

Implications of the Argentina Debt Litigation for Foreign Sovereign Immunity

Foreign sovereigns have long assumed that the Foreign Sovereign Immunities Act (FSIA) provides them with substantial protection against litigants in United States courts. Although the immunity afforded by the FSIA has never been absolute, two recent developments in the Supreme Court of the United States – both involving the Republic of Argentina – have expanded plaintiffs' ability to locate sovereign assets and force satisfaction of a judgment, notwithstanding the seemingly broad protections of the FSIA.

The rulings are important for sovereign investors for a number of reasons:

- By declining to accept review of a significant decision by the Second Circuit Court of Appeals in New York, the Supreme Court effectively upheld injunctions against a foreign sovereign's agents in the United States in order to achieve ends that might not have been directly achievable against the sovereign itself.
- The Supreme Court upheld the lower court's broad discovery orders permitting private litigants to conduct discovery into a foreign sovereign's assets – including assets that would be immune from attachment or execution under the FSIA.
- Both rulings run counter to positions taken by the U.S. Justice Department on behalf of the U.S. State Department during the proceedings.
- Both rulings suggest a willingness on the part of the U.S. federal courts to interpret the protections of foreign sovereigns under the FSIA narrowly, to the benefit of private litigants.

Background. After defaulting on its sovereign debt in 2001, Argentina offered investors new exchange bonds with modified terms in 2005 and 2010 restructurings. NML Capital Ltd. (NML), a hedge fund affiliated with Paul Singer's Elliott Management Corp., rejected the exchange and instead pursued multiple actions in the U.S. District Court for the Southern District of New York to enforce the original bonds. The original bonds contained a *pari passu*, or "equal treatment," provision that NML argued protected the original bondholders from subordination. The district court agreed and prohibited Argentina from paying the exchange bondholders unless it paid the original bondholders. The district court also enjoined the U.S. banks serving as Argentina's paying agents on the exchange bonds from making payments inconsistent with the court's ruling. After seeking clarification regarding the contours of the district court's ruling, the U.S. Court of Appeals for the Second Circuit upheld the injunctions. Separately, the district court allowed discovery of Argentina's assets, including immune assets, to aid collection of the judgment.

Developments in the Supreme Court. Argentina petitioned the Supreme Court to review the injunctions, arguing, among other things, that they amounted to an indirect "attachment arrest and execution" of sovereign assets in violation of the FSIA and that the decision ran afoul of the FSIA by "coerc[ing] a foreign sovereign into satisfying a money debt with immune assets." Given the high stakes for Argentina's economy, as well as the comity and reciprocity concerns raised by the Second Circuit's FSIA ruling, the high court was expected to give serious consideration to the case. However, on June 16, 2014, the Supreme Court denied Argentina's petition for review without explanation, and without asking for the views of the State Department, paving the way for potential default by Argentina at the end of July.

On the same day, in a related case, the Supreme Court upheld the broad discovery orders that allowed NML to issue subpoenas to third-party banks believed to hold Argentinian assets, in an effort to locate and attach those assets in satisfaction of judgment. Argentina argued that the FSIA, which curtails the circumstances

under which foreign sovereign assets can be seized or attached by U.S. courts, also limited discovery regarding such assets, independent of any general limits on discovery in aid of execution. In a 7-1 decision, the Supreme Court held that the FSIA lacks any provision providing a foreign sovereign unique immunity from post-judgment discovery of information concerning assets held outside the United States.

Why these cases are important. First, although the Supreme Court may have been influenced by Argentina's public statements indicating an intention to flout the U.S. legal system, the first ruling has broad implications because the injunctions apply to banks and other intermediaries through which Argentina would otherwise make payments to the exchange bondholders. The injunctions make it difficult, if not impossible, for Argentina to pay the exchange bondholders unless it pays NML, and so have the effect of compelling Argentina to pay the NML judgment with assets that are otherwise immune from execution under the FSIA. By permitting the injunctions to serve as an end run around the FSIA's execution immunities, the Supreme Court has curtailed the options available to foreign sovereigns that conduct significant business through the U.S. financial system in responding to judgments from the U.S. courts.

Second, the rulings suggest that U.S. courts will afford limited deference to the federal executive in interpreting the proper scope of the FSIA, even in cases that raise significant economic and foreign policy concerns. The U.S. Justice Department took the unusual step of filing an *amicus* brief in the Second Circuit urging that court to rehear its decision to uphold the injunctions – yet the government's effort proved unsuccessful. Subsequently, the Supreme Court declined to invite the U.S. Solicitor General's views regarding the injunctions case. The U.S. Solicitor General also filed an *amicus* brief in the third-party discovery case before the Supreme Court, but the Justices ruled against the government's position. The cases thus demonstrate the federal executive's limited ability to ensure broad protections for foreign sovereigns under the FSIA, even where important foreign policy issues are implicated.

Third, the rulings suggest an increased willingness on the part of the U.S. federal courts to interpret the FSIA narrowly and for the benefit of private litigants, despite the possible adverse effects of the rulings on sovereign defendants. The ruling in the third-party discovery case, for example, could pit a foreign sovereign's disclosure obligations under U.S. law against its domestic non-disclosure requirements. That issue was recently presented to the Supreme Court in a petition for review in *Arab Bank v. Linde*, which the Supreme Court declined to review.

The ultimate impact of the third-party discovery ruling may be limited. In that case, the Supreme Court confronted only a "single, narrow question" regarding the scope of the FSIA in discovery actions; the high court acknowledged other potential limitations on post-judgment discovery against foreign states – separate from the FSIA – including "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted." Foreign sovereigns now may be forced to rely on the discretion of individual district court judges – a far cry from the clarity in these matters foreign sovereigns thought the FSIA afforded.

For more information regarding the recent Supreme Court rulings and their implications for foreign sovereign immunity, please contact [Douglas Hallward-Driemeier](#), leader of Ropes & Gray's [Appellate and Supreme Court](#) practice and a Partner in the firm's Washington D.C. office, and [Timothy Diggins](#), co-head of Ropes & Gray's [Sovereign Investment Group](#).