
*Foreign Sovereign Immunities Act of 1976 —
Postjudgment Discovery — Republic of Argentina v. NML Capital, Ltd.*

The Foreign Sovereign Immunities Act of 1976¹ (FSIA) immunizes foreign state property in the United States from attachment in U.S. courts,² except in the case of certain assets “used for a commercial activity in the United States.”³ Last term, in *Republic of Argentina v. NML Capital, Ltd.*,⁴ the Supreme Court held that the FSIA does not also restrict the discovery of a foreign state’s extraterritorial assets in aid of postjudgment attachment.⁵ *NML* is consistent with the Roberts Court’s generally formalistic approach to statutory interpretation in foreign relations law cases. However, in some recent cases the Roberts Court has considered the potential international consequences of its rulings. By contrast, the *NML* Court refused to consider such consequences, suggesting that its reasoning was not simply a reflection of recent trends in the Court’s jurisprudence, but also owed much to the particular nature, text, and history of the FSIA.

In December 2001, the Argentine government, facing economic collapse, ceased paying its external debt.⁶ NML Capital, Ltd. (NML), a holder of Argentine bonds, filed suit in the Southern District of New York to collect on its bonds.⁷ Since 2003, the district court has ruled in favor of NML in several actions involving claims totaling more than \$2.5 billion.⁸ Argentina has refused to comply with the court’s rulings and instead has transferred significant assets out of the United States to avoid attachment in U.S. courts.⁹ NML in response has launched an extraordinary effort to attach Argentine assets both in the United States and around the world through lawsuits in U.S. and foreign courts respectively.¹⁰ These attempts have even included the dramatic

¹ Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

² 28 U.S.C. § 1609 (2012).

³ *Id.* § 1610(a).

⁴ 134 S. Ct. 2250 (2014).

⁵ *See id.* at 2256–57.

⁶ *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 (2d Cir. 2007).

⁷ *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 203 (2d Cir. 2012). U.S. courts had jurisdiction over Argentina in this matter because of Argentina’s waiver of sovereign immunity in its bond agreements. *Id.*

⁸ *Id.* The Second Circuit affirmed the district court’s ruling that Argentina was in breach of its debt agreement with NML, *see NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 250 (2d Cir. 2012), and the Supreme Court denied certiorari on that issue on the same day that it released the decision in *NML*, *see Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014).

⁹ *See NML Capital, Ltd. v. Banco Central de la República Arg.*, 652 F.3d 172, 178 (2d Cir. 2011). U.S. courts generally lack the authority to attach assets located outside the United States. *NML*, 134 S. Ct. at 2257.

¹⁰ *See EM*, 695 F.3d at 203.

temporary seizure of an Argentine naval vessel in Ghana and failed plans to seize Argentina's presidential plane.¹¹ In 2010, NML served subpoenas on Bank of America (BOA) and Banco de la Nación Argentina (BNA), asking for information on assets or accounts owned by Argentina without any territorial limitation.¹²

Argentina and both banks filed objections to the subpoenas with the district court.¹³ The district court ultimately compelled compliance with the subpoenas; while it approved the subpoenas "in principle," it expected the parties to limit discovery to those assets "reasonably calculated to lead to attachable property."¹⁴ After the subpoenas were narrowed, BOA, but not BNA, began complying.¹⁵ The district court subsequently issued a second order requiring BNA to comply.¹⁶ Argentina appealed the court's first order to the Second Circuit, arguing that it violated the FSIA.¹⁷

The Second Circuit affirmed the order.¹⁸ Writing for the panel, Judge Walker¹⁹ held that the order did not infringe upon Argentina's sovereign immunity.²⁰ The court first established its jurisdiction to review Argentina's appeal.²¹ Then, noting that "the district court's power to order discovery . . . does not derive from its ultimate ability to attach the property in question," the court considered whether the FSIA overrode ordinary federal procedural rules, which it viewed as authorizing extraterritorial discovery.²² It ultimately determined that the FSIA did not provide for immunity against discovery orders.²³ The panel also emphasized that the subpoenas were not directed against Argentina itself but against commercial banks, which could not assert immunity.²⁴

¹¹ See H.C., *Argentina and Its Creditors: A Languid Tango*, ECONOMIST: AMERICAS VIEW (Jan. 16, 2013, 3:14 PM), <http://www.economist.com/blogs/americasview/2013/01/argentina-and-its-creditors> [<http://perma.cc/Y6JK-52XP>]. A similar attempt in U.S. courts involved a suit aimed at attaching funds of Argentina's central bank held with the Federal Reserve. See *NML*, 652 F.3d at 178.

