NML Capital, Ltd. v. Banco Central de la República Argentina: The Second Circuit Reinforces Immunity Protection over Foreign Central Banks

I. OVERVIEW

When the President of the Republic of Argentina announced an indefinite moratorium on principal and interest payments in December 2001, the Republic of Argentina (Republic) owed foreign creditors over $80 billion.[1] The plaintiffs-appellees are beneficial debt holders who sought to recover their investment through litigation rather than by participating in Argentina's unfavorable debt restructure proposals.[2] The plaintiffs now hold unsatisfied final judgments against the Republic in the United States District Court for the Southern District of New York for nearly $2.4 billion.[3]

For the execution of these judgments against the Republic, the plaintiffs commenced this action in September 2006 to obtain a declaratory judgment that the Banco Central de la República Argentina (BCRA) is the "alter ego" of the Republic.[4] The plaintiffs argued that

1. NML Capital, Ltd. v. Banco Central de la República Argentina, 652 F.3d 172, 175 (2d Cir. 2011).

2. *Id.*

3. *Id.* at 176.

4. *Id.* at 181. The plaintiffs first appeared in the Southern District of New York on December 30, 2005, with motions seeking prejudgment attachment and restraining notices against BCRA. *Id.* at 179. The plaintiffs argued that the Argentine President's decree that granted the Republic the authority to use BCRA funds to repay the International Monetary Fund had the effect of making all BCRA assets the property of the Republic. *Id.* (citing EM Ltd. v. Republic of Argentina, 473 F.3d 463, 475 (2d Cir. 2007)). Furthermore, the plaintiffs argued that this repayment was a commercial activity and therefore, under the Foreign Sovereign Immunities Act (FSIA), was not afforded immunity from attachment. *See id.* at 181 (citing *EM Ltd.*, 473 F.3d at 481-85). The Part I judge of the district court granted the attachment and restraint motions. *Id.* The following month, Judge Griesa, the regularly assigned district court judge, vacated the attachments and restraints. *Id.* at 180. The Second Circuit Court of Appeals affirmed on January

BCRA's assets held at the Federal Reserve Bank of New York (FRBNY) are attachable under the *Bancec* test.[5] The district court agreed, finding that the Republic exercised such substantial control over BCRA that a relationship of principal and agent existed, and therefore, the FRBNY funds were effectively the Republic's funds.[6] The court then held that because the Republic had waived immunity from attachment, its property—the FRBNY funds—could be attached in the execution of the plaintiffs' judgment against the Republic.[7]

The United States Court of Appeals for the Second Circuit *held*, as matters of first impression, (1) that the property of a foreign central bank held for its own account is presumed to be immune from attachment under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1611(b)(1), regardless of the central bank's level of independence from its parent state and (2) that property of a central bank is held for its own account if used for central banking functions, as such functions are commonly understood, irrespective of their commercial nature. *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 187-88, 194 (2d Cir. 2011).

II. BACKGROUND

The Foreign Sovereign Immunities Act of 1976 (FSIA) is the codification of the common law tradition in the United States that grants immunity to foreign nations from civil suits.[8] Sovereign immunity was first granted in a U.S. court in *Schooner Exchange v. McFaddon* in 1812, where the Court reasoned absolute immunity must be granted because allowing litigation against a foreign sovereign "cannot take place without affecting [the sovereign's] power and his dignity."[9] Courts adhered to the principle of absolute immunity until 1938, when the Supreme Court of the United States held in *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar* that immunity should be available only at the request of the United States Department of State (State Department).[10]

5, 2007. *Id.* at 181 (citing *EM Ltd.*, 473 F.3d at 486-87). In dictum, the court discussed the principles of *Bancec* and entertained the idea that attachment may be granted if the plaintiffs can show that BCRA served as the alter ego of the Republic. *Id.* at 180-81 (citing *EM Ltd.*, 473, F.3d at 479).

5. *Id.* at 180-81.

6. *Id.* at 182.

7. *Id.*

8. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (2006); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 435 (1989).

9. 11 U.S. (7 Cranch) 116, 144 (1812).

10. 303 U.S. 68, 74-75 (1938).

