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SOVEREIGN DEBT 2
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SOVEREIGN IMMUNITY

Sovereign states benefit from immunity in courts of other states in relation to acts of sovereign authority.[2] In the US, the **Foreign Sovereign Immunities Act** (FSIA)[3] governs foreign sovereign immunity. The statute contains a number of exceptions to the

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[2] In some cases, courts may decline to hear cases involving foreign sovereigns under the political question doctrine if the US government has decided to resolve issues through international agreements rather than through litigation. *See, e.g.*, *Whiteman* v *Dorotheum GmbH & Co.* 431 F.3d 57(2d. Cir. 2006) (claims against the Republic of Austria relating to assets confiscated by the Nazi regime). Courts may also decline to review acts of foreign sovereigns under the act of state doctrine.

[3] The National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181 (110th Congress) amends the FSIA to provide for attachment of property in judgments against Iraq. Another 2008 amendment related to the settlement of terrorism claims against Libya.

immunity which are relevant to international financial transactions.[4] In the excerpt from the statute below I have marked some particular aspects of the statute to notice in bold type.

§ 1603 Definitions
For purposes of this chapter -
(a) A "foreign state" ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
(b) An "**agency or instrumentality of a foreign state**" means any entity -
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States... nor created under the laws of any third country.
(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.
(d) A **"commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose**.
(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having **substantial contact with the United States**.

§ 1604 Immunity of a foreign state from jurisdiction
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--
(1) in which the foreign state has **waived its immunity** either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

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[4]Countries designated as spate sponsors of terrorism do not benefit from sovereign immunity although their property may be immune from attachment and execution. Rubin v Islamic Republic of Iran 138 S. Ct. 816 (Supreme Court, 2018). Cf Curtis Bradley, Jack Goldsmith, Oona Hathaway,The Failed Transparency Regime for Executive Agreements (Dec 10. 2020) at https://www.lawfareblog.com/failed-transparency-regime-executive-agreements (The longer article is at 134 Harv L Rev 629 (2020)) ("n late October, the United States and Sudan reportedly signed a bilateral agreement "to resolve claims arising from the 1998 East Africa embassy bombings in Tanzania and Kenya." This agreement apparently requires Sudan to pay hundreds of millions of dollars and commits the United States to enact legislation that would restore Sudan's immunity under the Foreign Sovereign Immunities Act, which it lost when it was deemed a state sponsor of terrorism. A side agreement apparently even included specific legislative text and gave Sudan a veto over any changes to it.")

(2) in which the **action is based upon a commercial activity carried on in the United States by the foreign state**; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
(3) in which **rights in property taken in violation of international law are in issue** and that **property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.**..
(6) in which the action is brought, either to enforce **an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration** all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or
(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--
(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and
(B) even if the foreign state is or was so designated, if--
(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or
(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)]) when the act upon which the claim is based occurred.

§ 1609 Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and1611 of this chapter

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or ...

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction. ...

§1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the

order of, a foreign state as the result of an action brought in the courts of the United States or of the States.
(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if -
(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver...

Although financial transactions are considered to be commercial,[5] contracts with sovereigns should contain waivers of sovereign immunity, reducing the likelihood of disputes.[6] The following materials suggest why this is so.

In **Republic of Argentina v Weltover**[7] the US Supreme Court held:
...when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U. S. C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce," .... Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts to acquire goods...

The court went on to state:
The commercial character of the Bonods is confirmed by the fact that they are in almost all respects garden-variety debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income. We recognize that, prior to the enactment of the FSIA, there was authority suggesting that the issuance of public debt instruments did not constitute a commercial activity. Victory Transport, 336 F.2d at 360 (dicta). There is, however, nothing

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[5] *Cf.* Pablo Star Ltd. V Welsh Government 961 F. 3d 555 (2d. Cir. 2020) ("the Welsh Government did engage in commercial activity in publicizing Wales-themed events in New York, and we further find that the Welsh Government's activity had substantial contact with the United States.").

[6] See the example on page 59 below. A waiver of immunity in a conditional document has been held to be ineffective where the condition was not fulfilled. *Can-Am Int'l, LLC* v. *Republic of Trinidad & Tobago*, 169 Fed. Appx. 396 (5th Cir 2006) cert denied .

[7] 504 US 607 (1992). In the case two holders of Argentinian bonds (called Bonods) sued Argentina for breach of contract for failure to pay on the bonds. The Court held that the US federal courts did have jurisdiction over the case because foreign states could be subject to suits in US courts for acts in connection with a commercial activity under the FSIA..

distinctive about the state's assumption of debt (other than perhaps its purpose) that would cause it always to be classified as jure imperii, and in this regard it is significant that Victory Transport expressed confusion as to whether the "nature" or the "purpose" of a transaction was controlling in determining commerciality,... Because the FSIA has now clearly established that the "nature" governs, we perceive no basis for concluding that the issuance of debt should be treated as categorically different from other activities of foreign states.

Argentina contends that, although the FSIA bars consideration of "purpose," a court must nonetheless fully consider the context of a transaction in order to determine whether it is "commercial." Accordingly, Argentina claims that the Court of Appeals erred by defining the relevant conduct in what Argentina considers an overly generalized, acontextual manner and by essentially adopting a per se rule that all "issuance of debt instruments" is "commercial." .... We have no occasion to consider such a per se rule, because it seems to us that even in full context, there is nothing about the issuance of these Bonods (except perhaps its purpose) that is not analogous to a private commercial transaction.

Argentina points to the fact that the transactions in which the Bonods were issued did not have the ordinary commercial consequence of raising capital or financing acquisitions. Assuming for the sake of argument that this is not an example of judging the commerciality of a transaction by its purpose, the ready answer is that private parties regularly issue bonds, not just to raise capital or to finance purchases, but also to refinance debt. That is what Argentina did here: By virtue of the earlier FEIC contracts, Argentina was already obligated to supply the United States dollars needed to retire the FEIC-insured debts; the Bonods simply allowed Argentina to restructure its existing obligations. Argentina further asserts (without proof or even elaboration) that it "received consideration [for the Bonods] in no way commensurate with [their] value,"... Assuming that to be true, it makes no difference. Engaging in a commercial act does not require the receipt of fair value, or even compliance with the common-law requirements of consideration.

Argentina argues that the Bonods differ from ordinary debt instruments in that they "were created by the Argentine Government to fulfill its obligations under a foreign exchange program designed to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of foreign exchange."... In this regard, Argentina relies heavily on De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (1985), in which the Fifth Circuit took the view that "often, the essence of an act is defined by its purpose"; that unless "we can inquire into the purposes of such acts, we cannot determine their nature"; and that, in light of its purpose to control its reserves of foreign currency, Nicaragua's refusal to honor a check it had issued to cover a private bank debt was a sovereign act entitled to immunity... Indeed, Argentina asserts that the line between "nature" and "purpose" rests upon a "formalistic distinction [that] simply is neither useful nor warranted." ... We think this line of argument is squarely foreclosed by the language of the FSIA. However difficult it may be in some cases to separate "purpose" (i. e., the reason why the foreign state engages in the activity) from "nature" (i. e., the outward form of the conduct that the foreign state performs or agrees to perform) ... the statute unmistakably commands that to be done, 28 U. S. C. § 1603(d). We agree with the Court of Appeals... that it is irrelevant why Argentina participated in the bond market in the manner of a private actor; it matters only that it did so. We conclude that Argentina's issuance of the Bonods was a "commercial activity" under the FSIA.

In **Capital Ventures Int'l v. Republic of Argentina** (2nd Circuit, 2009) the court said:[8]
In the offering circulars, Argentina explicitly waived its sovereign immunity to suit in U.S. courts on claims related to the German bonds. Section 13(4) of the offering circulars provides that, "[t]o the extent that the Republic has or hereafter may acquire any immunity (sovereign or otherwise) from jurisdiction of any court or from any legal process . . . , the Republic hereby irrevocably waives such immunity in respect of its obligations under the Bonds to the extent it is permitted to do so under applicable law." This provision clearly and unambiguously waives Argentina's "immunity (sovereign or otherwise)" in "any court." This clear language satisfies the FSIA's requirement of an "explicit" waiver.
Argentina advances the argument that section 13(4), read in conjunction with section 13(3)[9], merely allows for judgments obtained pursuant to section 13(3) to be enforced in other courts. However, the language of subsection 4 is not so limited. Subsection 4 refers to "any legal process (whether through service or notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise)," language that contemplates actions other than those to enforce judgments. Further, subsection 3 ends with the provision that "a final judgment in any such suit . . . in the courts mentioned above . . . may be enforced in other jurisdictions by suit on the judgment or any other method provided by law." If the Republic's interpretation of subsection 4 were adopted, this last sentence in subsection 3 would render subsection 4 superfluous, a result that should be avoided... Further, if subsection 4 were intended to discuss enforcement in other jurisdictions, we would expect that the same terms in the last sentence of subsection 3 would be repeated in subsection 4--but they are not. Accordingly, we do not read section 13(4) as applying only to the enforcement of judgments.
Argentina also argues that reading section 13(4) as a waiver of sovereign immunity in any court renders subsection 3 superfluous, a result which, as just discussed, is disfavored. See id. According to Argentina, under such a reading Argentina has "agree[d] to jurisdiction in Germany and Argentina" in subsection 3 and also "agree[d] to jurisdiction everywhere" in subsection 4. Of course, such an interpretation of section 13(4) would render subsection 3 superfluous--but that is not what subsection 4 says. Subsection 4 is a waiver of Argentina's "immunity (sovereign or otherwise)," but it does not waive other objections to suit that Argentina might have, such as objections based on lack of personal jurisdiction, improper venue, or forum non conveniens. Section 13(3), on the other hand, provides that Argentina "submits to the non-exclusive jurisdiction" of the courts in Frankfurt and Buenos Aires as well as "waives . . . the defense of an inconvenient forum . . . and any . . . objection . . . on the grounds of venue, residence or domicile." It is thus clear that reading subsection 4 as a waiver of sovereign immunity in any court does not render subsection 3 superfluous.
Argentina also presses the argument that the case law reveals a requirement that, to be

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[8] 552 F.3d 289 (2d. Cir. 2009) cert denied 130 S. Ct. 202 (2009).

[9] Which provided: “The Republic hereby irrevocably submits to the non-exclusive jurisdiction of the District Court (Landgericht) in Frankfurt am Main and any federal court sitting in the City of Buenos Aires as well as any appellate court of any thereof, in any suit, action or proceeding against it arising out of or relating to these Bonds. The Republic hereby irrevocably waives -- to the fullest extent it may effectively do so -- the defense of an inconvenient forum to the maintenance of such suit or action or such proceeding and any present or future objection to such suit, action or proceeding whether on the grounds of venue, residence or domicile. The Republic agrees that a final judgment in any such suit, action or proceeding in the courts mentioned above shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or any other method provided by law.”

explicit, a waiver must contain a reference to the United States or a specific jurisdiction within the United States. We do not find such a requirement in the cases. Of course,.a specific reference to the United States can be helpful in determining that a waiver meets the FSIA's requirement of explicitness... but the statutory requirement is only that the waiver be "explicit." There can be explicit waivers without a reference to the United States, as the waiver of immunity in "any court" in this case illustrates. ...Any other result would stray from the plain meaning of the statutory language.

Despite Argentina's argument, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428...(1989), does not require a contrary result. In Amerada Hess, the Supreme Court stated that it did not "see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." .. Argentina would have us read this language as a requirement that, for a waiver to satisfy the FSIA's explicitness requirement, it must mention the United States in some way. That is not the holding of Amerada Hess. The international agreements at issue in Amerada Hess were the Geneva Convention on the High Seas... and the Pan American Maritime Neutrality Convention...neither of which mentions waiving sovereign immunity at all, let alone in the United States. The offering circulars at issue here, which are contracts between Argentina and the bondholders, are far removed from multi-party international agreements and do discuss waiver of sovereign immunity to suit in any court, thereby indicating "waiver of immunity to suit in United States courts." .... Accordingly, Amerada Hess does not control the outcome here.

There is likewise no support in our cases for Argentina's suggestion that the mention of specific, non-United States jurisdictions in subsection 3 of the offering circulars precludes a finding that Argentina waived its sovereign immunity to suit in the United States. Of course it is true that there will be cases in which, when a document mentions a non-U.S. jurisdiction, there will be no explicit waiver for FSIA purposes because it will be clear that there is no intent to waive sovereign immunity in United States courts.... It is not true, however, that the mere mention of a non-U.S. jurisdiction will preclude a finding of waiver, because the statute requires only that the waiver be "explicit." As the waiver at issue here demonstrates, a waiver of sovereign immunity can be explicit even when other provisions of the document are applicable only to specific, non-United States jurisdictions.

DRFP LLC (dba Skye Ventures) v Venezuela[10] involved promissory notes issued by Venezuela:[11]

DRFP L.L.C., doing business as Skye Ventures, is the holder of two promissory notes allegedly issued by the government of Venezuela. Skye demanded payment on the notes, and when it was refused, Skye filed suit against Venezuela and its Ministry of Finance in the federal district court in Columbus, Ohio. Venezuela sought dismissal of the case, claiming immunity from United States federal court jurisdiction ..The district court held that dismissal was not warranted

[10] 622 F.3d 513 (6th. Cir. 2010). Cert. Denied Jan 23, 2012 http://www.supremecourt.gov/orders/courtorders/012312zor.pdf.