¹² *EM*, 695 F.3d at 203–04.

¹³ *Id.* at 204.

¹⁴ *Id.* at 204–05.

¹⁵ *Id.* at 205.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 210.

¹⁹ Judge Walker was joined by Judges McLaughlin and Cabranes.

²⁰ *EM*, 695 F.3d at 205.

²¹ See *id.* at 205–07. The court determined that under the collateral order doctrine, the sovereign immunity issue was distinguishable from questions surrounding the actual attachment of the assets and the discovery order represented the district court's final determination of the issue. See *id.* at 206.

²² *Id.* at 208.

²³ *Id.*

²⁴ *Id.* at 210.

The Supreme Court affirmed.²⁵ Writing for the Court, Justice Scalia²⁶ held that the FSIA does not immunize foreign sovereigns against discovery orders in postjudgment execution proceedings, and thus ordinary discovery rules apply.²⁷ Assuming without deciding that the discovery NML had requested was within the scope of discovery ordinarily authorized by federal procedural rules, the Court focused on the narrow question of “whether the Foreign Sovereign Immunities Act specifies a different rule when the judgment debtor is a foreign state.”²⁸

Before answering this question directly, the Court summarized the history of the U.S. sovereign immunity regime. For nearly two centuries, the Court deferred to sovereign immunity decisions made by the Executive on a case-by-case basis.²⁹ However, in 1952 the State Department changed its approach, endorsing the “‘restrictive’ theory of sovereign immunity,” which only immunizes “a foreign sovereign’s public, noncommercial acts.”³⁰ Under that doctrine, which the Court described as “thr[owing] immunity determinations into some disarray,”³¹ both courts and the Executive were involved in defining the scope of sovereign immunity.³² In 1976 the FSIA, which enacted the present sovereign immunity regime, “abated the bedlam”³³ by establishing a “comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.”³⁴ The comprehensive nature of the FSIA’s approach meant, the Court said, that questions of foreign sovereign immunity must be examined purely in light of the FSIA’s text.³⁵ As Justice Scalia stated, that text guaranteed, with specified exceptions, two forms of immunity to foreign

²⁵ *NML*, 134 S. Ct. at 2258.

²⁶ Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, Alito, and Kagan. Justice Sotomayor did not participate in the decision of the case.

²⁷ See *NML*, 134 S. Ct. at 2256–57; see also FED. R. CIV. P. 69(a)(2) (“In aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.”).

²⁸ *NML*, 134 S. Ct. at 2255. Argentina had claimed in its reply brief that Rule 69 discovery only applied to assets executable by U.S. courts, which would necessarily preclude the discovery of extraterritorial assets; the Court declined to “revive [this] forfeited argument” that was not raised by Argentina in its petition for certiorari. *Id.* at 2255 n.2.

²⁹ *Id.* at 2255.

³⁰ *Id.* (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983)).

³¹ *Id.* (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004)) (internal quotation marks omitted).

³² *Id.* Under the 1952 regime, the Executive sometimes ignored the limits of the “restrictive” theory and courts were involved in interpreting the meaning of that theory in cases where the Executive was silent. *Id.* (quoting *Verlinden*, 461 U.S. at 487).

³³ *Id.*

³⁴ *Id.* (quoting *Verlinden*, 461 U.S. at 488) (internal quotation marks omitted).

