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Sovereign Immunity and Sovereign Debt

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W. Mark C. Weidemaier*

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 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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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

¹ See Max Winkler, FOREIGN BONDS: AN AUTOPSY 21-25 (1933) (describing default by Greek municipalities in the fourth century B.C.).

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 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.

² Federico Sturzenegger & Jeromin Zettelmeyer, *DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES 19-23* (MIT Press: 2007).

³ 28 U.S.C. § 1605(a)(1), (2).

⁴ See W. Mark C. Weidemaier, *Contracting for State Intervention: The Origin of Sovereign Debt Arbitration*, 73 *LAW & CONTEMP. PROBS.* 335 (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.

⁶ See Sturzenegger & Zettelmeyer, *supra* n. 2 at 31-32; see also Jeremy Bulow and Kenneth Rogoff, *Sovereign Debt: Is to Forgive to Forget?*, 79 *AM. ECON. REV.* 43, 49

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 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

(1989) (concluding that small countries lacking a reputation for repayment must grant legal rights to creditors in order to obtain loans).

⁷ Georges 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* NML Capital, Ltd. v. Republic of Argentina, Order (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 Argentina, 2012 WL 5275014, No. 12-CV-105(L) (2d Cir., Oct. 26, 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/07/05 (2011), Decision on Jurisdiction and Admissibility, <http://www.iareporter.com/downloads/20110810/download>; Abaclat and Others v The Argentine Republic (formerly Giovanna a Beccara and Others v Argentine Republic), ICSID Case No. ARB/07/05 (2011), Decision on Jurisdiction and Admissibility (Dissenting Opinion), 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.

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 I, 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 I 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-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 II 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 II presents evidence that

¹⁰ See *infra* note 29.

¹¹ See Part I.A.

¹² Listings on the NYSE began to dry up after the 1970s as issuers switched to Luxembourg and other exchanges.

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. See *infra* text accompanying notes 131-132.

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 III 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 sovereign immunity law—such as the 1952 issuance of the Tate Letter¹⁷—seem to have passed unnoticed in the bond markets.¹⁸

¹⁴ See Part II.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 134–141.

¹⁷ For further discussion of the Tate Letter, see Part I.A.3.

¹⁸ See *infra* note 234.

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 III 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 (By contrast, litigation ongoing in the New York

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 US 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 Argentina, No. 12-105 (2d Cir. filed Apr. 17, 2012), ECF No. 238 (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 (April 6, 2012), <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 Part III.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 264–272.

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 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 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 III 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 (and potentially effective) 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.

I. 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

²³ See *NML Capital, Ltd. v. Republic of Argentina*, 2012 WL 5275014, No. 12-CV-105(L) (2d Cir., Oct. 26, 2012).

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

²⁵ See Part III.B.

in English and US 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, 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.

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. SUPP. 473, 527–40 (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; Georges R. Delaume, *Jurisdiction of Courts and International Loans: A Study of Lenders' Practice*, 6 AM. J. COMP. L. 189, 203–04 & n.40 (1957). This was not the case in English and US 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, but was less clearly so under US law, which was evolving rapidly. Early US cases, however, clearly supported the view that a sovereign could withdraw its waiver of immunity at any time. See *Beers v. Arkansas*, 61 US 527, 529 (1857).

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 George Downs & Michael 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).

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 US and other states invested significant political capital in an effort to create a system of inter-state 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 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

³⁰ See Mark Weston Janis, INTERNATIONAL LAW 123–24 (5th ed. 2008); Robert H. Wiebe, THE SEARCH FOR ORDER, 1877–1920 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 A. Boyle, FOUNDATIONS OF WORLD ORDER: THE LEGALIST APPROACH TO INTERNATIONAL RELATIONS (1898-1922) 25-56 (Duke Univ. Press 1999).

³² The US was not a League member, but the State Department worked indirectly through participating US 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 the League Loans generally, see Margaret Myers, *The League Loans*, 60 POLI. SCI. QUARTERLY (1945) 492. For contemporaneous history, see Sir Arthur Salter, *The Reconstruction of Austria*, 2 FOREIGN AFFAIRS 630 (1924); Sir Arthur Salter, *The Reconstruction of Hungary*, 5 FOREIGN AFFAIRS 91-102 (1926).

³⁴ See Weidemaier, *supra* note 4 at 350; W. Mark C. Weidemaier, *Reforming Sovereign Lending Practices: Modern Initiatives in Historical Context* 7–9 in SOVEREIGN FINANCING

These clauses were designed primarily to resolve inter-state 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

AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING (Oxford Univ. Press, forthcoming 2013).

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

³⁶ A bit later in the century, US policymakers 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 J. Keith Horsefield, *The International Monetary Fund 1945-1965: Twenty Years of International Monetary Cooperation*, Vol. I at 77 (Washington, DC: International Monetary Fund 1969). On the US efforts in this regard generally, see 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 4-9.

³⁹ League of Nations, *Report of the Committee for the Study of International Loan Contracts* (1939), at 5 [herein, *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

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, Colombian Bond Cases, *reprinted in* 4 John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3591, 3614-15 (1898). For a summary of US 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 the San Domingo Improvement Company (a US 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, PAPERS RELATED TO THE FOREIGN RELATIONS OF THE UNITED STATES at 270 (Washington: Government Printing Office 1905).

⁴⁴ League of Nations, *Report on Loan Contracts*, at 27.

⁴⁵ *Id.* at 25.

⁴⁶ Indeed, the committee's primary concern was that *too much* litigation might ensue. *See* League of Nations, *Report on Loan Contracts*, 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.

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 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 US Department of State issued a letter (the Tate Letter) announcing the Department's adoption of the restrictive theory of sovereign immunity as a matter of policy.⁵² Foreign states henceforth would

⁴⁸ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter "NEW YORK CONVENTION"]. The Convention entered into force in the United States in 1970.

⁴⁹ See Convention for the Settlement of Investment Disputes Between States and Nationals of Other States art. 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 US courts. See 28 U.S.C. §§ 1605(a)(6)(B), 1610(a)(6).

⁵¹ See ICSID Convention art. 55. 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*, at 125-34 (2001).

⁵² See Curtis A. Bradley and 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"); Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT.

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 final and ended any litigation that private parties had instituted in US 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 one thing, the issuance of bonds might have been treated as a public act for which the sovereign retained its immunity from suit in US 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

REV. 111, 120 (“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.”); 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 sovereign immunity in American law”); Ingrid Wuerth, *Symposium Epilog: Foreign Sovereign Immunity at Home and Abroad*, 44 VAND. J. TRANSNAT’L L. 1233 (2011) (stating that the Tate Letter “formally articulate[d] official immunity principles”).

