SOVEREIGN IMMUNITY AND SOVEREIGN DEBT

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The law of foreign sovereign immunity changed dramatically over the course of the 20th century. The United States abandoned the doctrine of absolute immunity and opened its courts to lawsuits by private claimants against foreign governments. It also pursued a range of other policies designed to shift such disputes into litigation or arbitration (and thus relieve political actors of pressure to intervene on behalf of disappointed creditors). This Article uses a unique data set of sovereign bonds to explore how international financial contracts responded to these legal and policy initiatives.

The Article makes three novel empirical and analytical contributions. The first two relate to the law of sovereign immunity and to the role of legal enforcement in the sovereign debt markets. First, although the decision to abandon the absolute immunity rule was a major legal and policy shift, this article demonstrates that investors dismissed their new enforcement rights as irrelevant to the prospect of repayment. Second, the ongoing Eurozone debt crisis has prompted fears that private investors will use litigation to prevent debt restructurings necessary to revive European economies. This Article shows that such fears may be overblown and, in the process, informs the broader empirical and theoretical debate about the role of legal enforcement in the sovereign debt markets.

Finally, the Article exposes a gap in contract theory as it pertains to boilerplate contracts such as sovereign bonds. Boilerplate presents a puzzle of intense interest to contracts scholars. It is drafted to serve the interests of sophisticated, well-resourced players, yet it often remains static in the face of new risks. To explain this inertia, contract theory posits that major shifts in boilerplate financial contracts require a financial crisis or other exogenous shock that substantially alters investors' risk perceptions. This Article, however, demonstrates that the Foreign Sovereign Immunities Act of 1976 prompted a major shift in contracting practices despite investors' continued indifference

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to legal enforcement and argues that contract theory must recognize that a wider range of forces may prompt boilerplate to change.

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I. INTRODUCTION

Sovereigns have been borrowing money—and not always repaying it—for thousands of years.[1] For just as long, lenders have tried to ensure that they get their money back. Until fairly recently, private (i.e., non-government) lenders had two primary responses to a foreign sovereign's default: They could coordinate with other lenders to impose informal sanctions, such as denying the borrower future loans until it resumed payments or negotiated an acceptable settlement. Or they could rely on the occasional willingness of powerful governments to force a resumption of payments through diplomatic or military means. Litigation was not a realistic option, for most countries granted foreign sovereigns absolute immunity from suit in national courts.

Times have changed. Powerful countries rarely intervene directly on behalf of their citizens and do not use military force to protect their citizens' foreign investments.[2] Instead, these countries have opened their courts to lawsuits against foreign sovereigns. In the United States and

1. *See* MAX WINKLER, FOREIGN BONDS: AN AUTOPSY 21–25 (Arno Press 1976) (1933) (describing default by Greek municipalities as early as the fourth century B.C.).

2. FEDERICO STURZENEGGER & JEROMIN ZETTELMEYER, DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES 19–23 (2007).

United Kingdom, this happened gradually over the latter half of the twentieth century, as each jurisdiction abandoned the doctrine of absolute sovereign immunity. In its place, they adopted the so-called restrictive theory of immunity, under which private litigants gained limited rights to sue foreign sovereigns in national courts and to enforce the resulting judgment. For example, foreign sovereigns are no longer immune from suit when they engage in commercial acts or when they have waived their immunity in a contract.[3]

In the modern era, most sovereign lending is bond lending. And when countries issue bonds in foreign markets today, they almost always include waivers of immunity from suit and other terms designed to facilitate legal enforcement.[4]

This project began as an inquiry into the origins of these contract terms. The existing literature provides no answer, and the question is more complicated than it seems. A starting point might be to posit a direct link to the adoption of the restrictive theory of immunity.[5] Once countries liberalized immunity doctrine and began to allow lawsuits against foreign sovereigns, an important difference between private and sovereign borrowers seemingly vanished. One reason private borrowers repay loans is because, if they do not, they can be sued and their assets can be liquidated to satisfy the debt. Strong legal enforcement rights thus help reduce the risk of default.[6] Lenders to sovereign governments are not motivated by charity. They too should value legal enforcement rights and should prefer loan contracts whose terms grant them access to the courts.[7]

Yet this answer is too simplistic. Even today, litigation against foreign sovereigns is complicated by a number of legal and practical barriers, including the sovereign's ability to shelter assets beyond the reach of creditors.[8] Because of these barriers, investors may derive little benefit

3. 28 U.S.C. § 1605(a)(1)–(2) (2012).

4. *See* W. Mark C. Weidemaier, *Contracting for State Intervention: The Origins of Sovereign Debt Arbitration*, 73 LAW & CONTEMP. PROBS. 335, 341–42 (2010).

5. I am concerned with the immunity of *foreign* sovereigns in the courts of other countries, especially the United States. For example, when Argentina issues bonds governed by New York law, it typically waives its immunity from suit in New York courts. *See, e.g.*, Erik Larson, *Argentina Loses Debt Immunity Suit in U.K. Supreme Court, Reversing Ruling*, BLOOMBERG (Jul. 6, 2011, 10:11 AM), http://www.bloomberg.com/news/2011-07-06/argentina-loses-debt-immunity-suit-in-u-k-supreme-court-reversing-ruling.html.

6. *See* STURZENEGGER & ZETTELMEYER, *supra* note 2, at 31–32; *see also* Jeremy Bulow & Kenneth Rogoff, *Sovereign Debt: Is to Forgive to Forget?*, 79 AM. ECON. REV. 43, 49 (1989) (concluding that small countries lacking a reputation for repayment must grant legal rights to creditors in order to obtain loans).

7. *See* G. R. Delaume, *Jurisdiction of Courts and International Loans: A Study of Lenders' Practice*, 6 AM. J. COMP. L. 189, 205 (1957) (inferring "the intention of American bankers to assimilate as far as can be done government and private loans").

8. As an example, many lawsuits and arbitration claims arising out of Argentina's 2001 default are still pending, without creditors recovering a cent. Many of the claimants are extremely sophisticated litigants—typically hedge funds that bought distressed Argentine debt at a steep discount. Although a number of court plaintiffs have recovered money judgments, Argentina has simply ignored them and kept its assets out of plaintiffs' reach. In a closely-watched recent case, an exasperated district judge attempted to use the court's injunctive power to force Argentina to pay. *See generally* Or-

from contract terms that facilitate litigation.[9] Moreover, if changes to sovereign immunity law prompted bond contracts to incorporate these terms, it remains unclear which changes were the important ones. In the United States, sovereign immunity law changed gradually over several decades beginning in the early 1950s, and this slow evolution may have influenced contracts in subtle ways. Conversely, changes to sovereign immunity law may have lagged behind changes to contracts. This is because lenders may feel that they can rely on dispute resolution terms even when those terms are formally unenforceable. For example, a borrower concerned with its reputation for promise-keeping might honor a promise to arbitrate even if the doctrine of absolute immunity would prevent a court from compelling it to participate in the arbitration or from enforcing an arbitration award.[10] To complicate matters further, the United States and other international actors spent much of the twentieth century encouraging private parties to rely on formal adjudication, especially arbitration, to resolve disputes with foreign sovereigns.[11] These policies may have influenced bond contracts even during the era of absolute immunity.

To ask when dispute resolution terms originated, then, is to ask about the relationship between contracts, changes in legal doctrine, and shifting government policy. In the course of exploring these questions, this Article makes three primary contributions. In Part II, it draws on a data set of around 1800 bond issues to trace how dispute resolution terms originated and evolved over the twentieth century. Part II focuses on the subset of bonds that were likely to generate enforcement litigation in the United States (meaning, for all practical purposes, New York). This subset of around 630 bonds includes nearly all issues listed on the New York Stock Exchange and a large percentage of New York-law-governed bonds listed on other exchanges.[12] I document a sudden and previously

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der, NML Capital, Ltd. v. Republic of Arg., Nos. 08 Civ. 6978, 09 Civ. 1707, 09 Civ. 1708, (S.D.N.Y. Feb. 23, 2012) (No. 1:08–cv–06978–TPG), ECF No. 37. A panel of the Second Circuit affirmed that order, although proceedings to define the injunction's scope and implementation are ongoing. *See* NML Capital, Ltd. v. Republic of Arg., 699 F.3d 246, 250 (2d Cir. 2012).

Another notable example involves a mass arbitration filed on behalf of approximately 70,000 Italian holders of Argentine bonds. Again, the arbitration stems from Argentina's 2001 default. And once again, the claimants are nowhere near a recovery. The arbitration tribunal has only recently decided that it has jurisdiction over the mass claim. It has not yet addressed the merits, nor have the claimants (assuming they prevail) begun trying to enforce the award. *See generally* Abaclat and Others v. Argentine Republic (formerly Giovanna a Beccara and Others v. Argentine Republic), ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), http://www.iareporter.com/downloads/20110810/download; Abaclat and Others v. Argentine Republic (formerly Giovanna a Beccara and Others v. Argentine Republic), ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Oct. 28, 2011) (Abi-Saab, Prof., dissenting), http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf.

9. Because bonds are actively traded in secondary markets (at least today) I will often use the term investors, rather than lenders, to distinguish them from banks that make direct loans or underwrite the issuance of bonds.

10. *See infra* note 29.

11. *See infra* Part II.A.

12. *See infra* Part II.B. Listings on the NYSE began to dry up after the 1970s as issuers switched to Luxembourg and other exchanges.

unknown shift, which occurred in the wake of the 1976 enactment of the Foreign Sovereign Immunities Act (FSIA) in the United States. The statute seemingly acted as a trigger. Before enactment, virtually no country's bonds included terms designed to facilitate legal enforcement; afterwards, virtually all did.[13]

Part III explores this abrupt shift in contracting practices in more detail. At first glance, the shift implies that the FSIA was a significant event that marked a turning point in creditors' enforcement rights. In fact, however, the shift presents a deeper puzzle. Part III presents evidence that the FSIA did *not* materially enhance enforcement rights. For one thing, sovereign immunity law had evolved by the 1950s or 1960s to provide many of the benefits codified by the statute, yet contracts did not respond. In other words, it appears that contracts reacted to *codification*, rather than to actual change in legal doctrine.

Moreover, it seems that investors dismissed as irrelevant all twentieth-century developments in sovereign immunity law, including the introduction and passage of the FSIA. For example, I present evidence that secondary market prices for existing bonds did not react to the statute.[14] This suggests that investors were indifferent to the statute's baseline enforcement rights—i.e., those conferred on holders of bonds already in circulation.[15] Finally, although the FSIA allowed sovereigns who issued new bonds to bestow additional, potentially significant, enforcement rights, this did not happen. Bonds issued after the statute's enactment swiftly incorporated dispute resolution clauses, but these were largely cosmetic provisions that left bondholders little better off than holders of bonds that omitted such clauses altogether.

Part IV turns to the implications of these findings, which extend from our understanding of sovereign immunity law, to debates over the role of legal enforcement in the sovereign lending markets, to questions of contract theory. With respect to sovereign immunity law, there is no question that the shift from the absolute to the restrictive theory of immunity represented a major doctrinal development. But the practical import of this shift is questionable, especially in the context of sovereign debt. Sovereign issuers have potent incentives to shelter assets and otherwise to resist efforts to recover the full value of a loan through litigation.[16] This article focuses on a window of crucial importance to the evolution of sovereign immunity law—roughly 1950 to 1980—and finds little evidence that these legal developments mattered to investors. Indeed, some events that are widely viewed as fundamental to the evolution of

13. Although I focus on bonds likely to give rise to enforcement litigation in New York, I document a similar pattern for bonds listed in London or governed by English law. These bonds swiftly adopted dispute resolution clauses after the State Immunity Act of 1978. State Immunity Act, 1978, c. 33 (U.K.). *See infra* text accompanying notes 131–32.

14. *See infra* Part III.B.

15. These bonds did not address the subject of sovereign immunity or establish a process for resolving disputes.

16. *See infra* text accompanying notes 134–41.

sovereign immunity law—such as the 1952 issuance of the Tate Letter[17]—seem to have passed unnoticed in the bond markets.[18]

That conclusion has further implications for a significant and ongoing debate over the role of legal enforcement in the sovereign debt markets. In modern times, litigation arising out of sovereign default is mostly the domain of a few specialized and sophisticated investors—hedge funds that buy distressed debt at steep discounts.[19] The lawsuits filed by these investors never fail to roil the sovereign debt markets, sparking claims that enforcement rights may be *too* strong. For example, observers and public officials fear that litigation may prevent financially distressed European countries from obtaining the debt relief needed to resolve the ongoing sovereign debt crisis in the Eurozone.[20]

Given the difficulties involved in suing a sovereign, however, it is not clear how seriously we should take these fears. There is a large theoretical and empirical literature that seeks to explain why lenders extend credit to sovereign borrowers. One strand of this literature presumes that lenders extend credit because they have the ability to penalize the borrower for default, including through litigation and asset seizure.[21] If this claim is valid, it lends credence to fears that litigation may disrupt needed sovereign debt restructuring efforts. As Part IV explains, however, the findings presented here suggest that a more skeptical view is warranted—one that assigns little significance to creditors' ability to enforce a judgment by seizing sovereign assets.[22] In contrast, ongoing litigation in the New York federal courts suggests that courts might develop potent *injunctive* remedies, but it is too soon to draw conclusions.[23]

Finally, the evolution of sovereign bonds described in this article implicates questions of contract theory. Sovereign loan transactions involve vast sums of money, sophisticated players, and contracts that are actively traded in secondary markets. Those inclined to take for granted

17. For further discussion of the Tate Letter, see *infra* Part II.A.3.

18. *See infra* note 234.

19. For examples, see *supra* note 8.

20. Greece's default, combined with (possibly short-lived) victories by investors in litigation and arbitration, *see supra* note 8, has sparked fears that hedge fund litigants will disrupt restructuring efforts. *See generally* Michael Goldhaber, *A Brave New World?*, AM. LAWYER, July 1, 2012. The U.S. government has filed an amicus brief supporting Argentina in one prominent case, *see supra* note 8, reflecting the government's concern over the macroeconomic consequences of such litigation. *See* Brief for the United States of America as *Amicus Curiae* in Support of Reversal at 5, NML Capital, Ltd. v. Republic of Arg., 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)), 2012 WL 1150791 (stating that the district court's order "could enable a single creditor to thwart the implementation of an internationally supported restructuring plan, and thereby undermine the decades of effort the United States has expended to encourage a system of cooperative resolution of sovereign debt crises"); *see also* Anna Gelpern, *Revival on the Head of a Pin: Do U Pari Passu?*, CREDIT SLIPS (Apr. 6, 2012, 4:26 PM), http://www.creditslips.org/creditslips/2012/04/revival-on-the-head-of-a-pin-do-u-pari-passu.html (suggesting that "upholding the order [against Argentina] could spell the end of the prevailing restructuring regime").

21. *See infra* Part IV.A.

22. The findings also reveal flaws in the existing empirical work, which does not account for the relationship between litigation rights and the terms of sovereign bond contracts. *See infra* text accompanying notes 264–73.

23. *See* NML Capital, Ltd. v. Republic of Arg., 699 F.3d 246, 250 (2d Cir. 2012).

the efficiency of such markets might expect contracts to contain terms that market participants deem optimal. A more nuanced view might begin by recognizing that sovereign bonds are largely boilerplate and rarely adopt new terms. According to contract theory, major shifts in sovereign debt boilerplate occur primarily when prompted by government intervention or when an exogenous shock, such as global financial crisis, alters investors' perceptions of risk and creates a demand for new terms.[24]

These accounts, however, fail to explain the post-FSIA shift in sovereign bonds. The shift was not prompted by government pressure and occurred during a time of relative placidity in the sovereign debt markets. Part IV closes by offering an explanation that augments existing theories of contract change.[25] It suggests that, after codification, the parties involved in documenting sovereign bond deals could no longer ignore the ongoing revolution in sovereign immunity law. In this sense, the statute acted as a disruptive force that prevented drafters from following their usual contracting routines. In effect, the statute created a need to *do something* in response to the perceived change in legal environment. At the same time, governments do not like to cede substantial authority to foreign courts and may have been reluctant to agree to expansive dispute resolution clauses. Because investors remained indifferent to legal enforcement, drafters were able to produce watered-down clauses that reflected the new legal environment without prompting the issuing government to demand significant concessions of its own.

II. THE GREAT (OR NOT SO GREAT) SHIFT . . .

Until around the middle of the twentieth century, the doctrine of absolute sovereign immunity posed a nearly insurmountable barrier to suit in English and U.S. courts.[26] Courts applying the doctrine, for example, might decline jurisdiction over a lawsuit even if the sovereign had previously consented to be sued and waived its immunity.[27] Of course,

24. For discussion of contract theory in this context, see Part IV.B.

25. *See infra* Part IV.B.

26. In some jurisdictions, the principle of absolute immunity began to break down as early as the mid-nineteenth century. For a general summary, see Harvard Law School Research in International Law, *Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. 451, 527–40 (Supp. 1932) [hereinafter, Harvard Draft Convention]. French, German, and Swiss courts, for example, enforced *ex ante* waivers of state sovereign immunity under some circumstances, though typically only when the loan had some connection to the forum. *See id.* at 548–80 (surveying different countries' approaches); Delaume, *supra* note 7, at 203–04 & n.40. This was not the case in English and U.S. courts. *See infra* note 27.