[11] Venezuela also raised an issue of forum non conveniens, discussion of which is here omitted. The Court held that the district court must reconsider the forum non conveniens question.

because Venezuela was not immune from jurisdiction by virtue of the Foreign Sovereign Immunities Act (FSIA)... Venezuela now appeals.
For reasons we shall explain, we will hold that Venezuela is not immune from federal court jurisdiction...

I. According to the plaintiff's complaint, on December 7, 1981, a state-owned bank in Venezuela, the Banco de Desarrollo Agropecuario, issued some no-coupon bearer promissory notes. The notes stated that they were payable to the holder ten years and one day after the date of issue, although the maturity date was later extended to December 1999. The notes also stated that the Venezuelan Ministry of Hacienda (the precursor to the Ministry of Finance) guaranteed payment of the notes, and that the government of Venezuela backed the notes.
A Panamanian corporation, Gruppo Triad-FCC SPA, acquired the two promissory notes with which we are concerned in this case, each in the amount of $ 50 million. After Gruppo demanded payment on the notes in 2001, the Venezuelan Ministry of Finance conducted an investigation into their validity. In October 2003, the Venezuelan Attorney General issued an opinion declaring that the notes were valid. Based on this opinion, the plaintiff, Skye, an Ohio limited liability company whose principal office is in Columbus, Ohio, obtained the two notes from Gruppo and demanded payment of the notes at its office in Columbus. When Venezuela refused to honor the notes on the ground that the instruments were forgeries, Skye filed suit to collect on the notes in the federal district court in Columbus.
On January 31, 2005, while continuing to insist that the notes were invalid forgeries, Venezuela filed a motion requesting dismissal of the case on two grounds: (1) lack of jurisdiction due to sovereign immunity and (2) forum non conveniens. Without deciding the motion, the magistrate judge ordered that discovery proceed, and the motion remained undecided for four years. On July 24, 2007, Venezuela notified the district court that the Venezuelan Supreme Court had issued a decision that affected the issues in the case. The magistrate judge then modified his earlier order concerning discovery and, on May 27, 2008, directed the parties to file supplemental briefs addressing the issues of sovereign immunity and forum non conveniens.
On February 13, 2009, the district court issued an opinion denying Venezuela's motion to dismiss. Specifically, the district court held: (1) that Venezuela was not immune from suit pursuant to the FSIA's commercial activity exception and the court had jurisdiction of the case; and (2) that the doctrine of forum non conveniens did not apply.

II. Despite Venezuela's insistence that the notes are forgeries, we must assume, for purposes of deciding the jurisdictional issues before us, that they are valid....
It is undisputed that Venezuela is a foreign state normally entitled to sovereign immunity. The parties do not dispute that the activities involving the two promissory notes can be characterized as a "commercial activity." .. The dispositive question at this stage of the case is whether the "commercial activity of the foreign state" caused a "direct effect in the United States."
There are really two aspects to the "direct effect" question. The first is whether the bearer of the notes, Skye, is restricted by contract or by the terms of the notes in selecting the United States as a jurisdiction in which to seek and enforce payment of the notes. The second is whether, if Skye is not precluded from demanding that payment be made in the United States, the defendants' refusal to honor Skye's demand for payment in Ohio is an "act [that] causes a direct effect in the United States." Our answer to the first question is no, and to the second, yes.
Both notes explicitly state that the terms and conditions of the notes are governed by the law of Switzerland and "by the regulations of the International Chamber of Commerce in Paris and the United States Council of the International Chamber of Commerce [(ICC)] Brochure '322' last

revised edition." Skye introduced the affidavit of an expert, Professor Marco Villa, a Swiss lawyer, whose qualifications to testify as to Swiss law were not challenged by the defendants. Professor Villa, after examining the two promissory notes, testified that under Swiss law, and the ICC Rules on Collection which are recognized under Swiss law, the bearer of the notes may sue for collection in the jurisdiction of his choice, including the United States of America. Another witness, Gary Post, accepted by the district court as qualified to give an opinion as to "the ICC's regulations in its Rules on Collection," stated in an affidavit that in his opinion, the ICC regulations permit Skye to seek collection on the notes in the jurisdiction of its choice, including Ohio... Therefore, it would appear that by the terms of the notes, including the provision that Swiss law govern any dispute over terms and conditions, Skye was entitled to demand and enforce payment in Ohio.

The second aspect of Venezuela's immunity argument--the question whether Venezuela's refusal to honor Skye's demand for payment in Ohio caused a direct effect in the United States--is at the heart of the parties' dispute.

In ruling that Venezuela's refusal to honor the promissory notes caused a direct effect in the United States, the district court relied on the Supreme Court case of Republic of Argentina v. Weltover, Inc... In Weltover, the Supreme Court stated that."an effect is direct if it follows as an immediate consequence of the defendant's . . . activity.".. The Court rejected any requirement that the effect be either foreseeable or substantial.

In Weltover, Argentina issued bonds, and the bondholders designated New York as one place where payment could be made... When Argentina refused to pay and "rescheduled" the bonds, the bondholders sued to collect. The Supreme Court concluded that Argentina's refusal to pay caused a "direct effect" in the United States. The Court explained: "Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." ..ye argues that the analysis in Weltover can be directly applied to the circumstances of this case... .In opposition, Venezuela argues that the commercial activity exception of Section 1605(a)(2) does not apply because the terms of the promissory notes do not create a contractual right to compel payment of the notes in the United States. Venezuela attempts to distinguish the Weltover case by arguing that the foreign state in Weltover had more connections to the United States than Venezuela had in this case: for example, the foreign state in Weltover specifically designated New York as a possible place of payment. Venezuela contends that Skye is claiming jurisdiction based solely on Skye's pre-suit demand for payment, and nothing more, and that this is insufficient to establish the commercial activity exception. We find this argument unpersuasive.

Certainly neither the terms of the notes nor any other contractual arrangement between the parties explicitly designated the United States as the place of payment of the notes. But as we have explained, under the terms of the notes, including the provision that Swiss law will be applied, the parties implicitly agreed to leave it to the bearer to demand payment of the notes anywhere, including, perforce, Columbus, Ohio, the bearer's place of business. We do not read Weltover as creating an additional requirement that the United States be specifically mentioned in the terms of the notes, as suggested by Venezuela. The Second Circuit Court of Appeals came to a similar conclusion in Hanil Bank v. PT. Bank Negara Indonesia (Persero) .. where the court found that although a letter of credit did not specifically designate New York as the place of payment, the parties had implicitly agreed that the bank could designate the place of its choice for payment...

In short, we hold that Skye had the right to designate the United States as a place of payment

of the notes. Skye designated Columbus, Ohio, and when Venezuela refused to pay the promissory notes, money that was supposed to have been delivered to Skye at its office in Columbus was not forthcoming, causing a direct effect in the United States... Therefore, Skye has successfully satisfied its burden of production in establishing that the commercial activity exception of Section 1605(a)(2) of the FSIA applies, and Venezuela has not carried its burden of persuasion that the exception does not apply...

Boyce F. Martin,Jr Circuit Judge, concurring in part and dissenting in part. I must disagree with [the majority's] holding on the issue of jurisdiction over this claim.
The facts of this case are extraordinarily complicated. Essentially, Skye, an American corporation, went abroad and purchased Venezuelan notes, known as "Bandagro notes," from a Panamanian corporation, Gruppo Triad, and demanded payment from Venezuela in Columbus, Ohio. Venezuela did not pay. The district court found that this constituted a sufficient "direct effect" on United States commerce to create federal jurisdiction and defeat sovereign immunity. The majority affirms the holding of the district court, and I respectfully dissent.
The Foreign Sovereign Immunities Act of 1976 ("FSIA"),... "grants federal district courts jurisdiction over civil actions against foreign states 'as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity' under either another provision of the FSIA or 'any applicable international agreement.'" Republic of Austria v. Altmann .. Essentially, the court first presumes immunity, pursuant to section 1604, but looks for an exception, found in sections 1605-07; then, only if the court finds that the "foreign state is not entitled to immunity" will the court have subject matter jurisdiction, pursuant to section 1330(a). Skye contends that the "commercial activity exception" to the FSIA divests Venezuela of foreign sovereign immunity.
... In Weltover, the Supreme Court held that there was a direct effect when the Argentinian bonds specified for payment locations, one of which was New York, and Argentina had begun making payments to the plaintiffs in New York before unilaterally rescheduling its debts and suspending payments.
We recently held that "the mere act of including an American company in or excluding an American company from the process of bidding on a contract, where both parties' performance is to occur entirely in a foreign locale, does not, standing alone, produce an immediate consequence in the United States, and thus does not have a direct effect in the United States. Am. Telecom Co.... We also held that, "even if [the payment of $ 30,000 from an American bank to enter a bid] produced a direct effect, that effect was not caused by [the country]. American Telecom was not required to submit payment from an American bank; it chose to do so, and to the extent that making that payment had a direct effect in the United States, the effect was the direct result of American Telecom's action, not [the country's]."
In this case, Skye, an American corporation, went abroad and purchased Venezuelan notes from a Panamanian corporation, Gruppo Triad. Skye then brought the bonds to a bank in Columbus, Ohio and demanded payment. Venezuela refused to pay. That Skye chose to use an American bank from which to request payment is not sufficient to defeat sovereign immunity under American Telecom. If it were sufficient, everyone would request payment here so as to gain access to local federal courts. Thus, I agree with the majority that the pre-suit demand for payment is not enough to create federal jurisdiction and defeat sovereign immunity.
However, this does not end the inquiry. The note itself may create federal jurisdiction in the United States and concede sovereign immunity by expressly stating a place of performance in the United States... or by not specifying a place of performance but instead expressly granting the plaintiff the right to choose the place. In that case, if the plaintiff designates the United

States, then failure to pay can constitute a direct effect.... However, if the bond is silent on the place of performance, then there is no basis for United States jurisdiction over ensuing claims, even if the injury is somehow felt in the United States.

Here, it is undisputed that the Notes did not expressly state a place of performance in the United States and that they do not specifically state that their holder can demand payment in the United States. However, the parties dispute whether the Notes grant the holder the right to state the place of performance and specifically on what the concept of a "place of payment" means.

I find this issue to be most clearly crystalized in the dueling translations of a case from a Swiss court that examined Bandagro bonds, including those at issue here, to determine whether jurisdiction over Venezuela existed in Switzerland, that were submitted by the parties here. Woodsrite Investments Ltd. v. Gruppo Triad, et al., File No. OA200487 (District Court of Mendrisio Sud, Canton of Ticino, Switzerland) (R.E. 137-1 and 137-2). Venezuela purports that the relevant paragraph of Woodsrite is accurately translated:

> In addition to the above, there is no connection between the legal business regarding the promissory notes, as well as the guarantee they represent, and Switzerland; and, since the legal relationship has no connection with the Swiss territory, it would seem, according to what has been stated, that the securities can be redeemed anywhere, and paid in any requested currency. (Affidavit of Aura Colmanni, July 26, 2010, at 3).

On the other hand, Skye purports that the relevant section is most accurately translated as:

> The BANDAGRO promissory notes make express reference to the applicability of Swiss law and according to the rules of issue, which refer to the ICC rules, they may be called for payment in any part of the world. . . . Indeed, the court fails to see how the connection with Switzerland cannot be established, because payment of the notes, in accordance with the clauses they contain, is requested in the place in which they are found, by bringing an action before a Swiss court which must apply Swiss law. (Skye's letter brief, July 1, 2010, at 2).

If I did not know better, I would assume that these were translations from two different cases. As presented here, they demonstrate the fundamental difference in the understanding of payment in these cases: if it matters where the payment is demanded or from where the payment is demanded. In other words, is the fact that a noteholder may go to a bank anywhere in the world to request payment the same as designating every location as a place of payment, an action that waives sovereign immunity as to every country in which a noteholder may take a note after its purchase?

The method by which a noteholder may demand payment of the Notes at issue seems complicated. The noteholder goes to its bank and asks the bank to demand payment. Using a series of wires, the bank requests payment from a Venezuelan bank and receives the payment in that bank. The payment is then wired back to the noteholder's bank. Essentially, the bank uses wire transfers to act as the noteholder's proxy in going to Venezuela and requesting payment, which makes sense; it would be extraordinarily inefficient to require noteholders to purchase a plane ticket in order to request payment on their notes.

It seems likely that the bonds would not be easily negotiable internationally if a noteholder had to go to the country that issued the note in order to demand payment. However, it is incredible that a country issuing notes would, under any circumstances, waive its sovereign immunity in every country in the world in which a noteholder could take the notes and find a bank to act as its proxy without expressly so stating in the note. Such a waiver is far too broad to read into a document. Our laws presume sovereign immunity; unless there is an obviously implicit waiver, we ought not to create such an unwieldy exception to this important protection. To so find would

gut the laws of sovereign immunity.
Thus, I disagree with the majority and would find that, while a noteholder may request that a bank anywhere in the world demand payment on its behalf, this does not waive Venezuela's sovereign immunity. The effect on the United States is not direct because it is not "an immediate consequence of the defendant's activity" as required by Weltover. It was a consequence of Skye's choice of the United States and the choice of an American bank as its proxy to acquire the payment from the Venezuelan bank--not of Venezuela's express or implied waiver of sovereign immunity.