⁵³ See Tate Letter, 26 Dept. State Bull. 969, 984-85 (1952).

⁵⁴ For a discussion of the Department’s view of this role, see Statement of Murray J. Belman, Deputy Legal Advisor, Department of State, in *New Departures in the Law of Sovereign Immunity*, PROCEEDINGS OF THE AM. SOC. OF INT’L LAW AT ITS ANNUAL MEETING (1921-1969) at 182-87 (1969).

⁵⁵ See Mark Weston Janis, INTERNATIONAL LAW 359 (5th ed 2008) (“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).

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 Curtis A. Bradley & Laurence R. Helfer, *International Law and the US Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 219; G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 138-46 (1999); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1252 (1988).

⁵⁷ See *Victory Transport Incorporated v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964).

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 US 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 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 US was no longer immune from execution if the foreign sovereign had waived immunity from

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

⁵⁹ See Tate Letter, 26 Dept. State Bull. 969, 985 (1952).

⁶⁰ See Belman, *supra* note 54 at 186-87; *Weilamann v. Chase Manhattan Bank*, 192 N.Y.S. 2d 469, 472-73 (N.Y. Sup. Ct. 1959); 54 AM. J. INT'L L. 640-44 (1960) (describing the case and extensively quoting the State Department letter).

⁶¹ 28 U.S.C. § 1605(a)(2).

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* Draft Legislation on the Jurisdictional Immunities of Foreign States, 12 I.L.M. 118 (Jan. 26, 1973).

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.

execution⁶⁵ 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

⁶⁵ 28 U.S.C. § 1610(a)(1).

⁶⁶ 28 U.S.C. § 1610(a)(2). I am omitting discussion of other relevant provisions, especially those related to arbitration. For example, the FSIA also allows US courts to assume jurisdiction over a foreign sovereign to the extent necessary to enforce an arbitration agreement or confirm an arbitration award, 28 U.S.C. § 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”), 28 U.S.C. § 1610(a)(6).

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

⁶⁸ See Joseph M. Sweeney, *The International Law of Sovereign Immunity*, Policy Research Study for the Bureau of Intelligence and Research, Dep’t of State at 55 (Oct. 1963). See also *Draft Convention on the Competence of Courts in Regard to Foreign States*, 26 AM. J. INT’L L. SUPP. 473, 548-49 (1932). (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 the Jurisdictional Immunities of Foreign States* § 1605(1), 12 I.L.M. 118, 124 (Jan. 26, 1973). See also *Victory Trans. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (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. 94-1487.

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 incorporated 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

⁷⁰ American Law Institute, TENTATIVE DRAFT NO. 2, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 57(1) (May 8, 1958).

⁷¹ *Id.*, Comment 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.”).

⁷² American Law Institute, PROPOSED OFFICIAL DRAFT, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 73, Illus. 1 (May 3, 1962). The Reporter’s Notes acknowledged that US cases provided no direct support for the Restatement rule but opined that US courts would adopt the rule if the issue were to arise. *Id.*

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.*, 281 N.Y. 362, 373-74 (Ct. App. N.Y. 1939); Francis Deak, *The Plea of Sovereign Immunity and the New York Court of Appeals*, 40 COLUM. L. REV. 453, 454 (1940).

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 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 US citizens

⁷⁶ See *supra* note 60 and accompanying text.

⁷⁷ 28 U.S.C. § 1610(a)(2). 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 have been “used for the commercial activity” upon which the claimant based the claim.

⁷⁸ Or anyway, they transport it out of the United States.

⁷⁹ See *infra* text accompanying notes 124-130 and 157-162.

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.

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 the US 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,

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 (Cambridge University Press 2006).

⁸⁵ See Draft Legislation on the Jurisdictional Immunities of Foreign States, 12 I.L.M. 118, 121 (Jan. 26, 1973).

⁸⁶ See Georges R. Delaume, *Public Debt and Sovereign Immunity: Some Considerations Pertinent to S.566*, 67 AM. J. INT’L L. 745, 746–49 (1973).

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

⁸⁸ House Report (Judiciary Committee) No. 94-1487 at 6609 (Sept. 9, 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 FSIA and Public Debt Litigation*, 88 AM. J. INT’L L. 257, 259 (1994). After its enactment in 1978, the SIA explicitly defined commercial activities to include “any loan or transaction for the provision of finance,” SIA § 3(3), presumably settling the question in the UK.

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, US 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 US courts to lawsuits against foreign states (the Tate Letter), and by removing the State Department from the process of making immunity determinations (the FSIA), the changes

⁸⁹ House Report (Judiciary Committee) No. 94-1487 at 6609 (Sept. 9, 1976).

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* ICSID Convention, Art. 27. Article 27(1) 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. ICSID Convention, Art. 27(2).

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

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

promised to insulate political actors from pressure by both US citizens and foreign states.

Many government officials would have welcomed some distance from foreign investment disputes.⁹⁴ During the twentieth century, the US 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, US 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 260 percent as a percentage of US domestic corporate and agricultural wealth, and more than half of this investment was concentrated

⁹⁴ To be clear, 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, Lord 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 (Univ. of California Press: 1985). It is clear, however, that the US government played an active role both in making and enforcing foreign loans, especially in the first decades of the twentieth-century. See Emily S. Rosenberg, *FINANCIAL MISSIONARIES TO THE WORLD: THE POLITICS AND CULTURE OF DOLLAR DIPLOMACY, 1900–1930* (2003).

⁹⁵ See Rosenberg, *supra* note 94. On the general involvement of creditor states in settling default on foreign bonds, see also Barry Eichengreen & Richard Portes, *Settling Defaults in the Era of Bond Finance*, 3 *WORLD BANK ECON. REVIEW* 211 (1989); Barry Eichengreen, *Historical Research on International Lending and Debt*, 5 *J. ECON. PERSP.* 149, 162-64 (1991); Federico Sturzenegger & Jeromin Zettelmeyer, *DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES* (MIT Press: 2007); 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 Jeff Frieden, *Sectoral Conflict and Foreign Economic Policy, 1914-1940*, 42 *INT'L ORG.* 59 (1988).

in a handful of industries.⁹⁸ Over the same period, US 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 20 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 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

⁹⁸ Frieden, *supra* note 97, 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 (the 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); HANDBOOK ON AMERICAN UNDERWRITING OF FOREIGN SECURITIES, US DEP'T OF COMMERCE 12 & Tbl. 2 (1930).