27. In a 1961 case, *Rich v. Naviera Vacuba*, the State Department's suggestion of immunity for Cuba opined that an *ex ante* waiver of immunity "is binding only on the conscience of the sovereign and, once given, may be revoked at will . . . ." Memorandum for the United States [In Opposition to Application for Stay of Mayan Lines, S.A.], 1 I.L.M. 276, 297 (1961). This was indeed the case under English law, *see* Duff Dev. Co. v. Kelantan, [1924] A.C. 797 (H.L.); Kahan v. Pakistan Fed'n, [1951] 2 K.B. 1003, 1012 (Eng.), but was less clearly so under U.S. law, which was evolving rapidly. Early U.S. cases, however, clearly supported the view that a sovereign could withdraw its waiver of immunity at any time. *See* Beers v. Arkansas, 61 U.S. 527, 529 (1857).

this rule diminished the incentives to include dispute resolution provisions in a loan contract.[28] But it may not have eliminated the incentives altogether. Lenders might have hoped that sovereign borrowers would voluntarily comply with contract terms calling for litigation or arbitration.[29] In addition, lenders might have included dispute resolution terms in loan contracts in response to a range of government policies.

A. The Effort to Influence Loan Contracts: A Century of Trying . . .

Throughout the twentieth century, governments and other international actors took steps to promote the use of formal adjudication. Their efforts included developing model arbitration clauses for sovereign loans, erecting multinational treaties to support international arbitration, making non-statutory changes to sovereign immunity law, and, ultimately, passing statutes adopting the restrictive theory of sovereign immunity. This section provides a truncated summary of these efforts and explains how they served to shelter domestic political actors from the costs associated with private citizens' foreign investments.

1. Modeling Arbitration

Perhaps the earliest efforts involve providing model arbitration clauses for use in loan contracts. In the early twentieth century, the United States and other states invested significant political capital in an effort to create a system of interstate arbitration.[30] The details of those efforts are of only peripheral interest here.[31] Of more direct interest are post-World War I loans arranged under the auspices of the League of Nations. After the war, a number of European countries were effectively shut out of global capital markets and were forced to borrow under the

28. *See generally* Weidemaier, *supra* note 4, at 336 (noting that during the period of absolute immunity, "states typically were immune from suit unless they consented at the time of the lawsuit itself. Since any dispute-resolution process would require the sovereign's ex post consent, there would seem little point to bargaining over such a process ex ante").

29. It is possible (if unlikely) that concern for its reputation would induce a sovereign to comply with such promises. Sovereign defaults can be strategic in the sense that the sovereign is technically capable of repaying the loan, although the domestic political costs of doing so may be unacceptable or prohibitive. In these cases, extra-legal sanctions have already failed to prevent default, so why would they induce compliance with promises related to dispute resolution? One possibility is that a borrower's reputation for promise-keeping is independent of its reputation for loan repayment. A borrower could always claim—more or less plausibly—that it could not repay the loan. But no such claim could be made if it refused to participate in the dispute resolution process. For general discussion of the possibility that states possess multiple reputations, see generally George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002); Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 259–62 (2009).

30. *See* MARK WESTON JANIS, INTERNATIONAL LAW 123–24 (5th ed. 2008); ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877–1920, at 260–62 (1967) (describing the popularity among Americans of the idea of international arbitration as a means for peace and the efforts of the Taft Administration to negotiate international arbitration treaties). *See also infra* note 36.

31. For a more extensive treatment, *see* FRANCIS ANTHONY BOYLE, FOUNDATIONS OF WORLD ORDER: THE LEGALIST APPROACH TO INTERNATIONAL RELATIONS: 1898–1922, at 25–56 (1999).

League's auspices.[32] The League was heavily involved in shaping the terms of these "League Loans," in part because some loans were guaranteed by member states.[33] And the loan documents often included arbitration clauses.[34]

These clauses were designed primarily to resolve interstate disputes, not disputes between private lenders and sovereign borrowers.[35] But the clauses also may have been viewed as models for bankers to use in resolving their own disputes with borrower governments.[36] For example, there is evidence that banks involved in the League Loans later employed similar clauses in loans to Brazil (by Rothschild) and Argentina (by JP Morgan) in the 1920s.[37]

By the mid-1930s, League of Nations officials had launched a more formal effort to encourage the use of arbitration to resolve disputes between private lenders and sovereign borrowers.[38] A 1935 resolution sponsored by the Netherlands created the Committee for the Study of International Loan Contracts.[39] The committee was comprised of leading figures from central banks, international financial institutions, and private bondholder associations.[40] It was charged with drafting model contract terms for government loans, and it responded by promulgating a model arbitration clause.[41]

The committee took pains to distinguish its proposal from earlier (but rare) uses of arbitration, in which mixed-claims tribunals created by

32. The United States was not a League member, but the State Department worked indirectly through participating U.S. banks to collaborate on these loans. *See* Jeff Frieden, *Sectoral Conflict and Foreign Economic Policy, 1914–1940*, 42 INT'L ORG. 59, 77–78 (1988).

33. On League Loans generally, see Margaret G. Myers, *The League Loans*, 60 POL. SCI. Q. 492 (1945). For contemporaneous history, see generally Arthur Salter, *The Reconstruction of Austria*, 2 FOREIGN AFF. 630 (1924); Arthur Salter, *The Reconstruction of Hungary*, 5 FOREIGN AFF. 91 (1926).

34. *See* Weidemaier, *supra* note 4, at 350; W. Mark C. Weidemaier, *Reforming Sovereign Lending Practices: Modern Initiatives in Historical Context*, *in* SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING 7–9 (Carlos Esposito et al. eds., 2013).

35. *See* Weidemaier, *supra* note 4, at 340.

36. A bit later in the century, U.S. policy makers involved in the creation of the International Monetary Fund would propose a compulsory arbitration mechanism for adjusting the debt of member states in default. *See* MARGARET G. DE VRIES & J. KEITH HORSEFIELD, THE INTERNATIONAL MONETARY FUND 1945–1965: TWENTY YEARS OF INTERNATIONAL MONETARY COOPERATION, VOLUME II: CHRONICLE 77 (J. Keith Horsefield ed., 1969). On the U.S. efforts in this regard, see generally Eric Helleiner, *The Mystery of the Missing Sovereign Debt Restructuring Mechanism*, 27 CONTRIBUTIONS TO POL. ECON. 91, 98–104 (2008).

37. The clauses appeared only in the underlying loan contract between the banks and the borrower, not in the bonds, and were worded so as to exclude bondholder claims. The clauses also appear to have been exceptional and did not appear in other loan contracts used by these banks during the era. *See generally* Weidemaier, *supra* note 4, at 342–50. For an example of a 1920s loan contract containing an arbitration clause, see Loan Contract Dated May 25, 1925 Between Argentina & J.P. Morgan & Co. & The National City Company, § 5 (on file with author).

38. For further discussion, see Weidemaier, *supra* note 34, at 6–9.

39. LEAGUE OF NATIONS, REPORT OF THE COMMITTEE FOR THE STUDY OF INTERNATIONAL LOAN CONTRACTS 5 (1939) [hereinafter REPORT ON LOAN CONTRACTS].

40. *See id.* at 5–6.

41. *Id.* at 5.

treaty resolved disputes between investors and foreign governments.[42] These earlier tribunals, the committee acknowledged, had sometimes been empowered to restructure rather than enforce the government's obligations.[43] By contrast, the committee emphasized that its model clause contemplated a proceeding in which arbitrators would "declar[e] . . . the rights and obligations of the parties" rather than order "modifications of the contract."[44] In other words, the committee was proffering a tool for enforcing sovereign debt obligations, not restructuring them.

The accompanying report expressed the optimistic view that most disputes arising from sovereign default could "have been easily settled, if it had been possible to lay them before a tribunal" like the one the committee proposed.[45] The implication was that both lenders and borrowers would benefit from a system of arbitration and would eagerly embrace the new clause.[46] Time would prove otherwise.[47]

2. Promoting International Arbitration in General

Two mid-century multilateral treaties also can be seen as efforts to encourage lenders and sovereign borrowers to make use of arbitration. Although it did not address the unique problems arising from transactions with sovereign states, the New York Convention, which entered into force in 1959, sought to facilitate the enforcement of international arbitration agreements and awards.[48] And in 1966, the creation of the International Center for the Settlement of Investment Disputes (ICSID) offered a potential mechanism for resolving investment disputes with

42. These tribunals often (though not always) declined to exercise jurisdiction over bondholder claims on the theory that states traditionally had declined to extend diplomatic protection to citizens who had purchased bonds issued by foreign countries. *See, e.g.*, Award of Sir Frederick Bruce, Bond Cases, *reprinted in* 4 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3591, 3614–15 (1898). For a summary of U.S. executive agreements with respect to arbitration commissions, see Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 26–27 & n.176 (2003).

43. A 1904 protocol between the United States and Dominican Republic, for example, established a lump sum to be paid to the San Domingo Improvement Company (a U.S. investor) and created an arbitration tribunal to determine the terms on which this sum would be paid: principal and interest payments, security for the payment stream, etc. *See* Arbitration of the Claim of the San Domingo Improvement Company Against the Dominican Republic, *in* PAPERS RELATED TO THE FOREIGN RELATIONS OF THE UNITED STATES 270 (Washington: Government Printing Office 1905).

44. REPORT ON LOAN CONTRACTS, *supra* note 39, at 27.

45. *Id.* at 25.

46. Indeed, the committee's primary concern was that *too much* litigation might ensue. *See id*. at 33 ("Too many lawsuits would be a bad thing; not only would they be unpleasant for the debtors, but their Stock Exchange effects would be disastrous.").

47. *See infra* Figure 1. For evidence that contracts generally did not adopt the new terms used in the League Loans, see Weidemaier, *supra* note 34, at 20–21.

48. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 49 [hereinafter New York Convention]. The Convention entered into force in the United States in 1970. In addition, beginning after the second world war, the United States negotiated bilateral friendship, commerce, and navigation treaties, and these often waived any immunity to which state-owned enterprises might have been entitled. *See* John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 337–41 (2013).

sovereign states.[49] Neither development erased the uncertainty associated with litigation against a sovereign. The New York Convention, for example, does nothing to lift a sovereign's immunity from suit or execution,[50] and ICSID's Article 55 explicitly preserves any immunity from execution available to the sovereign.[51] Each development, however, increased the salience of international arbitration and might plausibly have led lenders to demand the inclusion of arbitration clauses in loan contracts.

3. The Evolution of Foreign Sovereign Immunity Law

In many respects, the most significant change occurred in 1952 when the U.S. Department of State issued the Tate Letter, which announced the Department's adoption of the restrictive theory of sovereign immunity as a matter of policy.[52] Foreign states henceforth would retain immunity for their "public" but not for their "private" (i.e., commercial) acts.[53] The State Department, however, retained a central role in making immunity determinations.[54] To claim immunity, foreign states typically sought a suggestion of immunity from the Department.[55] If the Department recognized and allowed the suggestion, its decision was effectively

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49. *See* Convention for the Settlement of Investment Disputes Between States and Nationals of Other States, at art. 53–55, Oct. 14, 1966 [hereinafter ICSID Convention]. ICSID does not create an obligation to arbitrate–that comes either from a contract negotiated directly by the investor or from a bilateral investment treaty concluded by the investor's home state and the host country.

50. *See* Weidemaier, *supra* note 34, at 11 n.53. The FSIA provides for the enforcement of foreign arbitral awards in U.S. courts. *See* 28 U.S.C. §§ 1605(a)(6)(B), 1610(a)(6) (2012).

51. *See* ICSID Convention, *supra* note 49. There also may have been lingering uncertainty about whether sovereign loans constituted an "investment" eligible for arbitration before ICSID, although contracting parties have substantial freedom to define the term for themselves. *See* CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, 125–34 (2001).

52. *See* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 219 (stating that the Tate Letter "announced an important shift in the U.S. approach to sovereign immunity"); Joseph W. Dellapenna, *Interpreting the Foreign Sovereign Immunities Act: Reading or Construing the Text?*, 15 LEWIS & CLARK L. REV. 555, 574 (2011) (stating that the Tate Letter "inaugurat[ed] the restrictive rule of foreign sovereign immunity in American law"); Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 120–21 ("The Tate Letter was so significant because during the mid-twentieth century the Supreme Court followed a practice of total deference to Executive suggestions of immunity."); Ingrid Wuerth, *Symposium Epilog: Foreign Sovereign Immunity at Home and Abroad*, 44 VAND. J. TRANSNAT'L L. 1233, 1235 (2011) (stating that the Tate Letter "formally articulate[d] official immunity principles"). For general discussion of the evolution of sovereign immunity law, see Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 819–25 (2012).

53. *See* Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T ST. BULL. 969, 984–85 (1952) [hereinafter *Tate Letter*].

54. For a discussion of the Department's view of this role, see Murray J. Belman, *New Departures in the Law of Sovereign Immunity*, 63 AM. SOC'Y INT'L L. 182, 182–87 (1969).

55. *See* JANIS, *supra* note 30, at 359 ("Before the passage of the FSIA, the granting of immunity was often decided on the basis of a formal suggestion made by the Department of State."); *cf.* Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 667 n.70 (1962) ("[I]n the area of sovereign immunity . . . a case may well be won or lost in the [State] Department rather than in the courtroom.") (citations omitted).

final and ended any litigation that private parties had instituted in U.S. courts against the foreign sovereign.[56]

From the standpoint of an investor in foreign government bonds, the Tate Letter left a number of issues unresolved, and it resolved others in unsatisfactory ways. For example, the issuance of bonds might have been treated as a public act for which the sovereign retained its immunity from suit in U.S. courts.[57] To counter this, investors might insist that the bond contract include a waiver of immunity. The problem, however, was that the State Department or the courts might allow the issuer to withdraw its waiver after the fact. One 1971 case, for example, upheld the dismissal of a lawsuit in accordance with the State Department's suggestion of immunity even though the foreign government had previously waived its immunity in a contract.[58] Finally, the Tate Letter addressed only the question of immunity from *suit*.[59] As a matter of Department policy, a foreign government's assets remained immune from *execution*.[60] Thus, an investor who managed to obtain a judgment had no right to seize the issuer's U.S. assets—assuming it could find any—to satisfy the judgment.

Enacted in 1976, the FSIA codified the restrictive theory of sovereign immunity announced in the Tate Letter.[61] As a formal matter, the statute changed existing law in three ways that would have been especially relevant to investors in foreign government bonds. First, it removed the State Department from immunity determinations and placed that responsibility on the courts.[62] Second, it clarified that foreign governments were not immune from suit if they had previously waived their immunity in a contract, "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms

56. If the State Department declined to act on the suggestion, courts would decide the immunity question. From the 1930s until the FSIA's enactment, courts deferred completely to State Department suggestions of immunity on behalf of a foreign state. *See* Bradley & Helfer, *supra* note 52, at 219; Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1252 (1988); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 138–46 (1999).

57. *See* Victory Transp., Inc. v. Comisaria Gen. de Abastecimientos y Trasportes, 336 F.2d 354, 360 (2d Cir. 1964).

58. *See* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971).

59. *See Tate Letter*, *supra* note 53, at 985.

60. *See* Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469, 472–73 (Sup. Ct. 1959); Belman, *supra* note 54, at 186–87; Denys P. Myers, *Contemporary Practice of the United States Relating to International Law*, 54 AM. J. INT'L L. 632, 640–44 (1960) (describing the case and extensively quoting the State Department letter).

61. 28 U.S.C. § 1605(a)(2) (2012).

62. A letter accompanying the draft legislation, which was jointly submitted by the Department of State and the Department of Justice, noted that current practice put the State Department "in the difficult position of effectively determining whether the plaintiff will have his day in court." Letter from the Attorney General and the Secretary of State to the President of the Senate (Jan. 22, 1973), *in United States: Draft Legislation on the Jurisdictional Immunities of Foreign States*, 12 I.L.M. 118, 120 (Jan. 26, 1973) [hereinafter *Draft Legislation on Jurisdicitonal Immunities*].

of the waiver."[63] Finally, the FSIA provided judgment-holders with limited rights to enforce a judgment against sovereign assets.[64] Most notably, property used for a commercial activity in the United States was no longer immune from execution if the foreign sovereign had waived immunity from execution[65] or, absent such a waiver, if the property "is or was used for the commercial activity upon which the claim is based."[66]

As a practical matter, however, the FSIA may not have represented a stark departure from existing law, which had continued to evolve in the wake of the Tate Letter. Take first the question whether a sovereign could irrevocably waive its immunity from suit in a contract. Even after the Tate Letter, the State Department seemingly viewed such waivers as revocable at the sovereign's whim.[67] Yet the law was clearly in flux. For example, a 1963 report prepared for the Department by an external researcher noted that foreign states could waive immunity by contract and listed only English courts as exceptions to this rule.[68] The FSIA's legislative history also contains little hint that the decision to treat waivers of immunity as irrevocable represented a clear break from existing law.[69] Indeed, early drafts of the Restatement of the Foreign Relations Law of the United States, published in 1958, took the position that such waivers were enforceable even when "made in advance of any enforcement action."[70] The accompanying comments contain no hint that the proposition was controversial,[71] and when in 1962 the proposal was finally incor-

63. 28 U.S.C. § 1605(a)(1). This may have been significant, as the FSIA did not remove all doubt as to whether the issuance of bonds was a commercial activity. *See infra* text accompanying notes 85–89.

64. These rights are codified at 28 U.S.C. § 1610 (2012).

65. *Id.* § 1610(a)(1).

66. *Id.* § 1610(a)(2). I am omitting discussion of other relevant provisions, especially those related to arbitration. For example, the FSIA also allows U.S. courts to assume jurisdiction over a foreign sovereign to the extent necessary to enforce an arbitration agreement or confirm an arbitration award, *id.* § 1605(a)(6), and allows the holder of a judgment based on an arbitration award to execute the judgment against the sovereign's commercial assets (whether or not the assets were "used for the commercial activity upon which the claim is based"), *id.* § 1610(a)(6). The FSIA's provisions with respect to arbitration were added in the late 1980s, before sovereign bonds began to include arbitration clauses.

67. *See supra* note 27 and text accompanying note 58.