This had the effect of shifting the determination of immunity from the Judicial Branch to the Executive Branch. Sovereign immunity under the State Department was essentially absolute until the department announced a policy change in 1952.[11] The letter, written by the Department of State's legal advisor (Tate Letter), suggested the adoption of "restrictive" sovereign immunity to parallel the changing policies in Europe.[12] Thereafter, the determination of immunity was based on the nature of the nation's act in the dispute.[13] The new policy guaranteed "the immunity of the sovereign . . . with regard to sovereign or public acts . . . of a state, but not with respect to private acts."[14] This new policy sought to protect injured parties in commercial dealings with foreign nations.[15]

The enactment of the FSIA in 1976 shifted the determination of sovereign immunity back to the courts.[16] The FSIA reflects the "restrictive" theory adopted in the Tate Letter regarding the number of immunity exceptions provided.[17] It is the exclusive basis for the exercise of jurisdiction over foreign states in civil suits in the United States.[18] A court may not assert jurisdiction over a foreign state unless the case falls within one of the exceptions to the statute's immunity provisions.[19]

The structure of the FSIA addresses jurisdiction and attachment immunity separately. Immunity from jurisdiction is provided by § 1604 and is extended to both the foreign state itself and to its agencies and instrumentalities.[20] This extension to foreign entities is implemented through the incorporation of the term "agencies and instrumentalities" in the definition of "foreign state" provided in § 1603.[21] Immunity from jurisdiction is subject to a number of general exceptions laid out in

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11. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486-87 (1983).

12. Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't of State, to the Attorney General (May 19, 1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 (1976) [hereinafter Tate Letter].

13. *Id.*

14. *Id.*

15. *See* Note, *Too Sovereign To Be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550, 554 (2010); Tate Letter, *supra* note 12.

16. *Too Sovereign To Be Sued*, *supra* note 15, at 555.

17. *Id.*

18. Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989)).

19. *Id.*

20. 28 U.S.C. § 1604 (2006).

21. *Id.* § 1603(a). "Foreign state" includes political subdivisions of a foreign state or an agency or instrumentality, defined in subparagraph (b) as a separate legal entity from the foreign sovereign that is an organ of its parent state or may be owned by the state and is not a citizen of the United States nor created under the laws of a third country. *Id.* § 1603(a)-(b)(1)-(3).

§§ 1605, 1605A, and 1607,[22] including the commercial activity exception,[23] the tortious-activity exception,[24] and the terrorism exception.[25] Additionally, a foreign state may implicitly or explicitly waive its right to immunity in U.S. federal courts.[26]

The FSIA specifically addresses the attachment and execution of foreign state-owned property in three sections.[27] Section 1609 provides that all property of a foreign state in the United States is immune from attachment and execution subject to the exceptions in §§ 1610 and 1611.[28] As in § 1604, immunity from attachment is extended to the property of both the foreign sovereign and foreign agencies and instrumentalities.[29] Section 1610(a) provides a number of exceptions to immunity for property of a foreign state "used for a commercial activity in the United States."[30] Section 1610(b) governs the execution of property, whether or not it is used for commercial activities, of a foreign agency or instrumentality engaged in commercial activity in the United States.[31] This section, therefore, provides a broader scope of property that may be attachable as long as immunity from attachment has been waived, or the agency or instrumentality is not immune from jurisdiction under the exceptions of §§ 1605 and 1605A.[32]

In turn, § 1611 provides additional immunity protection beyond that conferred in §§ 1609 and 1610 regarding particularly sensitive types of property—the property of foreign central banks[33] or monetary

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22. Section 1607 precludes any foreign state from claiming immunity under § 1604 against counterclaims arising out of the same transaction or occurrence as the claim brought to a United States court by the foreign state. *Id.* § 1607.

23. *Id.* §§ 1603(d), 1605(a)(2) (defining commercial activity); *see also* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) ("[T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'").

24. 28 U.S.C. § 1605(a)(5).

25. *Id.* § 1605A.

26. *Id.* § 1605(a)(1). This provision enables private creditors to include the contracting foreign sovereign's waiver of immunity in the terms and conditions of debt agreements. *Too Sovereign To Be Sued*, *supra* note 15, at 551.

27. 28 U.S.C. §§ 1609-1611.

28. *Id.* § 1609.

29. *Id.*

30. *Id.* § 1610(a). These exceptions include waiver and use of property in connection with the claim for attachment, among others. *Id.* § 1610(a)(1)-(7).