¹⁰² On this history generally see Marc Flandreau, Norbert Gaillard, & Ugo Panizza (2010), *Conflicts of Interest, Reputation, and the Interwar Debt Crisis: Banksters or Bad Luck?*, HEID Working Paper No. 02/2010 at 6-10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588031; Barry Eichengreen, *GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919-1939*, Ch. 2 (Oxford Univ. Press 1996).

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 97; Charles Lipson, *STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES* 57-64 (Univ. of California Press: 1985).

¹⁰⁴ For example, State Department officials worked with US banks to design arbitration clauses that would justify post-default US intervention in the affairs of Latin American borrowers. See Weidemaier, *supra* note 4. 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 97; Paul P. 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).

and American bankers, of course, may have implied that the US 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 US 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 US 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 US 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 imperatives.¹¹¹ But loan contracts may have been influenced by these efforts. For example, even during the era of absolute immunity, US banks might have included arbitration clauses in loan contracts because they knew their government favored such clauses and because they hoped it would

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 Michael R. Adamson, *The Failure of the Foreign Bondholders Protective Council Experiment, 1934-1940*, 76 BUS. HIST. REV. 479 (2002); Barry Eichengreen & Richard Portes, *After the Deluge: Default, Negotiation, and Readjustment During the Interwar Years*, in THE INTERNATIONAL DEBT CRISIS IN HISTORICAL PERSPECTIVE, eds. Barry Eichengreen & Peter H. Lindert (1989).

¹⁰⁸ See Adamson, *supra* note 107 at 491.

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

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

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 107.

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 reasonably exhaustive 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

¹¹² See Weidemaier, *supra* note 4 at 344–52.

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 and 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.

London Stock Exchange, and many private issuances listed on neither exchange.

Because I am concerned primarily with legal and policy developments in the US, 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

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 204.

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

¹¹⁷ As noted *infra*, dispute resolution clauses began to appear somewhat earlier in these bonds. See *infra* text accompanying notes 165-168.

¹¹⁸ Mark Weidemaier, Robert Scott & Mitu Gulati, *Contracts, Origin Myths, and the Hunt for Pari Passu*, LAW & SOC. INQUIRY (forthcoming 2012); Mark Weidemaier & Mitu Gulati, *How Markets Work: The Lawyer's Version*, STUDIES IN LAW, POLITICS, AND SOCIETY (forthcoming 2012-2013).

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% 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 TEMPLE L. REV. 1 (2009).

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

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

¹²¹ See *supra* note 66.

¹²² See Draft Legislation on the Jurisdictional Immunities of Foreign States, 12 I.L.M. 118, 118 (1973). 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 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. OF LAW & ECON. 291, 294 (2007).

¹²⁴ See Stephen J. Choi and 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 Part III.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.

Base Prospectus, The Lebanese Republic U.S. \$22,000,000,000 Global Medium-Term Note Program at 99–100 (Apr. 4, 2007) (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:

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

[Insert Figure 1 around here]

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

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.

Prospectus for the Republic of Finland, \$50,000,000 8.75% Bonds Due 1992 (Oct. 19, 1977) (emphasis added).

¹²⁷ On the timing of the crisis, see Eduardo Borensztein & Ugo Panizza, *The Costs of Sovereign Default*, IMF Working Paper No. WP/08/238 at 7 (Oct. 2008); Ugo Panizza, Federico Sturzenegger & Jeromin Zettelmeyer, *The Economics and Law of Sovereign Debt and Default*, 47 J. ECON. LIT. 1, 18 & Fig. 1 (2009).

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

¹²⁹ 28 U.S.C. § 1610(a)(2).

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 US court, then the bondholder might have broader enforcement rights. As this litany of conditions makes clear, however, bondholders had little cause for optimism.

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

¹³² 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

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

II. 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

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.

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, 666 (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 55-56; 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* n.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, Marcos Chamon, and Jeromin Zettelmeyer, *The Problem that Wasn't: Coordination Failures in*

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

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

Sovereign Debt Restructurings at 3–4, IMF Working Paper WP/11/265 (2011), available at <http://www.imf.org/external/pubs/ft/wp/2011/wp11265.pdf> (documenting the effective use of other restructuring techniques). But even when the sovereign uses another restructuring technique, its success depends on creditor consent.

¹³⁹ Jeffrey Sachs, *Theoretical issues in international borrowing*, in Princeton Studies in International Finance No. 54 (Princeton: Princeton University Press 1984). 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 Lock Law, which forbade the Argentine government to offer holdouts "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 LAW & BUS. REV. OF THE AMERICAS 745, 757-58 (2009).

¹⁴¹ See, e.g., Reynolds Holding, *Argentina case puts bite in holdout hedgies' bark*, 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).

¹⁴² See Jeremy Bulow & Kenneth Rogoff, *A Constant Recontracting Model of Sovereign Debt*, 97 J. POL. ECON. 155 (1989). If contract terms can increase 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, Laura Alfaro, & Noel Maurer, *Lawsuits and Empire: On the Enforcement of Sovereign Debt in Latin America*, 73 LAW & CONTEMP. PROBS. 39 (2010).

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 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

¹⁴⁴ See generally Mark A. Cymrot, *Barricades at the IMF: Creating a Municipal Bankruptcy Model for Foreign States*, 36 INT'L LAW. 1103 (2002); Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635 (2000-2001). 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 re: Argument held on 9/28/2011, NML Capital, Ltd. v. Rep. of Argentina, 08-CV-6978 (TPG) (S.D.N.Y. Sept. 28, 2011).

¹⁴⁵ See generally Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguard: 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 SIA.

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) (same); 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).

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

¹⁴⁸ See 28 USC. §§ 1605, 1608, 1610. The statute also established procedures for serving process. 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 Murray J. Belman, *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 Part I.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. 597, 598-602 (1995). For an analogous argument in the context of bilateral investment treaties, see Zachary Elkins, Andrew T. Guzman, and Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 2008 U. ILL. L. REV. 265, 278 (2008).

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

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 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 US)

¹⁵³ See Part II.B.

¹⁵⁴ See *supra* text accompanying notes 67–75.

¹⁵⁵ Cf. Zachary Elkins, Andrew T. Guzman, and Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 278 (2008) (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 122–123.

