Asset Discovery Against Foreign Sovereigns After *NML*

By Robert K. Kry

In litigation against foreign sovereigns, a final judgment is often not so much the finish line as a mere waypoint. If the sovereign refuses to pay voluntarily, the plaintiff's options for collection are sharply limited by the Foreign Sovereign Immunities Act, which provides a broad immunity from attachment to most sovereign property. To locate assets that fall within one of the Act's exceptions, judgment creditors often seek discovery from the sovereign or third parties about potentially attachable assets. But those efforts themselves have provoked controversy, as foreign sovereigns have objected on immunity grounds.

In its recent decision in *Republic of Argentina v. NML Capital, Ltd.*,[1] the Supreme Court weighed in on that issue, rejecting Argentina's attempt to avoid asset discovery sought by holders of its defaulted sovereign debt. *NML* provides potent new tools to plaintiffs seeking to collect judgments from foreign sovereigns – tools that are potent not merely because they produce information but also because of the burdens they impose. Nonetheless, while cutting back on sovereign immunity, the Court was careful to preserve other sources of law as potential shields. Going forward, judgment creditors and sovereigns will both need to understand those other rules in litigating discovery disputes.

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Asset Discovery Under the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act[2] provides two distinct forms of immunity. First, it provides jurisdictional immunity to foreign states and their instrumentalities.[3] That immunity is subject to a number of exceptions – for example, where the sovereign has waived immunity or engaged in certain commercial activities.[4] Second, the Act grants sovereign property immunity from attachment or execution.[5] That immunity is likewise subject to exceptions, but they are generally narrower than the ones that apply to jurisdictional immunity.[6] For example, while a waiver of immunity alone suffices to confer jurisdiction over a sovereign, the Act limits attachment and execution to assets "used for a commercial activity in the United States" even where the sovereign has purported to waive its property's immunity more broadly.[7]

All courts agree that a sovereign's jurisdictional immunity sharply limits discovery.[8] Enforcement of a discovery order against a sovereign necessarily entails an exercise of the court's jurisdiction over it. And although limited discovery may be appropriate to determine whether an exception to immunity applies, courts permit such discovery "circumspectly and only to verify allegations of specific facts crucial to an immunity determination."[9]

In the asset discovery context, however, jurisdictional immunity typically is not at issue. Asset discovery usually comes into play only after the plaintiff has obtained a judgment, in which case the court that entered judgment ordinarily will already have determined that the sovereign is subject to its jurisdiction.[10] In such cases, sovereigns have turned to the separate immunity from execution and attachment that the Foreign Sovereign Immunities Act affords to sovereign property.

Courts confronting that issue took two divergent views. In *Rubin v. Islamic Republic of Iran*,[11] the Seventh Circuit considered the issue in a case involving victims of terrorism who had obtained judgments against Iran under the Act's terrorism exception.[12] After the plaintiffs sought to execute their judgments against ancient Persian artifacts in American museums, Iran was forced to intervene to assert the property's immunity. The plaintiffs then sought general asset discovery against Iran, seeking information about all its property in the United States.

The Seventh Circuit refused to permit that discovery. As a general matter, it reasoned, the Foreign Sovereign Immunities Act aims to protect sovereigns from "the burdens of litigation, including the cost and aggravation of discovery."[13] Sovereign property in the United States is presumptively immune, and the exceptions are even narrower than those that apply to jurisdictional immunity. Accordingly, just as jurisdictional discovery must be ordered circumspectly, asset discovery had to proceed "in a manner that respects the statutory presumption of immunity and focuses on the specific property alleged to be exempt."[14] The practical upshot of that ruling was to foreclose blanket discovery demands inquiring into all of a sovereign's property and instead allow discovery only to verify claims that some specific property was attachable.