31. *Id.* § 1610(b).

32. *Id.*

33. The FSIA does not define the term "central bank." The House Report presupposes that, at minimum, a central bank will satisfy the definition of an "agency or instrumentality of a foreign state" laid out in § 1603(b)(1)-(3). H.R. REP. No. 94-1487, at 15-16 (1976), *reprinted in*

authorities.[34] Even if property would otherwise be reachable under § 1610, § 1611 supersedes the exceptions and provides that "the property of a foreign state shall be immune from attachment and from execution if (1) the property is that of a foreign central bank or monetary authority held for its own account."[35] Congress provided this extra protection because it feared that without it, "deposit[s] of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relation problems."[36]

Section 1611 contains only two qualifications to the special immunity protection covering central banks. The first is that immunity from postjudgment attachment will not be granted if it is waived by the foreign state or the central bank.[37] However, unlike the waiver exceptions in §§ 1605 and 1610, waiver over the property of central banks cannot be implied.[38] The waiver must be "clear and unambiguous," explicitly referring to the property of the central bank.[39]

The second qualification is that the property must be "held for [the central bank's] own account."[40] This term is not defined in the statute, and as a result, ambiguity concerning its scope exists.[41] Several different approaches have been suggested by commentators, and considered or applied by courts. One is a literal interpretation of the phrase, insisting that property is immune if it is held for the benefit and in the name of the foreign central bank.[42] In contrast, the House Report proposed a more restrictive meaning that allows immunity only for traditional central bank

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1976 U.S.C.C.A.N. 6604, 6614. To further determine an entity's central bank status, courts may look to characteristics of typical central banking activities, including:

1. The regulation of currency;
2. The performance of general banking and agency services for its government;
3. The custody of cash reserves of commercial banks;
4. The custody and management of nation's reserves of international currency.

Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. ILL. L. REV. 265, 274 n.37.

34. 28 U.S.C. § 1611. This section also provides special protection to property used in connection with military activities. For the purpose of this Recent Development, only property of central banks and monetary authorities will be discussed.

35. *Id.* § 1611(b)(1).

36. H.R. REP. No. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630.

37. 28 U.S.C. § 1611(b)(1).

38. *See id.* §§ 1605(a)(1), 1610(a)(1), 1610(b)(1) (providing that waiver may be explicit or implicit).

39. Carpenter v. Republic of Chile, 610 F.3d 776, 779 (2d Cir. 2010).

40. 28 U.S.C. § 1611(b)(1).

41. Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT'L L. 327, 377 (2002-2003).

42. *Id.*

activities, which would exclude funds used to finance commercial transactions.[43] The United States Court of Appeals for the Ninth Circuit adopted this reading in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*[44] A final interpretation proposes a focus on whether the funds are used for central banking functions, despite their potential commercial nature.[45] The District Court for the Southern District of New York employed this approach in *Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador*.[46] In this case, the funds of the foreign central bank were used for several different purposes, including financing government agencies and holding accounts for private parties.[47] The court ruled that the funds used for transactions with government agencies were held for the central bank's own account because the purpose of making and receiving payments of other government agencies is a central banking activity, even though these transactions were commercial in nature.[48] As to the other assets, the court held that it would not grant immunity to funds where the central bank acts merely as an intermediary because such activities are not common functions of central banks.[49]

Beyond the provisions governing attachment and execution in §§ 1609 to 1611, the Supreme Court has applied the principle of corporate veil piercing to hold a foreign state-owned entity liable for judgments against its government.[50] In the seminal case *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), the Supreme Court addressed whether the assets of a Cuban state-owned bank, Bancec,[51] could be setoff for the acts and liabilities of the foreign sovereign government of Cuba.[52] The Court held that governmental agencies are entitled to a presumption of separate juridical status.[53] However, this presumption may be overcome if the opposing party can

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43. H.R. REP. No. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630.

44. 385 F.3d 1206, 1223 (9th Cir. 2004). Currently, this is only other interpretation adopted by a federal circuit court besides the Second Circuit in the noted case. NML Capital, Ltd. v. Banco Central de la República Argentina, 652 F.3d 172, 191 (2d Cir. 2011).

