of foreign affairs. In the face of ambiguous statutory text, deference to the primacy of the Executive in foreign relations should carry the day.

III. Non-Constitutional Considerations

This Part addresses additional practical reasons why courts should avoid the use of contempt sanctions against foreign states, regardless of whether they are required to do so according to the Constitution's distribution of foreign affairs powers.

A. Reciprocity

The use of contempt orders and sanctions against foreign states—in addition to the use of injunctions, or the issuance of broad discovery orders in aid of postjudgment execution—could, in the opinion of the U.S. government, "lead to reciprocal adverse treatment of the United States in foreign courts."[181] For example, the U.S. government has a strong interest in not having foreign courts serve as a clearinghouse of information regarding the location of U.S. assets worldwide, such that plaintiffs could seek attachment or execution on those assets. Of course, this may not happen given that different jurisdictions have different rules governing discovery.[182] Nevertheless, some foreign states, as a matter of policy, make decisions on sovereign immunity based on reciprocal treatment—that is, their courts would grant the United States only the same treatment that they would receive in U.S. courts.[183]

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180. *Id.* at 35 (citing United States v. Lee, 106 U.S. 196, 209 (1882); *Ex parte* Republic of Peru, 318 U.S. 588 (1943)).

181. Brief for the United States as Amicus Curiae in Support of Petitioner at 20, Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) (No. 12-842); *see also* Adriana T. Ingenito & Christina G. Hioureas, *Carving Out New Exceptions to Sovereign Immunity: Why the* NML Capital *Cases May Harm U.S. Interests Abroad*, 30 Md. J. Int'l. L. 118, 130 (2015).

182. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, S.D. Iowa, 482 U.S. 522, 542 (1987) (noting that "the scope of American discovery is often significantly broader than is permitted in other jurisdictions").

183. *See* Persinger v. Islamic Republic of Iran, 729 F.2d 835, 841 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 881 (1984) ("[S]ince some foreign states base their sovereign immunity decisions on reciprocity, or parity of reasoning, it is possible that a decision to exercise jurisdiction in this case would subject the United States to suits abroad for torts committed on the premises of embassies located here.") (internal citations omitted); *cf.* Hilton v. Guyot, 159 U.S. 113, 210 (1895) (declining to "give conclusive effect to

For these reasons, U.S. courts have, in the past, applied the concept of reciprocity to guide their decision making. For example, in a case discussing whether the protection of foreign diplomatic officials justified an otherwise unconstitutional restriction on free speech, the Supreme Court noted that the protection of foreign diplomats is "grounded in our Nation's important interest in international relations," at least in part because it "ensures that similar protections will be accorded [to] those that we send abroad to represent the United States."[184] In the sovereign debt context, the United States has a clear interest in preventing *pari passu* clauses from being interpreted—and enforced—the way Judge Griesa did in the Argentine case. Economic experts, in the wake of that decision, cautioned that such an injunctive order could cause "unnecessary economic damage to the international financial system, as well as to U.S. economic interests, Argentina, and fifteen years of U.S. bi-partisan debt relief policy."[185] Thus, whether a decision will have a negative reciprocal effect on the U.S. government abroad, or more generally on U.S. interests in the world, can and should be considered by courts in making decisions in cases that involve foreign affairs.

Separately, the Supreme Court's approach to interpreting the FSIA against foreign sovereigns differs substantially from how most courts analyze the sovereign immunity of the U.S. federal government in U.S. courts. While the Supreme Court has not ruled on the question whether courts can issue or enforce contempt sanctions against the U.S. government, most courts that have been presented with the question have concluded that they cannot, unless the United States has waived sovereign immunity specifically for such a sanction.[186]

As a general matter, the doctrine of sovereign immunity bars suits against the federal government unless Congress has waived the government's immunity.[187] However, when interpreting the scope of waiver of sovereign immunity—such as under the Tucker Act for contract claims or the Federal Tort Claims Act for tort claims—most courts construe it narrowly. The Eighth Circuit has rejected the imposition of contempt sanctions against the federal

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the judgments of the courts of France . . . [because of] the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries").