The Second Circuit took the opposite view in *EM Ltd. v. Republic of Argentina*, the case that later produced the Supreme Court's decision in *NML*.[15] That case arose out of Argentina's massive default on its external government debt in 2001. Hedge funds that had acquired the defaulted bonds obtained judgments against Argentina based on waivers of immunity in the bond indentures. They then sought discovery about Argentina's bank accounts and transaction history from third-party banks. Unlike the discovery in *Rubin*, the requests in *EM Ltd.* were not limited to U.S. property but instead sought discovery into Argentina's assets worldwide – on the theory that, even if a U.S. court could not attach the assets, the plaintiffs could later seek to execute against the assets in foreign courts.[16]

The Second Circuit upheld the discovery demands. Unlike the Seventh Circuit, it viewed asset discovery as implicating only a sovereign's immunity from jurisdiction, not sovereign property's immunity from execution and attachment. Because the bond indenture waivers authorized jurisdiction over Argentina, the court reasoned, a court could "exercise its judicial power over Argentina as over any other party," including by ordering discovery.[17] Although the plaintiff would have to overcome attachment immunity before ultimately seizing any property, it did not have to surmount that hurdle simply to receive information about Argentina's assets.[18]

Republic of Argentina v. NML Capital

Given the circuit conflict, the Supreme Court granted certiorari to review the Second Circuit's *EM Ltd.* decision in *Republic of Argentina v. NML Capital, Ltd.*[19] In a 7-1 decision authored by Justice Scalia, the Court affirmed.

The Court began by observing that Federal Rules of Civil Procedure (FRCP) Rule 69(a)(2) permits broad discovery in post-judgment collection proceedings.[20] The parties disputed whether that rule authorized discovery even into extraterritorial assets that the court ordering discovery could not ultimately attach. But the Supreme Court declined to resolve that dispute as beyond the scope of the question presented, instead assuming that such discovery was available as a general matter and focusing only on whether it would violate sovereign immunity.[21]

Turning to that issue, the Court emphasized the comprehensive nature of the Foreign Sovereign Immunities Act. "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."[22] And while the Act provided express immunities from jurisdiction and execution, "[t]here is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets."[23] "Far from containing the 'plain statement' necessary to preclude application of federal discovery rules, the Act says not a word on the subject."[24]

Argentina urged that, prior to the Act, a foreign state's property was absolutely immune from both execution and

discovery, and that Congress lowered that bar only partially by permitting execution against narrow categories of assets in the United States.[25] But the Court observed that the Act provides *immunity* only to property "in the United States."[26] Thus, even if there were some basis for inferring discovery immunity from execution immunity, that would not shield Argentina's *foreign* assets from discovery.

Even as to property that was potentially immune from execution, the Court found Argentina's arguments unavailing. "[T]he reason for these subpoenas is that NML *does not yet know* what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law."[27] And although subpoenas might be unenforceable if they sought discovery that could not possibly even lead to attachable assets, the reason would not be some "penumbral 'discovery immunity' under the Act" but rather the general requirement of relevance that governs all asset discovery.[28]

The U.S. government expressed grave concerns about the rule the Court ultimately endorsed. Broad discovery requests, it warned, threatened foreign states' sovereignty, undermining international comity and inviting retaliation.[29] In the Court's view, however, those concerns were better directed to Congress.[30]

Despite the sweeping language of its opinion, the Court was careful to note the decision's limited scope. "[W]e have no reason to doubt," it stated, that "'other sources of law' ordinarily will bear on the propriety of discovery requests of this nature and scope."[31] Those "other sources of law" include both "settled doctrines of privilege" as well as "the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state."[32]

"Other Sources of Law" After *NML*

By sharply restricting the role of sovereign immunity, the Court significantly altered the landscape for asset discovery disputes. But by reaffirming the availability of "other sources of law" to restrict discovery, the Court made clear that its decision merely shifted the terrain for such disputes. Counsel representing both judgment creditors and sovereigns must fully understand those alternative doctrines to appreciate how the Court's decision will play out.

Other Immunities

NML by its terms addresses only the Foreign Sovereign Immunities Act. That limitation is important because asset discovery may implicate other immunities, many of which present stronger grounds for claiming immunity from discovery.

For example, *NML* does not address diplomatic immunity under the Vienna Convention. Unlike the Foreign Sovereign Immunities Act, the Vienna Convention expressly addresses discovery, providing that "archives and documents of the mission shall be inviolable at any time and wherever they may be," and that diplomats and their administrative staff may not be compelled to testify.[33] Although one district court nonetheless invoked *NML*-style reasoning to allow discovery into diplomatic assets,[34] its decision was short-lived. The Second Circuit stayed the ruling, finding "the applicability of *EM* to discovery claimed to be barred by the [Vienna Convention] to be of sufficient substance, and to raise issues of sufficient foreign relations sensitivity, to warrant a stay."[35]

Nor does the Supreme Court's decision in *NML* address common-law immunities, such as those applicable to heads of state and other foreign officials.[36] Discovery that implicates those immunities will still face hurdles. The Act's legislative history, for example, states that "if a plaintiff sought to depose . . . a high-ranking official of a foreign government, . . . official immunity would apply."[37] Given the Court's heavy reliance on statutory text in *NML*, courts will likely feel more free to imply restrictions on discovery from common-law immunities, whose scope is not bounded by particular statutory language.