45. Patrikis, *supra* note 33, at 277.

46. 823 F. Supp. 1106, 1113 (S.D.N.Y. 1993); *see also* Olympic Chartering S.A. v. Ministry of Indus. & Trade of Jordan, 134 F. Supp. 2d 528, 534-35 (S.D.N.Y. 2001).

47. *Weston*, 823 F. Supp. at 1113.

48. *Id.* at 1114-15.

49. *Id.*

50. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec), 462 U.S. 611, 623, 633 (1983).

51. Bancec was not considered a central bank or monetary authority for the purpose of § 1611(b)(1), but rather, it was Cuba's agent in foreign trade. *Id.* at 613-14.

52. *Id.* at 613.

53. *Id.* at 626-27.

show that the "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or that the recognition of separate legal status would "work fraud or injustice."[54] The *Bancec* exception was intended to be a difficult standard to satisfy as evidenced by the Supreme Court's warning that "[f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty."[55] In most cases, to prove alter ego status of a foreign agency, the opposing party must show that the control exercised by the foreign sovereign was substantial, rising to the level of day-to-day operational control.[56]

Despite the high bar of the *Bancec* doctrine, litigants employ the doctrine often, especially in cases concerning defaulted debt instruments of foreign states that include a waiver of sovereign immunity.[57] In theory, if a creditor can offer proof to satisfy the *Bancec* standard, the creditor can argue that the foreign agency's property is effectively the property of the foreign sovereign.[58] Therefore, in such a case, assuming the property is used for commercial activities,[59] the waiver contained in the debt instrument applies to the property pursuant to § 1610(a)(1).[60] The Second Circuit has consistently shown strong aversion to overcoming separate status.[61] For example, the court held that the presumption of separate juridical status was not overcome when Chile used the facilities of its state-owned airline located in the United States for execution of an assassination.[62]

The applicability of property that would otherwise fall within the FSIA extra protection provisions of § 1611—in particular property of central banks—has not been litigated as much as property of other agencies. While litigants have asserted *Bancec* claims in a few cases, courts have consistently found that movants fail to rebut the presumption of separate legal status.[63]

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54. *Id.* at 629 (citations omitted).
55. *Id.* at 626.
56. Minpeco S.A. v. Hunt, 686 F. Supp. 427, 435 (S.D.N.Y. 1988).
57. *Too Sovereign To Be Sued*, *supra* note 15, at 558.
58. *Id.*
59. 28 U.S.C. § 1610(a).
60. *Id.* § 1610(a)(1).
61. *See* Letelier v. Republic of Chile, 748 F.2d 790, 795 (2d Cir. 1984).
62. *Id.* at 799.
63. *See* LNC Invs., Inc. v. Republic of Nicar., 115 F. Supp. 2d 358 (S.D.N.Y. 2000), *aff'd*, 228 F.3d 423 (2d Cir. 2000); Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat, 713 F. Supp. 2d 267 (S.D.N.Y. 2010); Minpeco, S.A. v. Hunt, 686 F. Supp. 427 (S.D.N.Y. 1988).

III. COURT'S DECISION

In the noted case, as an issue of first impression, the court declined to conduct the alter ego analysis from *Bancec*, holding that the applicability of the foreign central bank immunity protection in § 1611 is not dependent on a presumption of independence of the bank from its parent government.[64] As a result, the court found that determining central bank immunity begins with § 1611.[65] This prompted the court, as another issue of first impression, to formulate a broad test for the determination of whether property of a central bank is "held for its own account" under § 1611(b)(1).[66]

A. Rejection of the Applicability of Bancec

In recounting the procedural history of this case, Judge Cabranes,[67] writing for the court, acknowledged the suggestion to the plaintiffs in their first appearance in the Second Circuit that the plaintiffs could assert that BCRA's assets are attachable through the principles in *Bancec*.[68] In the noted case, however, the Second Circuit decided to depart from this analysis. By looking to the plain language, structure, and historical context of § 1611(b)(1), the court determined that the *Bancec* test should not be applied to foreign central banks.[69] In other words, § 1611(b)(1) "immunizes property of a foreign central bank . . . without regard to whether the bank or authority is independent from its parent state pursuant to *Bancec*."[70]

Beginning with the plain language and structure of § 1611(b)(1), the court pointed out that no requirement of the central bank's independence is contemplated; the only qualification is that the property must be held for its own account.[71] Additionally, the court asserted that the language "[*n*]*otwithstanding the provisions of section 1610 of this chapter*" suggests Congress anticipated that property of a foreign central bank may also be property of the foreign state.[72] The court reasoned that

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64. NML Capital, Ltd. v. Banco Central de la República Argentina, 652 F.3d 172, 187-88 (2d Cir. 2011).