184. Boos v. Barry, 485 U.S. 312, 323 (1988). While the Court ultimately found that the relevant regulation *was* an unconstitutional content-based restriction on political speech, the reciprocity concerns remain relevant: presumably, the U.S. government would be willing to tolerate a marginally lower degree of safety abroad for its diplomats if the price were a more free local society.

185. Press Release, Ctr. Econ. & Pol'y Res., Economists Call on Congress to Mitigate Fallout from Ruling on Argentine Debt (July 31, 2014), http://www.cepr.net/press-center/press-releases/economists-call-on-congress-to-mitigate-fallout-from-ruling-on-argentine-debt.

186. United States v. Droganes, 728 F.3d 580, 590 (6th Cir. 2013) *cert. denied*, 134 S. Ct. 2287 (2014) (Most circuits faced with the argument that a court's inherent authority to sanctions trumps the government's sovereign immunity "have suggested that the government's sovereign immunity wins when it comes head-to-head with a lower court's inherent authority.") (internal citations omitted).

187. John Lobato & Jeffrey Theodore, *Federal Sovereign Immunity* (Harvard Law Sch. Fed. Budget Pol'y Seminar, Briefing Paper No. 21); *see also* United States v. Lee, 106 U.S. 196 (1882); Alden v. Maine, 527 U.S. 706 (1999); Hans v. Louisiana, 134 U.S. 1 (1890).

government where there was no "express waiver of sovereign immunity," even though the underlying suit did not present a conflict with federal sovereign immunity.[188] Similarly, the Sixth Circuit has denied the imposition of sanctions against the U.S. government absent an "unequivocal expression [of waiver] in statutory text," noting that "such a waiver will not arise by implication, nor by incident of a 'statute's legislative history.'"[189] The court held that 18 U.S.C. § 401, the statute conferring broad contempt power upon district courts, is not "sufficiently clear and unequivocal" to allow contempt sanctions against the federal government, and that the district court's "inherent authority to sanction" similarly did not trump the government's sovereign immunity.[190]

Thus, while most courts—including the Supreme Court in *NML Capital*—have presumed that the normal rules of litigation apply to foreign sovereigns unless clearly stated otherwise, most courts have presumed the opposite for the U.S. government: sovereign immunity applies unless clearly stated otherwise. The application of a more deferential sovereign immunity standard to the U.S. government than to foreign sovereigns suggests that the U.S. legal regime is more favorable to plaintiffs seeking to vindicate their rights against foreign sovereigns than it is to plaintiffs seeking to vindicate their rights against the U.S. federal government.

A general trend of plaintiff-friendly precedent as against foreign sovereigns may raise concern about how foreign courts would treat the United States abroad.[191] And this concern about reciprocity may be exacerbated if it becomes clear that U.S. courts are not even applying similar baseline presumptions about sovereign immunity to foreign sovereigns that they do to the United States. This is especially so because U.S. courts' approach to sovereign immunity toward the U.S. federal government reflects what should be the approach under the FSIA: the default, or presumptive, rule is immunity, and exceptions to that immunity should be clear, or read narrowly in the face of ambiguity. Basic notions of fairness suggest that courts should apply similar interpretive presumptions when interpreting similar statutes, including those relating to the scope of U.S. and foreign sovereign immunity. Thus, while disparate treatment of foreign sovereigns in U.S. courts does not by itself indicate that foreign courts will reciprocate with adverse disparate treatment of the United States, it should heighten concerns that this would occur. Foreign judiciaries might respond by applying

188. McBride v. Coleman, 955 F.2d 571, 576 (8th Cir. 1992) ("It does strike us as being a dubious proposition that by filing a contempt motion a claimant can be positioned to recover an unlimited amount of compensatory damages from the United States without being bound by the strictures of either the Tucker Act or the Federal Tort Claims Act, which are express (but carefully limited) waivers by the United States of its sovereign immunity with respect to contract and tort claims. Absent an express waiver of sovereign immunity, money awards cannot be imposed against the United States.").

189. *Droganes*, 728 F.3d at 589.

190. *Id.* at 589–90.

191. *See generally* Ingenito & Hioureas, *supra* note 181.

different jurisdictional rules to the United States, by refusing to enforce U.S. court judgments, or by treating adversely U.S. citizens seeking to vindicate their rights in local courts.