68. *See* JOSEPH M. SWEENEY, DEP'T OF STATE, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY 55 (1963); *see also* Harvard Draft Convention, *supra* note 26, at 549 (proposing that contractual waivers of immunity be irrevocable and that this rule "seems so obviously equitable that its general acceptability may be assumed," despite the English rule to the contrary). Indeed, a proposed draft of the FSIA, which was jointly submitted by the State Department and the Department of Justice, recognized binding waivers of immunity even in cases involving a foreign state's "public debt." The accompanying correspondence gives no hint that this was viewed as a significant change. *See Draft Legislation on Jurisdicitonal Immunities*, *supra* note 62, at 124; *see also* Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Trasportes, 336 F.2d 354, 363 (2d Cir. 1964) (agreement to arbitrate constituted submission to jurisdiction for purposes of a suit to compel arbitration).

69. A House Report noted that "[s]ome court decisions" had allowed foreign states to withdraw a waiver but that "the better view" was to the contrary. H.R. REP. NO. 94-1487, at 18 (1976).

70. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 57(1) (Tentative Draft No. 2, 1958).

71. *Id.* at cmt. b ("When a foreign state has made a contractual provision that it will not assert its immunity in the courts of another state there is no reason why it should not be bound by such a contractual provision.").

porated into the Proposed Official Draft, the following illustration might have caught a bondholder's eye:

> State A concludes a contract with private banks in state B for the sale of bonds issued by A. The contract provides that any dispute between the bondholders and A will be submitted to the courts of B. . . . X, a bondholder, sues A for payment in a court of B. A has waived its immunity in the matter and the courts of B may exercise their jurisdiction to determine the merits of X's claim.[72]

Well before the FSIA, then, investors arguably had reason to favor bonds that included waivers of immunity from suit and other clauses designed to facilitate legal enforcement. An issuer might comply with these clauses voluntarily even after defaulting on the loan itself.[73] If not, it was increasingly plausible that the State Department or the courts would enforce its waiver and that investors could at least succeed in obtaining a judgment. From the State Department's perspective, this could be accomplished simply by declining to file a suggestion of immunity on the foreign sovereign's behalf.[74] In such a case, the court would have discretion to decide whether to enforce the waiver.[75] And its decision on that question might well have been influenced by the growing consensus that such waivers were enforceable.

Of course, that was only half the battle. A successful litigant still had to enforce the judgment, and State Department policy was that sovereign assets were immune from execution.[76] As a formal matter, then, the FSIA represented a significant change from prior law regarding execution of judgments. As a practical matter, though, the change was modest, perhaps even nonexistent. That is because, except when a sovereign has waived immunity *from execution* (or agreed to arbitrate), the FSIA only allows judgment holders to reach assets "used for the commercial activity upon which the claim is based."[77] For holders of sovereign bonds, this is a problem. Because the relevant commercial activity is borrowing money, and because sovereigns quickly spend the money they borrow,[78]

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72. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 73 cmt. on subsec. (1), b, illus. 1 (Proposed Official Draft 1962). The Reporter's Notes acknowledged that U.S. cases provided no direct support for the Restatement rule but opined that U.S. courts would adopt the rule if the issue were to arise. *Id.* at cmt. on subsec. (1), reporter's notes 1.

73. *See supra* note 29.

74. *See supra* note 56.

75. Existing law suggested that courts should dismiss the case if the State Department filed a waiver of immunity, see Isbrandtsen Tankers v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971), but left the court discretion to decide the immunity question if the State Department did not "recognize[] and allow[]" the foreign sovereign's immunity claim. *See* Lamont v. Travelers Ins. Co., 24 N.E.2d 81, 86 (N.Y. 1939); Francis Deak, *The Plea of Sovereign Immunity and the New York Court of Appeals*, 40 COLUM. L. REV. 453, 454–55 (1940).

76. *See supra* note 60 and accompanying text.

77. 28 U.S.C. § 1610(a)(2) (2012). As noted earlier, *supra* note 66, an arbitration clause effectively constitutes a waiver of both jurisdictional immunity and immunity from execution. Like an express waiver of immunity from execution, an arbitration clause expands the range of property that is subject to execution by eliminating any requirement that the property has been "used for the commercial activity" upon which the claimant based the claim.

78. Or at minimum transport it out of the United States.

few assets will meet this definition. I will return to this subject below.[79] For now, the important point is that the FSIA granted meaningful execution rights to bondholders only when the bond contained a waiver of immunity from execution—and perhaps not even then.

4. *A Common Theme: Insulating Political Actors from Investment Disputes*

The discussion thus far may suggest that there is a unique link between efforts to encourage formal adjudication and sovereign bond lending. In some cases—as with the League Loans and the Committee for the Study of International Loan Contracts—that is true.[80] In others, however, the link is more tenuous.[81] The FSIA's drafters, for example, had in mind a range of activities that might result in claims by U.S. citizens against foreign governments.[82] Lending money was only one means of foreign investment, and not all loans involved the issuance of bonds.[83] Indeed, the Depression severely curtailed the bond markets, which remained relatively dormant until the late 1980s—after passage of the FSIA.[84]

But sovereign lending was hardly an afterthought. For example, early drafts of the FSIA would have allowed foreign sovereigns to assert immunity in lawsuits arising out of their "public debt."[85] Had they been adopted, these provisions would have codified the view that the issuance of bonds was a public (i.e., non-commercial) act.[86] These controversial provisions were eventually deleted.[87] Explaining this decision, the House Judiciary Committee's report flatly opined that the issuance of bonds to

79. *See infra* text accompanying notes 124–30, 157–62.

80. The League Loan documents often included arbitration clauses, and the Committee for the Study of International Loan Contracts drafted a model arbitration clause for inclusion in government loans. *See supra* text accompanying notes 32–46.

81. Neither the New York Convention nor ICSID, for example, were motivated by interest in resolving claims arising out of foreign government bonds. *See supra* text accompanying notes 48–51.

82. *See* H.R. REP. NO. 94-1487, at 7 (1976) (providing examples of "foreign state enterprises" acting as "every day participants in commercial activities"). The House Report cites as examples "when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price," "when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention," and "when a citizen crossing the street may be struck by an automobile owned by a foreign embassy." *Id.* at 6–7.

83. Most lending to sovereigns in the decades after WWII took the form of direct lending by governments or multilateral financial institutions to debtor countries. Private lending in the 1960s and 1970s typically involved syndicated bank loans, in which groups of banks would make direct loans to debtor countries.

84. YOUSSEF CASSIS, CAPITALS OF CAPITAL: A HISTORY OF INTERNATIONAL FINANCIAL CENTRES, 1780–2005, at 192–93, 244 (2006).

85. *Draft Legislation on Jurisdicitonal Immunities, supra* note 62, at 121.

86. *See* G. R. Delaume, *Public Debt and Sovereign Immunity: Some Considerations Pertinent to S.566*, 67 AM. J. INT'L L. 745, 747–49 (1973).

87. For relevant criticism, see generally *id.*; G. R. Delaume, *Public Debt and Sovereign Immunity Revisited: Some Considerations Pertinent to H.R. 11315*, 70 AM. J. INT'L L. 529 (1976).

the U.S. public was an act "of a commercial nature . . . ."[88] And anyway, the report's authors concluded, the question was irrelevant. Even if bond issuance was a public act for which the sovereign was entitled to immunity, the banks that underwrote the bonds "would invariably include an express waiver of immunity in the debt instrument."[89] The implication was clear: one way or the other, U.S. courts would adjudicate disputes arising out of the issuance of bonds by foreign governments.

Thus, one of the FSIA's functions was to channel bond disputes into the courts or into arbitration.[90] This was not a new goal. To a degree, the same goal had animated earlier initiatives to promote formal adjudication between private investors and foreign sovereigns. It is important to realize that these initiatives served an important (and self-serving) function for government officials: Each promised to insulate political actors from pressure to intervene on behalf of domestic constituents—including bondholders—whose foreign investment hopes had been dashed.

For example, ICSID Article 27 forbids contracting states to extend diplomatic protection to nationals when the relevant foreign state has agreed to arbitrate.[91] The effect of Article 27 is to allow states to commit, credibly and in advance, not to intervene in investment disputes.[92] By giving investors a remedy that does not depend on their home state's willingness to espouse their claims—indeed, by prohibiting espousal—ICSID depoliticizes investment disputes.[93] Changes to sovereign immunity law served a similar function. By opening U.S. courts to lawsuits against foreign states through the Tate Letter, and by removing the State Department from the process of making immunity determinations through the FSIA, the changes promised to insulate political actors from pressure by both U.S. citizens and foreign states.

88. H.R. REP. NO. 94-1487, at 10 (1976). As enacted, the FSIA said nothing at all about sovereign bonds, despite proposals to explicitly define commercial activity to include the issuance of "any debt security." *See* Georges R. Delaume, *The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later*, 88 AM. J. INT'L L. 257, 259 (1994). After its enactment in 1978, the State Immunity Act explicitly defined commercial activities to include "any loan or other transaction for the provision of finance," presumably settling the question in the U.K. State Immunity Act, 1978, c. 33, § 3 (U.K.).

89. H.R. REP. NO. 94-1487, at 10.

90. Recall that the statute treats an arbitration clause as a waiver of immunity to the extent necessary to enforce the arbitration clause or confirm an arbitration award, and it expands the range of property subject to execution. *See supra* note 66.

91. *See* Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *ICSID Convention*, *Regulations and Rules*, Art. 27(1) (Apr. 2006) which provides: "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute." Contracting states may, however, make "informal diplomatic exchanges" in an effort to facilitate a settlement. *Id*. at Art. 27(2).

92. In turn, the state that hosts the investment benefits to the extent that it prefers arbitration to diplomatic and economic pressure from the investor's home state.

93. *See, e.g.*, Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 175 (2005).

Many government officials would have welcomed some distance from foreign investment disputes.[94] During the twentieth century, the U.S. government was heavily involved both in the making of foreign loans and in the resolution of default-related disputes.[95] And that involvement proved costly.[96]

Some background may help frame this point. By the 1920s, U.S. overseas investments were concentrated in the hands of a relatively small group of manufacturing and extractive industries and internationally-oriented banks.[97] Between 1900 and 1929, foreign direct investment increased by two hundred and sixty percent as a percentage of U.S. domestic corporate and agricultural wealth, and more than half of this investment was concentrated in a handful of industries.[98] Over the same period, U.S. holdings of foreign bonds increased nearly six-fold, and new foreign issuances came to constitute a substantial part of the New York market.[99] Between 1919 and 1929, foreign issues constituted nearly twenty percent of all New York issues,[100] and the majority of these were foreign government securities.[101] As a result of World War I, New York became a leading global capital market.[102]

These concentrated economic sectors had an interest in securing an actively internationalist role for the United States and in lobbying the

94. Governments did not routinely intervene (much less wield military force) on behalf of bondholders, and many diplomatic interventions were minor and relatively costless. In fact, bondholders have historically been somewhat disfavored as creditors. For example, in an 1848 circular sent to British diplomats, Viscount Palmerston stressed the British government's unfettered discretion in deciding whether to assist British holders of foreign bonds and noted that "[t]he British Government has considered that the losses of imprudent men who have placed mistaken confidence in the good faith of foreign Governments would provide a salutary warning to others." The Palmerston Circular is quoted in CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 44 (1985). It is clear, however, that the U.S. government played an active role both in making and enforcing foreign loans, especially in the first decades of the twentieth-century. *See generally* EMILY S. ROSENBERG, FINANCIAL MISSIONARIES TO THE WORLD: THE POLITICS AND CULTURE OF DOLLAR DIPLOMACY, 1900–1930 (1999).

95. *See generally* ROSENBERG, *supra* note 94. On the general involvement of creditor states in settling default on foreign bonds, see also STURZENEGGER & ZETTELMEYER, *supra* note 2; Barry Eichengreen, *Historical Research on International Lending and Debt*, 5 J. ECON. PERSP. 149, 162–64 (1991); Barry Eichengreen & Richard Portes, *Settling Defaults in the Era of Bond Finance*, 3 WORLD BANK ECON. REV. 211 (1989); Albert Fishlow, *Lessons From the Past: Capital Markets During the 19th Century and the Interwar Period*, 39 INT'L ORG. 383 (1985).

96. In the early 1930s, for example, the State Department was publicly excoriated for its role in foreign lending. *See* Michael R. Adamson, *The Failure of the Foreign Bondholders Protective Council Experiment, 1934–1940*, 76 BUS. HIST. REV. 479, 486–87 (2002).

97. *See* Frieden, *supra* note 32, at 63.

98. *Id.* at 64 & tbl. 1.

99. *Id.* at 63–65 & tbl. 1. The increase is reported as a percentage of non-government bond issues (meaning it excludes US treasuries, municipal bonds, etc.).

100. *Id.* at 66 tbl. 3 (figure excludes domestic government securities).

101. ILSE MINTZ, DETERIORATION IN THE QUALITY OF FOREIGN BONDS ISSUED IN THE UNITED STATES, 1920–1930, at 19 (1951) (compare Table 3 to Table 1 on p. 9); RALPH A. YOUNG, U.S. DEP'T OF COMMERCE , HANDBOOK ON AMERICAN UNDERWRITING OF FOREIGN SECURITIES 12 tbl. 2 (1930).

102. On this history generally, see BARRY EICHENGREEN, GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919–1939, 29–67 (1992); Marc Flandreau et al., *Conflicts of Interest, Reputation, and the Interwar Debt Crisis: Banksters or Bad Luck?* 6–10 (HEID Working Paper No. 02, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588031.

government to support their overseas investments more directly.[103] And in fact, there is ample evidence that State Department officials were involved in structuring or reviewing foreign loans during the first decades of the twentieth century.[104] This degree of involvement between political actors and American bankers, of course, may have implied that the U.S. government was assuming the obligation to protect the interests of American investors.[105] And it generated an intense backlash after the wave of sovereign defaults that accompanied the Depression.[106]

A state that wants no part of enforcing its citizens' foreign investments would do well to offer them alternatives. And in fact, the U.S. government pursued a number of policies designed to channel bondholder claims into less costly (for political actors) enforcement devices. In the 1930s, for example, the State Department established the Foreign Bondholders Protective Council (FBPC), in part as a reaction to public outrage over the Department's role in foreign lending.[107] A quasi-private organization, the FBPC's purpose was to represent U.S. bondholders in settlement negotiations with sovereigns that had defaulted.[108] And if settlement negotiations failed, a viable system of arbitration or litigation might offer further protection from demands to intervene.[109]

This truncated discussion does not do justice to the U.S. government's complex involvement in foreign loans.[110] But the broader point is simple: throughout much of the century, many government officials had reason to encourage the use of formal adjudication to resolve foreign investment disputes, including those arising out of bond lending. That goal was pursued ambivalently and often was undermined by other policy im-

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103. Thomas Ferguson, *From Normalcy to New Deal: Industrial Structure, Party Competition, and American Public Policy in the Great Depression*, 38 INT'L ORG. 41, 63–79 (1984); Frieden, *supra* note 32, at 62–74; LIPSON, *supra* note 94, at 58–64.

104. For example, State Department officials worked with U.S. banks to design arbitration clauses that would justify post-default U.S. intervention in the affairs of Latin American borrowers. *See* Weidemaier, *supra* note 4 at 348–49. And by the early 1920s, the State Department was reviewing all proposed foreign loans in an effort to balance the interests of internationally-oriented banks and industries (which favored free trade and other policies, such as cancelation of inter-government war debts) and domestic manufacturers (who, supported by the Commerce Department, opposed such policies as a subsidy to international competitors). *See* Frieden, *supra* note 32, at 60 ("Through the 1920s and early 1930s, the two broad coalitions battled to dominate foreign economic policy. The result was an uneasy stand-off in which the two camps entrenched themselves in different portions of the state apparatus, so that policy often ran on two tracks and was sometimes internally contradictory."). *See generally* PAUL PHILIP ABRAHAMS, THE FOREIGN EXPANSION OF AMERICAN FINANCE AND ITS RELATIONSHIP TO THE FOREIGN ECONOMIC POLICIES OF THE UNITED STATES, 1907–1921 (1976); DAN P. SILVERMAN, RECONSTRUCTING EUROPE AFTER THE GREAT WAR 150–59 (1982) (discussing negotiations between Britain and the United States for British funding of American war debt).

105. MELVYN P. LEFFLER, THE ELUSIVE QUEST: AMERICA'S PURSUIT OF EUROPEAN STABILITY AND FRENCH SECURITY, 1919–1933, at 61–64 (1979).

106. *See* Flandreau et al., *supra* note 102, at 6–10.

107. On the history of the FBPC generally, including its conflicted relationship with the State Department, see Adamson, *supra* note 96; Barry Eichengreen & Richard Portes, *After the Deluge: Default, Negotiation, and Readjustment During the Interwar Years*, *in* THE INTERNATIONAL DEBT CRISIS IN HISTORICAL PERSPECTIVE 12 (Barry Eichengreen & Peter H. Lindert eds., 1989).

108. *See* Adamson, *supra* note 96, at 479, 491.

109. *See, e.g.*, *supra* text accompanying notes 91–94.

110. *See, e.g.*, ROSENBERG, *supra* note 94.

peratives.[111] But loan contracts may have been influenced by these efforts. For example, even during the era of absolute immunity, U.S. banks might have included arbitration clauses in loan contracts because they knew their government favored such clauses and because they hoped it would intercede—in the form of relatively costless diplomatic nudging—to the extent necessary to obtain the issuer's participation in the arbitration.[112]

For all of these reasons, sovereign bonds offer a unique opportunity to explore how contracts evolve in response to a wide array of formal and informal forces. These include the gradually evolving law of sovereign immunity, model contract terms drafted by influential international actors, and government policies designed to encourage reliance on adjudication even in the absence of formal enforcement rights. As the next section explains, however, bond contracts were largely indifferent to these events. When they adopted dispute resolution terms, they did so *en masse*, and seemingly in response to *codification* rather than to actual change in sovereign immunity doctrine.