Expropriation is a governmental rather than a commercial act. In **Yang Rong v. Liaoning Province Government**[12] the DC Circuit affirmed the District Court's dismissal of a complaint under the FSIA on the basis that the defendant Chinese province's expropriation of the plaintiff finance company's equity interest in a holding company was a sovereign act. The facts of this case provide an illustration of country risk:
In 1991 Rong and the municipality of Shen Yang, a city in the Liaoning Province in northeast China, entered into a joint venture for automobile production.. The principal partners in the venture.. were Broadsino, a Hong Kong-incorporated company wholly owned by Yang Rong, and .. Jin Bei Shareholding., a corporation owned by the Shen Yang municipal government.... Jin Bei Shareholding had 60 per cent ownership and Broadsino had 40 per cent ownership. To expand the venture through access to American capital the partners sought to list Shen Yang Automotive on the ...NYSE.. Yang Rong, who served as Shen Yang Automotive's chief executive and manager, incorporated Brilliance Holdings .. in Bermuda as the financing vehicle to obtain a listing on the NYSE and transferred his 40 per cent ownership interest to Brilliance Holdings. Jin Bei Shareholding also transferred 11 per cent of its interest .. to Brilliance Holdings, thereby giving the Bermuda-based company a 51 per cent interest in Shen Yang Automotive. In return for transferring 11 per cent of its interest, Jin Bei Shareholding received 21.57 per cent of Brilliance Holdings stock, thereby reducing Rong's interest in Brilliance Holdings to the remaining 78.43 per cent of its stock... In registering the stock with the Securities and Exchange Commission (SEC), preparing the initial public offering in the United States and listing the stock on the NYSE, senior Chinese government officials informed Rong that a Chinese entity rather than a Hong Kong private company should be the majority shareholder of the listed company inasmuch as the U.S. registration and listing would be the first for a China-based company in 50 years. Rong understood that the Chinese authorities would be satisfied if the majority interest in the listed company was held in the name of a Chinese non-governmental organization (NGO). ... Consequently in May 1992, Broadsino, the People's Bank of China and other Chinese governmental entities created the Chinese Financial Educational Development Foundation (Foundation), an NGO. Shang Ming, the deputy governor of the People's Bank of China (Ming), served as the Foundation's chairman while Rong served as vice chairman.
In September 1992, Broadsino transferred its Brilliance Holdings stock to the Foundation. Eventually, Rong and Ming agreed "that the Foundation would hold the shares in trust for Broadsino, in effect acting as the nominee for Broadsino," and that Rong was to have sole authority to manage, control and administer the Foundation's equity interest in Brilliance Holdings...The transferred Brilliance Holdings shares were held in the Foundation's name. As a result of this arrangement, as well as the sale of 28.75 per cent of Brilliance Holdings shares in

[12] 452 F.3d 883 (DC Cir. 2006).

October 2002, the Foundation held 55.88 per cent of the Brilliance Holdings shares and Jin Bei Shareholding held 15.37 per cent... At Rong's direction, Broadsino paid the costs to register and list the Brilliance Holdings stock and paid various administrative fees to the Foundation. He also managed and directed Brilliance Holdings' primary holding, Shen Yang Automotive, arranging with Toyota and General Motors to manufacture automobiles for those companies. All of Shen Yang Automotive's manufacturing facilities were located in Liaoning Province.
Meanwhile, in early 2002 the Province formed a "Working Committee," headed by the Assistant to the Governor of the Province. In March 2002 the Working Committee declared that all equity interests held in the name of the Foundation, including Rong's interest in Brilliance Holdings, were state assets and demanded that he transfer them to the Province... After Rong refused, the Working Committee informed Rong and the Brilliance Holdings board of directors that the Foundation no longer recognized Broadsino's beneficial interest in Brilliance Holdings. At the direction of the Province, the Brilliance Holdings board dismissed Rong as President, CEO and Director and placed Working Committee members in those positions and other management positions. In October 2002 the newly installed Brilliance Holdings board ceased paying Rong a salary, dismissed him as a director the next month and terminated his contract. The Province also formed Huachen Automotive Group Holdings Company Limited (Huachen) and appointed Province officials as officers of the new company. Approximately two months later Huachen purchased the Brilliance Holdings shares nominally held by the Foundation in trust for Broadsino for $ 18 million, about six per cent of market price. Huachen and the Brilliance Holdings board also made a tender offer for the remaining Brilliance Holdings shares, including those traded on the NYSE, resulting in the suspension of trading of Brilliance Holdings shares on the NYSE from December 18 to December 19, 2002...
As the Working Committee was executing the takeover, Rong, acting for Broadsino, sought relief in various courts... Broadsino initiated proceedings against the Foundation in the Beijing Municipal High Court seeking a determination of its interest in the assets nominally held by the Foundation, including the Brilliance Holdings stock the Foundation held in trust, but was rebuffed... Rong also filed a complaint against the Province in the District of Columbia district court, challenging the Province's "implementation of the scheme to take Plaintiffs' shares, other equity interests, and other property and then to maintain control thereof for its own commercial benefit" under FSIA... The Province moved to dismiss for lack of subject matter jurisdiction, asserting that neither FSIA's commercial activity exception.. nor its expropriation exception... applied...The district court agreed, holding that the Province's acquisition of the Brilliance Holdings shares was a sovereign act and the Province was therefore immune from suit. It dismissed the action.. This appeal followed, in which Rong challenges the district court's rejection of the commercial activity exception...
Here Rong claims that the Province's "implementation of the scheme to take Plaintiff's shares, other equity interests, and other property and then to maintain control thereof for its own commercial benefit,".. was "commercial activity" under the third clause of 28 U.S.C. §1605(a)(2), that is, an act "outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. " In Weltover, the United States Supreme Court declared that the analysis of the third clause of section 1605(a)(2) proceeds in three parts: 1) the lawsuit must be based upon an act that took place outside the territory of the United States; 2) the act must have been taken in connection with a commercial activity, and 3) the act must have caused a direct effect in the United States. .. Here there is no dispute that the act took place outside the U.S. The questions in dispute are (1) whether the Province's act was done "in connection with a commercial activity" in China, and (2) if so, whether it caused a "direct effect in the United States." Because

we answer the first question in the negative, we do not reach the second...
It may be true that in some respects the Working Committee's takeover of the Foundation and its ownership of the Brilliance Holdings shares seem commercial--for example, removing Yang Rong from the Brilliance Holdings board and placing Working Committee officials in those same positions. But all of these acts flow from the Working Committee's "state assets" declaration--an act that can be taken only by a sovereign. Rong is correct that this case has some similarity to Foremost-McKesson ..where we found the Republic of Iran's takeover of a dairy business commercial, in part because there was "no indication that Iran nationalized Pak Dairy by taking it over through a process of law," no formal declaration by the government of Iran that a takeover was to occur and no "statutory restrictions or governmental decrees or directives" referring to the takeover... In Foremost-McKesson, however, the plaintiff and various instrumentalities of Iran entered into a formal contract for an agreed-upon venture; the commercial activity there was the sovereign instrumentalities' use of their "majority position to lock the appellee out of the management of the dairy and to deny the appellee its share of the company's earnings." .. We affirmed the district court's conclusion that those allegations "sound[ed] in the nature of a corporate dispute between majority and minority shareholders"--allegations of breach of contract and of the directors' duty of care, with the only distinction being that the majority shares were held by the Iranian government and its subsidiaries rather than by a private party... Here, by contrast, there was no contractual relationship between Yang Rong and the Province regarding the Foundation. The Province did not assume control over Brilliance Holdings by purchasing the majority of Brilliance Holdings' stock from Broadsino, as a private party would; instead, it declared the Brilliance Holdings shares held by the Foundation to be state assets and claimed them as does a sovereign. A private party in the market could not have done what the Province did here--form a committee whose goal, as Rong's complaint describes it, was to "assume and exercise control over the Foundation and to acquire from it the Brilliance Holdings shares that it held in trust for Broadsino" by "advis[ing] Yang Rong that all equity interests held in the name of the Foundation . . . were state assets and demand[ing] that they be transferred to the [Province]."...These acts, initiated by the Assistant Governor of the Province and put into effect by the Working Committee, constituted a quintessentially sovereign act, not a corporate takeover.
Despite Rong's argument that the Province's use of the Brilliance Holdings shares after expropriating them independently establishes jurisdiction, the Province's subsequent acts of forming Huachen and transferring the Brilliance Holdings shares to Huachen did not transform the Province's expropriation into commercial activity. As the district court pointed out, Rong's complaint alleges that by the time of the stock transfer to Huachen, the Province had already wrested control of the shares; Huachen was not established until six months after the shares belonged to the Province... Neither Yang Rong's refusal to comply with the Working Committee's demand to transfer the Brilliance Holdings shares nor the Province's subsequent transfer of them to Huachen at a "firesale" price makes the Province's expropriation commercial activity. If Rong's interpretation of commercial activity were correct, then almost any subsequent disposition of expropriated property could allow the sovereign to be haled into a federal court under FSIA. Such a result is inconsistent with our precedent, the decisions of other circuits and the Act's purpose...

Expropriation contrary to international law is an exception to foreign sovereign immunity where the property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or ... is owned or operated by an agency or instrumentality

of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. The application of this exception has arisen in litigation involving Venezuela. In Bolivarian Republic of Venezuela v Helmerich & Payne[13] Justice Breyer, writing for the Court, said:

In our view, a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction. Rather, state and federal courts can maintain jurisdiction to hear the merits of a case only if they find that the property in which the party claims to hold rights was indeed "property taken in violation of international law." Put differently, the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law). A good argument to that effect is not sufficient. But a court normally need not resolve, as a jurisdictional matter, disputes about whether a party actually held rights in that property; those questions remain for the merits phase of the litigation...

A sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act (a "jure imperii") that the restrictive theory of sovereign immunity ordinarily leaves immune from suit....

To be sure, there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way. But such arguments are about whether such an expropriation does violate international law. To find jurisdiction only where a taking does violate international law is thus consistent with basic international law and the related statutory objectives and principles that we have mentioned. But to find jurisdiction where a taking does not violate international law (e.g., where there is a nonfrivolous but ultimately incorrect argument that the taking violates international law) is inconsistent with those objectives. And it is difficult to understand why Congress would have wanted that result.

Moreover, the "nonfrivolous-argument" interpretation would, in many cases, embroil the foreign sovereign in an American lawsuit for an increased period of time. It would substitute for a more workable standard ("violation of international law") a standard limited only by the bounds of a lawyer's (nonfrivolous) imagination. It would create increased complexity in respect to a jurisdictional matter where clarity is particularly important And clarity is doubly important here where foreign nations and foreign lawyers must understand our law.

Finally, the Solicitor General and the Department of State also warn us that the nonfrivolous-argument interpretation would "affron[t]" other nations, producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States in "expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated."

In Federal Republic of Germany v. Philipp the US Supreme Court held that the foreign sovereign immunity exception must be interpreted to mean that it does not include a foreign sovereign taking its own nationals' property, because this is not unlawful under the international law of expropriation.[14]

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[13] 137 S. Ct. 1312 (Supreme Court 2017).

[14] 592 U. S. ____ (2021)("It would destroy that distinction were we to subject all manner of sovereign public acts to judicial scrutiny under the FSIA by transforming the expropriation exception into

Tracing of the proceeds of expropriated property may be difficult.[15]

A Working Group of the ABA proposed amending the FSIA because of uncertainties about some of the terms contained in the statute.[16] For example, the Group noted uncertainty about the extent to which the statute applies to subsidiaries of corporations owned by a foreign state:

> "we examine the "tiering" and "pooling" issues, that is, the question of entities indirectly owned by a foreign state and entities owned by more than one foreign state. We propose statutory language to apply the Act to an entity majority owned by more than one foreign state and to all levels of subsidiaries as long as they are ultimately majority owned by a foreign state. We combine our recommendation on tiering with a proposal to include a rebuttable presumption that an instrumentality owned by another instrumentality rather than the state itself is engaged in commercial activity."[17]

On waivers, the Group said:

> First, although questions have been raised about the absence of a requirement connecting an explicit waiver to the territory of the United States, the Working Group does not recommend any amendment to the current statutory language as long as courts satisfy themselves, using traditional methods of contract interpretation, that a foreign state or instrumentality's waiver was a consent to be sued in the United States. Second, because of the costs and uncertainties associated with implied waivers, the Working Group proposes to amend the FSIA to limit implied waivers to those situations in which a foreign state or instrumentality participates as a defendant in litigation without properly raising or preserving a defense of sovereign immunity. Third, the Working Group recommends that the statute be amended to include language specifying the governing law for determining a person's actual or apparent authority to waive sovereign immunity."[18]

On the commercial exception, the Group said:

> "The only significant change the Working Group recommends for the commercial activity exception is to require a "substantial" and direct effect in the United States when applying the third clause dealing with commercial activity and acts occurring outside of the United States. In Part V, we explain that the Supreme

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an all-purpose jurisdictional hook for adjudicating humanrights violations.")