B. International Law

Mentioned earlier, the *Charming Betsy* canon provides that courts will interpret an ambiguous statute to avoid conflicts with international law.[192] Though Congress has the constitutional authority to pass laws that violate the law of nations, courts will not lightly presume Congress to have done so. Thus, absent evidence of Congress's clear intent to legislate in a manner that contravenes international law, courts will interpret statutes in a manner that does not do so.[193]

On the question of contempt sanctions, the FSIA is ambiguous. The term "contempt" does not appear in the text of the statute,[194] and it appears only once in the House Report accompanying the final bill, in the context of explaining the limits of a court's enforcement power.[195] The Act clearly does not bar a judicial contempt order against a foreign sovereign,[196] but it also does not contemplate the scenario.

On the second question—whether the issuance of contempt orders or sanctions against a foreign sovereign violates the law of nations—the answer is less clear. While the European Convention on State Immunity and the U.N. Convention on Jurisdictional Immunities of States and Their Property prohibit sanctions against foreign sovereigns' conduct in judicial proceedings, neither of these treaties binds the United States.[197] The United States has argued that these rules reflect "current international norms and practices

192. Posner & Sunstein, *supra* note 152, at 1179. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

193. *See supra* note 162.

194. DiClemente, *supra* note 28, at 196 n.105.

195. H.R. Rep. No. 94-1487, at 22 (1976) ("Consistent with [section 1606], a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction.").

196. FG Hemisphere Associates, LLC v. Dem. Rep. Congo, 637 F.3d 377, 378 (D.C. Cir. 2011).

197. The European Convention on State Immunity bars a court from imposing monetary sanctions on a foreign state for refusal "to comply with a court order to produce evidence (contempt of court)." *See* European Convention on State Immunity, Explanatory Rep., Point 70, ETS No. 074 (entered into force June 11, 1976). A court faced with a foreign state's noncompliance may only exercise such remedies involving "whatever discretion [the court] may have under its own law to draw the appropriate conclusions from a State's failure or refusal to comply." *See id.* Under the U.N. Convention on Jurisdictional Immunities of States and Their Property, "[a]ny failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act . . . shall entail no consequence other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal." *See* U.N. Convention on Jurisdictional Immunities of States and Their Properties art. 24(1), G.A. Res. 59/38, annex, U.N. Doc. A/5949, at 9–10 (2004). *See also* Af-Cap Brief, *supra* note 87, at 14.

regarding foreign state immunity,"[198] although it has not gone so far as to argue that these rules rise to the level of customary international law.[199] Regardless, some scholars have suggested that "immunity from enforcement jurisdiction remains largely absolute," and "a foreign State continues largely immune from forcible measures of execution against its person or property."[200]

At a minimum, the use of contempt sanctions against foreign states contravenes the approach to foreign sovereign immunity even in Western states that have long accepted the restrictive theory of sovereign immunity. For example, the FSIA-equivalent in Canada provides that "[n]o penalty or fine may be imposed by a court against a foreign state" for failure to comply with court orders, and that states are wholly immune from "any injunction, specific performance or the recovery of land or other property."[201] Similarly, the United Kingdom State Immunity Act states that a foreign state may not be penalized with monetary sanctions for its failure to disclose or produce any document or other information to the court.[202] Singapore and Pakistan have immunity provisions essentially identical to those of Canada and the United Kingdom,[203] and Australian law provides that "[a] penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court."[204] Thus, international practice strongly disfavors the imposition of contempt sanctions against foreign sovereigns.

Moreover, regardless of whether the international law sufficiently establishes the rule, it is not clear that courts need only invoke the *Charming Betsy* rationale if customary international law unambiguously accepts the norm in question. Comity concerns could argue in favor of a prudential application of the *Charming Betsy* canon, even where there is some uncertainty as to whether the international law norm embodies customary international law.[205]

198. Af-Cap Brief, *supra* note 87, at 15–16.

199. Customary international law consists of general and consistent state practice that stems from a sense of legal obligation. Statute of the International Court of Justice art. 38(1), 1945 I.C.J. Stat. 1060.