B. The FSIA as Trigger for Contract Change

This section maps sovereign bond contracting practices with respect to dispute resolution onto the developments described above. The overall data set consists of over 1800 bond contracts spanning the period 1823–2011. This includes the set of sovereign bond offerings available as of 2011 from the Thomson OneBanker database, a source of modern bonds. Thomson OneBanker is not complete, however, and it primarily includes documents related to bond issuances since the mid-1990s.[113] To supplement this data, I and others have also gathered documents from a variety of financial archives and libraries, primarily in New York, Washington, DC, and London.[114] This archival research expands the data set to include nearly every sovereign bond issuance listed on the New York Stock Exchange (if retained in the NYSE archives at the Library of Congress), a significant number of post-1900 issuances on the London Stock Exchange, and many private issuances listed on neither exchange.

111. The State Department's foreign policy agenda, for example, increasingly led it to interfere with the FBPC and eventually to supplant the FBPC altogether as chief settlement negotiator. *See* Adamson, *supra* note 96 at 506–12.

112. *See* Weidemaier, *supra* note 4, at 345–52.

113. It also contains relatively few bonds governed by local-law, which have featured rather prominently in recent discussions of sovereign debt restructuring—such as Greece's unilateral and retroactive imposition of collective action clauses on its local-law bonds. *See, e.g.*, Jeromin Zettelmeyer & Mitu Gulati, *In the Slipstream of the Greek Debt Exchange*, VOX (Mar. 5, 2012), http://www.voxeu.org/article/slipstream-greek-debt-exchange.

114. These include the New York Stock Exchange archives at the Library of Congress in Washington, DC; the London Stock Exchange archives at Guildhall library in London; the archives for HSBC, Rothschild, Barings, and UBS; the stock books at the JP Morgan Library and Museum in New York; the Willard Straight papers at Cornell University; and the Duke University and Harvard Business School library archives.

Because I am concerned primarily with legal and policy developments in the United States, I focus on bonds that were listed on the New York Stock Exchange or that were listed on another exchange but governed by New York law.[115] In either case, New York would be a likely forum for enforcement litigation.[116] I also focus only on bonds issued by foreign countries and thus exclude bonds issued by cities, provinces, and other quasi-sovereign entities such as development banks.[117] The resulting subset includes 630 bonds. A more complete description of the dataset and its limits is provided elsewhere,[118] but the Appendix provides additional detail.

Figure 1 depicts how bonds issued after 1940 and likely to be enforced in New York address the subject of dispute resolution. For simplicity, the figure focuses only on two variables. The first is whether the bond contract includes a waiver of the sovereign's immunity from suit.[119] The second is whether the bond contract also includes a waiver of immunity from execution.[120] Brazilian and El Salvadoran bonds issued after 1990 include arbitration clauses, and I treat these as including a waiver of both immunity from suit and execution.[121] With respect to immunity from suit, the figure depicts a clear shift. In the years immediately preceding the enactment of the FSIA, only a handful of issuances included waivers of sovereign immunity. These bonds were a distinct minority, however, and most appeared after the FSIA had been introduced in Congress with the joint support of the State Department and the Department of Justice.[122] (Five series of bonds issued simultaneously by Malaysia in 1965 are the sole exception.) After 1977, however, virtually all new issuances included a waiver of immunity from suit.[123]

115. There is reason to believe bonds adopted dispute resolution clauses earlier in other jurisdictions where sovereign immunity law had evolved earlier to permit lawsuits against foreign states. *See* Delaume, *supra* note 7, at 203–04.

116. None of the bonds in the dataset selects the law of another U.S. jurisdiction.

117. As noted *infra*, dispute resolution clauses began to appear somewhat earlier in these bonds. *See infra* text accompanying notes 165–68; *see also* Coyle, *supra* note 48 (discussing impact of friendship, commerce, and navigation treaties on immunity of state-owned enterprises).

118. *See generally* Mark Weidemaier et al., *Origin Myths, Contracts, and the Hunt for* Pari Passu, 38 LAW & SOC. INQUIRY 72 (2013); W. Mark C. Weidemaier & Mitu Gulati, *How Markets Work: The Lawyer's Version*, STUDIES IN LAW, POLITICS, AND SOCIETY (forthcoming 2013).

119. Such a waiver is always accompanied by a clause submitting to the jurisdiction of foreign courts or (in rare cases) providing for arbitration.

120. Thus, the figure omits a good deal of information, including the location of the chosen forum, whether the contract includes a choice of law clause, and other variables. Not surprisingly, some of these variables are strongly related. As a general rule, for example, sovereign bonds provide for litigation in the jurisdiction whose law governs the issuance. In the full dataset of 1862 bonds, 1135 contain both a choice of law clause and a choice of forum clause, and in 98.9 percent of these issuances (1122 of 1135), the chosen law matches the selected jurisdiction (although the issuer sometimes agrees that it may also be sued elsewhere). In the mid-1990s, a few issuers began to include arbitration clauses in their bonds, either in lieu of or in addition to clauses submitting to foreign court jurisdiction. On these clauses generally, see W. Mark C. Weidemaier, *Disputing Boilerplate*, 82 TEMP. L. REV. 1 (2009).

121. *See supra* text accompanying note 66.

122. *See Draft Legislation on Jurisdicitonal Immunities*, *supra* note 62, at 118. The first draft of the legislation that became the FSIA was introduced in the Senate in January, 1973. *See id.*

123. Many of the exceptions involve Latin American issuers who had long sought to channel foreign investors into their local courts. According to the Calvo Doctrine, foreign creditors who held

Like other boilerplate contracts, sovereign bonds rarely adopt new terms.[124] For that reason alone, this shift was a significant contracting event.[125] At the same time, its practical impact was limited. Note that, in the immediate wake of the FSIA, no issuer waived its immunity from *execution*.[126] Such waivers did not become common until the mid-1990s, and they did not begin to appear in the New York market until after Mexico's suspension of payments in August of 1982 prompted the 1980s debt crisis.[127] The omission is significant. As noted above, it is not clear that the FSIA meaningfully enhanced bondholders' enforcement rights in the absence of a waiver of immunity from execution.[128] This is because, without the waiver, bondholders could only hope to seize commercial assets that had been "used for the commercial activity upon which" they had based their claims—i.e., used for the issuance of bonds.[129] This may have been a null set.[130]

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defaulted sovereign debt should submit their claims to local (debtor country) courts rather than rely on the protections of foreign governments. *See* Ryan J. Bubb & Susan Rose-Ackerman, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment*, 27 INT'L REV. L. & ECON. 291, 294 (2007).

124. *See* Stephen J. Choi & G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 932 & n.7 (2004) (discussing assumption of standardization in sovereign bond contracts).

125. *See infra* Part IV.B.

126. A modern bond, for example, might provide something like:

> To the extent that the Republic may in any jurisdiction claim or acquire for itself *or its assets* immunity (sovereign or otherwise) from *suit*, *execution, attachment (whether in aid of execution, before judgment or otherwise*) or other legal process (whether through service or notice or otherwise), the Republic irrevocably agrees for the benefit of the Holders of Notes not to claim, and irrevocably waives, such immunity, to the fullest extent permitted by the laws of such jurisdiction.

MERRILL LYNCH INT'L, U.S. $22,000,000,000 THE LEBANESE REPUBLIC GLOBAL MEDIUM-TERM NOTE PROGRAM 104 (2009) (emphasis added). By contrast, bonds issued in the late-1970s typically waived only the sovereign's immunity from suit. For example, bonds issued by Finland in 1977 provide:

> Finland will irrevocably waive any immunity from jurisdiction to which it might otherwise be entitled in any action arising out of or based on the Bonds which may be instituted by any holder of a Bond in any State or Federal court in New York City or in any competent court in Finland.

REPUBLIC OF FIN. 8.75% BONDS DUE 1992, PROSPECTUS (1977).

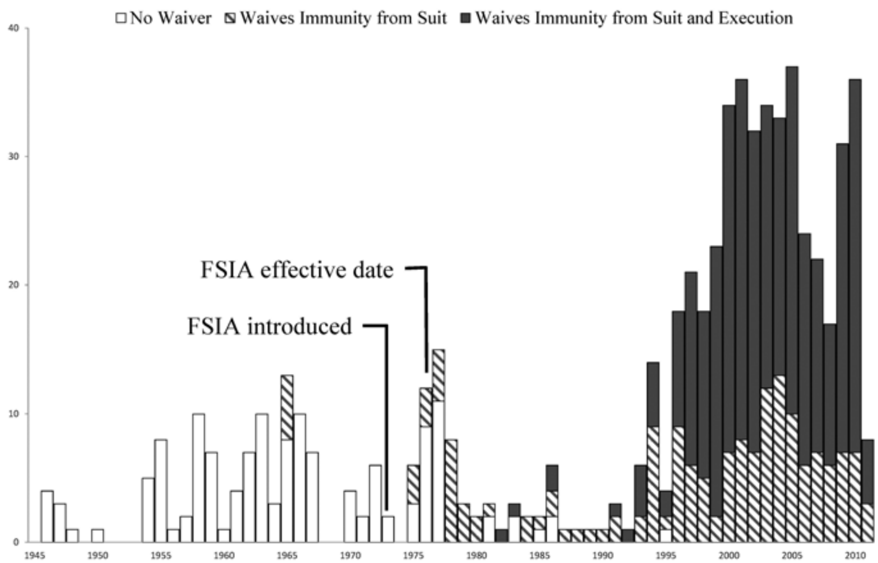
127. On the timing of the crisis, see Eduardo Borensztein & Ugo Panizza, *The Costs of Sovereign Default* 7 (Int'l Monetary Fund, Working Paper No. WP/08/238, 2008). *See generally* Ugo Panizza et al., *The Economics and Law of Sovereign Debt and Default*, 47 J. ECON. LITERATURE 651, 669 fig. 1 (2009).

128. *See supra* text accompanying notes 76–78.

129. 28 U.S.C. § 1610(a)(2) (2012).

130. If the issuing country had assets in another jurisdiction, if that jurisdiction had more favorable rules with respect to execution against sovereign property, and if that jurisdiction would recognize and enforce the judgment of a U.S. court, then the bondholder might have broader enforcement rights. Likewise, it is conceivable that a creditor holding a judgment could seize the proceeds of a new loan contracted in the United States, which would be a more potent enforcement right. But this would require a court to conclude that the new loan "is or was used for the commercial activity upon which the claim is based"—i.e., "used for" the old loan. 28 U.S.C. § 1610(a)(2). The creditor's argument would be strengthened if the issuer intended to devote some of the new loan proceeds to satisfying claims of holders of the old (i.e., defaulted) bonds. But even this seems a stretch of the statutory language.

FIGURE 1:
SOVEREIGN IMMUNITY TRANSITION IN NEW YORK



Although I am primarily interested in bonds issued in New York or governed by New York law, these bonds are not unique. A similar shift took place in bonds that were likely to give rise to enforcement litigation in England.[131] These bonds quickly incorporated waivers of immunity in the wake of the State Immunity Act of 1978, which codified the restrictive theory of immunity in the United Kingdom.[132] Across a wide spectrum of sovereign bonds, then, codification of the restrictive theory of immunity seemingly acted as a trigger prompting the wholesale inclusion of waivers of immunity and other dispute resolution terms in sovereign bonds.[133]

131. This includes bonds governed by English law or listed on the London Stock Exchange.

132. *See generally* State Immunity Act, 1978, c. 33 (U.K.). Note that there are a number of important differences between the two jurisdictions that I do not explore here. For instance, waivers of immunity from execution began to appear earlier in London and now comprise the vast majority of English-law bonds. By contrast, in the New York market, waivers of immunity from execution did not become common until the 1990s. Even today, in fact, bonds governed by New York law are less likely to include such waivers, and it is not uncommon for the same issuer to include a waiver in its English-law but not its New York-law bonds. For example, disclosure documents from roughly contemporaneous bonds issued by Australia, Finland, Portugal, South Africa, and Turkey report that English-law bonds contain a waiver of immunity from execution but do not report such a waiver in New York-law bonds.

133. As noted, *see supra* note 120, Figure 1 omits a good deal of information. Waivers of immunity, however, were (and are) always paired with choice of forum clauses, and virtually always with choice of law clauses. As with waivers of immunity, choice of law and choice of forum clauses were largely absent from sovereign bonds before the FSIA and SIA.

III. THE IRRELEVANCE OF LEGAL ENFORCEMENT

Why would contracts have changed so suddenly in the wake of the FSIA? The statute does not guarantee creditors meaningful relief.[134] The sovereign may not keep assets in the enforcing jurisdiction or may remove assets in anticipation of being sued.[135] Judgment creditors thus tend to recover only if sovereigns willingly pay the judgment.[136] But a country that has defaulted on its bond debt has no incentive to pay voluntarily. In fact, its incentives are quite the opposite. Because there is no sovereign bankruptcy mechanism,[137] a financially-distressed sovereign must persuade a supermajority of bondholders to accept a restructuring plan.[138] This results in familiar coordination problems in which individual creditors may hold out in hope of a better deal.[139] Given this dynamic, it would make no sense to pay successful litigants voluntarily; doing so would encourage holdouts and potentially derail the restructuring.[140] For this reason, sovereign issuers fiercely resist attempts to use the courts to recover defaulted sovereign bond debt.[141]

134. *See* George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 667 (2008) ("In the United States alone, there have been more than 200 reported court cases filed against foreign sovereigns since 2004 . . . . Yet, if history is any guide, few of these parties will succeed in enforcing any judgments they may obtain.").

135. STURZENEGGER & ZETTELMEYER, *supra* note 2, at 55–57; William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 11 (2004).

136. Awards granted by an ICSID (International Centre for Settlement of Investment Disputes) tribunal, for example, have historically been voluntarily satisfied in most cases. *See* Foster, *supra* note 134, at 704.

137. Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE. L.J. 888, 890 (2012).

138. William W. Bratton, Pari Passu *and a Distressed Sovereign's Rational Choices*, 53 EMORY L.J. 823 (2004); David A. Skeel, Jr., *Can Majority Voting Provisions Do it All?*, 52 EMORY L.J. 417 (2003). This assumes the sovereign restructures through the use of collective action clauses, which is not always the case. *See, e.g.*, Ran Bi et al., *The Problem That Wasn't: Coordination Failures in Sovereign Debt Restructurings* 3–4 (Int'l Monetary Fund, Working Paper No. WP/11/265, 2011) (documenting the effective use of other restructuring techniques). But even when the sovereign uses another restructuring technique, its success depends on creditor consent.

139. *See* Jeffrey Sachs, *Theoretical Issues in International Borrowing* 44–45 (Nat'l Bureau of Econ. Research, Working Paper No. 1189, 1983). In brief, bondholders may refuse to participate in a restructuring in the hope of extracting a side payment, benefitting from a government bailout, or recovering the full value of their debt through litigation. And if enough bondholders choose this path, the sovereign will be unable to get the needed debt relief.

140. Put differently, if a sovereign wants to restructure its debt, its restructuring proposal must be accompanied by a credible commitment that holdouts will not receive better terms. Without such a commitment, too few bondholders will voluntarily participate in the restructuring. The need to make such a commitment explains some otherwise-perplexing sovereign behavior, such as Argentina's 2005 enactment of the so-called Padlock Law, which forbade the Argentine government to offer holdouts to "any kind of court, out-of-court, or private transaction, or settlement." *See* Rodrigo Olivares-Caminal, *To Rank* Pari Passu *or Not to Rank* Pari Passu*: That Is the Question in Sovereign Bonds After the Latest Episode of the Argentine Saga*, 15 L. & BUS. REV. AMS. 745, 757–58 (2009).

141. *See, e.g.*, Reynolds Holding, *Argentina Hold 'Em*, BREAKINGVIEWS (Apr. 9, 2012), http://www.breakingviews.com/argentina-case-puts-bite-in-holdout-hedgies-bark/21010820.article (describing the hedge fund Elliott Associates' decade-long fight to recover against Argentina, and Argentina's willingness to ignore U.S. court judgments). This does not mean that court judgments impose no costs on the issuer. Although creditors have little hope of seizing sovereign assets, judgments impose something like an embargo on the sovereign's commercial relations with third parties. In some cases, the costs of this embargo may induce the sovereign to pay voluntarily. On this dynamic generally, see W.

It does not necessarily follow, however, that legal enforcement is irrelevant. Under a regime of absolute immunity, a sovereign that anticipates default need not take steps to protect its assets. But under the FSIA, the sovereign may need to shelter assets, and this may prevent it from putting them to better use.[142] Thus, contract terms that facilitate enforcement may deter default by making it more costly.[143] In addition, a few specialized investors—mostly hedge funds trading in distressed debt—have managed to force unwilling sovereigns to satisfy a judgment.[144] If such investors add liquidity to sovereign debt markets, investors may value contract terms that facilitate litigation.[145]

These possibilities suggest a straightforward, functional explanation for the post-FSIA change in bond contracts: perhaps investors believed that the threat of litigation could help deter default and that the FSIA had finally made litigation feasible, at least when the sovereign had waived its immunity from suit.[146] This story conforms nicely to the view that drafters will swiftly revise contracts to account for material legal developments.[147] The next sections briefly expand this argument before explaining why it cannot adequately explain either the uniformity of the contract shift or its specific link to the FSIA.

A. The FSIA's Limited Practical Impact

Although sovereign immunity law had been evolving for decades, the FSIA did represent a change. Recall that, beyond removing the State Department from immunity determinations, the statute (1) made clear

Mark C. Weidemaier and Anna Gelpern, *Injunctions in Sovereign Debt Litigation* at 24–30 (draft dated Sept. 25, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330914.