[15] *See, e.g.*, Rukoro v. Federal Republic of Germany, 976 F. 3d 218 (2d. Cir. 2020).

[16] Report on the U.S. Foreign Sovereign Immunities Act by a Working Group of the International Litigation Committee of the Section of International Law and Practice of the American Bar Association, (Apr. 2001)

[17] Id. at p. 9.

[18] Id. at pp 10-11.

> Court's construction of the current direct effect language has caused confusion and disagreements in the lower courts and permits U.S. courts to resolve commercial cases having only the most distant relationship with the United States."[19]

In relation to torts, the Group:

> "recommends two clarifying amendments to the tort exception. First, the U.S. connection language should be amended to specify that the Act applies only when a substantial portion of the tortious act or omission occurs in the United States and that the place of injury or damage is not relevant. Second, the Act should be amended to make clear that the types of claims that may not be brought under the tort exception, such as defamation, deceit, and malicious prosecution, may be brought under the commercial activity exception. The Working Group also examined the part of the tort exception preserving immunity from tort claims for discretionary functions and determined that courts should continue to apply the current statutory language to deal with the issues that arise."[20]

The Group also recommended removing restrictions on property which could be subject to execution in the US.[21]

EMTA, a trade group for the emerging markets trading and investment community opposed these proposed amendments to the FSIA, in part because it argued that the proposed changes to the FSIA "would have a decidedly negative impact on the ability of emerging market creditors to obtain enforcement of significant categories of the external debt of sovereign borrowers following sovereign defaults."[22] In particular, the EMTA argued against the ABA Working Group's proposal that there should be a substantial and direct effect in the US in relation to the commercial activity:

From the perspective of emerging market participants, the Working Group's recommendation would, if adopted, displace the bright-line clarity of Weltover, and introduce its own, far more damaging, "confusion and disarray" into the enforcement of financial contracts denominated in United States dollars and payable in the United States which did not contain express submissions to jurisdiction and waivers of immunity. In addition, it goes virtually without saying that introducing the word "substantial" into the jurisdictional test would make it significantly more difficult for United States contracting parties in a broad range of non-financial contracts to obtain jurisdiction in the United States over a defaulting sovereign counterparty. While the

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[19] Id. at p. 11.

[20] Id.

[21] Id. at p. 12.

[22] EMTA, Opposition of EMTA to Proposed Amendments to the U.S. Foreign Sovereign Immunities Act of 1976, (Aug. 7, 2002).

Working Group nowhere illuminates the extent to which the proposed amendment would constrict the subject matter jurisdiction of the U.S. courts, it is clear that, under the Working Group's proposal, subject matter jurisdiction would no longer extend to the full reach allowed by due process under International Shoe v. Washington, 326 U.S. 310 (1945), as intended by the Congress in enacting the FSIA in the first place... The "minimum contacts" test articulated in International Shoe can in no way be squared with the "direct and substantial effects" the Working Group would require.[23]

The EMTA pointed out that this idea of requiring substantial effects in the US was rejected by the Supreme Court in Weltover, as the following excerpt from Weltover shows:

The remaining question is whether Argentina's unilateral rescheduling of the Bonods had a "direct effect" in the United States... In addressing this issue, the Court of Appeals rejected the suggestion in the legislative history of the FSIA that an effect is not "direct" unless it is both "substantial" and "foreseeable." ... That suggestion is found in the House Report, which states that conduct covered by the third clause of § 1605(a)(2) would be subject to the jurisdiction of American courts "consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." .... Section 18 states that American laws are not given extraterritorial application except with respect to conduct that has, as a "direct and foreseeable result," a "substantial" effect within the United States. Since this obviously deals with jurisdiction to legislate rather than jurisdiction to adjudicate, this passage of the House Report has been charitably described as "a bit of a non sequitur," .... Of course the generally applicable principle de minimis non curat lex ensures that jurisdiction may not be predicated on purely trivial effects in the United States. But we reject the suggestion that § 1605(a)(2) contains any unexpressed requirement of "substantiality" or "foreseeability." As the Court of Appeals recognized, an effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity."...

The Court of Appeals concluded that the rescheduling of the maturity dates obviously had a "direct effect" on respondents. It further concluded that that effect was sufficiently "in the United States" for purposes of the FSIA, in part because "Congress would have wanted an American court to entertain this action" in order to preserve New York City's status as "a preeminent commercial center."... The question, however, is not what Congress "would have wanted" but what Congress enacted in the FSIA. Although we are happy to endorse the Second Circuit's recognition of "New York's status as a world financial leader," the effect of Argentina's rescheduling in diminishing that status (assuming it is not too speculative to be considered an effect at all) is too remote and attenuated to satisfy the "direct effect" requirement of the FSIA...

We nonetheless have little difficulty concluding that Argentina's unilateral rescheduling of the maturity dates on the Bonods had a "direct effect" in the United States. Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming. We reject Argentina's suggestion that the "direct effect"

[23] Id.

requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States. We expressly stated in Verlinden that the FSIA permits "a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied,"...

Finally, Argentina argues that a finding of jurisdiction in this case would violate the Due Process Clause of the Fifth Amendment, and that, in order to avoid this difficulty, we must construe the "direct effect" requirement as embodying the "minimum contacts" test of International Shoe Co. v. Washington... Assuming, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause ... we find that Argentina possessed "minimum contacts" that would satisfy the constitutional test. By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city, Argentina "'purposefully availed itself of the privilege of conducting activities within the [United States].'"...

The ABA's Working Group said:

> The *Weltover* Court's discussion of "direct effect" has caused two problems. First, the Court defined direct effect too broadly, made it too easily satisfied, and therefore made U.S. courts available to resolve disputes that have only the most distant relationship with the United States. That means that cases could arise in which foreign states question or object to the application of U.S. law on foreign sovereign immunity. Second, by referring to New York as the place of performance for Argentina's contractual obligations, the Court created confusion and disarray over whether, in a case dependent on the third clause, a contract must require some performance in the United States (a situation already addressed by the first clause) or whether some other "legally significant act" must occur in the United States.[24]

What do you think the rule should be? Does it matter if it is possible to negotiate for a waiver of the immunity?

Where it is necessary to enforce a judgment against a sovereign debtor obtained in one state in another state, sovereign immunity may become an issue in the courts of the second state. So, in **Republic of Argentina v NML Capital Limited**, a creditor which was able to obtain judgment with respect to Argentine debt in the Southern District of New York encountered problems in the UK where the English Court of Appeal[25] treated Argentina's sovereign immunity as a bar to enforcement in England.

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[24] Note 16 above, at 83.

[25] Aikens LJ gave judgment and the other two judges agreed. " Tieless and in shirtsleeves, Mr Justice Aikens (club: Groucho; recreations: music, wine, le Pays Basque) seems to typify the approach of .. judges [of the commercial court] who dislike wigs and robes, chiefly because their many foreign litigants are unused to them. In 80 per cent of all claims issued one party is from outside the jurisdiction. Most claims are for more than £1 million and can be up to £1 billion. "It's another reason why we must have a modern business court because the guys out there are right on top of it; if they think they'll have to go back to quill pens they won't like it." He adds: "It's fair to say that if left to decide we'd do away with robes altogether in commercial disputes. If there's an opportunity not to wear them we take it.""Frances Gibb, A

The Court of Appeal held[26] that although Argentina had waived immunity with respect to the bonds at issue, it had not submitted to the jurisdiction of the English courts as required under the State Immunity Act 1978. The UK Supreme Court subsequently reversed the Court of Appeals' decision. The bonds provided:

> The republic has in the fiscal agency agreement irrevocably submitted to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan … and the courts of the republic of Argentina ('the specified courts') over any suit, action or proceeding against it or its properties, assets or revenues with respect to the securities of this series or the fiscal agency agreement (a 'related proceeding') … The republic has in the fiscal agency agreement waived any objection to related proceedings in such courts whether on grounds of venue, residence or domicile or on the ground that the related proceedings have been brought in an inconvenient forum. The republic agrees that a final non-appealable judgment in any such related proceeding ('the related judgment') shall be conclusive and binding upon it and may be enforced in any specified court or in any other courts to the jurisdiction of which the republic is or may be subject (the 'other courts') by a suit upon such judgment.
> To the extent that the republic or any of its revenues, assets or properties shall be entitled, in any jurisdiction in which any specified court is located, in which any related proceeding may at any time be brought against it or any of its revenues, assets or properties, or in any jurisdiction in which any specified court or other court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any related judgment, to any immunity from suit, from the jurisdiction of any such court, from set-off, from attachment prior to judgment, from attachment in aid of execution of judgment, from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction … provided further that such agreement and waiver, in so far as it relates to any jurisdiction other than a jurisdiction in which a specified court is located, is given solely for the purpose of enabling the fiscal agent or a holder of securities of this series to enforce or execute a related judgment.

The judgments in the UK Supreme Court decision[27] follow:

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court for the world to solve its business disputes, The Times (Sep. 5, 2006).

[26] [2010] EWCA Civ 41 at http://www.bailii.org/ew/cases/EWCA/Civ/2010/41.html .

[27] [2011] UKSC 31 at http://www.bailii.org/uk/cases/UKSC/2011/31.html .

Lord Phillips[28]: Introduction
The appellant ("NML") is a Cayman Island Company. It is an affiliate of a New York based hedge fund of a type sometimes described as a "vulture fund". Vulture funds feed on the debts of sovereign states that are in acute financial difficulty by purchasing sovereign debt at a discount to face value and then seeking to enforce it. This appeal relates to bonds issued by the Republic of Argentina in respect of which, together with all its other debt, Argentina declared a moratorium in December 2001. Between June 2001 and September 2003 affiliates of NML purchased, at a little over half their face value, bonds with a principal value of US$ 172,153,000 ("the bonds"). On 11 May 2006, NML, as beneficial owner, obtained summary judgment on the bonds for a total, including interest, of US$ 284,184,632.30, in a Federal Court in New York. NML brought a common law action on that judgment in this jurisdiction, and succeeded before Blair J in the Commercial Court. That judgment was reversed by the Court of Appeal, which held that Argentina is protected by state immunity. The question raised by this appeal is whether that finding was correct....

The proceedings in this jurisdiction
In order to serve a foreign sovereign state it is necessary to obtain the permission of the court to serve the claim form out of the jurisdiction. On 14 March 2008 NML applied ex parte for this permission. The witness statement supporting this application, and the draft particulars of claim exhibited to it, alleged two reasons why Argentina was not entitled to state immunity. The first was that under clause 22 of the Fiscal Agency Agreement Argentina had waived, and agreed not to plead, any claim that it might have to state immunity. The second was that NML's claim was founded on the Fiscal Agency Agreement and the bonds, and consequently constituted "proceedings relating to a commercial transaction" for the purposes of the State Immunity Act 1978 ("the 1978 Act")....

The following issues are raised by this appeal:
(1) Whether the present proceedings for the recognition and enforcement of the New York court's judgment are 'proceedings relating to a commercial transaction' within the meaning of section 3 of the State Immunity Act 1978....
(3) Whether the bonds contain a submission to the jurisdiction of the English court in respect of these proceedings within the meaning of section 2 of the State Immunity Act 1978...

State immunity
At the beginning of the 20th century state immunity was a doctrine of customary international law, applied in England as part of the common law. Under this doctrine a state enjoyed absolute immunity from suit in the court of another state. The property of the state was also immune from execution. Because a state could not be sued, there was no procedural provision in this jurisdiction for service of process on a foreign state. The Court of Appeal had, however, occasion to consider the law of state immunity when proceedings in rem were served on a mail packet owned by Belgium which had been involved in a collision in the case of The Parlement Belge (1880) LR 5 PD 197. The Court held that the vessel, being the property of a foreign sovereign state, was immune from legal process. Giving the judgment of the court Brett LJ explained the reason for this immunity, at pp 207-208 and 220:
"From all these authorities it seems to us, although other reasons have

[28] Lord Phillips was President of the UK Supreme Court. He retired from the Supreme Court in 2012 and now works as an arbitrator.

> sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity – that is to say, with his absolute independence of every superior authority. By a similar examination of authorities we come to the conclusion, although other grounds have sometimes been suggested, that the immunity of an ambassador from the jurisdiction of the courts of the country to which he is accredited is based upon his being the representative of the independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be.

It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such an owner. The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity."

In Mighell v Sultan of Johore [1894] 1 QB 149 leave to effect substituted service on the Sultan of Johore in an action in personam was set aside on the ground that he enjoyed sovereign immunity. To an argument that he had waived this immunity, the court held that the only way that a sovereign could waive immunity was by submitting to jurisdiction in the face of the court as, for example, by appearance to a writ. If the sovereign ignored the issue of the writ, the court was under a duty of its own motion to recognise his immunity from suit.

In Compania Naviera Vascongado v Steamship "Cristina" [1938] AC 485 the House of Lords confirmed that a state-owned ship that was used for public purposes could not be made the subject of proceedings in rem. Lord Atkin started his judgment with the following definition of state immunity, at p 490:

> "The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both."