³⁵ *Id.* at 2256.

states: immunity from the jurisdiction of U.S. courts, which Argentina waived in its bond agreement, and immunity from attachment of assets in the United States.³⁶ There was, the Court emphasized, “no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor’s assets.”³⁷ Without a “plain statement” to the contrary, the Court held, the FSIA’s text should not be understood to preclude ordinary federal discovery rules.³⁸

The Court then considered and rejected Argentina’s argument that the FSIA impliedly limited discovery to only assets also subject to execution in U.S. courts. It did so for three reasons: First, the Court rejected Argentina’s historical argument. Argentina had argued that pre-FSIA, the assets of foreign states were entitled to absolute execution and discovery immunity.³⁹ The FSIA, Argentina asserted, only modified this immunity with respect to the limited exceptions to execution immunity codified in the Act, none of which apply to a foreign state’s extraterritorial assets.⁴⁰ Justice Scalia emphasized that Argentina failed to cite a single case supporting the existence of historical absolute execution immunity over a foreign state’s extraterritorial assets.⁴¹ Second, the Court stated that even if the FSIA’s grant of execution immunity “impliedly” coextensive discovery-in-aid-of-execution immunity,⁴² Argentina’s argument would still fail because the FSIA only granted execution immunity to assets “in the United States.”⁴³ Third, the Court stressed that “NML does not yet know what property Argentina has”⁴⁴ and the FSIA should not be understood to prohibit an order ultimately aimed at assisting NML in “identify[ing] where Argentina may be holding property that is subject to execution.”⁴⁵

Finally, the Court rejected the claim that Congress could not have intended to allow for “postjudgment discovery ‘clearinghouses’” for foreign states’ assets.⁴⁶ Justice Scalia did not consider relevant the assertion, made by both Argentina and the United States (in an amicus brief), that doing so would have “worrisome international-relations

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 2256–57 (quoting *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 539 (1987)) (internal quotation marks omitted).

³⁹ *See id.* at 2257.

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *Id.*

⁴³ *Id.* (quoting 28 U.S.C. § 1609 (2012)) (internal quotation marks omitted).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2258. The Court conceded that had the discovery order been specifically addressed to assets that definitively could not be attached in U.S. or foreign courts, the order would be unenforceable due to relevance concerns. *Id.* at 2257 (citing FED. R. CIV. P. 26(b)(1)).

⁴⁶ *Id.* at 2258.

consequences.”⁴⁷ The question of Congress’s purpose, along with the potential foreign relations consequences of such broad discovery orders, were, he argued, a “riddle not [the Court’s] to solve.”⁴⁸

Justice Ginsburg dissented. She found that a broader discovery inquiry “would not be ‘relevant to execution in the first place,’”⁴⁹ and would have limited the scope of discovery “to property used here or abroad ‘in connection with . . . commercial activities.’”⁵⁰ With respect to property in the United States, the FSIA bars the execution of non-commercial property.⁵¹ As for property outside the United States, Justice Ginsburg argued that unless NML could prove “that other nations would allow unconstrained access to Argentina’s assets,” U.S. courts should not “indulge the assumption that . . . the sky may be the limit for attaching a foreign sovereign’s property.”⁵²

The decision in *NML* represents the apotheosis of the Roberts Court’s formalist approach to matters of foreign relations law. The Roberts Court has marked its approach to foreign relations law matters with a focus on statutory text and the application of clear-cut and inflexible rules, as opposed to a functionalist understanding that emphasizes case-by-case analysis, statutory purpose, and the needs of the Executive Branch. Yet the Roberts Court’s relative formalism compared to its predecessors has not prevented it from sometimes addressing the potential foreign affairs consequences of its decisions. In *NML*, however, the Court chose to leave such policy concerns to the political branches. This seeming inconsistency is best explained by the Court’s view of the FSIA as establishing a *comprehensive* foreign sovereign immunity regime, which is informed by the FSIA’s history and text, and has often led the Court to interpret the FSIA in a more formalist mode than it interprets other foreign relations law statutes or provisions.