142. *See* Jeremy Bulow & Kenneth Rogoff, *A Constant Recontracting Model of Sovereign Debt*, 97 J. POL. ECON. 155 (1989). If contract terms can decrease the cost of default in this manner, it might make sense to include them under the "can't hurt, might help" principle of contract drafting.

143. Despite this possibility, the evidence suggests that litigation imposes only modest costs. *See* Faisal Z. Ahmed et al., *Lawsuits and Empire: On the Enforcement of Sovereign Debt in Latin America*, 73 LAW & CONTEMP. PROBS. 39, 46 (2010).

144. *See generally* Mark A. Cymrot, *Barricades at the IMF: Creating a Municipal Bankruptcy Model for Foreign States*, 36 INT'L LAW. 1103 (2002) (arguing for a modified municipal bankruptcy system that would allow distressed nations to seek remedies similar to those currently employed by businesses); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635 (2001) (discussing the impact of the Brussels court's interpretation of the *pari passu* clauses and the need for this interpretation to be challenged). These efforts continue with ongoing efforts by NML Capital, a subsidiary of hedge fund Elliott Associates, to recover on defaulted Argentine debt. *See* Transcript of Proceedings at 11:30 AM at 4, NML Capital, Ltd. v. Republic of Arg., 08-CV-6978 (TPG) (S.D.N.Y. Sept. 28, 2011).

145. *See* Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043, 1100–01 (2004).

146. To explain the corresponding shift in bonds governed by English law or listed on the London Stock Exchange, of course, one would also have to attribute similar importance to the State Immunity Act.

147. *Cf.* Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 397 (2009) (noting insight, underlying economic theory, that parties will choose terms that maximize their joint surplus); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 554 (2003). *See also* ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY vii (4th ed. 2007) (noting that lawyers draft contracts to avoid problems revealed through past disputes).

that a waiver of immunity from suit could not be revoked, (2) let creditors execute judgments against a limited range of sovereign property, and (3) allowed execution against a wider range of assets when a sovereign had separately waived immunity from execution.[148] I have argued that the first two of these changes, and possibly all three, were relatively modest when compared to the pre-FSIA law as it had evolved after the Tate Letter.[149] But perhaps investors were clamoring even for modest improvements in enforcement rights and believed that the FSIA had finally made litigation a viable option.

Imagine, for example, that between 1950 and 1975 it gradually became easier to sue a foreign state but that investors still judged litigation to be hopeless. Imagine further that the benefits conferred by the FSIA, however modest, were just enough to make litigation feasible, so that issuers could lower borrowing costs by agreeing to be sued. This is a familiar dynamic in lending relationships. Lenders act on incomplete information about the borrower's ability and intent to repay and price this risk into their loans.[150] If a borrower can credibly commit to repayment—as by agreeing to suffer a penalty in the event of default—it can reduce its borrowing costs.[151] In this story, the FSIA acted as a trigger: before the statute, litigation had zero value; afterwards, it had non-zero value, and nearly all issuers chose to take advantage of the pricing benefits offered by sovereign immunity waivers. Note that, for this story to make sense, issuers must be able to make a credible commitment to repayment simply by agreeing to waive immunity from *suit*.[152]

The next section attempts to assess the pricing implications of the FSIA's enactment.[153] Before doing so, however, I note two problems with this account. First, the data undercut the view that contract terms waiving immunity from suit functioned as a commitment device. The reason is simple: if they served this function, why were such waivers not included in pre-FSIA bond contracts? As I have explained, beginning in

148. *See* 28 U.S.C. §§ 1605(a)(1), 1605(a)(2), 1610(a)(1) (2012). The statute also established procedures for serving process. *See generally* 28 U.S.C. § 1608 (2012). This was no trivial matter before the FSIA, but neither was it an insurmountable hurdle. The classic method of securing jurisdiction was to attach sovereign assets, but courts gradually began to permit service of process as a less intrusive method. For a contemporary summary of post-Tate Letter law and State Department policy, see generally Murray J. Belman et al., *New Departures in the Law of Sovereign Immunity*, *in* 63 PROCEEDINGS OF THE AM. SOC'Y OF INT'L LAW, Perspectives for International Legal Development (Apr. 24–26, 1969).

149. *See supra* Part II.A.3.

150. *See, e.g.*, Michael K. Ulan, *Should Developing Countries Restrict Capital Inflows?*, 579 ANNALS AM. ACAD. POL. & SOC. SCI. 249, 250 (2002).

151. *See* Adam Feibelman, *Equitable Subordination, Fraudulent Transfer, and Sovereign Debt*, 70 LAW & CONTEMP. PROBS. 171, 187 n.95 (2007); Peter V. Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 598–602 (1995) (discussing penalties and their intended impact on debtor behavior). For an analogous argument in the context of bilateral investment treaties, see Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 278.

152. Recall from Figure 1 that bonds did not incorporate waivers of immunity from execution for another fifteen years.

153. *See infra* Part III.B.

the 1950s it grew increasingly likely that the State Department or the courts would enforce the waiver.[154] The odds may not have been high, but they were not zero. Moreover, even if such a waiver would have been revocable under pre-FSIA law, an issuer who invoked that right might cause a range of third parties to view it as an unreliable partner.[155] In other words, *if* waivers of immunity functioned as a commitment device, issuers arguably would have provided them well before the FSIA. Yet only one country in the dataset did so.[156]

Nor could the FSIA's provisions regarding immunity from *execution* transform post-FSIA contracts (which waived only immunity from *suit*) into credible commitment devices.[157] It is true that, before the statute, sovereign assets were absolutely immune from execution.[158] As a practical matter, however, the statute did little to change this for post-FSIA bonds.[159] Holders of these bonds could enforce a court judgment only if they could find assets that were "used for the commercial activity" upon which they had based their claims.[160] As a practical matter, this would likely prove impossible, for none of the issuer's assets (assuming it had any in the United States) would have been "used for" obtaining the loan.[161] From an enforcement perspective, then, holders of post-FSIA bonds were no better off than holders of pre-FSIA bonds.[162]

The second reason for skepticism has to do with the uniformity of post-FSIA contracts. Even if a waiver of immunity from suit could function as a commitment device, it is odd that nearly every issuer agreed to provide one. Sovereign bonds are often described as "boilerplate."[163] The term is apt but also obscures the fact that contracts vary in important

154. *See supra* text accompanying notes 73–75.

155. *Cf.* Elkins et al., *supra* note 151 (noting, in the context of bilateral investment treaties, that "when a government spurns the decision of a neutral authoritative third party with which it has voluntarily precommitted to comply, a range of important actors—public and private—are likely to infer that that government is an unreliable economic partner"); Weidemaier, *supra* note 4, at 345 & nn.49–50.

156. *See supra* text accompanying notes 122–23.

157. The argument here would be that, after the FSIA, an investor who managed to parlay the sovereign's waiver of immunity from suit into a judgment for money damages finally had some hope of enforcing the award even without a waiver of immunity from execution. But this is wishful thinking. As the text indicates, the investor would find it nearly impossible to find non-immune assets to seize.

158. *See supra* text accompanying notes 26–29.

159. *See supra* text accompanying notes 77–78.

160. 28 U.S.C. § 1610(a)(1)–(2). Some assets remain immune from execution, such as assets held by a central bank "for its own account." 28 U.S.C. § 1611(b)(1).

161. *See supra* text accompanying notes 77–78.

162. As noted earlier, *see supra* note 130, it would in theory have been possible to enforce a U.S. court judgment in another jurisdiction. Likewise, a creditor might have been able to seize the proceeds of a new loan in the United States, although this would be a long shot.

163. *See* Robert B. Ahdieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 EMORY L.J. 691, 714, 718–20 (2004); Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 337 (2006); Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 WASH. U. L. REV. 1627, 1629 (2006). *See also* Choi & Gulati, *supra* note 124, at 932 n.7 (discussing assumption of standardization in sovereign bond contracts); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 732 n.131 (2007); Weidemaier, *supra* note 120, at 8–14 (discussing theoretical implications of characterizing sovereign bond contracts as boilerplate).

ways.[164] And historically, contracting practices were *not* uniform, especially when it comes to terms that sovereign borrowers find offensive, such as sovereign immunity waivers.

Long before the FSIA, lenders were attuned to the potential benefits of dispute resolution terms and sometimes included them in government loan contracts—just not in *bonds* issued by sovereign *countries*.[165] By the mid-1940s, for example, such clauses occasionally appeared in contracts for direct loans by banks to foreign countries.[166] In addition, by the 1950s, such clauses sometimes appeared in bonds issued in foreign markets by quasi-sovereign entities, such as cities and provinces.[167] Even in these contexts, however, contracts did not uniformly include dispute resolution terms.[168] Thus, when lawyers began to draft immunity waivers for bonds issued by sovereign countries, there was no clearly established market preference for uniformity.

Sovereign countries, moreover, do not like to be sued in foreign courts. If absolutely necessary, a country might waive its immunity in order to obtain a direct loan from a commercial bank or bank syndicate.[169] Such contracts are often kept private, and in any event they can be invoked only by the relative handful of parties to the loan. By contrast, bonds are public documents, and, in most cases, hundreds or thousands of bondholders can invoke their dispute resolution provisions.[170]

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164. *Cf.* Choi & Gulati, *supra* note 124, at 932 n.7 (noting that the assumption of standardized terms is "routinely made" in research about sovereign debt contracts, but noting that at least one study has challenged this assumption in the collective action clause context); Weidemaier, *supra* note 120, at 24–38 (illustrating variance in "boilerplate" dispute resolution terms in sovereign bonds).

165. This is not to say that international courts and tribunals never heard claims arising out of sovereign default. *See generally* MICHAEL WAIBEL, SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS (2011). Such claims arise in a variety of ways, including by executive agreement. *See* Wuerth, *supra* note 42, at 26–27 & n.176 (summarizing history of U.S. executive agreements with respect to arbitration commissions).

166. GEORGES R. DELAUME, LEGAL ASPECTS OF INTERNATIONAL LENDING AND ECONOMIC DEVELOPMENT FINANCING 161–87 (1967); *see also* Philip R. Wood, *Essay: Sovereign Syndicated Bank Credits in the 1970s*, 73 LAW & CONTEMP. PROBS. 7, 12–15 (2010) (noting that borrowers agreed to various dispute resolution terms in syndicated loans in the 1970s).

167. For example, bonds issued in the late 1950s and 1960s by Oslo, Milan, Copenhagen, Helsinki, and Tokyo appoint an agent to receive service of process and waive immunity from suit before courts in New York or London. The status of such entities was uncertain, but some courts held that they were entitled to assert sovereign immunity. *See, e.g.*, Sullivan v. State of Sao Paulo, 36 F. Supp. 503, 504–05 (E.D.N.Y. 1941). On the uncertainty generally, see DELAUME, *supra* note 166, at 157–60. *See also* Coyle, *supra* note 48 (discussing immunity of state-owned enterprises).

168. For example, disclosure documents for bonds issued in the 1950s and 1960s by Buenos Aires, Hamburg, and Rio Grande do Sul (all on file with author) do not report the existence of any dispute resolution provisions. In compiling the dataset, we were primarily interested in bonds issued by sovereign countries. Thus, we made no concerted effort to gather bonds issued by cities and provinces, although we often included those bonds when we came across them. As a result, I list these examples only to show the lack of uniformity with respect to sovereign immunity waivers and other terms related to dispute resolution. I make no claims regarding the relative prevalence of such clauses in bonds issued by quasi-sovereign entities.

169. *See* Wood, *supra* note 166, at 14–15.

170. *See, e.g.*, MERRILL LYNCH INTERNATIONAL, U.S. $22,000,000,000 THE LEBANESE REPUBLIC GLOBAL MEDIUM-TERM NOTE PROGRAM 104 (2009) ("The Republic irrevocably agrees for the benefit of each Holder of Notes that the courts of the State of New York and of the United States sitting in the City of New York, Borough of Manhattan, shall have non-exclusive jurisdiction . . . ."). Other con-

There is a big difference between agreeing to be sued by a handful of international banks and agreeing to be sued by anyone who happens to acquire a sovereign bond. As a result, many issuers resist including a waiver of immunity in a bond contract.[171] For their part, lenders should bar-bargain more fiercely to obtain a waiver in some contexts, such as when the issuer presents a higher risk of default.[172] For example, issuers with no reputational "bond"[173] to post, such as new market entrants, might waive immunity from suit, while issuers who returned to the bond markets frequently and enjoyed sterling reputations for repayment might not.[174]

Such a pattern would be consistent with corporate lending practices.[175] It would also be consistent with historic practices in the sovereign debt markets. Before World War II, for example, countries with solid reputations for repayment often issued bonds without providing investors any special protection against default. Issuers with less sterling reputations sometimes did the same if they found a prestigious banking house to underwrite the bonds.[176] Higher-risk issuers, however, often agreed to onerous terms that caused some insult to their sovereignty. For example, an issuer might have to place some of its assets or revenues under the control of an agent appointed by the lenders.[177] Such secured, or "ear-

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tractual mechanisms, of course, may prevent individual bondholders from filing suit, such as when that power is assigned to a trustee.

171. Lee Buchheit suggests that borrowers render their opposition to a waiver of immunity "truly memorable for the bankers [by having] other members of the country negotiating team softly hum the Marseillaise in the background." LEE C. BUCHHEIT, HOW TO NEGOTIATE EUROCURRENCY LOAN AGREEMENTS 142 (2d ed. 2000).

172. Analogously, lenders to corporate borrowers may bargain for more constraints on managerial discretion when repayment is less assured. *See infra* note 175.

173. *See generally* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 414–17 (1990).

174. *Cf.* Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 671–74 (1997) (positing that public companies have significant reputational capital to preserve and that this reduces the benefits to creditors of secured lending). The question how reputational constraints affect government decision-making is a complicated one. For a discussion, see generally Brewster, *supra* note 29 (exploring the limits of reputation as a source of compliance with international law).

175. Lenders may confer significant discretion on corporate managers in the hope of seeing high returns, but they also will incur risk. Contract terms that limit managers' discretion can mitigate this risk but also may result in lower returns. *See* Michael Bradley & G. Mitu Gulati, *Collective Action Clauses for the Eurozone: An Empirical Analysis* 46 (Mar. 28, 2013) (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948534. Generally, higher-risk borrowers agree to more restrictions on managerial discretion. *See, e.g.*, Michael Bradley & Michael R. Roberts, *The Structure and Pricing of Corporate Debt Covenants* 5 (May 13, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=466240.

176. For underwriting banks, the decision whether to "stand sponsor" for an issuer, or to risk having another bank capture the underwriting business, could be difficult. For example, cables in the JP Morgan archives reveal internal debate over whether the bank should participate in a 1914 loan to Argentina being arranged by the less-prestigious National City Bank: "Of course we can only too easily secure interest in business, but would be entirely unwilling [to] lead in it and stand sponsor for these notes with the public." Telegram from J.P. Morgan & Co. to H.P. Davidson, Esq., (Dec. 21, 1914) (on file with author).

177. *See, e.g.*, Chinese Government Five Per Cent Reorganization Gold Loan Agreement, 2, Apr. 26, 1913 (providing that bonds would be "secured . . . by a charge" on revenues from the salt trade and on customs revenues).

marked," loans were common in the pre-World War II era, but they were generally reserved for higher-risk borrowers.[178]

As a matter of theory, it makes sense that one would see such variance.[179] A contract term (such as an "earmark") adds value by increasing the likelihood that the borrower will repay the loan.[180] The value added, however, varies inversely with the issuer's reputation for repayment—for issuers who are already likely to repay do not need much additional incentive.[181] At the same time, most issuers find the proposed term offensive and would prefer not to agree to it.[182] So, predictably, the term appears in loans where it has real value to add: those made to countries perceived to be at higher risk of default.

Yet practices with respect to dispute resolution do not fit this model. Consider first waivers of immunity from jurisdiction. From 1952 on, it was increasingly likely that the State Department or the courts would decline to confer immunity on a sovereign that had waived this immunity in a contract.[183] In that context, one might expect a few issuers to provide such a waiver, especially those who were perceived to present a higher risk of default. Yet except for one issuance, by Malaysia in 1965, the dataset includes no case when a sovereign country waived its immunity from suit in foreign courts in the twenty years following the Tate Letter. Then, between the FSIA's introduction in Congress in 1973 and its enactment in 1976, a few additional countries included immunity waivers in their bonds.[184] But these were countries like Norway and Finland that presumably did not need to provide a waiver to borrow on acceptable terms.[185] And finally, after the FSIA's enactment, virtually every issuer—no matter how highly rated—waived immunity from suit.[186]

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178. For some examples, see generally HERBERT FEIS, EUROPE: THE WORLD'S BANKER, 1870–1914 (1930). For evidence on the prevalence of these "earmarking" arrangements, see generally Weidemaier, *supra* note 118.

179. Observers familiar with sovereign bond contracts may object that contract change tends to occur in clusters. *See* Stephen J. Choi et al., *Political Risk and Sovereign Debt Contracts* 18, (John M. Olin Law & Econ., Working Paper No. 583, 2d. ser., 2011). As a general matter that is true, at least in the modern era. As discussed in the text, however, it is less obviously true with respect to terms that issuers view with hostility, such as terms providing "security" for the loan and terms subjecting the issuer to suit in foreign courts. For that reason, the "clustered" nature of the post-FSIA shift is somewhat unusual.

180. With respect to earmarks, for example, powerful governments may have been more willing to intervene diplomatically on behalf of lenders whose contracts contained a specific pledge of revenues or assets. *See* 1 EDWIN BORCHARD, STATE INSOLVENCY AND FOREIGN BONDHOLDERS 98 (1951).

181. *See* Bulow & Rogoff, *supra* note 6, at 43 & n.2 (1989) (citing an "influential body of research hold[ing] that a small country can enjoy at least some access to world capital markets by maintaining a reputation for repaying its loans").