Three members of the House questioned, however, whether state immunity would protect a vessel that was used for the purposes of commercial trade. This reflected a growing recognition around the world of the "restrictive doctrine" of state immunity under which immunity related to

governmental acts in the exercise of sovereign authority (acta jure imperii) but not to commercial activities carried on by the state (acta jure gestionis).
The absolute doctrine of state immunity could pose a disincentive to contracting with a state and some states attempted to avoid this disadvantage by including in contracts an agreement not to assert state immunity. The English courts held, however, that such a purported waiver was ineffective. Immunity could only be lost by a submission to the jurisdiction when it was invoked, and not earlier – see Duff Development Co v Kelantan Government [1924] AC 797 and Kahan v Pakistan Federation [1951] 2 KB 1003.
In Rahimtoola v Nizam of Hyderabad [1958] AC 379, 422 Lord Denning expressed, obiter, the view that judicial immunity should not apply to commercial transactions, but the other members of the House expressly dissociated themselves from this view, because the point had not been argued. It was not until nearly twenty years later that Lord Denning MR was able to carry the rest of the Court of Appeal with him in applying the restrictive doctrine of state immunity in Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529. This decision was approved by the House of Lords in I Congreso del Partido [1983] 1 AC 244....

Enforcement of foreign judgments
Prior to the 1982 Act the common law provided two alternative remedies to a plaintiff who had obtained a judgment against a debtor in a foreign jurisdiction. He could bring a claim on the judgment or he could bring a claim on the cause of action in respect of which he had obtained the judgment...
In order to establish jurisdiction to sue on the judgment the plaintiff had to serve a writ in personam in accordance with the normal procedure. The existence of a foreign judgment was not a ground upon which permission could be obtained to serve a writ out of the jurisdiction.... . In particular [the [plaintiff] had to establish that the foreign court had had jurisdiction over the defendant in accordance with the English rules of private international law and the judgment had to be final and conclusive on the merits.
Part II of the Administration of Justice Act 1920 ("the 1920 Act") provides an alternative means of enforcing, in the United Kingdom, the judgment of a superior court in another part of "His Majesty's dominions". Section 9 of that Act provides that, subject to the conditions there specified, the High Court may, "if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the United Kingdom" order the judgment to be registered. The conditions include a requirement that the foreign court should have had jurisdiction and preclude registration where the judgment is "in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court". These conditions plainly preclude the registration of a judgment against a defendant who, under English law, is subject to state immunity. Prior to 1978 there is no record, so far as I am aware, of any plaintiff having attempted to register such a judgment.
The Foreign Judgments (Reciprocal Enforcement) Act 1933 was passed to make provision for the enforcement in the United Kingdom of judgments given in foreign countries that accord reciprocal treatment to judgments given in the United Kingdom. Section 2 of this Act provides for registration of such judgments on specified conditions, subject to the right of the judgment debtor to apply to have the judgment set aside. The section provides that for the purposes of execution a registered judgment is to be treated as if it were a judgment of the registering court. Section 4 makes provision for an application to set aside a registered judgment. The section includes a provision that the judgment shall be set aside if the registering court is satisfied that the foreign court had no jurisdiction in the circumstances of the case. The section further

provides by subsection (3)(c) that the foreign court shall not be deemed to have had jurisdiction

> "if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court. "

This last provision is significant in the present context in that it implicitly provides for the registration of a judgment against a state, a state entity or an individual who was subject to state immunity in the foreign country if there has been a submission to the foreign jurisdiction. The 1933 Act contains no provision, however, that permits enforcement of such a judgment against property owned by a state. Furthermore section 2(1)(b) of the Act precludes recognition of a judgment that cannot be enforced by execution in the country of the original court, and section 4(1)(a)(v) requires the registration of a judgment to be set aside if enforcement would be contrary to the public policy of the registering court. So long as the absolute doctrine of state immunity prevailed in the United Kingdom it is hard to envisage registration of a foreign judgment against a judgment debtor who had been entitled to state immunity, but who had submitted to the foreign jurisdiction, except perhaps a diplomat in respect of whom his state had waived diplomatic immunity. There does not seem to be any recorded instance of such a case.

Issue 1: are the present proceedings "proceedings relating to a commercial transaction" within the meaning of the State Immunity Act 1978?

...Section 3(1) of the 1978 Act provides: "A State is not immune as respects proceedings relating to – (a) a commercial transaction entered into by the state". Section 3(3)(b) defines "commercial transaction" as including "any loan or other transaction for the provision of finance…". In view of this definition it is not surprising that it is common ground that the action in respect of which NML obtained judgment in New York was a "proceeding relating to a commercial transaction" within the meaning of section 3(1)(a). Permission to effect service on Argentina out of the jurisdiction was obtained from David Steel J on the basis of an averment that the common law action that was to be brought in England on the New York judgment was also a "proceeding relating to a commercial transaction". However before Blair J and the Court of Appeal NML conceded that this averment was not open to them short of the Supreme Court. This was because of two reasoned decisions, one in the High Court and one in the Court of Appeal which, albeit that the latter was obiter, constrained NML to accept that, for the purposes of section 3(1)(a), the action that NML was seeking to bring was a proceeding "relating to" the New York judgment and not to the transaction to which that judgment related. Before this Court Mr Sumption QC has challenged these authorities. Issue 1 turns on the question of whether they were rightly decided.

The first of these cases is AIC Ltd v Federal Government of Nigeria [2003] EWHC 1357 (QB). AIC registered under the 1920 Act a judgment that they had obtained in Nigeria against the Nigerian Government in relation to what AIC alleged to be a commercial transaction. The Nigerian Government applied to have the registration set aside on the ground that registration was an adjudicative act and that Nigeria was protected by state immunity by reason of section 1 of the 1978 Act. AIC argued that their application to register the judgment was a "proceeding relating to a commercial transaction" within section 3(1)(a). Stanley Burnton J rejected this submission. His reasoning appears in the following short passage in para 24 of his judgment

> "In my judgment, the proceedings resulting from an application to register a judgment under the 1920 Act relate not to the transaction or transactions underlying the original judgment but to that judgment. The issues in such

> proceedings are concerned essentially with the question whether the original judgment was regular or not."

Stanley Burnton J held that this conclusion was supported by two matters. The first was that section 9 of the 1978 Act excludes immunity "as respects proceedings … which relate to [an] arbitration" where the state has entered into a written arbitration agreement. As most arbitrations relate to commercial transactions, section 9 would be unnecessary if a claim in respect of an arbitration constituted a "proceeding relating to the commercial transaction" to which the arbitration related, for that would fall within 3(1)(a). The second matter was that it would be illogical to exempt from immunity the enforcement of a judgment in relation to a commercial transaction, but not the enforcement of a judgment in relation to any of the other matters in respect of which the 1978 Act provided exceptions to immunity under sections 3 to 11 of the Act.

Stanley Burnton J remarked at para 30 that it was unsurprising that the defendants were immune from proceedings for the registration of the Nigerian judgment:

> "the underlying principle of the State Immunity Act is that a state is not immune from the jurisdiction of the courts of the United Kingdom if it enters into commercial transactions or undertakes certain activities having some connection with this jurisdiction. Purely domestic activities of a foreign state are not the subject of any exception to immunity. Sections 3(1)(b), 4, 5, 6, 7, 8 and 11 all contain territorial qualifications to the exceptions to immunity to which they relate. Section 3(1)(a) does not include any such qualification, but even there the claimant wishing to bring proceedings must establish a basis for jurisdiction under CPR Part 6.20, normally under paragraphs (5) or (6), relating to contractual claims."

Stanley Burnton J went on to observe that Lord Denning MR when advancing the restrictive doctrine of state immunity in Rahimtoola v Nizam of Hyderabad ... in Thai-Europe Tapioca Service Ltd v Government of Pakistan, Directorate of Agricultural Supplies [1975] 1 WLR 1485, 1491 and in Trendtex Trading v Bank of Nigeria [1977] 1 QB 529, 558 had emphasised the significance not merely of the fact that the proceedings related to a commercial transaction, but that the transaction was connected with the United Kingdom.

A similar issue to that considered by Stanley Burnton J arose in Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2) [2005] EWHC 2437 (Comm); [2006] 1 Lloyd's Rep 181. There the relevant issue was whether a claim to enforce an arbitration award constituted "proceedings relating to" the transaction that gave rise to the award for the purposes of section 3(1)(a). Gloster J followed Stanley Burnton J's reasoning in holding that it did not. Her decision on the point was obiter, but it received reasoned approval, also obiter, when the case reached the Court of Appeal [2006] EWCA Civ 1529; [2007] QB 886. The court held at para 137:

> "In our view the expression 'relating to' is capable of bearing a broader or narrower meaning as the context requires. Section 3 is one of a group of sections dealing with the courts' adjudicative jurisdiction and it is natural, therefore, to interpret the phrase in that context as being directed to the subject matter of the proceedings themselves rather than the source of the legal relationship which has given rise to them. To construe section 3 in this way does not give rise to any conflict with section 9, which is concerned with arbitration as the parties' chosen means of resolving disputes rather than with the underlying transaction. In our view AIC Ltd v Federal Government of Nigeria was correctly decided and Gloster J was right to follow it in the present case."

I agree with the Court of Appeal that the expression "relating to" is capable of bearing a broader or narrower meaning as the context requires. I disagree, however, with their conclusion as to the relevant context. Sections 1 to 11 of the 1978 Act are a comprehensive statement of the scope of state immunity under the law of the United Kingdom. Section 3(1)(a) makes it plain that the United Kingdom applies the restrictive doctrine of state immunity. The context in which the question of the meaning of "relating to" has arisen in this case is the issue of whether Argentina is or is not protected by state immunity against the proceedings that NML seek to bring. The object of bringing these proceedings is to enforce the New York judgment. Argentina has not suggested that (subject to the issue of immunity) these proceedings did not fall within CPR 6.20(9), which provides for service out of the jurisdiction "if a claim is made to enforce any judgment or arbitral award". The only issue is whether Argentina is immune from the claim. Whether a state is immune from such a claim should, under the restrictive doctrine of state immunity, depend upon the nature of the underlying transaction that has given rise to the claim, not upon the nature of the process by which the claimant is seeking to enforce the claim. When considering whether a state is entitled to immunity in respect of a claim to enforce a foreign judgment the question "does the claim constitute proceedings relating to a commercial transaction?" can only be given a meaning that is sensible if "relating to" is given a broad, rather than a narrow, meaning. The proceedings relate both to the foreign judgment and to the transaction underlying that judgment, but in the context of restrictive state immunity it only makes sense to focus on the latter.

The argument to the contrary accepted by Stanley Burnton J in AIC proceeds as follows. There is a distinction between the adjudicative and the executionary stages of these proceedings. First NML has to establish liability in this jurisdiction and then proceed to attempt to levy execution. The question is whether Argentina enjoys immunity from the adjudicative stage. That stage involves the conversion of the New York judgment into an English judgment. The proceedings to effect this conversion do not turn on the nature of the underlying transaction, but on whether the judgment in respect of that transaction was regularly obtained. Thus those proceedings do not relate to the underlying transaction.

The fallacy in this argument is that the issue raised in the present proceedings is not the regularity of the New York judgment but whether Argentina is immune to an action on that judgment. Mr Howard QC put the matter more accurately at para 15 of his written case:

> "It is important to bear in mind that the issue in these proceedings is not whether the English court had jurisdiction to entertain proceedings on the bonds. It is common ground that it did not. Rather, the issue is whether the present proceedings for the recognition and enforcement of the New York judgment are proceedings 'relating to' that judgment, or are, instead, proceedings 'relating to' a 'commercial transaction entered into by' Argentina within the meaning of section 3(1)(a) on the grounds that the New York proceedings on which the New York judgment was based were proceedings 'relating to' a commercial transaction entered into by Argentina (ie 'relating to' the bonds)."

The issue that Mr Howard identifies has to be answered in order to determine whether, under English law, Argentina enjoys state immunity in relation to these proceedings. That question ought to be answered in the light of the restrictive doctrine of state immunity under international law. There is no principle of international law under which state A is immune from proceedings brought in state B in order to enforce a judgment given against it by the courts of state C, where state A did not enjoy immunity in respect of the proceedings that gave rise to that judgment. Under international law the question of whether Argentina enjoys immunity in these proceedings depends upon whether Argentina's liability arises out of acta jure imperii or acta

jure gestionis. This involves consideration of the nature of the underlying transaction that gave rise to the New York judgment. The fact that NML is seeking to enforce that judgment in this jurisdiction by means of an action on the judgment does not bear on the question of immunity. This leads to the conclusion that the context in which the issue of the meaning of the words "relating to" arises in this case requires one to look behind the New York judgment at the underlying transaction.

I must deal with the matters that Stanley Burnton J considered supported the narrower interpretation of "relating to" in AIC Ltd v Federal Government of Nigeria. The first is that section 9 would not be needed if section 3(1)(a) applies to proceedings to enforce an arbitration award. It is true, if "relating to" is given the wider meaning, that the circumstances covered by section 9 of the 1978 Act will often overlap with the circumstances covered by section 3(1)(a), but this will not always be the case. Not all arbitrations relate to commercial transactions. Furthermore, as Mr Sumption pointed out, section 9 relates not only to proceedings to enforce an award, but to all proceedings relating to an arbitration to which a state is party, and establishes jurisdiction of the English court in relation to all such proceedings.