Governmental Privileges

NML expressly mentioned "settled doctrines of privilege" among the "other sources of law" that survived its decision.[38] Congress clearly did not intend to displace such privileges by enacting the Foreign Sovereign Immunities Act. The Act's legislative history makes clear that "if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply."[39] And a footnote attached to that sentence reads "e.g. 5 U.S.C. 552 concerning public information" – a reference to the federal Freedom of Information Act.[40]

Courts have recognized a number of privileges in litigation against the U.S. government. The government may withhold sensitive national security information under the "state secrets" privilege.[41] Executive privilege shields presidential and other high-level communications (although unfortunately for President Nixon, not absolutely).[42] More mundane privileges such as the "deliberative process" privilege cover internal agency working papers.[43]

Any privilege that the U.S. government may invoke in domestic litigation would seem to be fair game for a foreign sovereign as well. The legislative history's specific reference to the Freedom of Information Act suggests that courts will be receptive to such claims.[44] That statute sets forth a number of exemptions from disclosure.[45] By citing it, Congress appears to have envisioned that foreign governments could withhold information on similar grounds.

Foreign Prohibitions on Disclosure

Wholly apart from privileges under U.S. law, foreign sovereigns may also invoke their own laws to shield information from discovery. In that case, a court would apply comity principles to resolve the conflict between the foreign disclosure restriction and the U.S. discovery rules. The Supreme Court addressed such conflicts (somewhat obliquely) in *Société Nationale Industrielle Aerospatiale v. U.S. District Court*,[46] a case that *NML* cited in its "other sources

of law" discussion.[47] *Société Nationale* identified five factors a court should balance:

> (1) the importance to the . . . litigation of the documents or other information requested;
> (2) the degree of specificity of the request;
> (3) whether the information originated in the United States;
> (4) the availability of alternative means of securing the information; and
> (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[48]

Those comity factors apply to discovery disputes involving foreign parties generally.[49] But they are particularly relevant to sovereigns. A sovereign's own documents and information are especially likely to implicate restrictions on disclosure under foreign law. And courts have been more sensitive to the interests underlying government secrecy than they have to other confidentiality restrictions such as bank secrecy laws and so-called "blocking statutes."[50] Thus, even where information would not be privileged under U.S. law, foreign sovereigns may seek to invoke their own laws to shield the information from discovery.

Discretionary Control

Finally, *NML* recognized that district courts have discretionary authority to tailor discovery, and that a court's exercise of discretion "may appropriately consider comity interests and the burden that the discovery might cause to the foreign state."[51] District courts have "broad discretion to limit discovery in a prudential and proportionate way."[52]

Those principles, applicable to all discovery, carry special force when the target is a foreign sovereign. Like any exercise of a court's coercive authority, discovery has the potential to disrupt foreign relations when directed against a sovereign. Even if Congress has not found those concerns compelling enough to warrant statutory immunity from discovery, courts may still consider them when exercising their discretion under the federal rules.

American-style discovery is often significantly broader than the procedures available in other jurisdictions; many countries descend from a civil-law legal tradition where discovery is essentially unheard of.[53] According to the *Restatement*, "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."[54] Those basic differences in legal culture – present in any dispute across national borders – are all the more pronounced when the opponent is the sovereign itself.

Asset discovery against foreign sovereigns also implicates practical concerns. Sovereigns are generally large bureaucracies whose records are strewn across many agencies and subdivisions. Particularly in the developing world, they lag behind private corporations in their technology and organizational infrastructure, making responses to discovery demands more difficult. Meanwhile, asset discovery is uniquely far-reaching, as it is not tied to a discrete claim or event the way pretrial discovery theoretically is. Courts will consider those sorts of factors when exercising their discretionary control.