65. *Id.*

66. *Id.* at 194 (internal quotation marks omitted).

67. Judge José A. Cabranes was also the judge for the opinion on the parties' first appearance. EM Ltd. v. Republic of Argentina, 473 F.3d 463 (2d Cir. 2007). However, the other panel members are not the same judges as before. *NML Capital*, 652 F.3d at 174.

68. *NML Capital*, 652 F.3d at 180.

69. *Id.* at 187-88.

70. *Id.*

71. *Id.* at 188.

72. *Id.*

this is because the reference in the phrase is to § 1610 as a whole, which includes property of a foreign sovereign and property of foreign instrumentalities, rather than only to § 1610(b), which governs property of the latter.[73] The court also looked to the FSIA House Report, which referred to foreign reserves—the type of funds held by foreign central banks—as property of the central bank and the foreign state interchangeably, thereby suggesting the presumption of agency relationships between governments and their central banks.[74]

The court then turned to the historical context of the FSIA's enactment. Judge Cabranes found most convincing the fact that during the time of the Act's passage, "most central banks in the world functioned as departments of ministries of finance," and therefore, agency relationships between governments and their central banks were the norm.[75] Accordingly, the court found that Congress intended to provide immunity to central banks no matter the level of control a foreign state exerted over the bank.[76] Therefore, the court declined to analyze the merits of the plaintiffs' alter ego argument and proceeded to its examination of FSIA § 1611(b)(1).[77]

B. Analysis of FSIA § 1611(b)(1)

The court's rejection of the *Bancec* argument meant that the "analysis of the immunity of a foreign central bank's property [must] *begin*[] with § 1611(b)(1)."[78] Provided that the central bank has not explicitly waived immunity, the court concluded that the plaintiffs can only rebut the presumption that a central bank's property is immune by demonstrating that its funds are not held for its own account under § 1611(b)(1).[79] The court addressed the arguments from each party and amici individually regarding the proper definition of the phrase "held for its own account."[80] BCRA argued that property is held for its own account if it is used for traditional central banking activities and not utilized in commercial activities such as the financing of commercial

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73. *Id.* (citing Brief for United States as Amicus Curiae Supporting Appellant, NML Capital, 652 F.3d 172 (No. 10-1487-cv(L), 2010 WL 4597226)).

74. *Id.* at 189 (citing H.R. REP. No. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630).

75. *Id.* (internal quotation marks omitted) (alterations in original).

76. *Id.* at 190.

77. *Id.* at 190-91.

78. *Id.* at 190.

79. *Id.* at 191.

80. *Id.* at 191-94.

transactions of other entities or of foreign states.[81] The Federal Reserve Bank of New York (FRBNY), appearing as *amicus curiae*, proposed a "plain language test" based on the common law of bank deposits.[82] Under this definition, property is held for its own account if simply held under the name of the central bank because "[u]nder fundamental banking law principles, a positive balance in a bank account reflects a debt from the bank to the depositor" and no other party.[83] Furthermore, the plaintiffs suggested that a central bank's property is held for its own account when it is for the foreign central bank's benefit or profit.[84]

The court rejected all three proposed definitions. It discussed the plaintiffs' argument at length, commenting on its novelty, but ultimately disposing of it.[85] The court found this definition to be nonsensical because BCRA was created for the purpose of serving the "national economic interest."[86] Instead, the Second Circuit adopted the functions test employed by the Federal District Court for the Southern District of New York in *Weston* and *Olympic Chartering*.[87] Under this test, property of a foreign central bank is held for its own account "if the central bank uses such property for central banking functions as such functions are normally understood, irrespective of their commercial nature."[88] Recognizing that the normal activities of central banks will evolve over time, the court did not attempt to provide a comprehensive list of such functions.[89] Instead, it asserted that such determination should be left for Congress.[90] For now, the court observed, whether an activity is one normally understood as a central banking function is not a difficult issue to resolve "even in unusual circumstances."[91]

Having adopted this new test, the court analyzed BCRA's use of the FRBNY funds and concluded that the funds were property of BCRA, held for its own account.[92] The funds were used for paying Argentine commercial banks seeking to lower their U.S. reserves, as well as for receiving payment from Argentinian banks seeking to increase their U.S.