In order to deal with the second matter to which Stanley Burnton J referred, it is necessary to quote the point that he made in his own words at para 26:

> "Furthermore, if Parliament had intended the State Immunity Act to include an exception from immunity relating to the registration of foreign judgments, it would have been illogical to limit it to commercial transactions entered into by the state (which is the consequence of AIC's contentions), with no provision for the registration of foreign judgments where the exception to immunity before the original court was the equivalent of one of the other exceptions to immunity in that Act."

In argument this point was, I believe, misunderstood. It was assumed that Stanley Burnton J was suggesting that if a foreign judgment relating to a commercial transaction were enforceable here, so logically should a foreign judgment dealing with one of the other matters specifically exempted from immunity under the 1978 Act. Thus, for instance, if in New York a judgment were given against Argentina in respect of personal injury caused to the claimant in the United Kingdom, one would expect that judgment to be enforceable here – see section 5 of the 1978 Act.

Mr Sumption's answer was that the judgment would in fact be enforceable here. An action on the New York judgment would be an action "in respect of" the personal injury caused in the United Kingdom.

I believe that we all misunderstood Stanley Burnton J's point. It was not that it would be logical to be able to enforce here a New York judgment dealing with a personal injury caused in the United Kingdom, but a New York judgment where there was an exemption from immunity equivalent to that provided by section 5 – ie a New York judgment in respect of a personal injury caused in New York. As to that point, I agree with Stanley Burnton J. It was illogical that the 1978 Act did not make provision for the enforcement in this country of such a judgment. This was because the draftsman of the 1978 Act did not deal generally with foreign judgments. That omission was made good by section 31 of the 1982 Act, as I shall show.

The other matter that impressed Stanley Burnton J was the desirability of giving section 3(1)(a) an interpretation which would have the effect of requiring a link between the defendant state's commercial transaction and the United Kingdom jurisdiction. He drew attention to the existence of such a link in the other exemptions to state immunity in the 1978 Act and to dicta of Lord Denning. It is true that the need for such a link receives support from dicta of Lord Denning in the judgments prior to 1978 in which he sought to introduce the restrictive doctrine of state

immunity into English law. Thus in Thai-Europe Tapioca Service v Government of Pakistan he said, [1975] 1 WLR 1485, 1491-1492:

> …a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts…By this I do not mean merely that it can be brought within the rule for service out of the jurisdiction under RSC Ord, 11, r 1. I mean that the dispute should be concerned with property actually situate within the jurisdiction of our courts or with commercial transactions having a most close connection with England, such that, by the presence of parties or the nature of the dispute, it is more properly cognisable here than elsewhere.

Fox on The Law of State Immunity at p 269 describes the academic criticism of what was alleged to be confusion by Lord Denning of the doctrine of state immunity with principles of extra territorial jurisdiction.

When Parliament enacted the 1978 Act the exemption from immunity under section 3(1)(a) in respect of proceedings relating to a commercial transaction entered into by the state was not qualified by any requirement for a link between the transaction and the United Kingdom. This was not accidental. The United Kingdom ratified the ECSI on the same day that the 1978 Act came into force, and the Act was designed to give effect to the Convention. The original Bill followed closely the structure of the ECSI. Its scope was, however, significantly enlarged by amendment. The ECSI only applies as between contracting states. The 1978 Act was expanded so as to apply to all states. The ECSI does not give effect to the restrictive doctrine of sovereign immunity. Article 24 provides, however, that any state may declare that

> …its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not party to the present Convention. Such declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (acta jure imperii).

The United Kingdom made such a declaration at the time of ratification of the Convention. In Kuwait Airways Corporation v Iraqi Airways Corporation [1995] 1 WLR 1147, 1158 Lord Goff, with whom the rest of the Committee agreed, observed that the declaration:

> "must have been intended to recognise the inapplicability in English law of the principle of sovereign immunity in cases in which the sovereign was not acting jure imperii, as had by then been recognised both in The Philippine Admiral [1977] AC 373 and in the Trendtex case [1977] QB 529, though the authoritative statement of the law by Lord Wilberforce in I Congreso del Partido [1983] 1 AC 244, 262, was not then available. At all events, the consequential exception included in section 3 of the Act of 1978 related to commercial transactions, though in section 3(3) the expression 'commercial transactions' is very broadly defined."

I can see no justification for giving section 3(1)(a) a narrow interpretation on the basis that it is desirable to restrict the circumstances in which it operates to those where the commercial transaction has a link with the United Kingdom. The restrictive doctrine of sovereign immunity does not restrict the exemption from immunity to commercial transactions that are in some way linked to the jurisdiction of the forum.

For these reasons I have concluded that Stanley Burnton J's decision on this point in AIC and the Court of Appeal's approval of it in Svenska was erroneous. By reason of section 3(1)(a) of the 1978 Act Argentina is not immune from the proceedings that NML have commenced in this

jurisdiction... My conclusion is that the present proceedings are "proceedings relating to a commercial transaction" within the meaning of section 3 of the 1978 Act.
The conclusion that I have reached resolves an issue that may not have occurred to the draftsman of the 1978 Act or to Parliament when enacting it. While section 9 of the Act makes express provision for arbitration awards, the Act makes no mention of proceedings in relation to foreign judgments against states, other than Part II, which deals with judgments against the United Kingdom in the courts of other states party to the ECSI; there have been, in fact, only 8 ratifications of that Convention. Prior to 1978 there had been no attempts to enforce in the United Kingdom foreign judgments against states. As I have explained the 1920 and the 1933 Acts gave little scope for registering foreign judgments against states and there is no recorded instance of an attempt to do this before 1978. In 1978 the Rules of Court made no provision for impleading a foreign sovereign, no doubt reflecting the previous absolute doctrine of state immunity. Section 12(1) of the 1978 Act made provision for service on a state and section 12(7) made it plain that such service required permission, which could only be granted in accordance with the rules of court governing service out of the jurisdiction. There was no provision in 1978 for service out of the jurisdiction of a claim to enforce a judgment. In these circumstances it is perhaps not surprising that the Act made no express provision in relation to proceedings to enforce foreign judgments, other than judgments against the United Kingdom covered by the ECSI....

Issue 3: Do the Bonds contain a submission to the jurisdiction of the English court in respect of these proceedings within the meaning of section 2 of the 1978 Act?
Section 2(2) of the 1978 Act varied the law of what was capable of amounting to a submission by a state to the jurisdiction of the English court... in that it provided that a state could submit to the jurisdiction by a written agreement prior to any dispute arising. The issue on this appeal is simply whether, on the true construction of the relevant provisions of the bonds, Argentina submitted to the jurisdiction of the English court. The bonds were governed by New York law and that law applies a narrow construction in favour of the state to the construction of a term which is alleged to waive state immunity...
It is accepted that the judgment of the New York court is a "related judgment", that is a judgment in "related proceedings". The issue in relation to the provisions of the first paragraph is whether the following provision constitutes a submission to the jurisdiction of the English court:

> "…the related judgment shall be conclusive and binding upon [Argentina] and may be enforced in any specified court or in any other courts to the jurisdiction of which the republic is or may be subject (the 'other courts') by a suit upon such judgment…"

Blair J considered.. that this provision constituted a submission to the jurisdiction of the English court inasmuch as

> "Argentina unambiguously agreed that a final judgment on the bonds in New York should be enforceable against Argentina in other courts in which it might be amenable to a suit on the judgment."

Aikens LJ did not agree. He held..that the agreement that the New York judgment could be enforced in any courts to the jurisdiction "of which Argentina is or may be subject by a suit upon such judgment" was neither a waiver of jurisdiction nor a submission to the jurisdiction of the English court. I do not follow this reasoning. It seems to rob the provision of all effect. Blair J held that this agreement was more than a mere waiver, and I agree. If a state waives immunity it does no more than place itself on the same footing as any other person. A waiver of immunity

does not confer jurisdiction where, in the case of another defendant, it would not exist. If, however, state immunity is the only bar to jurisdiction, an agreement to waive immunity is tantamount to a submission to the jurisdiction. In this case Argentina agreed that the New York judgment could be enforced by a suit upon the judgment in any court to the jurisdiction of which, absent immunity, Argentina would be subject. It was both an agreement to waive immunity and an express agreement that the New York judgment could be sued on in any country that, state immunity apart, would have jurisdiction. England is such a country... The provision in the first paragraph constituted a submission to the jurisdiction of the English courts. If consideration of the first paragraph alone left any doubt that the terms of the bonds included a submission to this jurisdiction, this would be dispelled by the second paragraph. Omitting immaterial words, this reads:

> "To the extent that the republic … shall be entitled, in any jurisdiction … in which any … other court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any related judgment, to any immunity from suit, from the jurisdiction of any such court … from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction … solely for the purpose of enabling … a holder of securities of this series to enforce or execute a related judgment."

The words "may at any time be brought" which I have emphasised once again constitute Argentina's agreement that the waiver of immunity applies in respect of any country where, immunity apart, there is jurisdiction to bring a suit for the purposes of enforcing a judgment on the bonds. England is such a jurisdiction. Thus the second paragraph constitutes an independent submission to English jurisdiction. Both jointly and severally the two paragraphs amount to an agreement on the part of Argentina to submit to the jurisdiction of the English (no doubt among other) courts.

This conclusion does not involve a departure from the narrow approach to construction required by the law of New York. It gives the provisions as to immunity in the bonds the only meaning that they can sensibly bear. Neither Aikens LJ nor Mr Howard suggested any alternative meaning for the words. The reality is that Argentina agreed that the bonds should bear words that provided for the widest possible submission to jurisdiction for the purposes of enforcement, short of conferring jurisdiction on any country whose domestic laws would not, absent any question of immunity, permit an action to enforce a New York judgment. No doubt those responsible were anxious to make the bonds as attractive as possible.

Aikens LJ held at para 103 that because, in the present proceedings, NML had to bring an action in this jurisdiction to obtain recognition of the New York judgment, the proceedings here were not "brought solely for the purpose of enforcing or executing any related judgment". This was to confuse the means with the ends. Obtaining recognition of the New York judgment is no more than an essential stepping stone to attempting to enforce it. No suggestion has been made that there is any other purpose in bringing these proceedings.

For this reason I would reverse the decision of the Court of Appeal on the third issue also.

Lord Mance[29]

Lord Phillips has set out the facts and ... identified the five issues to which they give rise. I

[29] https://7kbw.co.uk/barrister/lord-mance/ .

agree with his judgment on the .. third issue... whether the bonds contain a submission to the English jurisdiction. ... In the result, I also agree with Lord Phillips... that the Republic is not entitled to claim state immunity in the present proceedings to enforce against it the judgment obtained in New York proceedings. But I do so by a different route to his primary route.
This is because I am unable to agree with Lord Phillips on the first issue: the scope of section 3 of the State Immunity Act 1978. This represents his preferred basis for his answer to the fifth issue. I do not consider that the drafters of that Act or Parliament contemplated that section 3(1)(a) of the 1978 Act had in mind that it would or should apply to a foreign judgment against a foreign state. I understand Lord Phillips effectively to accept that.. but, nonetheless, he and Lord Clarke treat the words as wide enough to cover such a judgment. I do not consider this to be justified.
The pursuit of a cause of action without the benefit of a foreign judgment is one thing; a suit based on a foreign judgment given in respect of a cause of action is another. In the present case, the only issue arising happens to be the issue of state immunity with which the Supreme Court is concerned. But a claim on a cause of action commonly gives rise to quite different issues from those which arise from a claim based on a judgment given in respect of a cause of action. A claim on a cause of action normally involves establishing the facts constituting the cause of action. A suit based on a foreign judgment normally precludes re-investigation of the facts and law thereby decided. But it not infrequently directs attention to quite different matters, such as the foreign court's competence in English eyes to give the judgment, public policy, fraud or the observance of natural justice in the obtaining of the judgment...
The exceptions from immunity provided by sections 2 to 11 of the 1978 Act focus on specific conduct (submission) in the domestic UK proceedings or on specific transactions, contexts or interests in relation to which causes of action may arise. The recognition and enforcement of foreign judgments has long been recognised as a special area of private international law. Careful statutory attention was given to it in the Administration of Judgments Act 1920 (judgments of courts from other parts of Her Majesty's dominions) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (judgments from certain other countries) in terms which... respect the existence of state immunity, as well as in Part II of the 1978 Act itself (judgments against the United Kingdom in other states party to the European Convention on State Immunity, now Regulation EC44/2001) in terms specifically addressing state immunity. In this context, it stretches language beyond the admissible to read "proceedings relating to … a commercial transaction" as covering proceedings relating to a judgment which itself relates to a commercial transaction. The improbability of so extended a construction is underlined by the extreme care that the drafters of the Act took to define in s.3, in the widest terms, the concept of "commercial transactions".
I do not however agree with the view (expressed by Stanley Burnton J in AIC Ltd v The Federal Government of Nigeria [2003] EWHC 1357 (QB), paras 30-32) that the improbability can be supported on the basis of an implied limitation of section 3(1)(a) of the 1978 Act to commercial transactions with a domestic nexus. That view ignores the clear contrast between the wording of section 3(1)(a) and (b). If there were any doubt about the point (which there is not), it would be dispelled by the Parliamentary history. In the original bill, clause 3(1), the precursor to section 3(1)(a), was territorially limited to commercial activity by a State "through an office, agency or establishment maintained by it for that purpose in the United Kingdom". Following strong criticism of this limitation by Lords Wilberforce and Denning... the Lord Chancellor moved an amendment inserting a clause in the form which became section 3(1), making expressly clear that this was to ensure that "No qualifications, no jurisdictional links with the United Kingdom are to be required" under sub-clause (a) as distinct from sub-clause (b)...