The *NML* Court’s formalist, text-focused analysis of the FSIA, executed with little deference to the Executive Branch, echoes the Court’s recent approach to other cases bearing on issues of foreign relations. The Roberts Court has overseen the normalization of foreign relations law,⁵³ moving away from the Supreme Court’s once largely flexible and functionalist approach.⁵⁴ For example, the Roberts Court has

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 2259 (Ginsburg, J., dissenting) (quoting *id.* at 2257 (majority opinion)) (internal quotation marks omitted).

⁵⁰ *Id.* (Ginsburg, J., dissenting) (alteration in original) (quoting 28 U.S.C. § 1602 (2012)).

⁵¹ *See id.*

⁵² *Id.*

⁵³ *See generally* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. (forthcoming May 2015).

⁵⁴ *See* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. (forthcoming 2015) (manuscript at 5–6), <http://ssrn.com/abstract>

used ordinary statutory canons in cases that touched upon issues of international law,⁵⁵ has restricted the use of the flexible and standard-based political question doctrine,⁵⁶ and has applied a similarly rigorous textual analysis to an international treaty as it would to an act of Congress.⁵⁷ Furthermore, the Roberts Court has shown little deference to the Executive in cases that implicate national security and foreign policy.⁵⁸ In that same vein, the Court in *NML* showed little deference to the position of the U.S. government⁵⁹ and situated the terms of the debate firmly within the four walls of the FSIA's text, rejecting an approach founded in the common law presumptive immunity of foreign states.⁶⁰

But in its treatment of the foreign policy concerns raised by Argentina and the United States, the Court in *NML* went even further with its formalist reasoning than it has done in these similar decisions. Despite its embrace of formalism, the Roberts Court has remained

=2412103 [http://perma.cc/5S8Y-K2AT] (“[I]n a string of decisions . . . the Roberts Court has jettisoned its traditional functionalism in favor of formalism.”). For examples of the Court's former functionalist approach, see *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (finding that an executive agreement preempts state law in part because of the principles “that animated the Constitution's allocation of the foreign relations power to the National Government”); and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431–32 (1964) (comparing the judicial and executive roles in foreign relations as part of the justification behind the act of state doctrine).

⁵⁵ See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2089–90 (2014) (applying the federalism canon of construction to a statute implementing the international Convention on Chemical Weapons); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) (applying the presumption against extraterritoriality to the Alien Tort Statute).

⁵⁶ See *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (holding that the political question doctrine did not apply to a case implicating the President's power to recognize foreign sovereigns).

⁵⁷ See *Medellin v. Texas*, 552 U.S. 491, 514 (2008) (endorsing the use of a “time-honored textual approach” to treaty interpretation as opposed to “a multifactor, judgment-by-judgment analysis”).

⁵⁸ See Cohen, *supra* note 54 (manuscript at 5). For example, the Court decided against the United States (as a party or an amicus) in three of the five cases last Term that arguably touch on matters of international or foreign relations law. See Andrew Pincus, *The Solicitor General's Report Card*, SCOTUSBLOG (July 2, 2014, 3:40 PM), <http://www.scotusblog.com/2014/07/the-solicitor-generals-report-card> [http://perma.cc/DE67-7CAS]. The five cases were *NML*, 134 S. Ct. 2250; *Bond*, 134 S. Ct. 2077; *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014); and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The Court rejected the U.S. position in the first three. In *Bond*, Justice Breyer showed clear skepticism toward the Solicitor General's argument that the case could have national security implications. See Transcript of Oral Argument at 40, *Bond*, 134 S. Ct. 2077 (No. 12-158), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-158_8m58.pdf [http://perma.cc/BQT8-U59C].

⁵⁹ See *NML*, 134 S. Ct. at 2258 (dismissing the U.S. government's objections in a single paragraph).