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

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 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

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

¹⁶² As noted earlier, see *supra* n. 130, it would in theory have been possible to enforce a US court judgment in another jurisdiction, but this was 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, 713–21 (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, 1628–29 (2006); Michael Waibel, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT’L L. 711, 732 n.131 (2007); see also Stephen J. Choi and 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); Weidemaier, *supra* note 120 at 8–14 (discussing theoretical implications of characterizing sovereign bond contracts as boilerplate).

¹⁶⁴ Cf. Stephen Choi and Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 932 n.7 (2004) (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 US executive agreements with respect to arbitration commissions).

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 There is a big difference

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 Sullivan v. State of Sao Paulo*, 36 F. Supp. 503 (1941). On the uncertainty generally, *see* Georges R. Delaume, *LEGAL ASPECTS OF INTERNATIONAL LENDING AND ECONOMIC DEVELOPMENT FINANCING* 157-60 (Dobbs Ferry, NY: Oceana Pubs. 1967).

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 12–15.

¹⁷⁰ *See, e.g.*, Base Prospectus, The Lebanese Republic US \$22,000,000,000 Global Medium-Term Note Program, at 99 (Apr. 4, 2007) (“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 contractual mechanisms, of course, may

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 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

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. 2006).

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 discussion, see Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L. J. 231 (2009) (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 & Mitu Gulati, *Collective Action Clauses for the Eurozone: An Empirical Analysis* at 71 (Oct. 24, 2011), 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 Roberts, *The Structure and Pricing of Corporate Debt Covenants* (May 13, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=466240.

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 “earmarked,” 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

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., Prospectus, Chinese Government 5% Reorganization Gold Loan of 1913, at 2 (May 21, 1913) (providing that bonds would be “specially secured ... by a charge” on revenues from the salt trade and on customs revenues).

¹⁷⁸ For some examples, see Herbert Feis, *EUROPE: THE WORLD’S BANKER, 1870-1914* (Yale Univ. Press 1930). For evidence on the prevalence of these “earmarking” arrangements, see Mark Weidemaier, Robert Scott, and Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, LAW & SOC. INQ. (forthcoming 2012).

¹⁷⁹ Observers familiar with sovereign bond contracts may object that contract change tends to occur in clusters. See Stephen J. Choi, Mitu Gulati and Eric A. Posner, *Political Risk and Sovereign Debt Contracts* 17, John M. Olin Law & Economics Working Paper No. 583 (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 Jeremy Bulow and Kenneth Rogoff, *Sovereign Debt: Is to Forgive to Forget?*, 79 AM. ECON. REV. 43, 43 n.2 and accompanying text (1989) (citing an “influential body of research hold[ing] that a small country can enjoy at least some access to world markets by maintaining a reputation for repaying its loans”).

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

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

¹⁸² Cf. Lee C. Buchheit, HOW TO NEGOTIATE EUROCURRENCY LOAN AGREEMENTS at 134-44 (2d ed 2006) (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 Bond Guide at 144-45 (December 31, 1977).

¹⁸⁶ See Figure 1.

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 US 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.

¹⁸⁷ Cf. William Bratton, *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 Frank J. Fabozzi, ed., HANDBOOK OF FINANCE VOL. 1: FINANCIAL MARKETS AND INSTRUMENTS 218 (2008) (explaining 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* 20, NBER 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 \$1,000.

¹⁹² Yield spreads capture the difference in yield between a security and an equivalent but risk-free security – typically a US treasury bond of equivalent maturity – and thus allow for assessments of relative risk. See Frank J. Fabozzi, *Federal Agency Securities*, in Frank J. Fabozzi, ed., HANDBOOK OF FINANCE VOL. 1: FINANCIAL MARKETS AND INSTRUMENTS 248 (2008); Mark Hallerberg & Guntram B. Wolff, *Fiscal Institutions, Fiscal Policy, and Sovereign Risk Premia in EMU*, 13 PUBLIC CHOICE 379, 382-83 (2008).

¹⁹³ See Timothy Q. Cook, *Changing Yield Spreads in the US Government Bond Market: Flower Bonds Bloom, then Wilt*, ECON. REV. (Mar./Apr. 1977).

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 See Draft Legislation on the Jurisdictional Immunities of Foreign States, 12 I.L.M. 118, 118 (Jan. 26, 1973) (stating that the FSIA draft bill was jointly submitted by the Department of State and Department of Justice).

¹⁹⁶ By the 1970s, the U.S. was playing catch-up to other jurisdictions, such as France, Germany, and Switzerland, which had abandoned absolute immunity earlier. See *supra* n.26.

¹⁹⁷ Draft Legislation on the Jurisdictional Immunities of Foreign States § 1605(2), 12 I.L.M. 118, 124 (Jan. 26, 1973).

¹⁹⁸ Draft Legislation on the Jurisdictional Immunities of Foreign States § 1610(a)(1), 12 I.L.M. 118, 128 (Jan. 26, 1973). 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 Draft Legislation on the Jurisdictional Immunities of Foreign States § 1610(a)(1), 12 I.L.M. 118, 128 (Jan. 26, 1973). See also *supra* text accompanying notes 85-89.

[Insert Figure 2 here]

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.

[Insert Figure 3 here]

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

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).

²⁰² See *Republic of Argentina v. Weltover*, 504 US 607 (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* p. 19.

²⁰⁴ Compare 28 U.S.C. § 1610(a)(1) to Draft Legislation on the Jurisdictional Immunities of Foreign States § 1610(a)(1), 12 I.L.M. 118, 128 (Jan. 26, 1973).

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.

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

[Insert Figure 4 here]

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 US 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 US courts too—and since, in any event, *no* bondholder had a

²⁰⁹ A bid price is “[t]he highest price a market maker will pay to buy a specific number of shares.” U.S. SECURITIES AND EXCHANGE COMMISSION, *Bid Price*, Investor.gov, http://investor.gov/glossary/glossary_terms/bid-price (accessed Jul. 5, 2012).

²¹⁰ Cf. Frank J. Fabozzi, *Bonds: Investment Features and Risks*, in Frank J. Fabozzi, ed., *HANDBOOK OF FINANCE VOL. 1: FINANCIAL MARKETS AND INSTRUMENTS* 218 (2008) (explaining that because U.S. government securities are considered to be free of default risk, “a non-U.S. government tradable bond will trade in the market at a higher yield than a U.S. government bond that is otherwise comparable in terms of maturity and coupon rate”).

²¹¹ See Figure 1.

²¹² See Part II.A.