200. Hazel Fox, *International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States, in* INTERNATIONAL LAW 364, 366, 371 (MALCOLM EVANS, ED., 2003); *see* Af-Cap Brief, *supra* note 87, at 12.

201. State Immunity Act, R.S.C. 2012, c.1, § 12(1) (Can.).

202. State Immunity Act 1978, c.33, § 13, (U.K.); *see generally* Af-Cap Brief, *supra* note 87, at 21–24.

203. *See* State Immunity Act, 2014, § 15 (Sing.) ("No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party."); State Immunity Ordinance 1981, § 14 (Pak.) ("No penalty by way of committal to prison or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or information for the purposes of proceedings to which it is a party.").

204. *Foreign States Immunities Act 1985*, s 34 (Austl.).

205. *See also supra* Part II.B.

Thus, while the status of the international law rule disfavoring specifically the use of contempt against foreign sovereigns is unclear, it is equally unclear that Congress intended to grant courts this broad—and potentially disruptive—power under the terms of the FSIA. In his signing statement from October 22, 1976, President Ford described the FSIA as "continu[ing] the longstanding commitment of the United States to seek a stable international order under the law" and "carr[ying] forward a modern and enlightened trend in international law" by "mak[ing] it easier for [U.S.] citizens and foreign governments to turn to the courts to resolve ordinary legal disputes."[206] The legislative history confirms that the purpose of the Act was to "facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation"[207] and that the statutory regime was intended to "incorporate[ ] standards recognized under international law."[208] In later congressional testimony in 1987, a Deputy Legal Adviser at the State Department noted expressly that while the FSIA does not "explicitly preclud[e] a court from imposing a fine on a foreign state . . . [for] failure to comply with a court order," the statute's legislative history makes clear that sanctions of this sort are not permitted, a position that "is consistent with state practice" internationally.[209]

In addition, the basic presumption underlying sovereign immunity—that the sovereignty of a state creates immunity unless an exception to immunity applies or the state waives immunity—suggests that U.S. courts' approach to interpreting the FSIA is inappropriate. This basic framework reflects the historical evolution of sovereign immunity. Historically, customary international law favored absolute immunity, and the transition over the past century or so has been from absolute to restrictive immunity.[210] Thus, that the international norm reflects a move from broader immunity to more limited immunity suggests that an overzealous application of limited immunity rules will more likely contravene international custom than a more state-friendly interpretation.

Moreover, the structure of the FSIA—in which sovereign immunity is the default, and the statute puts forth the only valid exceptions to that pre-

206. President Gerald Ford, *Statement on Signing the Foreign Sovereign Immunities Act of 1976* (Oct. 22, 1976), http://www.presidency.ucsb.edu/ws/?pid=6506.

207. H.R. Rep. 94-1487, at 45 (1976).

208. S. Rep. 94-1310, at 14 (1976).

209. *Foreign Sovereign Immunities Act of 1987: Hearing on H.R. 1149, H.R. 1689, and H.R. 1888, Before the Subcomm. on Admin. Law & Gov't Relations of the H. Comm. on the Judiciary*, 100th Cong. 36 (1987) (statement of Elizabeth Verville, Deputy Legal Adviser, Dep't of State); *see* Brief of the United States as Amicus Curiae in support of Defendant-Appellant, Belize Telecom, Ltd. v. Gov't of Belize (11th Cir. 2008), http://www.state.gov/s/l/2005/87217.htm (never filed because the court denied the government's motion for leave to file this amicus brief).

210. Seema Bono et al., *Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries*, 8 (Mayer Brown, White Paper, 2012) https://m.mayerbrown.com/Files/Publication/2e0f7077-9b25-430e-8b70-6a8f8c1a9d76/Presentation/PublicationAttachment/1be4c54c-bfc2-4d78-9403-85e37c560f43/12270.PDF.

sumptive immunity—reflects this conceptual framework.[211] In an earlier case similar to the *NML Capital* cases, the Seventh Circuit refused to endorse a general discovery order aimed at obtaining information about Iran's worldwide assets precisely because it would "turn th[e] presumptive immunity [of Iran's assets] on its head."[212] The court emphasized that under the FSIA the foreign sovereign's property is "cloak[ed]" with a "presumption of immunity . . . unless an exception applies."[213]

Because Congress explicitly intended the FSIA to *incorporate*, not reject, international law standards of sovereign immunity, courts should hesitate to interpret the Act in a manner that will contravene accepted international norms, even if these norms do not rise to the level of customary international law or treaty-based obligations.[214] While the Supreme Court's decision in *NML Capital*, and in particular its endorsement of injunctive relief against Argentina, suggests little concern for this distinction, the unique nature of contempt—a quasi-criminal civil sanction—as well as the strong recognition of the special role of the executive branch in foreign affairs, argues in favor of changing course.