182. *Cf.* BUCHHEIT, *supra* note 171, at 134–44 (discussing sovereign objections to submission to jurisdiction clauses and waivers of immunity).

183. *See supra* text accompanying notes 67–75.

184. *See* Figure 1.

185. Both of these countries were rated AAA by Standard & Poor's. *See* STANDARD & POOR'S STOCK AND BOND GUIDE 144–45 (1993).

186. *See* Figure 1.

In sum, the uniform nature of the shift is hard to square with the FSIA's relatively modest technical properties, with historic variance in how government loans employed immunity waivers, and with the historic reluctance of countries to agree to contract terms that offend their sovereignty. Moreover, as the next section demonstrates, there is little evidence that bond investors thought the FSIA provided *any* real enforcement benefits.

B. The Investor Reaction: A Collective Yawn

If changes to sovereign immunity law, sovereign bonds, or both lowered the risk of default, one would expect this to be reflected in increased bond prices.[187] Unfortunately, a number of factors make it difficult to assess the market reaction. Because virtually all issuers waived immunity from suit after the FSIA, one cannot exploit variance in the terms of different countries' bonds.[188] Nor can one easily compare the same issuer's pre- and post-FSIA bonds.[189] This is because the sovereign bond markets were relatively dormant from the 1930s to the late 1980s,[190] and relatively few issuers had pre- and post-FSIA bonds trading at roughly the same time.[191] Finally, the yield spread on sovereign bonds is perhaps the ideal measure of perceived risk,[192] but U.S. Treasury yields were extremely volatile in late 1976 and early 1977,[193] making it difficult to calculate spreads for the period of most direct interest. Despite all of these caveats, however, there is no evidence of any market reaction at all.

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187. *Cf.* William W. Bratton, Jr., *Corporate Debt Relationships: Legal Theory in a Time of Restructuring*, 1989 DUKE L.J. 92, 110; Frank J. Fabozzi, *Bonds: Investment Features and Risks*, *in* HANDBOOK OF FINANCE VOLUME 1: FINANCIAL MARKETS AND INSTRUMENTS 207, 218 (Frank J. Fabozzi ed., 2008) (explaining the relationship between perceived default risk and bond prices).

188. In the modern era, there is variance in the use of waivers of immunity from execution, but no evidence that this variance is priced. *Cf. infra* note 272.

189. For example, assume that bonds issued by the same country pre- and post-FSIA were traded at the same time on secondary markets. After accounting for differences in maturity and other contract terms, any difference in yield might be attributed to the bonds' differing approaches to sovereign immunity. In particular, lower yields on the post-FSIA bonds might indicate that investors associated a waiver of immunity from suit with lower default risk. Unfortunately, there are few opportunities to make such a comparison. *See infra* text accompanying note 216.

190. *See* Marc Flandreau et al., *The End of Gatekeeping: Underwriters and the Quality of Sovereign Bond Markets, 1815-2007*, at 20 (Nat'l Bureau of Econ. Research Working Paper No. 15128), *available at* http://www.nber.org/papers/w15128 (noting that "between the collapse of the 1930s and the securitization of the 1980s (Brady bonds), there were about 50 years during which the international government debt market was a sleeping beauty").

191. Once issued, bonds were rarely traded on secondary markets. For some bonds, months passed without a trade. When there were trades, moreover, the volumes were extremely low. On same days, the Wall Street Journal might report sovereign bond trading volume of as little as $1000.

192. Yield spreads capture the difference in yield between a security and an equivalent but risk-free security—typically a U.S. treasury bond of equivalent maturity—and thus allow for assessments of relative risk. *See* Frank J. Fabozzi & George P. Kegler, *Federal Agency Securities*, *in* HANDBOOK OF FINANCE VOLUME 1: FINANCIAL MARKETS AND INSTRUMENTS 243, 248 (Frank J. Fabozzi, ed., 2008); Mark Hallerberg & Guntram B. Wolff, *Fiscal Institutions, Fiscal Policy and Sovereign Risk Premia in EMU*, 136 PUB. CHOICE 379, 382–83 (2008).

193. *See* Timothy Q. Cook, *Changing Yield Spreads in the U.S. Government Bond Market: Flower Bonds Bloom, Then Wilt*, FED. RES. BANK OF RICHMOND ECON. REV., Mar.–Apr. 1977, at 3.

Begin by considering the FSIA's impact on outstanding bonds—i.e., those issued (without an immunity waiver) before the statute. Figures 2–3 track the prices of some of the more frequently-traded bonds in two windows around the FSIA's introduction and passage.[194] Prices were gathered from the Wall Street Journal daily edition during the relevant periods. Figure 2 focuses on an eight month window around January 22, 1973, when the State Department and Department of Justice jointly submitted the FSIA as proposed legislation to the President of the Senate.[195]

Because the proposed statute had such broad support, investors might have thought that passage was assured.[196] On the other hand, the draft differed in some respects from the final version of the statute in ways that were less favorable to bondholders. Like the final version, the proposed legislation made clear that courts, rather than the State Department, would be responsible for immunity determinations.[197] The draft also provided that judgments could be enforced against sovereign assets only if there was a nexus between the assets and the commercial activity underlying the suit; this requirement also appeared in the final bill.[198] The draft statute differed, however, in providing that the sovereign would remain immune from suit in cases arising out of its "public debt," unless it had explicitly waived this immunity.[199] Still, the proposed statute had a high chance of passage and clearly signaled a liberalization in the law of foreign sovereign immunity. Yet the statute's introduction had no apparent effect on bond prices.

194. Even these bonds were not traded every day. Some were traded on fewer than a dozen days in the period.

195. *Draft Legislation on Jurisdicitonal Immunities*, *supra* note 62, at 118 (stating that the FSIA draft bill was jointly submitted by the Department of State and Department of Justice).

196. *See supra* note 26.

197. *Draft Legislation on Jurisdicitonal Immunities*, *supra* note 62, at 124.

198. *Id.* at 128. According to the draft, assets "used for a particular commercial activity in the United States" were not immune from execution if "such attachment or execution relates to a claim which is based on that commercial activity . . . ." The statute also would have allowed execution on a wider range of assets, but only if the contract contained a waiver of execution.

199. *Id.* *See also supra* text accompanying notes 85–89 (discussing what was considered in determining public debt immunity).

FIGURE 2: PRICES (USD) OF FREQUENTLY-TRADED BONDS; 8-MONTH WINDOW AROUND JAN. 22, 1973

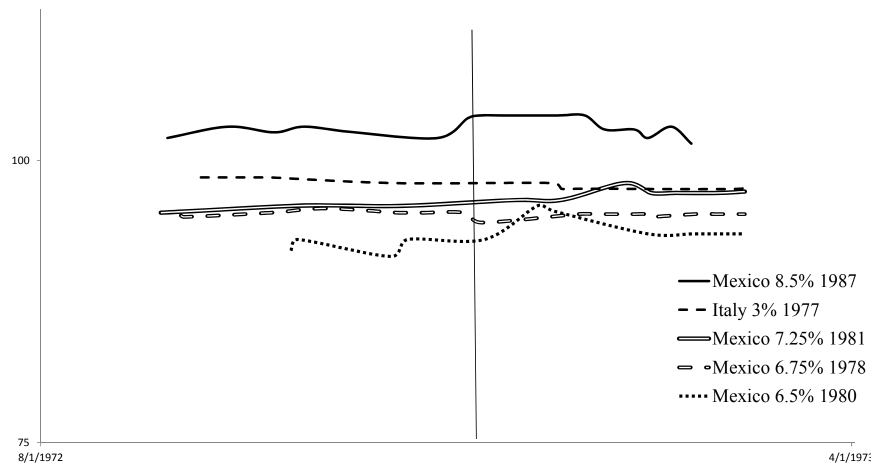


Figure 3 reports prices in a six month window around October 21, 1976, the FSIA's date of enactment.[200] As enacted, the statute did not explicitly address "public debt" cases, leaving it to the courts to determine whether the issuance of bonds was a commercial act.[201] The question would not be settled until 1992,[202] but bondholders had reason to be confident of the outcome given the statute's legislative history and the fact that the exception for "public debt" cases had been removed.[203]
Moreover, the statute made clear, as had the early drafts, that courts were to treat waivers of immunity as irrevocable.[204] Once again, however, bond prices reveal no evidence that investors viewed this as a material improvement in their enforcement rights.

200. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891.

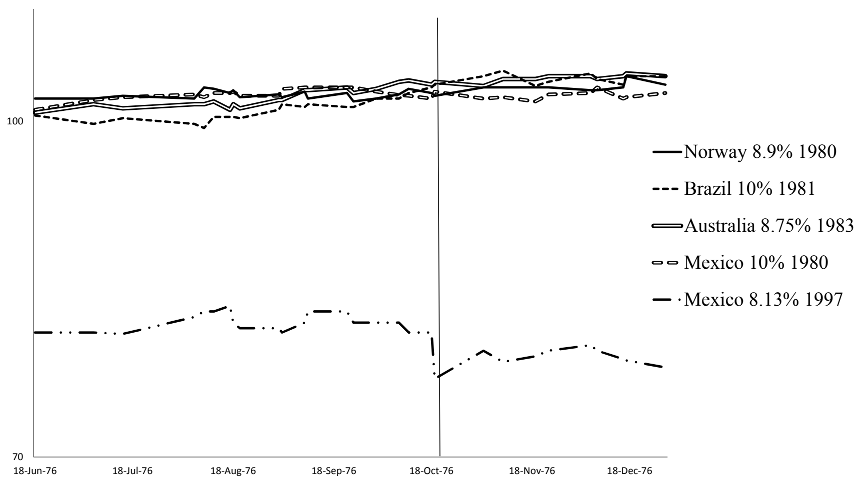
201. If it was, the sovereign would lose its immunity from suit. 28 U.S.C. § 1605(a)(2) (2012).

202. *See* Arg. v. Weltover, Inc., 504 U.S. 607, 614 (1992).

203. As noted earlier, the House Judiciary Committee had removed the provisions addressing "public debt" cases on the ground that these cases "should be treated like other similar commercial transactions." *See supra* text accompanying note 88; *see also* H.R. REP. NO. 94-1487, at 10 (1976).

204. *Compare* 28 U.S.C. § 1610(a)(1) *with Draft Legislation on Jurisdicitonal Immunities*, *supra* note 62, at 128.

FIGURE 3: PRICES OF FREQUENTLY-TRADED BONDS AROUND FSIA'S ENACTMENT



Yield spreads might be a better measure of the market's response to these events.[205] As noted previously, however, treasury yields were especially volatile in late 1976 and early 1977, introducing variance that cannot be attributed to the perceived risk associated with the foreign issuer's bonds.[206] The problem is compounded by the infrequency with which bonds were traded.[207] Figure 4 nevertheless depicts the average yield spread for the bonds issued by one country, Mexico, for the period November 1972 through 1977.[208] Note that several of these bonds were not traded *at all* during this period. For those bonds, yield spread was computed from the month-end yields reported in Standard & Poor's Bond Digest, which are based on bid prices rather than on actual sales.[209]

205. *See supra* note 192.

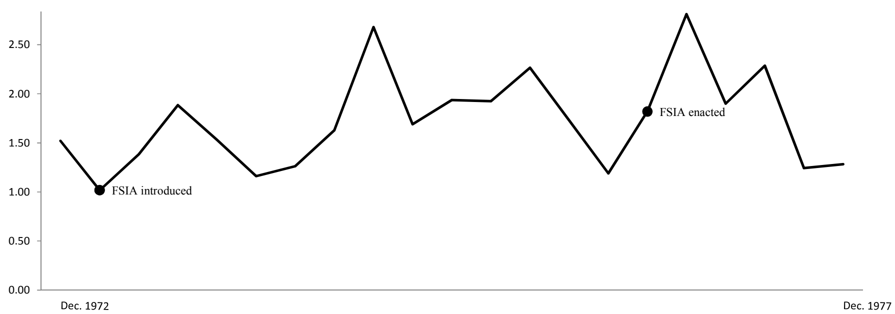
206. *See supra* text accompanying note 193.

207. *See supra* text accompanying note 191.

208. The bonds are Mexico's: (1) 6.5% bonds issued in 1964 and maturing in 1979; (2) 6.25% bonds issued in 1964 and maturing in 1979; (3) 6.5% bonds issued in 1965 and maturing in 1980; (4) 6.875% bonds issued in 1966 and maturing in 1981; (5) 7.25% bonds issued in 1966 and maturing in 1981; and (6) 7% bonds issued in 1967 and maturing in 1982.

209. A bid price is "[t]he highest price a market maker will pay to buy a specific number of shares." *Bid Price*, U.S. SECURITIES AND EXCHANGE COMMISSION, http://investor.gov/glossary/glossary_terms/bid-price (last visited Oct. 22, 2013).

FIGURE 4: AVERAGE YIELD SPREAD FOR MEXICAN BONDS (NOV. 1972-DEC. 1977)



If the FSIA had materially reduced the perceived risk of default, one would expect spreads to have gone down as a result of the statute's introduction or passage.[210] But this does not seem to have happened. To the contrary, and despite some volatility, spreads remained generally higher than they had been in late 1972, two months before the statute was introduced, and also higher than they had been in the months before the statute's October 1976 enactment. Given the limits of the data, and the range of factors that might influence bond yields, this is hardly dispositive. But there is no reason to believe that investors associated the FSIA with a reduction in default risk.

Figures 2–4 focus on bonds issued before the FSIA. Unlike post-FSIA bonds, these did not include waivers of immunity from suit.[211] The figures thus provide no direct evidence as to how investors viewed bonds issued after the statute. As explained in the previous section, however, investors had little reason to favor post-FSIA bonds.[212] The only real difference was that holders of new bonds could invoke the jurisdiction of U.S. courts without establishing that the issuance of bonds was a commercial act.[213] But since holders of old bonds might have been able to invoke the jurisdiction of U.S. courts too—and since, in any event, *no* bondholder had a meaningful right to enforce a judgment—the difference was modest at best.[214]

210. *Cf.* Fabozzi, *supra* note 187, at 218 (explaining that because U.S. government securities are considered to be free of default risk, "a non-U.S. government taxable bond will trade in the market at a higher yield than a U.S. government taxable bond that is otherwise comparable in terms of maturity and coupon rate").

211. *See* Figure 1.

212. *See* Part III.A.

213. Before the FSIA, the State Department bore primary responsibility for making immunity determinations. *See* Part II.A.3. After the FSIA, holders of bonds that did not include a waiver of immunity from suit could bypass the State Department but would have needed to convince a court that the issuance of bonds was a commercial act. *See* 28 U.S.C. § 1605(a)(2) (2012).

214. After the FSIA, a bondholder who had not obtained a waiver of the sovereign's immunity from execution could enforce a judgment only against commercial assets that had the requisite nexus to the loan. *See supra* text accompanying notes 158–62.

Readers inclined to assign more significance to waivers of immunity from suit might prefer a more robust test of the market response to post-FSIA bonds. As noted previously, the uniformity of the shift, combined with the fact that few countries had both pre- and post-FSIA bonds trading in the late 1970s, makes such a test difficult.[215] In two cases, however, the dataset includes bonds issued by the same country both with and without a waiver of immunity from suit (Norway and Finland).[216] In this very small subset of bonds, there were no noticeable differences in yield spread between bonds that included waivers of immunity from suit and those that did not.[217] In short, investors seemingly greeted the FSIA itself, and the new contracts that were issued in the statute's wake, with a collective shrug. Certainly nothing indicates a newfound interest in legal enforcement.

IV. ON THE LIMITS OF DOCTRINE AND THE PRODUCTION OF BOILERPLATE CONTRACTS

Beyond a doubt, the middle of the twentieth century witnessed major developments in the law of foreign sovereign immunity.[218] Most notably, the United States and the United Kingdom, two major jurisdictions in which enforcement litigation might take place, finally abandoned the doctrine of absolute immunity.[219] As they occurred, these doctrinal changes captured the attention of lawyers, policy makers, and the media.[220] By opening the door to litigation against foreign states and officials,[221] the Tate Letter and FSIA spawned a host of difficult questions that continue to occupy public officials and scholars today.[222] Part III demonstrated, however, that this doctrinal revolution had little practical significance in the bond markets. That conclusion is important, first and

215. Any difference between the same country's pre- and post-FSIA bonds might reasonably be attributed to the waiver of immunity from suit contained in the latter. *See supra* note 189 and accompanying text.

216. For Norway, these include: (1) 5.5% bond issued in 1962 and maturing in 1977 (no waiver); (2) 5.25% bonds issued in 1963 and maturing in 1978 (no waiver); (3) 8.875% bonds issued in 1976 and maturing in 1980 (waiver); (4) 8.85% bonds issued in 1976 and maturing in 1980 (waiver); and (5) 8.25% bonds issued in 1976 and maturing in 1981 (waiver). For Finland, these include (1) 6% bonds issued in 1964 and maturing in 1979 (no waiver); (2) 6.5% bonds issued in 1965 and maturing in 1980 (no waiver); and (3) 7.875% bonds issued in 1977 and maturing in 1981 (waiver).

217. In some months, in fact, spreads were higher for post-FSIA bonds than for pre-FSIA bonds, although this may be due to volatility in the treasury market.

218. *See, e.g.*, STURZENEGGER & ZETTELMEYER, *supra* note 2, at 56.

219. As noted earlier, other jurisdictions had abandoned the doctrine of absolute immunity much earlier. *See supra* note 26.