²¹³ Before the FSIA, the State Department bore primary responsibility for making immunity determinations. See Part I.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).

meaningful right to enforce a judgment—the difference was modest at best.²¹⁴

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.

III. 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 US and the UK, 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

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 158-162.

²¹⁵ As noted previously, *see supra* text accompanying note 189, 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.

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, *see supra* note 26, other jurisdictions had abandoned the doctrine of absolute immunity much earlier.

attention of lawyers, policymakers, 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 II demonstrated, however, that this doctrinal revolution had little practical significance in the bond markets. That conclusion is important, first and 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, policymakers 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 US 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 US 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

²²⁰ See, e.g., Richard I. Fine, *Sovereign Immunity and the Nation State Cartel*, 51 L.A. B.J. 283, 287–292 (Dec. 1975); *Proposed Legislation on Jurisdictional Immunity of Foreign States: A Report of the International and Foreign Law Committee of the Chicago Bar Association*, 56 CHI. B. REC. 78 (Sep.-Oct. 1974); *Proposed Federal Legislation on Immunity of Foreign States in Proceedings before American Courts* (H.R. 3494; S.566), 30 REC. ASS'N B. CITY N.Y. 301 (1975); Eric Page, *Exotic Old Foreign Bonds Focus of Collection Suits: Holders of Some Old Foreign Bonds Sue for Payment*, N.Y. TIMES, June 22, 1983, at B1.

²²¹ 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, 666 (2008) (noting that more than 200 reported court cases had been filed against foreign sovereigns in the U.S. between 2004 and the time of the writing).

²²² See, for example, the “Foreign Sovereign Immunity at Home and Abroad” symposium in Volume 44 of the *Vanderbilt Journal of Transnational Law* (2011).

²²³ See generally Tate Letter, 26 Dept. State Bull. 969, 984–85 (1952) (discussing developments underlying shift to restrictive theory of sovereign immunity); Georges Delaume, *Public Debt and Sovereign Immunity: Some Considerations Pertinent to S.566*, 67 AM. J. INT'L L. 745 (1973) (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, 26 Dept. State Bull. 969, 984, 985 (1952).

²²⁶ See Part I.A.4.

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 US 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 US 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 US banks²³¹ 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 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

²²⁷ As an extreme example, the US corporation United Fruit sought to involve the US 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* at 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 Part III.A.

²²⁹ See *supra* text accompanying notes 85–89.

²³⁰ See Section by Section Analysis of S. 566, at 12 I.L.M. 118, 143-44 (Jan. 22, 1973).

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

²³² See Georges Delaume, *Public Debt and Sovereign Immunity: Some Considerations Pertinent to S.566*, 67 AM. J. INT'L L. 745, 752 (1973).

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

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

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. OF ECON. STUD. 289 (1981).

²³⁷ For various reputational models, see Michael Tomz, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES (2007); Kenneth M. Kletzer & Brian D. Wright, *Sovereign Debt as Intertemporal Barter*, 90 AM. ECON. REV. 621, 623 (2000); Harold L. Cole & Patrick J. Kehoe, *The Role of Institutions in Reputation Models of Sovereign Debt*, 35 J. MONETARY ECON. 46, 46-48 (1995); Eaton & Gersovitz, *supra* note 236, at 289-90.

²³⁸ See Jeremy Bulow & Kenneth Rogoff, *A Constant Recontracting Model of Sovereign Debt*, 97 J. POL. ECON. 155, 158-59 (1989).

²³⁹ See generally Kris J. Mitchener & Marc D. Weidenmier, *Supersanctions and Sovereign Debt Repayment*, NBER Working Paper No. 11472 (June 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).

control. In separate studies, for example, Mitchener and Weidenmier²⁴² find that actual or credibly-threatened intervention by powerful states resulted in increased bond prices²⁴³ and reduced ex ante default probabilities²⁴⁴ 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-

²⁴² No relation.

²⁴³ Kris J. Mitchener & Marc D. Weidenmier, *Empire, Public Goods, and the Roosevelt Corollary*, NBER Working Paper No. 10729 (Sept. 2004). See also Ahmed, Alfaro, & Maurer, *supra* note 143.

²⁴⁴ Kris J. Mitchener & Marc D. Weidenmier, *Supersanctions and Sovereign Debt Repayment*, NBER Working Paper No. 11472 (June 2005).

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 (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, Marc Flandreau, Riad Rezzik & Frédéric Zumer, *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*, Princeton University Research Program in Development Studies, Discussion Paper # 108 at 4 (Sept. 1983).

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

²⁵⁰ 28 U.S.C. §§ 1605, 1610.

²⁵¹ Gersovitz, *supra* note 249 at 1-3; Bulow & Rogoff, *supra* note 238 at 174. The borrower can try to keep its assets away from creditors, but it is costly to do so. See Bulow & Rogoff, *supra* note 238 at 174-75; William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interests of Creditors*, 57 VAND. L. REV. 1, 15-16 (2004).

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 policymakers 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 al. studied whether the US Supreme Court's 1992 decision in *Republic of Argentina v. Weltover*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 US courts.²⁵⁶ In other work, Ahmed et al. studied litigation by vulture funds²⁵⁷ 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 II.

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 US

²⁵² Cf. Bulow & Rogoff, *supra* note 238 at 174 (noting that “prospective sovereign borrowers [may] court creditors by strengthening creditors’ rights in default”)

²⁵³ See *supra* note 20.

²⁵⁴ 504 U.S. 607 (1992).

²⁵⁵ Ugo Panizza, Federico Sturzenegger & Jeromin Zettelmeyer, *The Economics and Law of Sovereign Debt and Default*, 47 J. ECON. LIT. 1, 20 (2009).

²⁵⁶ See Panizza et al., *supra* note 255 at 20 n.29.

²⁵⁷ “Vulture funds” are distressed debt investors. See Cashing in on the Crash, THE ECONOMIST (Aug. 23, 2007). 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 POLICY (June 11, 2007) (available at http://www.foreignpolicy.com/articles/2007/06/11/the_debt_frenzy).

²⁵⁸ Ahmed, Alfaro, & Maurer, *supra* note 143, at 45-46.

²⁵⁹ See Panizza et al., *supra* note 255 at 20.