⁶⁰ Compare *id.* at 2257 (rejecting a common law approach to immunity in favor of the FSIA's more narrow protections), with *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 796 (7th Cir. 2011) (analyzing the FSIA in light of the common law presumption of sovereign immunity).

sensitive to the global impact of its rulings.⁶¹ In *NML*, the Court acknowledged the U.S. government's concern for the potentially "worrisome international-relations consequences" of expansive global discovery orders,⁶² emphasizing that district courts are free to exercise their discretion under law other than the FSIA and take into account "comity interests and the burden that the discovery might cause to the foreign state" when determining whether discovery is warranted in a particular case.⁶³ But the Court flatly refused to consider these policy concerns a second time as part of its statutory interpretation of the FSIA, instead referring the parties to the "branch of government with authority to amend the Act."⁶⁴

In contrast, the Roberts Court has taken similar foreign policy considerations more directly into account in two recent cases, *Kiobel v. Royal Dutch Petroleum Co.*⁶⁵ and *Daimler AG v. Bauman*.⁶⁶ In *Kiobel*, the Roberts Court applied the presumption against extraterritoriality to the Alien Tort Statute⁶⁷ (ATS), restricting the jurisdiction of U.S. courts over certain international law claims that lack a significant U.S. nexus.⁶⁸ As in *NML*, the Court chose not to completely defer to the position of the U.S. government.⁶⁹ However, the *Kiobel* Court was more willing to take note of the foreign policy implications of its ruling.⁷⁰ Notably, unlike in *NML* where it found that existing doctrines

⁶¹ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (taking into account the possibility of "harmful reciprocal treatment of American citizens abroad" when invalidating an Arizona immigration statute); see also Kenneth Anderson, *Readings: Through Our Glass Darkly: From 'Universal' to 'Extraterritorial'?*, LAWFARE (June 23, 2014, 8:00 PM), <http://www.lawfareblog.com/2014/06/readings-through-our-glass-darkly-from-universal-to-extraterritorial> [<http://perma.cc/ZWU7-M4VF>] (arguing that the Court has been "seeking to rein in the cross-border reach of US courts").

⁶² *NML*, 134 S. Ct. at 2258.

⁶³ *Id.* at 2258 n.6 (quoting Brief for Respondent at 25, *NML*, 134 S. Ct. 2250 (No. 12-842), 2014 WL 1260423, at *25) (internal quotation mark omitted).

⁶⁴ *Id.* at 2258. Justices Scalia and Breyer were similarly dismissive of these policy concerns in oral argument. See Transcript of Oral Argument at 11, 17-18, *NML*, 134 S. Ct. 2250 (No. 12-842), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-842_3c45.pdf [<http://perma.cc/63Z9-35TD>].

⁶⁵ 133 S. Ct. 1659 (2013).

⁶⁶ 134 S. Ct. 746 (2014). For a more detailed discussion of *Daimler*, see *The Supreme Court, 2013 Term — Leading Cases*, 128 HARV. L. REV. 311 (2014).

⁶⁷ 28 U.S.C. § 1350 (2012).

⁶⁸ See *Kiobel*, 133 S. Ct. at 1669.

⁶⁹ The government argued, in contrast to the Court, that the presumption against extraterritoriality does not directly apply to the creation of causes of action under the ATS. See Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 3, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2012 WL 2161290, at *3.

⁷⁰ See Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*, 107 AM. J. INT'L L. 852, 852 (2013) ("[F]oreign policy concerns' and the overarching goal to avoid diplomatic tensions with foreign sovereigns are themes heavily informing the Roberts opinion." (alteration in original) (quoting *Kiobel*, 133 S. Ct. at 1664)); Recent Case, 127 HARV. L. REV. 1493, 1500 (2014) (referring to this concern with international relations consequences as an "underlying principle" of *Kiobel*);

at the district court level already served to constrain overly expansive discovery, the Court in *Kiobel* chose not to accept the invitation of the United States in its amicus brief to merely apply doctrines such as exhaustion and forum non conveniens with “special vigor in ATS cases.”⁷¹ Instead, it found foreign policy concerns directly applicable to its statutory interpretation analysis. These concerns animated the Court’s decision to apply the presumption against extraterritoriality, which has traditionally been applied only to statutes regulating extraterritorial conduct, to the ATS, a purely jurisdictional statute.⁷²