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81. *Id.* at 191.
82. *Id.* at 191-92.
83. *Id.* at 192 (internal quotation marks omitted) (alterations in original).
84. *Id.*
85. *Id.*
86. *Id.* at 193.
87. *Id.* at 194.
88. *Id.* (internal quotation marks omitted).
89. *Id.* at 194 n.20.
90. *Id.*
91. *Id.*
92. *Id.* at 195.

reserves.[93] Additionally, BCRA would regularly purchase U.S. dollars to control its currency and manage deposits pursuant to its regulatory exchange rule.[94] The court held that these activities amounted to the practice of regulating the Argentinian peso and promoting financial stability, which are "paradigmatic central banking functions."[95]

Finally, the court considered the waiver exception to § 1611(b)(1) and agreed with the district court that this exception did not apply.[96] Although in the debt agreement with plaintiffs, Argentina waived immunity for "the Republic or any of its revenues, assets or property," the agreement did not contain any explicit waiver of the assets of BCRA.[97] The court reasoned that because waiver for the property of a central bank must be "clear and unambiguous," no such waiver exception applied in this case.[98] Therefore, the court determined that the property of BCRA was entitled to immunity from attachment for the judgments against the Republic under § 1611(b)(1).[99]

The court concluded its opinion by expressing it and the district court's shared "irritation at the Republic's 'willful defiance of [its] obligations to honor the judgments of a federal court.'"[100] The Second Circuit acknowledged that the plaintiffs entered into an agreement with Argentina with the explicit assurances that plaintiffs would have a legal recourse in the United States to hold the Republic to its promises.[101] Unfortunately, as the court pointed out, these debt instruments failed to inform the plaintiffs of the severe restrictions under the FSIA on the ability to obtain a remedy.[102]

IV. ANALYSIS

Argentina's default in 2001 is currently the largest government default in history.[103] The Republic's notorious tradition of evading its financial obligations resulted in years of litigation in which creditors have received judgments against the Republic but failed to secure any

93. *Id.* (citing EM Ltd. v. Republic of Argentina, 720 F. Supp. 2d 273, 303 (S.D.N.Y. 2010)).
94. *Id.*
95. *Id.*
96. *Id.*; *see also EM Ltd.*, 720 F. Supp. 2d at 297.
97. *NML Capital*, 652 F.3d at 196 (internal quotation marks omitted).
98. *Id.* at 195.
99. *Id.* at 196.
100. *Id.* (quoting *EM Ltd.*, 720 F. Supp. 2d at 304) (alternations in original).
101. *Id.*
102. *Id.*
103. EM Ltd. v. Republic of Argentina, 473 F.3d 463, 466 n.2 (2d Cir. 2007).

remedy.[104] Judge Thomas Griesa, who presided over the proceedings of the noted case in the district court, labeled the Republic's aversions to the payment of judgments as "immoral."[105] The Republic has even gone as far as passing a law (Law 26017) "prohibit[ing] [it] from conducting any type of in-court, out-of-court or private settlement" with respect to bonds not exchanged during the Republic's unfavorable restructuring scheme in 2005.[106] Based on these facts, the Second Circuit's holding in the noted case may seem contrary to equitable principles against bad faith dealings and fraud.

However, the rise of privately funded foreign sovereign debt has expanded the type and number of private counterparties available to financially struggling nations.[107] These counterparties typically target debt instruments that include immunity waivers.[108] Among these debt holders are the aptly-named "vulture funds."[109] Companies that invest in these schemes are not primary lenders, but instead purchase the debts at significantly discounted prices after the sovereign party has defaulted.[110] Thereafter, the debt holder typically refuses to participate in any debt restructuring proposed by the sovereign and then initiates litigation to compel repayment of the debt along with interest.[111] The plaintiffs in the noted case are holders of vulture funds; these companies have been continuously harassing and subjecting the Republic of Argentina to litigation in Swiss, British, and U.S. courts over the past six years.[112]

The issue of attachment and execution of foreign central banks' funds held in the United States (and in particular with the FRBNY) has been a cause for concern for financial commentators, institutions, and policymakers for the past decade due to the increase of foreign debt

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104. *See, e.g.*, Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120 (2d Cir. 2009) (holding that Argentina's social security administration was immune from attachment).