C. The Comparative Advantage of the Executive

As a practical matter, courts may serve plaintiffs better by exercising restraint when interpreting the scope of their authority under the FSIA, as the Executive is often better equipped to resolve matters involving foreign states favorably to plaintiffs.

The FSIA cannot guarantee recovery for plaintiffs seeking to vindicate their rights in U.S. courts against foreign sovereigns. Under the existing statute, even if a defendant state has voluntarily waived immunity, it can evade compliance with court judgments and orders, making it extremely difficult or virtually impossible for a judgment creditor to enforce a judgment. Normally, when a party to a suit in U.S. courts behaves in such a manner, a court can issue and enforce contempt sanctions aimed at inducing compliance. However, under the FSIA a court has no power to enforce contempt sanctions, so this sanctioning tool represents little more than the court's disapproval of the state's actions.

In order to bypass the fact that courts can issue a contempt sanction in the form of a monetary fine, but not enforce it through execution, a court may seek to impose non-monetary sanctions when it finds a foreign sovereign in

211. *See supra* Part I.B.

212. Rubin v. The Islamic Republic of Iran, 637 F.3d 783, 796 (7th Cir. 2011).

213. *Id.* at 799.

214. *See, e.g.*, Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1294–95 (11th Cir. 1999) ("We may look to international law as a guide to the meaning of the FSIA's provisions. We find the FSIA particularly amenable to interpretation in light of the law of nations for two reasons. First, Congress intended international law to inform the courts in their reading of the statute's provisions. . . . Second, the FSIA's purposes included 'promot[ing] harmonious international relations . . . .'").

civil contempt. Of course, a court by itself likely has no authority to do so. Under Article III of the Constitution, courts have no enumerated foreign affairs powers nor any of the plenary powers vested in the political branches of government.[215] Almost all non-monetary economic sanctions enforced by the U.S. government against foreign sovereigns are legally authorized by three statutes: the Trading with the Enemy Act, the U.N. Participation Act, and the International Emergency Economic Powers Act, all of which authorize the President to exercise her authority in the imposition of economic sanctions against foreign states.[216]

The most obvious and straightforward solution to this dilemma would be for Congress to amend section 1610 of the FSIA to create explicit exceptions to immunity from attachment or execution of a foreign sovereign's property in the United States for the purposes of enforcing not only a judgment, but also accrued sanctions. This would create the conditions under which a court could, in theory, enforce monetary contempt sanctions, which could strengthen their deterrent effect and incentivize compliance with court proceedings, as they are intended to do. Of course, because many foreign states do not hold a lot of executable assets in the United States, execution would still be unlikely as a practical matter. And even if a plaintiff could collect on contempt sanctions, that would not necessarily make collecting on a judgment any easier.

Moreover, even where Congress has, in the past, legislated in order to help plaintiffs collect on judgments against foreign states, the results have been mixed at best. As the experiences of countless litigants who have brought claims under the state-sponsored terrorism exception of the FSIA demonstrate, the aid of the executive branch provides the best way—but one still far from guaranteed—to collect on judgments against foreign sovereigns.

In 1996, as part of the Antiterrorism and Effective Death Penalty Act, Congress added to the FSIA a new exception to sovereign immunity: the state sponsor of terrorism exception.[217] Enforcement of judgments against foreign states under this exception remained difficult, in part because states like Iran did not have much (if any) property used for commercial activity in the United States that could be subject to execution.[218] Furthermore, in cases in which the federal government had control over the limited Iranian assets that remained in the United States, plaintiffs' efforts to enforce judgments via writs of execution were quashed by the executive branch.[219] Following more than a decade of disagreement among Congress, the courts, and

215. Royce C. Lamberth, *The Role of Courts in Foreign Affairs, in* FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 3, 19 (JOHN NORTON MOORE ED., 2013).