Daimler, another recent case, restricted the scope of general personal jurisdiction over foreign defendants under the Due Process Clause.⁷³ Here too, in addition to applying its previous personal jurisdiction precedents, the Roberts Court took note of the “risks to international comity” posed by an “expansive view of general jurisdiction,” warning that highly expansive U.S. jurisdictional rules could reduce the willingness of foreign nations to recognize American judgments.⁷⁴

Kiobel, *Daimler*, and *NML* have a number of similarities. The cases all plausibly implicated U.S. foreign relations interests. The expansive discovery orders at issue in *NML* might have conflicted with foreign laws,⁷⁵ invited reciprocal behavior from other nations aimed at the United States,⁷⁶ or given rise to foreign resentment.⁷⁷ These harms are not obviously less serious than those in *Kiobel* — where there was a risk of “diplomatic strife” associated with authorizing suits in U.S. courts over “conduct occurring in the territory of another sovereign,”⁷⁸ — or those in *Daimler* — where there was a risk of conflict with foreign doctrines of limited personal jurisdiction.⁷⁹ The three cases also all involved private plaintiffs, which the Court has acknowledged pose a

The Supreme Court, 2012 Term — Leading Cases, 127 HARV. L. REV. 308, 316 (2013) (emphasizing *Kiobel*’s application of “freestanding foreign policy consequences”). For example, the Court referenced the “serious foreign policy consequences” of accepting a broad view of the jurisdiction granted by the ATS as part of its analysis of the statute’s history and the reasons for its enactment. *Kiobel*, 133 S. Ct. at 1669.

⁷¹ Supplemental Brief for the United States, *supra* note 69, at 24.

⁷² See *Kiobel*, 133 S. Ct. at 1664.

⁷³ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

⁷⁴ *Id.* at 763.

⁷⁵ Cf., e.g., *Linde v. Arab Bank, PLC*, 706 F.3d 92, 111, 120 (2d Cir. 2013) (upholding sanctions against a foreign bank for violating a discovery order that would have forced it to breach foreign bank secrecy laws), *cert. denied*, 134 S. Ct. 2869 (2014).

⁷⁶ See Brief for the United States as Amicus Curiae in Support of Petitioner at 19–21, *NML*, 134 S. Ct. 2250 (No. 12-842), 2014 WL 827994, at *19–21.

⁷⁷ See *id.* at *21–22.

⁷⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

⁷⁹ See *Daimler*, 134 S. Ct. at 763. Justice Scalia did, however, express some skepticism during the *NML* oral argument regarding the severity of the foreign relations harms at issue. See Transcript of Oral Argument, *supra* note 64, at 22 (highlighting the fact that no foreign state had filed an amicus brief protesting the discovery order).

particular risk of foreign policy harm.⁸⁰ Nevertheless, while the *Kiobel* and *Daimler* Courts viewed the foreign policy harms as integral to their interpretive analysis, the *NML* Court saw them primarily as a discretionary factor for the district courts to consider.⁸¹

The Court's different approach in *NML* is best explained by examining the FSIA's text and history. In contrast to the Due Process Clause and the ATS, which are seventeen⁸² and thirty-three words⁸³ respectively, the FSIA is a detailed eight-page statute.⁸⁴ For this reason, the Court is engaged more heavily in the process of judicial law-making when it formulates rules of personal jurisdiction or federal common law claims under the ATS than when it applies the law of foreign sovereign immunity.⁸⁵ And it is precisely the foreign policy consequences of these kinds of judicial, as opposed to congressional, actions that most worry the Court.⁸⁶ By contrast, the Court sees itself as implementing a regime of purely congressional design when it interprets the FSIA; any harmful consequences of that regime are, therefore, a "riddle" for Congress "to solve."⁸⁷

This explanation is reinforced by the history of the U.S. foreign sovereign immunity regime, which the Court took pains to highlight in *NML*. Justice Scalia characterized the FSIA as replacing the "bedlam" of the historically politicized process of determining sovereign immunity with an approach that was "comprehensive," a term that the Court has used "often and advisedly to describe the Act's sweep."⁸⁸ This

⁸⁰ See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) ("[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." (alteration in original) (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTI-TRUST L.J. 159, 194 (1999)) (internal quotation marks omitted)).