105. *Gauchos and Gadflies: Creditors' Decade-Long Battle with Argentina Shows Just How Tangled Sovereign Defaults Can Be*, ECONOMIST, Oct. 22, 2011, http://www.economist.com/node/21533453/print [hereinafter *Gauchos and Gadflies*].

106. *EM Ltd.*, 720 F. Supp. at 279. This restructuring plan only offered creditors 35 cents on the U.S. dollar, whereas most delinquent nations offer 50 to 60 cents. *Gauchos and Gadflies*, *supra* note 105.

107. Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT'L L. REV. 1, 1-3 (2008).

108. *Id.*

109. *Id.*

110. *Too Sovereign To Be Sued*, *supra* note 15, at 552 (citing Elizabeth Broomfield, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUM. BUS. L. REV. 473, 475).

111. *Id.*

112. *Gauchos and Gadflies*, *supra* note 105.

litigation.[113] Many argue that foreign central banks are the most vulnerable state-owned entities to the execution of claims against foreign sovereigns.[114] Most central banks hold reserves and other assets of their parent state in foreign countries.[115] The FRBNY's status as the largest holder of U.S. dollar-backed reserves, equaling over $3 trillion, has made it a prime target for holders of sovereign debt seeking to attach the funds of foreign central banks.[116] Many fear the financial repercussions of courts' ambiguity surrounding the possibility of attachment of FRBNY.[117] Echoing the same concerns expressed by Congress in the House Report,[118] commentators argue that uncertainty will discourage deposits or result in withdraws of U.S. dollar-backed reserves, which would drive down the value of U.S. currency.[119]

The Second Circuit's holding in the noted case clearly echoes the policy concerns surrounding the attachment of foreign central bank funds. The decision to return to a more absolute application of immunity to central banks creates a more predictable legal environment for foreign central banks that hold reserves in New York. Being in the federal circuit in which the FRBNY resides may have a profound impact due to its presumed expertise in the area of banking law, influencing other circuits to take the same approach.

Although the Second Circuit has upheld the application of the *Bancec* analysis to foreign central banks in the past,[120] thus revealing inconsistency in the noted case with prior holdings, the decision to abandon the *Bancec* analysis in cases of property of foreign central banks is proper. The court's interpretation of the immunity presumption for property of central banks qualified only by the use to which property is put is consistent with the plain language of the statute and the legislature's intent to provide special protection to central bank property.[121] The court's holding is not in conflict with the Supreme Court's decision in *Bancec*. In *Bancec*, the foreign agency was a state-

113. Lee, *supra* note 41; *see also Too Sovereign To Be Sued*, *supra* note 15, at 569-70.

114. *Too Sovereign To Be Sued*, *supra* note 15, at 552 (quoting Jeremy Ostrander, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments*, 22 BERKELEY J. INT'L L. 541, 568 (2004)).

115. *Id.*

116. *Id.*

117. *Id.* at 569-70.

118. H.R. REP. No. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630.

119. *Too Sovereign To Be Sued*, *supra* note 15, at 570.

120. *See* LNC Invs., Inc. v. Republic of Nicaragua, 115 F. Supp. 2d 358 (S.D.N.Y. 2000), *aff'd*, 228 F.3d 423 (2d Cir. 2000); Minpeco, S.A. v. Hunt, 718 F. Supp. 168 (S.D.N.Y. 1989).

121. *See* 28 U.S.C. § 1611(b)(1) (2006).

owned bank, but not a central bank for purposes of § 1611.[122] Therefore, a principal-agent relationship resulting in liability for the acts of the other was not precluded by the strict protection covering central banks in § 1611 as determined in the noted case.

V. CONCLUSION

The decision of the Second Circuit in the noted case reinforces the protection that Congress intended foreign central banks to enjoy through the application of FSIA § 1611(b)(1). The court's holding will likely have the effect of preventing abuses of the federal court system by "vulture funds" and similar secondary debt holders, while simultaneously fostering a more stable legal environment for countries considering holding U.S. reserves.

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122. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec), 462 U.S. 611, 613-14 (1983).

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