²⁶⁰ See Panizza et al., *supra* note 255 at 20; Ahmed et al., *supra* note 143 at 42.

courts.²⁶¹ Under the FSIA, foreign sovereigns are not immune from suit when they have engaged in commercial activity with a US nexus.²⁶² By clarifying that bond issuance was a commercial act and that the act of making payments in the US satisfied the nexus requirement, *Weltover* would have removed the uncertainty (had there been any).²⁶³

But was there uncertainty? The evidence presented in Part II indicates not. Recall that the FSIA extends jurisdiction to lawsuits arising out 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 II demonstrated, virtually all bonds 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 US 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

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 255 at 4. Ahmed et al. note that *Weltover*'s holding meant that "sovereign 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).

²⁶³ See Panizza et al., *supra* note 255 at 20 n.29.

²⁶⁴ See *supra* note 3; see also Part I.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). 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" 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). 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.

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 II 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 of

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

²⁶⁹ See, e.g., Prospectus Supplement, Rep. of South Africa 4.5% Notes due 2016, at S-3 (Apr. 18, 2006) ("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., Base Prospectus, The Lebanese Republic US \$22,000,000,000 Global Medium-Term Note Program, at 99-100 (Apr. 4, 2007) ("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 II made clear, virtually all modern sovereign bonds waive immunity from suit. Bonds vary, however, in whether they waive immunity from execution. 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 249 at 2-3.

²⁷⁴ To be sure, an investor who obtained a judgment from a US 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. In at least some cases, however,

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 US.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

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 213–214.

²⁷⁶ See *supra* notes 134–136 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, and this injunction was affirmed on appeal. See *supra* note 8. This 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 <http://ftalphaville.ft.com/tag/pari-passu-saga/>; <http://www.creditslips.org/creditslips/GelpernAuthor.html>; <http://www.creditslips.org/creditslips/WeidemaierAuthor.html>.

²⁷⁹ See, e.g., Clifford W. Smith & Jerald B. Warner, *On Financial Contracting*, 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).

fact, however, sovereign bonds are highly standardized contracts that rarely change in material ways.²⁸⁰

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, moreover, the large law firms that create sovereign bond contracts may tend to build "routines that are dedicated to the mass production of homogeneous goods."²⁸⁵

²⁸⁰ Many observers have explored the causes and effects of standardization on contracts, including William W. Bratton, Jr., *The Economics and Jurisprudence of Convertible Bonds*, 1984 WIS. L. REV. 667, 689; Charles J. Goetz & Robert Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting* (Or, the "Economics of 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); Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 69 U. CIN. L. REV. 1023 (2000); Stephen Choi & Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 947 (2004); D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315 (2005); Omri Ben Shahr & John Pottow, *On the Stickiness of Default Rules*, 33 Fla. St. U. L. Rev. 651 (2006); Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481 (2009); and Barak Richman, *Contracts Meet Henry Ford*, 40 HOFSTRA L. REV. 77 (2011).

²⁸¹ See Ben-Shahr & Pottow, *supra* note 280 at 655-70.

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, 943 (5th Cir. 1981) (noting that uniformity of contract terms makes it easier for investors and advisors to compare issues).

²⁸⁵ Richman, *supra* note 280 at 82.

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, too, 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 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

²⁸⁶ Stephen J. Choi, Mitu Gulati, and Eric A. Posner, *The Dynamics of Contract Evolution*, Chicago Institute for Law & Econ. Working Paper No. 605 at 1, 9-11 (June 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2093598.

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

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

²⁸⁹ For examples, see Mitu Gulati & Robert E. Scott, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (Univ. of Chicago Press, forthcoming); Weidemaier, Scott, & Gulati, *supra* note 118; Weidemaier & Gulati, *supra* note 118.

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

²⁹¹ See Weidemaier, *supra* note 34 at 20-21 (2012); Choi et al., *supra* note 286 at 11.

²⁹² Choi et al., *supra* note 286 at 10; Stephen J. Choi, Mitu Gulati, and Eric A. Posner, *Political Risk and Sovereign Debt Contracts* at 17 (Nov. 21, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962788. 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.

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

²⁹³ See Choi et al., *supra* note 292.

²⁹⁴ Most of the default episodes involved bank debt rather than bonds. For the timing of default episodes, see Eduardo Borensztein & Ugo Panizza, *The Costs of Sovereign Default*, IMF Working Paper WP/08/238, Tbl. A-1 (October 2008). 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.* See also Fisch & Gentile, *supra* note 145 at 1054-55; Lex Rieffel, *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery* 154 (Brookings Inst. Press 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 292.

documents underlying the bond issue: the issuer, its underwriters, and their respective lawyers.²⁹⁶

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 negotiate hard 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

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.

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 & 229-233

²⁹⁹ *See supra* text accompanying note 166.

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 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 US 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

³⁰⁰ See Part I.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; Choi et al., *supra* note 292.

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 the issuer would willingly submit to the jurisdiction of US 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.

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.

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 immunity 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.