⁸¹ One difference between the cases is that *Kiobel* and *Daimler* dealt with jurisdictional questions, while *NML* involved questions of procedure once jurisdiction had been established. However, while this factor can sometimes affect the severity of the foreign policy harms at issue, see, e.g., *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 210 (2d Cir. 2012) (explaining why courts should be more careful when determining jurisdictional issues in sovereign immunity cases), there is no reason to treat these questions differently in terms of the policy harms detailed above.

⁸² See U.S. CONST. amend. XIV, § 1.

⁸³ See 28 U.S.C. § 1350 (2012).

⁸⁴ See Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

⁸⁵ See Anderson, *supra* note 61 ("[I]t's just a fact that modern ATS cases put the decisions, remedies, and the evolution of extraterritorial reach into judicial hands.").

⁸⁶ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) ("[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do."); see also Anderson, *supra* note 61.

⁸⁷ *NML*, 134 S. Ct. at 2258.

⁸⁸ *Id.* at 2255–56 (emphasis omitted). For examples of the Court describing the FSIA in this way, see *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610–11 (1992) (describing the FSIA as a "comprehensive framework" that "provides the 'sole basis' for obtaining jurisdiction over a foreign sovereign in the United States" (quoting *Argentine Republic v. Amerasia Shipping*

understanding was evident in *Verlinden B.V. v. Central Bank of Nigeria*,⁸⁹ the first time the Court interpreted the FSIA, where the Act was described as “free[ing] the Government from . . . case-by-case diplomatic pressures [and] clarify[ing] the governing standards.”⁹⁰ Since *Verlinden*, the Court has repeatedly endorsed a narrow, text-based interpretation of the Act’s provisions.⁹¹ Further, although it may have previously “consistently . . . deferred to the decisions of the . . . Executive Branch . . . on whether to take jurisdiction’ over particular actions against foreign sovereigns,”⁹² the Court showed little concern for the views of the U.S. government in FSIA cases even before the Roberts Court’s recent turn toward formalism.⁹³ It seems likely, therefore, that in light of the FSIA’s history and purpose, the Court views its text as particularly controlling.⁹⁴

NML, then, can be seen as an example both of the Roberts Court’s recent shift toward foreign affairs formalism and of a longer trend of rejecting any role for possible foreign affairs consequences in interpreting the FSIA. Lower courts and commentators should therefore be wary of ascribing too much significance to the *NML* Court’s ultra-textualist approach outside the specific FSIA context.

Corp., 488 U.S. 428, 434 (1989)); and *Amerada Hess*, 488 U.S. at 437 (emphasizing the “comprehensiveness” of the FSIA’s statutory scheme).

⁸⁹ 461 U.S. 480 (1983).

⁹⁰ *Id.* at 488.

⁹¹ See, e.g., *Samantar v. Yousuf*, 130 S. Ct. 2278, 2282, 2285–89 (2010) (holding that the FSIA does not immunize foreign officials from suit, and including a detailed analysis of the statute’s text); *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) (criticizing the lower court for engaging in a “detailed historical inquiry” instead of focusing upon the “FSIA’s clear guidelines”).

⁹² *Altmann*, 541 U.S. at 689 (first alteration in original) (quoting *Verlinden*, 461 U.S. at 486).

⁹³ In none of the pre-Roberts Court cases concerning foreign sovereign immunity since *Verlinden* did the Court explicitly defer to the Solicitor General’s position. See *id.* at 701 (“While the United States’ views . . . are of considerable interest to the Court, they merit no special deference.”); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); *Weltover*, 504 U.S. 607; *Amerada Hess*, 488 U.S. 428; *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

⁹⁴ See John C. Balzano, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act: Searching for an Integrated Approach*, 24 DUKE J. COMP. & INT’L L. 1, 5 (2013) (stating that the Court’s approach to interpreting the FSIA has “focus[ed] heavily” on its text at the expense of the “nuance” the Court has used when interpreting other statutes).