216. *See generally* Michael P. Malloy, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE 143–204 (2001).

217. Lamberth, *supra* note 215, at 4. *See* 28 U.S.C. § 1605(a)(7) (2000) (amended 2008).

218. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 52–53 (D.D.C. 2009).

219. *Id.* at 53.

the Executive as to the scope of the state sponsor of terrorism exception,[220] in 2008, Congress passed a series of major reforms that created the new section 1605A state-sponsored terrorism exception.[221] Congress designed the new exception to clarify and strengthen the legal rights of U.S. victims of terrorism in U.S. courts: it created a federal cause of action against foreign states; made punitive damages available in those actions; authorized compensation for special masters; and implemented new measures designed to facilitate the enforcement of judgments.[222] One noteworthy change allowed a judgment to be enforced against any property "titled in the name of any defendant, or titled in the name of any entity controlled by any defendant," thereby broadening the scope of liability to cover state-owned enterprises, in addition to the state proper.[223]

Nevertheless, despite Congress' concerted action to make the FSIA work for U.S. victims of state-sponsored terrorism, successful recovery on civil judgments under this exception has most often occurred through the involvement of the executive branch. In 2000, Congress passed (and President Clinton signed) the Victims of Trafficking and Violence Protection Act of 2000, which required the U.S. Treasury to pay more than $213 million in compensatory damages in a limited number of FSIA terrorism cases against Iran or Cuba.[224] In 2008, after the U.S. District Court for the District of Columbia awarded a $6 billion judgment against Libya in connection with the 1989 bombing of UTA Flight 772, the U.S. government negotiated with the Libyan government to settle all the claims for $1.5 billion.[225] In 2012, President Obama signed into law section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, which stripped the immunity previously provided under the FSIA from assets of the Iranian Central Bank in the United States, thus allowing judgment creditors to trace and execute on those assets.[226]

The example of the state sponsor of terrorism exception helps to confirm what may seem obvious by now: as a practical matter, the Executive has a much wider set of options available to sanction a foreign state, and it will almost invariably more successfully negotiate with a foreign state than will courts. This underlies, at least in part, the justification for a strong presiden-

220. For a thorough history of the FSIA's state sponsor of terrorism exception, see *id.*

221. National Defense Appropriations Act for Fiscal Year 2008 ("2008 NDAA"), Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338–44 (2008) (codified at 28 U.S.C. § 1605A) (cited in Lamberth, *supra* note 215, at 8).

222. In re *Islamic Republic of Iran*, 659 F. Supp. 2d at 59–62.

223. Steven R. Perles & Edward B. MacAllister, *Policy Options for the Obama Administration: Enforcement Provisions of the Foreign Sovereign Immunities Act as a Tool Against State Sponsors of Terrorism*, *in* FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 21, 37 (JOHN NORTON MOORE ED., 2013) (QUOTING FROM 28 U.S.C. § 1605(G)(1)).

224. In re *Islamic Republic of Iran*, 659 F. Supp. 2d at 57 (referring to Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 2002(a) (2000)).

225. Perles & MacAllister, *supra* note 222, at 37–38.

226. *Id.* at 44.

tial power to settle international claims. For example, after World War II, President Truman settled U.S. citizens' claims against Yugoslavia for expropriated property, totaling $17 million.[227] When, in the late 1990s, it was revealed that U.S. banks had confiscated bank accounts of Holocaust victims, provoking a global movement for mass restitution, the Clinton Administration was instrumental in negotiating settlements for the victims.[228] While the federal court system successfully established some of the settlement funds, the U.S. diplomat responsible for negotiating those settlements later claimed that the Executive would have better resolved them through diplomatic means.[229]