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

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

Figure 1. Sovereign Immunity Transition in New York

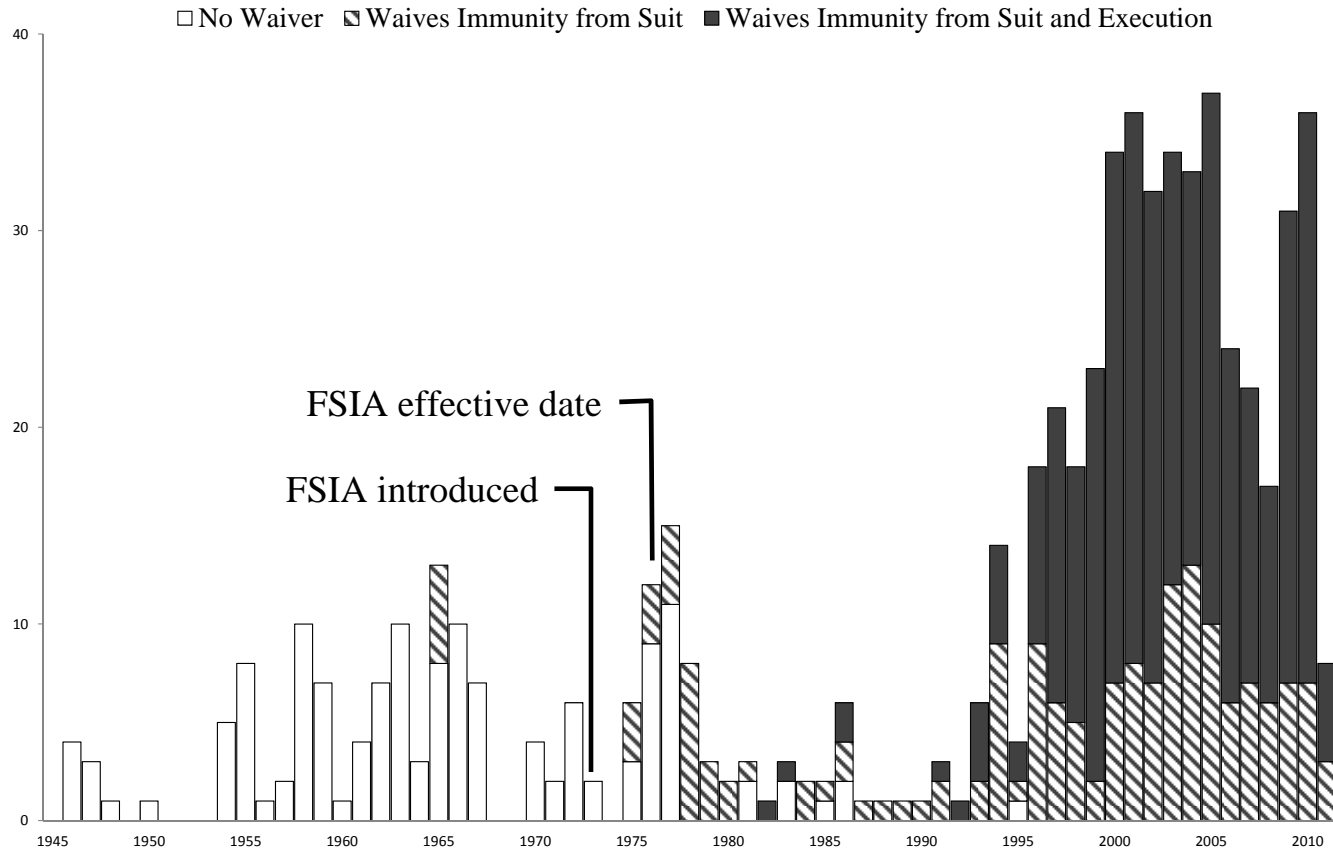


Figure 2. Prices (USD) of frequently-traded bonds; 8-month window around Jan. 22, 1973