Finally, even if attachment immunity does not imply immunity from asset discovery, it is still relevant to how a district court exercises its discretionary control. The Second Circuit emphasized a court's discretion to "limit discovery where the plaintiff ha[s] not demonstrated any likelihood that the discovery it s[eeks] relate[s] to attachable assets."[55] Even after *NML*, therefore, courts can consider the scope of potential attachment immunity in deciding whether particular asset discovery is warranted. For example, if a plaintiff sought discovery into assets located in a foreign country that accorded absolute attachment immunity to sovereign property, the sovereign would have a strong basis for opposing the discovery on the ground that it was not reasonably calculated to lead to attachable assets. Immunity will thus continue to figure prominently in asset discovery disputes, even if playing a different role.

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The Future of Asset Discovery Against Foreign Sovereigns

While *NML* leaves sovereigns with several tools to oppose discovery, it significantly alters the legal landscape for post-judgment enforcement proceedings. Plaintiffs and sovereigns must adapt their litigation strategies in light of the decision.

For plaintiffs seeking to execute a judgment, the decision offers important opportunities. The district court in *NML* offered to act as a "clearinghouse for information" in global collection efforts without any prior showing of "attachability" – a powerful tool in post-judgment collection proceedings.[56] Worldwide asset discovery not only offers a major new source of information for plaintiffs but also raises the costs of opposing collection efforts, precisely because it is so burdensome and intrusive.

As was true before *NML*, discovery directed at third parties will often prove more fruitful than discovery against the sovereign itself. A sovereign that has already refused to pay a judgment might or might not comply with asset discovery orders (depending in part, perhaps, on whether its refusal to pay reflects some legitimate ground for disputing the judgment or a more general contempt for the rendering jurisdiction's authority). By contrast, third-party banks and other

intermediaries subject to the court's jurisdiction have more to lose from noncompliance.

From the sovereign's perspective, the "other sources of law" that *NML* left on the table may provide only partial relief. Asset discovery is both burdensome and intrusive, and *NML*'s "other sources of law" do more to alleviate the intrusiveness than the burden. Even where a sovereign can assert privilege over sensitive documents, it may still have to shoulder the burden of locating them, reviewing them, and identifying them on a privilege log.

NML will also increase legal uncertainty by committing more decisions to the district court's discretion. Some questions invite bright-line answers. For example, the Supreme Court reserved judgment over whether Rule 69 permits discovery into extraterritorial assets at all.[57] Sovereigns will rely on that reservation to argue that district courts categorically lack discretion to order extraterritorial asset discovery.

For the most part, however, the federal rules assign decisions over the scope of discovery to the district court's discretion.[58] The five-factor comity test governing conflicts with foreign law is particularly subjective and open-ended.[59] By shifting the analysis from bright-line immunity rules to discretionary determinations by the district court, the Supreme Court's decision will increase not only the amount of discovery but the frequency of discovery disputes, as parties have less guidance over how much discovery a court will ultimately permit.

A related effect is to shift decision-making authority from courts of appeals to district courts. Discretionary rulings are by definition reviewed only for abuse of discretion, and thus are more likely to be affirmed on appeal. In many cases, moreover, appellate review may be denied or significantly delayed. Denials of immunity are immediately appealable under the collateral order doctrine.[60] But the appealability of privilege rulings is less clear. In *Mohawk Industries, Inc. v. Carpenter*,[61] the Supreme Court refused to allow immediate appeals from attorney-client privilege rulings. In a footnote, the Court declined to express a view on whether "certain governmental privileges" should be treated differently.[62] Sovereigns will rely on that footnote in seeking to appeal adverse privilege rulings, but it remains to be seen whether courts will be as receptive to those appeals as they were to immunity rulings.

At the end of its decision, the Supreme Court all but invited Congress to intervene.[63] Congress may ultimately do so, particularly if the Court's ruling ends up producing a foreign relations debacle. While it is too much to say the Court declared open season on asset discovery against foreign sovereigns, it dramatically changed the rules of the game. ■