Even before the enactment of section 34 of the Civil Jurisdiction and Judgments Act 1982, it is extremely doubtful whether the principle that a cause of action did not merge in a foreign judgment survived in English law: Carl Zeiss Stiftung v Rayner & Keeler Ltd [1967] 1 AC 853, 966 per Lord Wilberforce. This, to my mind, also makes unconvincing a reading of "proceedings relating to (a) a commercial transaction" which covers proceedings to enforce a judgment based on a cause of action arising from a commercial transaction.

Where a state has agreed in writing to submit a dispute to arbitration, section 9 of the 1978 Act provides that the state is not immune as respects proceedings in United Kingdom courts which relate to the arbitration. This subsection addresses the consequences of submission, and leaves it to the court to determine whether such has occurred. The subsection also covers ancillary or interlocutory applications relating to arbitration, and is not limited to arbitration relating to commercial transactions. But very many arbitrations are commercial; and a major purpose of section 9 must on any view have been to lift state immunity in respect of the enforcement of arbitration awards against states, including foreign arbitration awards since the subsection is in general terms... On NML's case, there is, as a result, an unlikely dichotomy between the express treatment of arbitration in Part I of the 1978 Act and the suggested tacit, but nonetheless (if achieved) very important, removal of state immunity in respect of judgments relating to commercial transactions.

At the time of the 1978 Act, the rules of court provided no basis for obtaining leave to serve out of the jurisdiction in respect of a claim to enforce any judgment or arbitral award. Such a basis was only introduced.. from 1 January 1984. Section 12(7) of the 1978 Act maintained the need for leave to serve out of the jurisdiction where required by the rules of court. The lifting by section 9 of the 1978 Act of state immunity in respect of arbitration awards had obvious relevance in a case... where a foreign state had by an English arbitration agreement undertaken to submit to the English jurisdiction in respect of an application to enforce any award as a judgment. Indeed, as appears from the original bill and from the passages in Hansard quoted in the Svenska Petroleum Exploration case ... the clause in the original bill which became section 9 in the 1978 Act was confined to "arbitration in or according to the law of the United Kingdom", and this phrase was only deleted in the House of Commons. In relation to foreign judgments there was, however, no equivalent problem to that raised by the Duff Development and Kahan cases, and the absence when the 1978 Act was passed of any basis for obtaining leave to serve out in respect of a foreign judgment or award also points, I think, against a construction stretching the wording of section 3(1) to cover suits to enforce such judgments.

It is true that the 1978 Act adopted the restrictive theory of state immunity, but the question before the Supreme Court now is: how far and in respect of what transactions. It is true that it is now well-recognised that no principle of international law renders state A immune from proceedings brought in state B to enforce a judgment given against it in state C. But the question is how far the drafters of the 1978 Act appreciated or covered the full possibilities allowed by international law, or, putting the same point in a different way, how far these were only covered a little later by section 31 of the 1982 Act. As Lord Phillips records... English common law was at the time itself in development and not finally settled, on the point that states were not immune in respect of commercial transactions, until the House of Lords decision in I Congreso del Partido [1983] AC 244, some years after the 1978 Act. The question whether a claim to enforce a judgment "constitute[s] proceedings relating to a commercial transaction" simply does not arise, unless one assumes that the wording of section 3(1)(a) of the 1978 Act covers proceedings on judgments. But that is the very issue which is before the Supreme Court. On NML's case, which Lord Phillips favours, Parliament by section 3(1) of the 1978 Act

achieved a partial and oddly imbalanced lifting of state immunity in respect of foreign judgments against foreign states. First, it omitted to introduce any analogue of a most obvious situation in which a foreign judgment might be rendered against a state. Under section 2, a state is not immune as respects proceedings in respect of which it has submitted to United Kingdom courts; but nothing in the 1978 Act lifts state immunity in the United Kingdom in respect of a foreign judgment on the basis of its submission in proceedings abroad.

Secondly, the Act either fails to lift immunity or, if it lifts immunity at all, does so in a partial and illogical way, in situations paralleling those covered by sections 4 to 11 of the Act. To this, Mr Sumption QC responds on behalf of NML that, if "relating to a commercial transaction" can be read widely enough to cover "relating to a foreign judgment relating to a commercial transaction", then phrases in other sub-sections such as "in respect of death or personal injury" (section 5(a)) can be read widely enough to mean "in respect of a foreign judgment in respect of death or personal injury" caused by an act or omission in the United Kingdom.

However, as Mr Mark Howard QC points out on behalf of the Republic, even if this persistent stretching of words were to be accepted, it does not remove the anomalies which flow from NML's case. It does not, in particular, address the cases of a foreign judgment against a state where the contract of employment was not made in the United Kingdom or the work was not wholly or to be performed here (cf section 4); or in respect of death or personal injury or damage or loss of tangible property caused by an act or omission not occurring in the United Kingdom (cf section 5); or relating to immovable property not in the United Kingdom (cf section 6); or relating to any patent not registered in the United Kingdom (cf section 7); or relating to membership of any body corporate not incorporated or constituted under United Kingdom law (cf section 8). Lord Phillips acknowledges the illogicality (para 34). The territorial limits involved in these sections are understandable in proceedings actually relating to such contexts or interests. But they make no real sense as a basis for distinguishing between foreign judgments in respect of which state immunity is and is not said to exist.

On NML's analysis, section 3 of the 1978 Act therefore gave a very partial and haphazard mandate for enforcement of foreign judgments, while section 31 of the 1982 Act was necessary, though only necessary, to restore the comprehensive harmony which in that respect the 1978 Act had singularly failed to achieve. There is however no trace of that in the 1982 Act itself. On the contrary, section 31(1)(b) refers to sections 2 to 11 of the 1978 Act without discrimination and evidently without recognising that (on NML's analysis) the legislator must, by reason of the words "if and only if", have been replacing a partial scheme of enforcement of foreign judgments under the 1978 Act with a new scheme provided by section 31(1) of the 1982 Act.

Further, section 31(1) makes clear that the scheme it introduces is to apply to judgments by a foreign court "against a state other than the United Kingdom or the state to which that court belongs". Mr Sumption submits that this would, in consequence of the words "if and only if", supersede section 3(1) as regards judgments "against the state to which that court belongs". If that were so, then the 1982 Act would for some unexplained reason be cutting down what is, on Mr Sumption's case, the width of section 3(1). But I do not think that Mr Sumption's submission is correct. All that the words "if and only if" achieve is the exclusion of judgments "against the state to which that court belongs" from the scheme of section 31. They do not overrule or affect any provision of section 3(1) which, on NML's case, already covered such judgments. The patchwork provision of the two statutes, which arises on NML's case, and which Lord Phillips and Lord Clarke are minded to accept, becomes even less probable as a matter of imputed Parliamentary intention.

I see no basis for giving the phrase "relating to" in section 3(1)(a) what is described as an

"updated" meaning. What constitutes a family or cruel or inhuman treatment or a "true and fair view" (to take three well-known examples) may vary, and has varied, with social or professional attitudes from time to time. But a connecting factor like "relating to" is most unlikely to have this elasticity, and it is implausible to suggest that Parliament intended that its meaning or application in or under section 3(1)(a) could, over time, expand to remove immunity in respect of judgments. This would amount to altering the scope of the Act in a way not falling within the principles originally envisaged, contrary to the rule stated in Bennion on Statutory Interpretation (5th ed) section 288, para (6). Further, even if (contrary to my view) any expansion were theoretically possible, no legal, social or other developments have been identified justifying it in this case. On the contrary: the enactment of section 31(1) of the 1982 Act argues strongly against any such expansion of the ambit of "relating to" in section 3(1)(a) of the 1978 Act; and the only effect of expanding the scope of section 3(1)(a) would be partially to create an overlap with that section and/or the illogical patch-work effect referred to in preceding paragraphs.
It is for these reasons that I am unable to follow Lord Phillips' and Lord Clarke's answer to the first issue. In my view, section 31 is the means by which the United Kingdom legislator achieved, for the first time, a comprehensive and coherent treatment of the issue of state immunity in respect of foreign judgments, and it enables the enforcement of the New York judgment in this case. But the bonds also contain a comprehensive submission to the English jurisdiction in respect of the enforcement of the New York judgment, and this leads to the same result. I would, on this basis, therefore allow the appeal.

Lord Collins[30] (with whom Lord Walker agrees)
I agree with Lord Phillips that the appeal should be allowed, but, in agreement with Lord Mance, I would rest my conclusion on section 31 of the 1982 Act and on Argentina's submission and waiver of immunity, and not on section 3 of the 1978 Act....
The first widespread defaults on sovereign debt occurred in the early 19th century. The newly independent former Spanish American colonies "besieged London for loans" in the years 1822-1825 and the proceeds were "quickly expended on armaments, or otherwise wastefully dissipated, with little regard to the quite different purposes for which, in many instances, the loan had been ostensibly raised:" ...
National courts of the debtor state and of the creditors were unable to secure the rights of unpaid bondholders. In Twycross v Dreyfus (1877) LR 5 Ch D 605, a case concerning Peruvian bonds, Sir George Jessel MR said..:

> "… [T]he municipal law of this country does not enable the tribunals of this country to exercise any jurisdiction over foreign governments as such. Nor, so far as I am aware, is there any international tribunal which exercises any such jurisdiction. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign government… without the consent of the government of that country."

By the beginning of the 20th century only a few countries (including Belgium and Italy) had adopted a restrictive theory of sovereign immunity, but only with regard to jurisdiction, and not to execution:.. The only remedy for countries whose citizens were affected by sovereign default was force, and in response to the blockade of Venezuelan ports by the United States, Italy, Germany and Britain, the Minister of Foreign Affairs of Argentina, Dr Drago, enunciated in 1902

[30] https://arbitratorsinternational.com/arbitrator/lord-collins-of-mapesbury/ .

what became known as the Drago doctrine, namely that "the public debt [of an American nation] cannot occasion armed intervention … by a European power": ... Venezuelan bond claims were subsequently submitted to mixed claims commissions...
But law and practice was revolutionised in the second half of the 20th century by the widespread (but by no means uniform) adoption of the restrictive theory of sovereign immunity, and the modern law now depends on the application of the restrictive theory of immunity and on the almost invariable use in international loan agreements and bond issues since the 1970s of clauses providing for submission to national jurisdiction and waivers of immunity.
NML is one of several bondholders who have obtained judgments in the New York Federal District Court against Argentina on the bonds...The idea behind "vulture funds" is not new. Borchard State Insolvency and Foreign Bondholders ... Wynne... in relation to the early South American defaults:

> "Meanwhile, however, the bonds had largely passed out of the hands of the original purchasers into the possession of speculators who bought them up at next to nothing and, in due time, reaped a handsome profit."

So also in the famous Greek bond cases in England in the 1960s and 1970s, the bondholders were speculators who had bought cheaply bonds issued by the Greek Government in the 1920s and unpaid since 1941...
So-called vulture funds have given rise to at least two problems. First, the ability of investors to acquire defaulted debt can be abused...
Second, particular attention has focussed on the ability of vulture funds to thwart loan re-structuring by "highly indebted poor countries"...
Argentina declared a sovereign debt moratorium in December 2001 and has restructured much of its debt through debt exchange, but that has no effect on these proceedings because (a) there is no international insolvency regime for States; and (b) the bonds are governed by New York law and are unaffected by any Argentine moratorium.