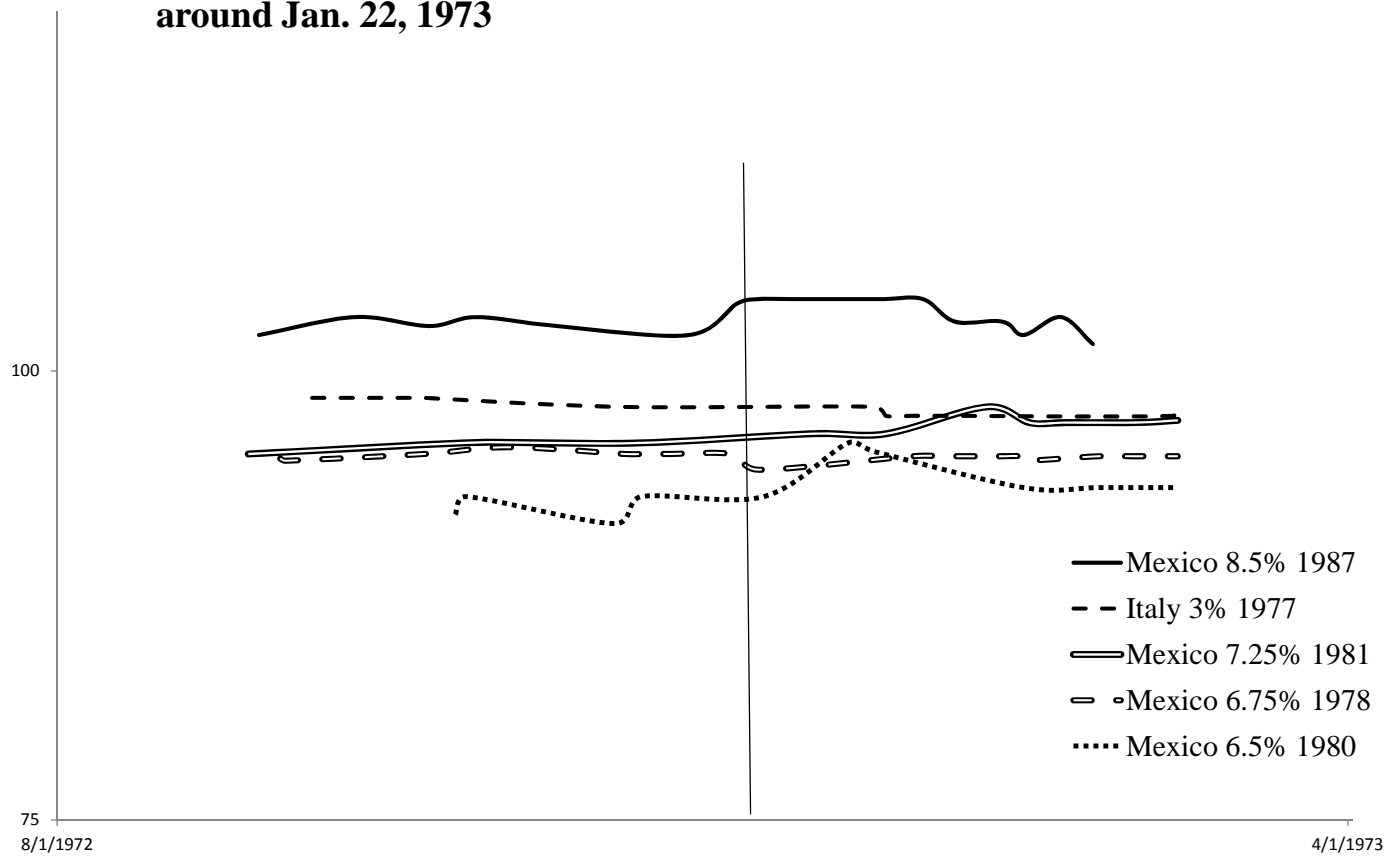


Figure 3. Prices of frequently-traded bonds around FSIA's enactment

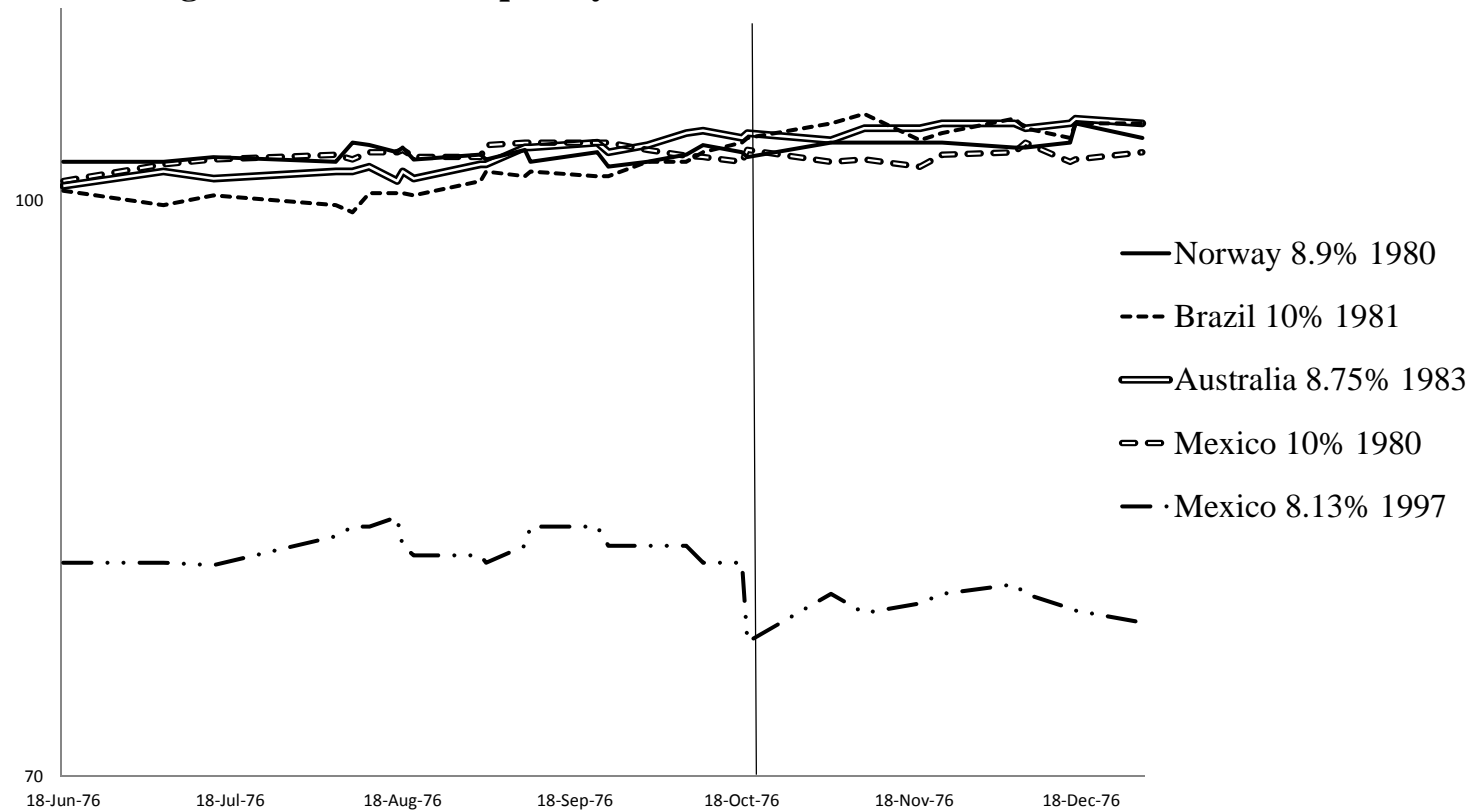
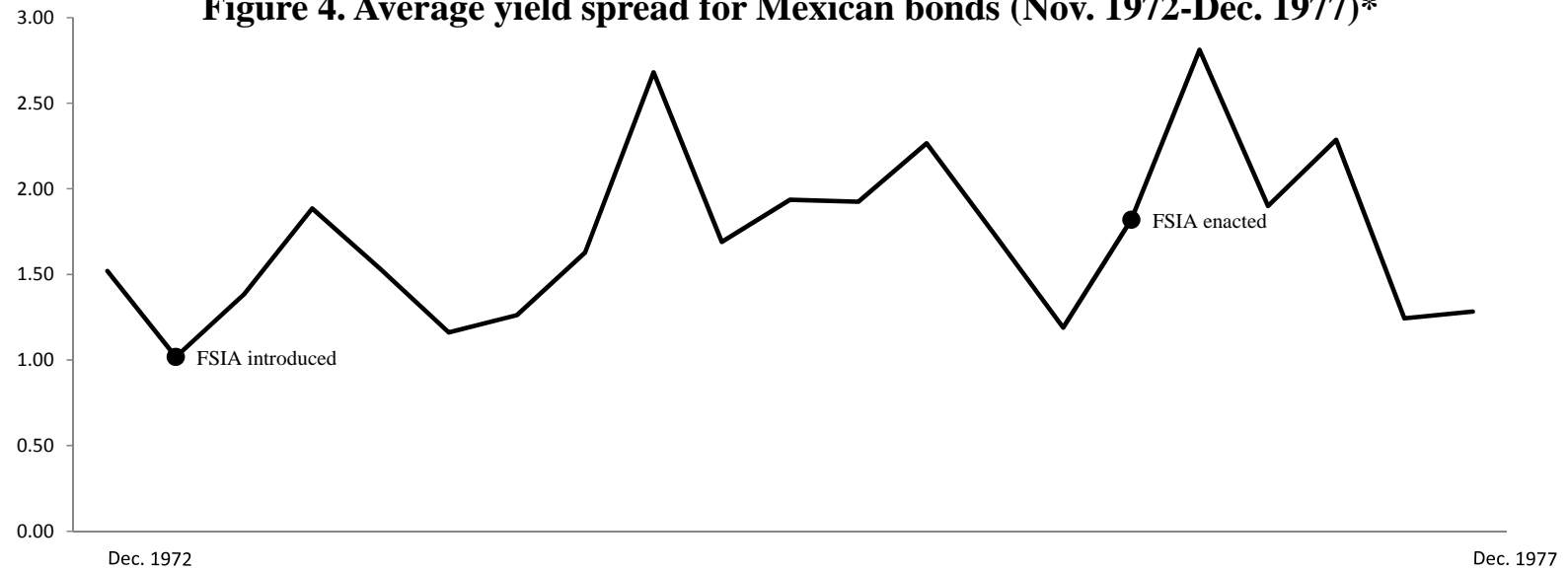


Figure 4. Average yield spread for Mexican bonds (Nov. 1972-Dec. 1977)*



Appendix

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%)	

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%