Moreover, as a normative matter, the executive branch has shown itself willing to exercise its foreign relations powers to attempt to secure payment for U.S. citizens, and not only in cases arising under the state sponsor of terrorism exception of the FSIA. In March 2012, President Obama suspended Argentina from the U.S. Generalized System of Preferences ("GSP") program, a trade benefits program that waives import duties on thousands of goods for developing countries.[230] Obama took this step precisely because Argentina refused to pay judgment creditors in two separate arbitration awards totaling over $300 million, representing the first time a U.S. President has removed a country from eligibility for GSP benefits for nonpayment of arbitral awards.[231] Then-U.S. Trade Representative Ron Kirk made a public statement urging the government of Argentina to pay the awards, and expressly conditioning the reinstatement of GSP benefits on that payment.[232] In addition, U.S. representatives began voting against loans to Argentina in the World Bank and the Inter-American Development Bank.[233]

In practice, judgment creditors of recalcitrant foreign sovereigns will likely be better off seeking Executive espousal of claims rather than trying to execute on foreign sovereign assets in the United States. While this does not necessarily require that the Executive decide *whether* a foreign sovereign is in contempt, the capacity to enforce a sanction is often relevant to the decision of whether to issue that sanction.[234] Moreover, the issuance of the contempt order itself may well be the root of the foreign affairs problem.[235] That is,

227. Adam S. Zimmerman, *Presidential Settlements*, 163 U. PENN. L. REV. 1393, 1436 (2015).

228. *Id.* at 1427–28.

229. *Id.* at 1428.

230. Doug Palmer, *Obama Says to Suspend Trade Benefits for Argentina*, REUTERS (MAR. 26, 2012), HTTP://WWW.REUTERS.COM/ARTICLE/2012/03/26/US-USA-ARGENTINA-TRADE-IDUSBRE82P0QX20120326.

231. Stephen Johnson & Meredith Broadbent, *Trade Preferences – Argentina Suspended*, Ctr. for Strategic and Int'l Stud.: Americas Program Blog (Mar. 28, 2012), http://csis.org/blog/trade-preferences-argentina-suspended.

232. Tom Barkley & Ken Parks, *U.S. Cuts Trade Preferences to Argentina*, WALL ST. J. (MAR. 26, 2012), HTTP://WWW.WSJ.COM/ARTICLES/SB10001424052702304177104577305652479085184.

233. Johnson & Broadbent, *supra* note 231.

234. DiClemente, *supra* note 28, at 206.

235. *See, e.g.*, *In re* Paparendreou, 139 F.3d 247, 251 (D.C. Cir. 1998) (stating that a contempt order against Greek officials "offends diplomatic niceties even if it is ultimately set aside on appeal").

even if the Executive declined to enforce the sanction, alternative executive branch remedies or plans for recovery may have already been undermined. For these reasons, courts should not hesitate to read their statutory grant of authority narrowly, particularly when doing so may better serve the plaintiffs' interests that they are seeking to validate.

Conclusion

The imposition of contempt sanctions against foreign sovereigns in U.S. courts is a highly controversial matter: it arguably contravenes international law principles regarding the equal sovereignty of all states, and it has the potential to affect adversely the President's conduct of foreign relations. Based only on its reading of the FSIA in the *NML Capital* litigation, the Supreme Court likely would conclude that the FSIA does not restrict a court's authority to hold a foreign sovereign in civil contempt of court. Nevertheless, under the same reading of the FSIA, a court will likely have no authority to enforce any contempt sanctions that it may issue.

This reading of the FSIA flouts basic constitutional principles regarding the role of the Executive as the "sole organ" of the United States in the conduct of foreign relations. The Court should instead apply the reasoning of *Zivotofsky II* to conclude that, in the face of ambiguous congressional intent, the FSIA should not be read to allow a broad contempt power that threatens the ability of the President to speak with "one voice" in the field of foreign affairs. In the meantime, lower courts should exercise judicial restraint and avoid the imposition of contempt sanctions against foreign sovereigns in light of the potential interference with the Executive's exercise of its unique, plenary power in the field of foreign affairs.

As a practical matter, the issuance of contempt sanctions against foreign sovereigns has done little to nothing to change plaintiffs' ability to recover. There is also no reason to believe that eliminating contempt sanctions would somehow empower recalcitrant foreign sovereigns in U.S. courts. Absent judicial sanctions, the United States can still impose extra-judicial costs on such countries while maintaining legitimacy in the international legal community, not least by treating foreign sovereigns in its courts more similarly to how U.S. courts treat the United States.

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