220. *See, e.g.*, The Committee on International Law, *Proposed Federal Legislation on Immunity of Foreign States in Proceedings Before American Courts (H.R. 3493; S.566)*, 30 REC. ASS'N B. CITY NEW YORK 301 (1975); *Proposed Legislation on Jurisdictional Immunity of Foreign States: A Report of the International and Foreign Law Committee of The Chicago Bar Association*, 56 CHICAGO B. REC. 78 (1974); Richard I. Fine, *Sovereign Immunity and the Nation State Cartel*, LOS ANGELES B. J., Dec. 1975, at 283, 287–92; Eric Pace, *Exotic Old Foreign Bonds Focus of Collection Suits: Holders of Some Old Foreign Bonds Sue for Payment*, N.Y. TIMES, June 22, 1983, at B4.

221. *See* Foster, *supra* note 134, at 667 (noting that more than 200 reported court cases had been filed against foreign sovereigns in the United States between 2004 and the time of the writing).

222. *See generally* Wuerth, *supra* note 52.

foremost, as a reminder that major legal developments need not have a potent—or indeed, any—impact on the ground.

Sovereign lending, of course, was not the primary driver of changes in sovereign immunity law.[223] At the time of the Tate Letter, policy makers were more immediately concerned with the fact that foreign governments were increasingly engaged in activity that was commercial rather than "governmental" in nature.[224] The Tate Letter noted this "widespread and increasing practice" and cited it as a primary justification for opening U.S. courts to suits against foreign sovereigns.[225] On a more pragmatic level, I have also argued that changes to sovereign immunity law were part of a broader effort to insulate U.S. political actors from pressure to intervene on behalf of citizens whose foreign investments had soured.[226] That kind of pressure could arise in a wide range of investment contexts and transactions; it was not confined to sovereign lending.[227] Perhaps changes to sovereign immunity law were more meaningful in other kinds of disputes.[228]

All of this is true, but it is equally true that the FSIA was enacted following years of debate over whether to grant U.S. courts jurisdiction over sovereign lending disputes.[229] The argument for preserving the sovereign's traditional immunity from suit was that a contrary rule would prompt foreign governments to avoid issuing bonds in U.S. capital markets out of fear of being sued.[230] The rebuttal, most forcefully articulated by Georges Delaume, was that foreign governments had already demonstrated their willingness to waive that immunity in certain kinds of loan contracts, such as when they borrowed money directly from U.S. banks[231] and when they issued bonds in some European capital markets.[232] It is worth pausing to note the disconnect between these arguments and the apparent disinterest with which investors viewed the question. Legal discourse often takes for granted that the choice of legal rules *matters*. But at times, the choice may matter only to lawyers, academics, and others for whom legal rules are the stock-in-trade. This seems to have been true

223. *See generally Tate Letter*, *supra* note 53, at 984–85 (discussing developments underlying shift to restrictive theory of sovereign immunity); Delaume, *supra* note 86 (discussing purposes of FSIA).

224. In particular, the Soviet Union and its socialist allies routinely carried out business through state-sponsored commercial entities. *See* STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 191–92 (2006).

225. *See Tate Letter*, *supra* note 53, at 969, 984–85.

226. *See supra* Part II.A.4.

227. As an extreme example, the U.S. corporation United Fruit sought to involve the U.S. government in protecting the company's investments in Guatemala by harnessing fears of a communist takeover in that country. *See* STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA 79–97 (2d ed. 2005).

228. It is also possible that, over time, investors came to assign more value to legal enforcement in the sovereign lending context. On that point, however, the evidence is mixed at best. *See supra* Part IV.A.

229. *See supra* Part II.A.4.

230. *See Draft Legislation on Jurisdicitonal Immunities*, *supra* note 62, at 143–44.

231. On these direct loan contracts, see *supra* note 83 and accompanying text.

232. *See* Delaume, *supra* note 86, at 752.

for the great mid-century "tectonic shift"[233] in sovereign immunity law, at least in the bond markets.

In sum, the FSIA may have prompted sovereign bond contracts to change, but the mid-century revolution in sovereign immunity doctrine provided no obvious benefit to investors.[234] This conclusion has important implications for two debates. The first concerns the role of legal enforcement in the sovereign debt markets. The second concerns our understanding of the forces that produce change in boilerplate contracts.

A. *Enforcement Versus Reputation in the Sovereign Debt Markets*

The difficulty of forcing governments to pay their debts gives rise to a puzzle that occupies much of the sovereign debt literature: How can sovereigns borrow at all?[235] Why lend when you cannot make the borrower repay?[236] Broadly speaking, answers to this question either invoke reputational considerations (e.g., sovereigns repay so that they can borrow at acceptable rates in the future)[237] or presume that lenders can impose direct sanctions on a borrower after it defaults.[238]

In the nineteenth and early twentieth centuries, military coercion was a potential sanction for default.[239] Influential lenders might pressure their government to use military force to compel a weaker country to repay its debts.[240] Although there is debate over the significance of military force as an enforcement tool,[241] a body of econometric evidence suggests that bondholders assigned real value to direct government intervention and control. In separate studies, for example, Mitchener and Wei-

233. Harold Hongju Koh, *Foreign Official Immunity After* Samantar*: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1143 (2011); STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 191–92 (2006).

234. Although I have been focused primarily on the FSIA, this conclusion extends to the Tate Letter as well. Although of unquestioned doctrinal significance, *see supra* note 52, the Tate Letter seemingly failed to impress bond investors. Again using the daily edition of the Wall Street Journal, I coded bond prices in an eight-month window around the Tate Letter in 1952 and found no movement (or slightly downward movement) during this period.

235. For a summary, see STURZENEGGER & ZETTELMEYER, *supra* note 2, at 31–38.

236. For a classic treatment of the subject, see Jonathan Eaton & Mark Gersovitz, *Debt With Potential Repudiation: Theoretical and Empirical Analysis*, 48 REV. ECON. STUD. 289 (1981).

237. For various reputational models, see generally MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES (2007). *See also* Harold L. Cole & Patrick J. Kehoe, *The Role of Institutions in Reputation Models of Sovereign Debt*, 35 J. MONETARY ECON. 45, 46–48 (1995); Eaton & Gersovitz, *supra* note 236, at 289–90; Kenneth M. Kletzer & Brian D. Wright, *Sovereign Debt as Intertemporal Barter*, 90 AM. ECON. REV. 621, 622–23 (2000).

238. *See* Bulow & Rogoff, *supra* note 142, at 158–59.

239. *See generally* Kris James Mitchener & Marc D. Weidenmier, *Supersanctions and Sovereign Debt Repayment* (Nat'l Bureau of Econ. Research, Working Paper No. 11472, 2005).

240. *See id.* at 5.

241. For a skeptical view, see TOMZ, *supra* note 237, at 114–53 (finding little evidence of a systematic link between gunboat diplomacy and bond lending). *But see* Adam Tooze & Martin Ivanov, *Disciplining the 'Black Sheep of the Balkans': Financial Supervision and Sovereignty in Bulgaria, 1902–38*, 64 ECON. HIST. REV. 30, 32 & n.11 (2011) (suggesting that coercive discipline played a more significant role).

denmier[242] find that actual or credibly-threatened intervention by powerful states resulted in increased bond prices[243] and reduced *ex ante* default probabilities[244] for bonds issued in the nineteenth and early twentieth centuries.[245]

Military coercion, of course, is no longer an available sanction.[246] For pure reputational models of sovereign debt, this is unimportant. Under these models, borrowers repay so that they can return to capital markets on acceptable terms.[247] Models that rely on the ability of lenders to impose sanctions, however, must identify other ways in which lenders can penalize default.[248] Legal enforcement is one possibility.[249] Because of the FSIA, disappointed investors may obtain a judgment for the amount of the defaulted debt and may also enforce the judgment against sovereign assets.[250] Even if their effort to find and seize sovereign assets failed, the attempt itself might disrupt the borrower's trade relations and thereby penalize default.[251] Indeed, a borrower might seek to demonstrate its credit-worthiness by conferring robust enforcement rights in the loan contract, which it could do by including the broadest possible immunity waiver.[252]

These arguments suggest that legal enforcement may offer investors a powerful sanction for sovereign default. The European sovereign debt crisis has only served to reinforce that impression, as policy makers and media outlets obsess over whether enforcement rights are *too* strong, enabling voracious holdout litigants to deny needed debt relief to financially distressed governments.[253] But are the underlying assumptions valid? A small body of empirical evidence casts doubt. For example, Panizza et

242. No relation.

243. Kris James Mitchener & Marc D. Weidenmier, *Empire, Public Goods, and the Roosevelt Corollary* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 10729, 2004); *see also* Ahmed et al., *supra* note 143, at 39–46.

244. Mitchener & Weidenmeir, *supra* note 239, at 3.

245. A similar phenomenon may explain why British colonies were able to borrow in London at substantially lower rates than non-colonies. *See* Niall Ferguson & Moritz Schularick, *The Empire Effect: The Determinants of Country Risk in the First Age of Globalization, 1880–1913*, 66 J. ECON. HIST. 283, 283 (2006). Not all colonies were treated alike, of course, and to the extent colonization conferred benefits, these were not divided equally among the colonies. *See* Olivier Accominotti et al., *Black Man's Burden, White Man's Welfare: Control, Devolution, and Development in the British Empire 1880–1914*, 14 EUR. REV. ECON. HIST. 47 (2010).

246. Bulow & Rogoff, *supra* note 238, at 157.

247. *See* STURZENEGGER & ZETTELMEYER, *supra* note 2, at 31–32.

248. For example, lenders might deny access to trade credit or might convince their government to impose trade sanctions. *See* Bulow & Rogoff, *supra* note 238, at 158–59; Mark Gersovitz, *Trade, Capital Mobility and Sovereign Immunity* 4 (Research Program in Dev. Studies, Discussion Paper, No. 108, 1983).

249. Bulow & Rogoff, *supra* note 238, at 174; Gersovitz, *supra* note 248, at 1–3.

250. 28 U.S.C. §§ 1605, 1610 (2012).

251. Bulow & Rogoff, *supra* note 238, at 174; Gersovitz, *supra* note 248, at 1–3. The borrower can try to keep its assets away from creditors, but it is costly to do so. *See* Bratton & Gulati, *supra* note 135, at 15–16; Bulow & Rogoff, *supra* note 238, at 174–75.

252. *Cf.* Bulow & Rogoff, *supra* note 238, at 174 (noting that "prospective sovereign debtors [may] court creditors by strengthening creditors' rights in default"); *see also* Weidemaier & Gelpern, *supra* note 141 (discussing embargo effect of court judgments).

253. *See supra* note 20.

al. studied whether the U.S. Supreme Court's 1992 decision in *Republic of Argentina v. Weltover, Inc.*[254] altered the probability of sovereign default.[255] They viewed *Weltover* as significant because the Court's decision finally established that bond issuance was a commercial act for which (due to changes in sovereign immunity law) foreign sovereigns could be sued in U.S. courts.[256] In other work, Ahmed et al. studied litigation by vulture funds[257] and found that successful enforcement actions had no discernible effect on bond yields.[258] These studies suggest that legal enforcement rights are of little use to investors.[259] But they are also subject to methodological limitations whose significance becomes apparent in light of the evidence presented in Part III.

Take, for example, studies that assign significance to the Supreme Court's 1992 *Weltover* decision.[260] From the standpoint of an investor in sovereign bonds, the decision would have been significant if it clarified uncertainty about whether sovereigns remained immune from suit in U.S. courts.[261] Under the FSIA, foreign sovereigns are not immune from suit when they have engaged in commercial activity with a U.S. nexus.[262] By clarifying that bond issuance was a commercial act and that the act of making payments in the United States satisfied the nexus requirement, *Weltover* would have removed the uncertainty (had there been any).[263]

But was there uncertainty? The evidence presented in Part III indicates not. Recall that the FSIA extends jurisdiction to lawsuits arising out of a foreign sovereign's commercial activities *and* to suits in which the sovereign has previously waived its immunity.[264] Thus, the question in *Weltover* mattered only for bonds that did not already include a waiver of immunity from suit.[265] And as Part III demonstrated, virtually all bonds

254. 504 U.S. 607 (1992).

255. Panizza et al., *supra* note 127, at 670.

256. *See id.* at 670 n.29.

257. "Vulture funds" are distressed debt investors. *See Cashing in on the Crash*, THE ECONOMIST (Aug. 23, 2007), *available at* http://www.economist.com/node/9687782. In the sovereign debt context, vulture funds buy distressed debt and, rather than participate in restructurings, attempt to recover the full face value of the bonds through litigation. *See generally* David Bosco, *The Debt Frenzy*, FOREIGN POL'Y (June 11, 2007), *available at* http://www.foreignpolicy.com/articles/2007/06/11/the_debt_frenzy.

258. Ahmed et al., *supra* note 143, at 45–46.

259. *See* Panizza et al., *supra* note 127, at 670.

260. *See* Ahmed et al., *supra* note 143, at 42; Panizza et al., *supra* note 127, at 670.

261. Thus, Panizza et al. note that, because of *Weltover*, "sovereign immunity no longer plays an important role in shielding sovereign debtors from creditor suits." Panizza et al., *supra* note 127, at 654. Ahmed et al. note that *Weltover*'s holding meant that "[s]overeign immunity . . . did not automatically apply" to lawsuits arising out of sovereign debt obligations. Ahmed et al., *supra* note 143, at 42.

262. 28 U.S.C. § 1605(a)(2) (2012).

263. *See* Panizza et al., *supra* note 127, at 670 n.29.

264. *See supra* note 3; *see also supra* Part II.A.3–4.

265. In theory, the question might have mattered for bonds that waived immunity from suit but did not waive immunity from execution. An investor who held one of these bonds and who had obtained a judgment against the sovereign could enforce the judgment under the FSIA only against assets "used for the commercial activity upon which" the investor had based the lawsuit. 28 U.S.C. § 1610(a)(2) (2012). By holding that bond issuance was a commercial activity, *Weltover* implicitly made clear that the investor could enforce the judgment against any assets that had been "used for"

contained such a waiver by the late 1970s.[266] Holders of these bonds had little reason to care about the doctrinal question at issue in *Weltover*, for U.S. courts plainly had jurisdiction over any lawsuit they might file.[267]

Another way to put this methodological point is to say that no assessment of sovereign immunity law's impact can be complete unless it takes contract terms into account. Sanctions-based theories of sovereign debt recognize that the utility of litigation (if it has utility) is in part a function of contract terms, which can bestow greater or lesser enforcement rights.[268] If legal enforcement matters to investors, the market should react differently to bonds that waive immunity from suit,[269] bonds that waive immunity from both suit and execution,[270] and bonds that contain no waiver at all.[271] If legal enforcement does not matter, the market should largely ignore these and other differences in how bonds approach the subject of dispute resolution.[272]

The evidence presented in Part III highlights these methodological limitations of existing studies. Indirectly, however, it reinforces their skepticism about the potency of legal enforcement. If it is to be a meaningful weapon, litigation must allow investors to seize the sovereign's assets or disrupt its trade.[273] This means investors must do more than obtain a judgment; they must find a way to enforce it. Yet contracting practices around the time of the FSIA suggest that investors had little interest in making the effort. Until the 1990s, waivers of immunity from execution were largely absent from sovereign bonds governed by New York law (Figure 1).[274] Instead, post-FSIA bonds included only waivers

that activity. Perhaps the doctrinal clarity was welcome, but the investor had a bigger problem: No such assets existed. *See supra* note 130.

266. *See supra* Figure 1.

267. 28 U.S.C. § 1605(a)(1) (2012). Thus, although *Weltover* may have been followed by an increase in lawsuits against sovereign debtors, *see* Ahmed et al., *supra* note 143, at 42, it is unlikely that the Court's sovereign immunity ruling was responsible.

268. *See, e.g.*, Bulow & Rogoff, *supra* note 238, at 174.

269. *See, e.g.*, REPUBLIC OF S. AFR. 7 3/8% NOTES DUE APRIL 25, 2012, PROSPECTUS SUPPLEMENT, at S-4 (2002) ("The South African government will irrevocably submit to the jurisdiction of the Federal and State courts in The City of New York, and will irrevocably waive any immunity from the jurisdiction (including sovereign immunity but not any immunity from execution or attachment or process in the nature thereof) of such courts . . . .").

270. *See, e.g.*, MERRILL LYNCH INTERNATIONAL, *supra* note 170, at 104 (2009) ("To the extent that the Republic may in any jurisdiction claim or acquire for itself or its assets immunity (sovereign or otherwise) from suit, execution, attachment . . . or other legal process . . . the Republic irrevocably . . . waives, such immunity, to the fullest extent permitted by the laws of such jurisdiction.").

271. Russian bonds, for example.

272. In a separate project (with Guangya Liu), I undertake such an analysis, and the results are consistent with studies that dismiss the relevance of sovereign immunity law. As Part III made clear, virtually all modern sovereign bonds waive immunity from suit. Bonds vary, however, in whether they waive immunity from execution. *See supra* Part III. If legal enforcement matters, the market should price this variance, but it seemingly does not. Adjusting for the issuer's rating and the presence of other contract terms known to influence bond yields, we find that variance in immunity-related terms does not affect yield spreads.

273. *See, e.g.*, Gersovitz, *supra* note 248, at 2–3.

274. To be sure, an investor who obtained a judgment from a U.S. court could try to enforce the judgment against assets located in other jurisdictions. In such a case, the investor's enforcement rights would be determined by the sovereign immunity law of the jurisdiction where the assets were located.

of immunity from suit. These were arguably unnecessary, for the FSIA itself might have conferred jurisdiction over bond claims.[275] In any event, they did nothing to solve the problem of execution, at least against assets located in the United States.[276]

This does not refute sanctions-based theories of enforcement. For one thing, lenders may have other ways to impose sanctions after a default.[277] For another, the law continues to develop. Recent developments in federal court in New York suggest that, under the right circumstances, courts might develop effective *injunctive* remedies.[278] In the FSIA's wake, however, it seems that market participants were skeptical of the value of legal enforcement. And this raises a puzzle that implicates questions of contract theory: why would contracts have shifted as they did after the statute was enacted?