1. 134 S. Ct. 2250 (June 16, 2014).
2. 28 U.S.C. §§ 1602 *et seq.*
3. 28 U.S.C. § 1604.
4. 28 U.S.C. § 1605.
5. 28 U.S.C. § 1609.
6. 28 U.S.C. § 1610.
7. *Compare* 28 U.S.C. § 1605(a)(1) *with* 28 U.S.C. § 1610(a)(1).
8. *See, e.g.*, *First City, Texas–Houston N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992).
9. *Arriba*, 962 F.2d at 534.
10. *See, e.g.*, *NML*, 134 S. Ct. at 2256 (noting that jurisdictional immunity "is of no help to Argentina here" because "[a] foreign state may waive jurisdictional immunity, and in this case Argentina did so" (citation omitted)).
11. 637 F.3d 783 (7th Cir. 2011).
12. Former 28 U.S.C. § 1605(a)(7), amended and recodified at 28 U.S.C. § 1605A.
13. 637 F.3d at 795.
14. *Id.* at 796.
15. 695 F.3d 201 (2d Cir. 2012), *aff'd sub nom. Republic of Arg. v. NML Capital, Ltd.*, No. 12-842 (June 16, 2014).
16. *Id.* at 203–04.
17. *Id.* at 209.
18. *Id.*
19. 134 S. Ct. 2250 (June 16, 2014).
20. *Id.* at 2254 (citing FRCP 69(a)(2)).
21. *Id.* at 2255.
22. *Id.* at 2256.
23. *Id.*
24. *Id.* (citation omitted).
25. *Id.* at 2257.
26. 28 U.S.C. § 1609.
27. *NML*, 134 S. Ct. at 2257.
28. *Id.*
29. *Id.* at 2258.
30. *Id.*
31. *Id.* at n.6.
32. *Id.* (quotation marks omitted).
33. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 24, 31.2, 37.2, 23 U.S.T. 3227, 3238, 3241, 3244.
34. *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 924 F. Supp. 2d 508, 526 (S.D.N.Y. 2013) (emphasis omitted).
35. *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, No. 13-495, Dkt. 247 at 2 (2d Cir. May 28, 2013). The appeal was subsequently withdrawn without prejudice to reinstatement by stipulation of the parties, subject to the condition that the stay of diplomatic discovery would remain in effect. *See* Dkt. 321 at 3 (Nov. 4, 2013); Dkt. 328 (Nov. 7, 2013).
36. *See Samantar v. Yousuf*, 560 U.S. 305, 312 & n.6, 324–26 (2010) (recognizing foreign official immunity and holding that it is governed by common law principles rather than the Foreign Sovereign Immunities Act); *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) (head of state immunity).
37. H.R. Rep. No. 94-1487, at 23 (1976).
38. *NML*, 134 S. Ct. at 2258 n.6 (quotation marks omitted).
39. H.R. Rep. No. 94-1487, at 23.
40. *Id.* at 23 n.11.
41. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1 (1953); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010).
42. *See United States v. Nixon*, 418 U.S. 683, 703–16 (1974).
43. *See, e.g.*, *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 4 (D.C. Cir. 2014) (privilege "allows an agency to withhold 'all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be'").
44. H.R. Rep. No. 94-1487, at 23, n.2 (1976).
45. 5 U.S.C. § 552(b)(1)–(9).
46. 482 U.S. 522 (1987).
47. *NML*, 134 S. Ct. at 2258 n.6 (citing *Société Nationale*, 482 U.S. at 543–44 & n.28).
48. *Société Nationale*, 482 U.S. at 544 n.28 (quoting factors now appearing at Restatement (Third) of the Foreign Relations Law of the United States § 442(1)(c) (1987)).
49. *See, e.g.*, *Linde v. Arab Bank, PLC*, 706 F.3d 92, 109–10 (2d Cir. 2013).
50. *See Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 556 (S.D.N.Y. 2012) ("Ordering the production of the non-public regulatory documents of a foreign government may infringe the sovereignty of the foreign state and violate principles of international comity to a far greater extent than the ordered production of private account information in contravention of foreign bank secrecy laws . . . .").
51. *NML*, 134 S. Ct. at 2258 n.6 (quotation marks omitted).
52. *EM Ltd.*, 695 F.3d at 207 (citing FRCP 26(b)(2)).
53. *See Société Nationale*, 482 U.S. at 542; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261–62 n.12 (2004).
54. Restatement (Third) of the Foreign Relations Law of the United States § 442 n.1 (1987).
55. *EM Ltd.*, 695 F.3d at 209.
56. *NML*, 134 S. Ct. at 2254.
57. *Id.* at 2254–55.
58. *Id.* at 2254.
59. *See Société Nationale*, 482 U.S. at 544, n.28.
60. *See Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 789–90 (7th Cir. 2011); *FG Hemisphere Assocs. v. République du Congo*, 455 F.3d 575, 584 (5th Cir. 2006).
61. 558 U.S. 100 (2009).
62. *Id.* at 113 n.4.
63. *NML*, 134 S. Ct. at 2258.