B. What Prompts Boilerplate to Change?

Although the post-FSIA shift in bond contracts did little to improve bondholders' enforcement rights, it was a major event from a contracting perspective. Sovereign bond contracts are drafted by lawyers at major global firms, involve transactions worth many hundreds of millions of dollars, and (in the modern era) are actively traded by sophisticated players in secondary markets. Thus, it is tempting to believe that their terms represent optimal solutions to the problems that concern the market.[279] In fact, however, sovereign bonds are highly standardized contracts that rarely change in material ways.[280]

In at least some cases, however, borrowers would have conducted substantial trade with parties in the US, and bond contracts left investors unable to interfere with these relationships.

275. *See supra* text accompanying notes 213–14.

276. *See supra* notes 134–36 and accompanying text.

277. *See supra* note 248.

278. A federal judge in New York has recently issued an injunction forbidding Argentina to pay holders of its restructured debt unless it also pays holdout creditors. This injunction was affirmed on appeal. *See supra* note 8. Litigation is ongoing, and the full details of the injunction have yet to be worked out. However, if courts were to routinely issue such injunctions (and could find a way to enforce them), the dynamic between sovereign borrowers and their creditors might change dramatically. For extensive coverage of these ongoing developments, see Joseph Cotterill, PARI PASSU SAGA (last visited Oct. 22, 2013), http://ftalphaville.ft.com/tag/pari-passu-saga/; Anna Gelpern, *Postings by Anna Gelpern*, CREDIT SLIPS, http://www.creditslips.org/creditslips/GelpernAuthor.html (last visited Oct. 22, 2013); Mark Weidemaier, *Postings by Mark Weidemaier*, CREDIT SLIPS, http://www.creditslips.org/creditslips/WeidemaierAuthor.html (last visited Oct. 22, 2013).

279. *See, e.g.*, Clifford W. Smith Jr. & Jerold B. Warner, *On Financial Contracting: An Analysis of Bond Covenants*, 7 J. FIN. ECON. 117, 123 (1979) (noting that contract terms that have survived over long periods of time likely represent efficient—or at least not harmful—solutions).

280. Many observers have explored the causes and effects of standardization on contracts, including Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023 (2000); Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006); William W. Bratton, Jr., *The Economics and Jurisprudence of Convertible Bonds*, 1984 WIS. L. REV. 667, 689 (1984); Choi & Gulati, *supra* note 124, at 947; Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481 (2009); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261 (1985); David A. Hoffman, *Whither Bespoke Procedure*, 2014 U. ILL. L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216902; Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or the Economics of*

A number of factors may explain the reluctance to make changes.[281] For example, standardization may reduce lawyers' incentives to produce custom terms. Because the lawyer cannot anticipate every contingency, it is possible that the term will fail to accomplish its intended objective.[282] When this happens, clients may judge the lawyer who designed the custom term more harshly than a lawyer who used the market standard employed by everyone else.[283] In addition, secondary market traders prefer standardization; they do not want to invest the time and energy necessary to evaluate the implications of novel contract language.[284] Like other mass producers, the large law firms that create sovereign bond contracts tend to build "routines that are dedicated to the mass production of homogeneous goods."[285]

The fact that sovereign bonds are resistant to change, however, does not mean that change never occurs.[286] As an empirical matter, the literature has identified several contexts in which changes have been introduced into bond contracts. Significant innovations have occasionally appeared in bonds issued by marginal issuers—i.e., smaller countries that are not in the market spotlight.[287] But the governments and lawyers involved in these transactions do not trumpet the innovation, and it largely passes unnoticed in the broader market.[288] Lawyers also appear to engage in widespread "tinkering," making modest changes to existing language but not introducing significant variation or adding new clauses.[289] These small changes fail to attract the attention of market participants.

Neither of these contexts involves the widespread adoption of a new contract term by most issuers in the market. On relatively rare occasions, however, such wholesale changes *do* occur, often after a period of foment and experimentation.[290] The general understanding is that this

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Boilerplate"), 83 VA. L. REV. 713 (1997); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998); Barak Richman, *Contracts Meet Henry Ford*, 40 HOFSTRA L. REV. 77 (2011); Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses?: The Use of Arbitration Clauses After* Concepcion *and* Amex (draft dated Aug. 5, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306268; and D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315 (2005).

281. *See* Ben-Shahar & Pottow, *supra* note 280, at 655–70; Hoffman, *supra* note 280 at 37–44; Rutledge & Drahozal, *supra* note 280, at 18–22.

282. *See, e.g.*, Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L. Q. 347, 355–58 (1996).

283. *See id.* at 356.

284. *See, e.g.*, Broad v. Rockwell Int'l Corp., 642 F.2d 929, 942–43 (5th Cir. 1981) (noting that uniformity of contract terms makes it easier for investors and advisors to compare issues).

285. *See* Richman, *supra* note 280, at 82.

286. Stephen J. Choi et al., *The Dynamics of Contract Evolution* 2, 9–11 (Univ. of Chi. Inst. for Law & Econ., Working Paper No. 605, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2093598.

287. Anna Gelpern & G. Mitu Gulati, *Innovation After the Revolution: Foreign Sovereign Bonds Since 2003*, 4 CAPITAL MARKETS L. J. 85, 92 (2009) (noting innovations in use of collective action clauses); Weidemaier, *supra* note 120, at 60 (noting use of arbitration clauses).

288. Choi et al., *supra* note 286, at 7; Gelpern & Gulati, *supra* note 287, at 89–90.

289. *See, e.g.*, MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN (2013); Weidemaier et al., *supra* note 118; Weidemaier & Gulati, *supra* note 118.

290. *See* Choi et al., *supra* note 286, at 10–11.

happens because public-sector actors have pushed market participants to accept the new term,[291] or because a major shock, such as that associated with global financial crisis, has unsettled investors' perceptions of risk and caused them to demand new terms.[292] According to theory it takes a major event of this sort to overcome the inherent inertia that characterizes bond contracts.[293] But the post-FSIA contract shift does not conform neatly to this prediction. There were few defaults in the 1970s, and most occurred late in the decade after waivers of immunity from suit had already been introduced into bond contracts.[294] By the time of the Latin American debt crisis of the 1980s, the new contract terms were well established in both New York and London.[295] No obvious external shock occurred to alter investors' perceptions of default risk, nor was there any explicit government pressure to introduce sovereign immunity waivers into bond contracts. What *did* happen was the enactment of the FSIA. But if this "shocked" any participants in the bond markets, it does not seem to have been the investors. As we have seen, there is little evidence that the FSIA caused investors to re-assess the risk associated with foreign government bonds.

To be clear, the post-FSIA shift is not fundamentally incompatible with existing theories of contract change. It suggests, however, that a wider range of forces may disrupt existing contracting routines. Rather than alter the perceptions of investors, the FSIA arguably increased the salience of legal enforcement to the players involved in documenting sovereign loan transactions. These include, at a minimum, the parties who produce the documents underlying the bond issue: the issuer, its underwriters, and their respective lawyers.[296]

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291. *See* Weidemaier, *supra* note 34, at 20–21; Choi et al., *supra* note 286, at 11.

292. Choi et al., *supra* note 286, at 10; Stephen J. Choi et al., *supra* note 179, at 17. The theory draws from the literature on organizational behavior and innovation, positing that technological advances and other exogenous shocks disrupt established practices and present opportunities for innovation. For discussion of this literature as applied to contracts, see Richman, *supra* note 280.

293. *See* Choi et al., *supra* note 179.

294. Most of the default episodes involved bank debt rather than bonds. For the timing of default episodes, see Borensztein & Panizza, *supra* note 127, at 43 tbl. A1. Mexico's payment standstill in 1982 initiated a widespread debt crisis involving at least seventy default episodes. *Id.* at 7. In addition to a wave of defaults on commercial loans, Nigeria, Yugoslavia, Argentina, Bolivia, Costa Rica, Guatemala, Panama, and others defaulted on bond debt. *Id.* at 41–48 tbl. A1; *see also* Fisch & Gentile, *supra* note 145, at 1054–55; LEX RIEFFEL, RESTRUCTURING SOVEREIGN DEBT: THE CASE FOR AD HOC MACHINERY 154 (2003).

295. As an example, between 1978 and 1982 (the year of Mexico's default and the onset of the crisis, *see supra* note 294), fifteen of the seventeen New York law bonds in the dataset included waivers of immunity. (The exceptions were Mexico and Venezuela.) A similar pattern holds for English law bonds, which almost uniformly incorporated waivers of immunity after 1977. By contrast, waivers of immunity from *execution* might plausibly be attributed to the shock of the Latin American debt crisis of the 1980s or the financial crisis beginning in the mid-1990s. On the influence of these shocks more generally, see Choi et al., *supra* note 179.

296. Investors are not directly involved in negotiating the terms of sovereign bond contracts. The issuer, its underwriters, and their respective lawyers negotiate the details, and investors typically review disclosure documents that describe key terms in detail. *See* Gelpern & Gulati, *supra* note 163, at 1637 & n.43.

The statute was disruptive for these players—unlike the non-statutory developments that began with the Tate Letter—because it made dispute resolution impossible to ignore. During the 1950s and 1960s, developments in the law of sovereign immunity had little to do with sovereign lending, much less bond lending.[297] No influential court or other authoritative legal actor had declared that waivers of sovereign immunity would be enforced. By contrast, the treatment of sovereign loans featured prominently in the debate leading up to the enactment of the FSIA,[298] and this could not have escaped the attention of lawyers involved in sovereign bond deals. After the statute formally established the enforceability of sovereign immunity waivers, informed lawyers could no longer avoid raising the subject during negotiations over the terms of a bond issuance. Put a bit differently: an informed lawyer surely would have felt the obligation to *do something* in response to such a salient legal development.

Although this is speculation, it is easy to see how the FSIA could have altered the negotiating dynamic underlying sovereign bond transactions, even if it did not depart radically from existing law or represent a major development from an enforcement perspective. As I have noted, other types of government loans already included immunity waivers, but sovereign countries were reluctant to agree to these terms when issuing bonds.[299] Before the FSIA, there may have been little reason for banks and their lawyers to focus on this point. Investors, after all, had demonstrated little interest in the subject of dispute resolution. As evidence of their disinterest, sales documents for bonds issued between 1950 and 1976 generally did not discuss legal enforcement at all. If investors had cared about enforcement rights, they might have wondered whether the Tate Letter made it feasible to sue a foreign issuer, or whether the evolving law of sovereign immunity made it worthwhile to include a waiver of the issuer's immunity from suit.[300] Had they been interested in such matters, the detailed sales documents that were distributed to prospective investors might have addressed the subject. But this did not happen.[301]

After the FSIA, however, it would have been harder to justify the different treatment of direct loans and sovereign bonds.[302] And once the

297. As noted, the Tate Letter and other developments were primarily concerned with other kinds of state commercial activity. *See supra* note 224. Moreover, most sovereign lending during the era was made through governments or multilateral financial institutions. *See supra* notes 83–84.

298. *See supra* text accompanying notes 85–89, 229–33.

299. *See supra* text accompanying note 166.

300. *See supra* Part II.A.3.

301. Likewise, if investors had cared about legal enforcement, one might have expected a wave of litigation to ensue after the defaults that took place in the 1980s and again in the 1990s. *See supra* note 294. These defaults, however, provoked remarkably little litigation despite the amounts at stake. (For a discussion of litigation during this era, see Fisch & Gentile, *supra* note 145 at 1077–80.) What the defaults seemingly *did* provoke is more contract change. In the New York market, waivers of immunity from execution began to appear after Mexico's payment standstill in 1982 and became common in the mid-1990s. *See* Figure 1; *see also* Choi et al., *supra* note 179, at 20 tbl. 1A.

302. Direct loans are made by large commercial banks. There are relatively few of these, and they are potent economic and political actors. Their leverage may have given them reason to believe

statute injected the subject of legal enforcement into bond negotiations, fairly compelling logic supported including a waiver of immunity in the bond contract: it certainly couldn't hurt investors to have one. At the same time, investors' relative disinterest in the subject may have made it unnecessary for the underwriters' lawyers to bargain for significant concessions, such as waivers of immunity from execution, for which issuers might have demanded concessions in return. Viewed in this manner, the post-FSIA contract shift was a formal, largely symbolic, reaction to a development that increased the salience of legal enforcement for the bankers and lawyers who bear primary responsibility for structuring sovereign bond issues and thinking about the consequences of default.

This understanding dovetails with other, largely overlooked developments in the sovereign debt markets. These changes often took place after external events increased the salience of a particular contract term. For example, in the early 2000s, the U.S. government cajoled issuers in the New York market to adopt a new contract term—Collective Action Clauses (CACs)—designed to facilitate the restructuring of sovereign debt.[303] Their efforts placed CACs front and center in global discussions of sovereign bond contracts. Although the intervention was targeted only at the New York market, it appears to have had the unintended effect of provoking changes to standardized contracts in other markets.[304] In similar fashion, by placing legal enforcement front and center in discussions of relations between private creditors and foreign sovereigns, the FSIA may have provided an impetus to modify contracts that were, under ordinary circumstances, supposed to be boilerplate.

V. CONCLUSION

At first glance, the swift incorporation of immunity waivers into sovereign bonds seems to illustrate the power of doctrine and the importance of legal enforcement rights. But upon deeper inquiry, an entirely different set of lessons emerges. One lesson is a cautionary tale about the limits of doctrine. The shift from the absolute to the restrictive theory of sovereign immunity was nothing short of a doctrinal revolution. But revolutions have limits, and, at least in the context of sovereign debt, this one's were dramatic indeed. Neither the FSIA nor the contract shift that followed it created a regime in which investors had meaningful enforcement rights.

As a matter of contract theory, however, the post-FSIA shift was a major event. Strikingly, the shift occurred not because sovereign immun-

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the issuer would willingly submit to the jurisdiction of U.S. courts if it had previously agreed to do so. (Relatedly, the banks' political clout may have given them some confidence that the State Department would decline to recognize and allow an immunity claim if the issuer made one.) Dispersed bondholders, by contrast, had less leverage and arguably depended more on formal enforcement rights. Once the FSIA made clear that immunity waivers were enforceable, this justification for treating bondholders differently disappeared.

303. *See generally* Gelpern & Gulati, *supra* note 163.

304. For extended discussion of this episode, see Weidemaier, *supra* note 34.

ity law had changed but because those changes were *codified*. This unusual pattern, which occurred without pressure from government officials and during a time of relative placidity in the sovereign debt markets, does not map easily onto standard models of contract change. The best explanation, it seems, is that contracts changed because the statute made legal enforcement salient to the players involved in documenting bond transactions. Investors, by contrast, were largely unmoved by the revolution in sovereign immunity law. For them, neither the radical doctrinal changes, nor the introduction of contract terms related to legal enforcement, played much of a role in the broader drama of sovereign debt.

APPENDIX 1

Issuers of bonds listed on NYSE or governed by New York law, by frequency of appearance in dataset

Mexico: 47 (7.5%)	Peru: 9 (1.4%)	Grenada : 2 (0.3%)
Brazil: 42 (6.7%)	New Zealand: 9 (1.4%)	Bosnia: 2 (0.3%)
Italy: 37 (5.9%)	Lebanon: 9 (1.4%)	Bahamas: 2 (0.3%)
Australia: 30 (4.8%)	Austria: 9 (1.4%)	Aruba: 2 (0.3%)
Venezuela: 26 (4.1%)	Poland: 8 (1.3%)	Vietnam: 1 (<0.1%)
Uruguay: 25 (4.0%)	Korea: 8 (1.3%)	Spain: 1 (<0.1%)
Philippines: 25 (4.0%)	Israel: 8 (1.3%)	Rhodesia: 1 (<0.1%)
Turkey: 24 (3.8%)	Denmark: 8 (1.3%)	Kazakhstan: 1 (<0.1%)
Colombia: 24 (3.8%)	Qatar: 7 (1.1%)	Nova Scotia: 1 (<0.1%)
South Africa: 23 (3.7%)	Costa Rica: 7 (1.1%)	Netherlands: 1 (<0.1%)
Norway: 21 (3.4%)	Belgium: 7 (1.1%)	Micronesia: 1 (<0.1%)
Panama: 19 (3.0%)	Egypt: 5 (0.8%)	Ivory Coast: 1 (<0.1%)
Argentina: 18 (2.9%)	Bulgaria: 5 (0.8%)	Iraq: 1 (<0.1%)
Jamaica: 17 (2.7%)	Belize: 5 (0.8%)	Iceland: 1 (<0.1%)
El Salvador: 14 (2.2%)	Trinidad & Tobago: 4 (0.6%)	Greece: 1 (<0.1%)
Finland: 12 (1.9%)	Japan: 4 (0.6%)	Gabon: 1 (<0.1%)
China: 12 (1.9%)	Hungary: 4 (0.6%)	Congo: 1 (<0.1%)
Chile: 11 (1.8%)	Thailand: 3 (0.5%)	Canada: 1 (<0.1%)
Sweden: 10 (1.6%)	Guatemala : 3 (0.5%)	Belgian Congo: 1 (<0.1%)
Indonesia: 10 (1.6%)	Ecuador: 3 (0.5%)	
Portugal: 9 (1.4%)	United Kingdom: 2 (.3%)	

APPENDIX 2

Sovereign Bond Issues (1945-present)

Decade	N	Percent of Total Issuances
1945-1949	8	1.3%
1950-1954	6	1.0%
1955-1959	28	4.4%
1960-1964	25	4.0%
1965-1969	30	4.8%
1970-1974	14	2.2%
1975-1979	44	7.0%
1980-1984	11	1.7%
1985-1989	11	1.7%
1990-1994	25	4.0%
1995-1999	84	13.3%
2000-2004	169	26.8%
2005-present	175	27.8%