Issue 1: "proceedings relating to a commercial transaction" and the State Immunity Act 1978, section 3
The proceedings in the present appeal are proceedings at common law for the enforcement of the New York judgment. None of the statutory methods of enforcement is available for judgments rendered in the United States. On this part of the appeal the only relevant question is whether the proceedings in England at common law on the New York judgment are "proceedings relating to … a commercial transaction entered into by the State," where "commercial transaction" includes "any loan or other transaction for the provision of finance…": section 3(1)(a); section 3(3)(b). Whether the New York proceedings were themselves "proceedings relating to a commercial transaction" is not the relevant question.
The question on this issue is whether the expression "relating to" is to be given the meaning ascribed to it (in proceedings different from the present ones) by Stanley Burnton J in AIC Ltd v Federal Government of Nigeria [2003] EWHC 1357 (QB) (registration of a Nigerian judgment under the Administration of Justice Act 1920) and by Gloster J and the Court of Appeal in Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)... (enforcement of Danish arbitral award under Arbitration Act 1996, section 101).
The question, to what do the proceedings for enforcement of the New York judgment "relate," can be given a narrow or a wide answer. The narrow meaning would result in a conclusion that they "relate" to the enforceability of the New York judgment, which would involve such matters ...as whether the New York court had in personam jurisdiction (here there was a clear submission to the jurisdiction of the New York courts) or whether enforcement could be resisted

on any of the traditional grounds (such as want of natural justice, fraud, or public policy), none of which has any arguable application. The wider meaning would give effect to the practical reality that the proceedings relate to liability under the bonds, the issue of which was plainly a commercial transaction for the purposes of section 3.
My conclusion that the narrower meaning is the one which must be ascribed to Parliament rests on considerations somewhat different from the reasons articulated by Stanley Burnton J in AIC. I do not consider that a potential overlap with the arbitration provision in section 9 supports a narrow interpretation of section 3. The overlap would not be complete, and it would be artificial and over-technical to use the potential overlap to cut down the scope of section 3. Nor do I consider that the narrow construction is supported by an argument that section 3(1)(a) should be interpreted so as to require a link with the territorial jurisdiction of the United Kingdom. No such link is required in the 1978 Act in relation to the head of commercial transactions covered by section 3(3)(b).
...What is not likely to be in doubt is that at the time the 1978 Act was enacted it would not have been envisaged that section 3 would have applied to the enforcement at common law of a foreign judgment against a foreign State based on a commercial transaction. That was because until ... 1982 ... a defendant outside the jurisdiction could not be served in an action on a foreign judgment even if there were assets within the jurisdiction to satisfy the judgment (and consequently no freezing injunction could be made in relation to those assets... Nor is it likely that section 31 of the Civil Jurisdiction and Judgments Act 1982 would have been enacted in the form that it was enacted if Parliament had thought that the 1978 Act already applied to a class of foreign judgments.
I accept that neither of those points is conclusive as to the meaning of section 3. There is no impediment in public international law to the institution of proceedings to enforce a foreign judgment based on commercial transactions. It is now possible to serve a foreign sovereign out of the jurisdiction in such proceedings, and the 1978 Act could be construed in the light of present circumstances...
But for section 31 of the 1982 Act, and the almost invariable employment of wide express waivers of immunity, it might have been desirable as a matter of policy to give section 3 the wider meaning. There would, however, be no principled basis on which to found such a conclusion. The proceedings in England relate to the New York judgment and not to the debt obligations on which the New York proceedings were based.

Issue 2: section 31 of the Civil Jurisdiction and Judgments Act 1982
... The natural meaning of section 31(1) is that it requires recognition and enforcement of a foreign judgment against a foreign State (other than the United Kingdom or the State in which the foreign proceedings were brought) if (a) the normal conditions for recognition and enforcement of judgments are fulfilled, and (b) mutatis mutandis the foreign State would not have been immune if the foreign proceedings had been brought in the United Kingdom. That meaning is the one which text writers have propounded since the section was enacted...

Issue 3: submission
As late as 1957 Delaume, Jurisdiction of Courts and International Loans (1957) 6 Am J Comp L 189, 203, said "there was no consensus of opinion as to whether contractual waivers of immunities are valid and binding upon a foreign sovereign or as to what acts are necessary to constitute such a waiver." In 1965 the Restatement Second, Foreign Relations Law of the United States, section 70(1) stated that a foreign State might waive its immunity by agreement with a private party, including an agreement made before the institution of proceedings. The

Reporters' Note accepted that there had been no judicial decision to this effect, but that it was believed that United States courts would apply a waiver rule. As indicated above ... it was only in the 1970s that it became almost invariable practice for syndicated bank loans to States and international bonds issued by States to contain wide submissions to the jurisdiction of national courts and express waivers of immunity.

The position in English law prior to the enactment of the 1978 Act was that it was thought that a prior contractual submission to the jurisdiction of the court was ineffective to amount to a waiver of immunity and that nothing less than an appearance in the face of the court would suffice... In Duff Development Co Ltd v Government of Kelantan [1924] AC 797 the question was whether the Government had waived immunity in relation to an application to the court to enforce an arbitration award by agreeing to the arbitration clause in the deed of concession and by applying to the court to set aside the award. The effect of the decision was that a submission to arbitration was not a submission to enforcement...

In Kahan v Federation of Pakistan [1951] 2 KB 1003, in a contract for the supply of Sherman tanks Pakistan agreed "to submit for the purposes of this agreement to the jurisdiction of the English courts" and agreed a method of service within the jurisdiction.... the Court of Appeal held that there was no submission in the absence of an undertaking given to the court at the time when the other party asked the court to exercise jurisdiction over it.

As Dr F A Mann said, "the proposition that a waiver or submission had to be declared in the face of the court was a peculiar (and unjustifiable) rule of English law"... In a classic article Dr E J Cohn showed that from the 19th century civil law countries had accepted that sovereign immunity could be waived by a contractual provision, and that the speeches in Duff Development on the point were obiter (and did not constitute a majority) and that both Duff Development and Kahan v Federation of Pakistan had overlooked the fact that submission in the face of the court was not the only form of valid submission since the introduction in 1920 in RSC Ord 11, r 2A (reversing the effect of British Wagon Co Ltd v Gray [1896] 1 QB 35) of a rule that the English court would have jurisdiction to entertain an action where there was a contractual submission. In particular, in Duff Development Lord Sumner had overlooked the fact that British Wagon Co v Gray was no longer good law.

The principle enunciated in Kahan v Federation of Pakistan was reversed by section 2(2) of the 1978 Act, which provided that a State could submit to the jurisdiction "by a prior written agreement." This is consistent with international practice: United States Foreign Sovereign Immunities Act 1976, section 1605(a)(1) (State not immune if it has "waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver ..."); European Convention on State Immunity 1972, Art 2(b) (no immunity if "it has undertaken to submit to the jurisdiction of [the] court … by an express term contained in a contract in writing"); UN Convention on Jurisdictional Immunities of States and their Property 2004, Art 7(1)(b) (no immunity if the State has "expressly consented to the exercise of jurisdiction by the court with regard to the matter or case … in a written contract").

The "Waiver and Jurisdiction Clause" in the bonds provided that a related judgment:

> "…shall be conclusive and binding upon [Argentina] and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the 'Other Courts') by a suit upon such judgment."

The New York judgment was on any view a "related judgment." Argentina agreed that it could be enforced in any other courts "to the jurisdiction of which the Republic is or may be subject." This was the clearest possible waiver of immunity because Argentina was or might be subject to the jurisdiction of the English court since the English court had a discretion to exercise jurisdiction in an action on the New York judgment by virtue of CPR 6.20(9) (now CPR PD6B,

para 3.1(10)).
The waiver is confirmed by the second paragraph of the clause, which provides:

> "To the extent that the Republic… shall be entitled, in any jurisdiction…in which any…Other Court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any Related Judgment, to any immunity from suit, from the jurisdiction of any such court…from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the Republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction …solely for the purpose of enabling the Fiscal Agent or a holder of Securities of this Series to enforce or execute a Related Judgment."

Again England is a jurisdiction in which an action "may … be brought" to enforce the New York judgment and Argentina agreed not to claim any immunity in that jurisdiction. The contrary conclusion of the Court of Appeal is not readily explicable.

Lord Clarke[31]
I agree that the appeal should be allowed for the reasons given by Lord Phillips. I add a short judgment of my own because of the difference of opinion between Lord Phillips and Lord Mance, Lord Collins and Lord Walker on the first issue...
The question raised by the first issue is whether these proceedings are "proceedings relating to … a commercial transaction entered into by the state" of Argentina within the meaning of section 3(1)(a) of the State Immunity Act 1978 ("the 1978 Act"). The Court of Appeal held that they are not. As Lord Phillips observes at para 20, it is common ground that the New York proceedings in which NML obtained judgment against Argentina were such proceedings. The contrary would have been unarguable because they were brought in order to establish Argentina's liability under the bonds described by Lord Phillips. NML's argument is that, if the New York proceedings related to a commercial transaction, it is but a short step to hold that these proceedings, which were brought in order to enforce a judgment in respect of a liability under the bonds, are also proceedings "relating to a commercial transaction". I agree. As ever, all depends upon the context, but it seems to me to follow naturally from the conclusion that the New York proceedings were such proceedings that the same is true of these. Both have the same purpose, namely to enforce Argentina's liabilities under commercial bonds. There is nothing in the language of section 3(1) to lead to any other conclusion.
The Court of Appeal reached its conclusion in the light of the decision of Stanley Burnton J in AIC Ltd v Federal Government of Nigeria [2003] EWHC 1357 (QB) and in the light of dicta in the Court of Appeal in Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2) [2006] EWCA Civ 1529, [2007] QB 886. Lord Phillips has set out the relevant parts of the judgments in those cases... . In Svenska the judgment of the court was given by Moore-Bick LJ. Scott Baker LJ and I were the other two members of the court. I have now reached the conclusion that the decision in AIC and the dicta in para 137 of Svenska (to which I was a party) were wrong, essentially for the reasons given by Lord Phillips... which I adopt without repeating.
Lord Mance has reached a different view. He notes.. that.. Lord Phillips recognises that the conclusion that he has reached may not have occurred to the draftsman of the 1978 Act or to Parliament. Lord Mance concludes that Lord Phillips' approach and conclusions are not

[31] https://www.scma.org.sg/arbitrator/101.

justified. He does so principally by looking at circumstances as they existed at the time the 1978 Act was enacted. However, in my opinion, that is to approach the construction of section 3(1)(a) of the Act too narrowly.

It is stated in Bennion on Statutory Interpretation, 5th ed (2008) at section 288 that, unless a contrary intention appears, an enactment is intended to develop in meaning with developing circumstances and should be given what Bennion calls an updating construction to allow for changes since the Act was initially framed. Bennion distinguishes that case, which he calls the usual case, from the comparatively rare case of the Act which is intended to be of unchanging effect. The commentary to section 288 states that the court must, in interpreting an Act, make allowances for the fact that the surrounding legal conditions prevailing on the date of its passing have changed.

That approach seems to me to be entirely consistent with that of Lady Hale in Yemshaw v Hounslow London Borough Council ... where she was considering whether words such as "violence" in a statute could be given an updated meaning. She concluded that the question was whether an updated meaning was consistent with the statutory purpose. See also Fitzpatrick v Sterling Housing Association Ltd ... per Lord Clyde... where he said in the context of the meaning of "family" in the Rent Acts:

> "The judges in Helby v. Rafferty [1979] 1 WLR 13 had difficulty in accepting that a word which had been repeated throughout the successive Rent Acts could change its meaning from time to time. But as a matter of construction I see no grounds for treating the provisions with which we are concerned as being in the relatively rare category of cases where Parliament intended the language to be fixed at the time when the original Act was passed. The rule of contemporary exposition should be applied only in relation to very old statutes (Governors of Campbell College, Belfast v Commissioner Northern Ireland Valuation [1964] 2 All ER 705). The general presumption is that an updating construction is to be applied (Bennion on Statutory Interpretation, 3rd ed p 686). Such an approach was recently adopted by this House in Reg v Ireland [1988] AC 147..."

In my opinion it is appropriate and consistent with the statutory purpose of the 1978 Act to give it an updated meaning. The question is whether, viewed at the time the question arises, particular proceedings for the enforcement of a particular foreign judgment are proceedings "relating to a commercial transaction". At the time the 1978 Act was enacted there was no machinery for seeking permission to serve proceedings out of the jurisdiction in respect of a claim to enforce either an arbitration award or a foreign judgment. It could thus be said with force that at that time it was not contemplated that proceedings could be brought in England on a foreign judgment, at any rate unless the defendant accepted service of them.

I note that section 12(6) of the 1978 Act permits a state to accept service of proceedings against it in a particular manner, including no doubt proceedings to enforce a foreign judgment. As Lord Phillips says.. prior to 1978 there had been no attempts to enforce in the United Kingdom judgments against states. However, he adds that section 12(7) makes it plain that service on a sovereign state requires permission, which could only be granted in accordance with the rules of court governing service out of the jurisdiction.

In my opinion, Parliament must have recognised that those rules... would be likely to be amended from time to time and, indeed, may well have contemplated that at some future date a rule would be introduced permitting permission to be given allowing service out of the jurisdiction. As Lord Collins explains... such a rule was introduced with effect from January 1 1984 ... [the current rule] provides for service of proceedings out of the jurisdiction where "a claim is made to enforce any judgment or arbitral award." As I see it, the question is whether

such proceedings are proceedings "relating to a commercial transaction" within section 3(1)(a) in circumstances where such proceedings are contemplated by the present rules of court. I would answer that question in the affirmative.

As Lord Phillips has explained, there was during the 20th century a growing recognition round the world of the restrictive doctrine of state immunity under which immunity related to government acts in the exercise of sovereign authority (acta jure imperii) but not to commercial activities carried on by the state (acta jure gestionis). As I see it, the conclusion that these proceedings are proceedings relating to a commercial transaction is no more than a further example of that growing recognition.

The question arises in the context of the particular proceedings in this case. As Lord Phillips observes ... the question in these proceedings is whether Argentina enjoys state immunity. I agree with him that, there being no principle of international law under which state A is immune from proceedings brought in state B in order to enforce a judgment given against it by the courts of state C where state A did not enjoy immunity in respect of the proceedings that gave rise to that judgment, under international law the question whether Argentina enjoys immunity in these proceedings depends upon whether its liability arises out of acta jure imperii or acta jure gestionis. That involves a consideration of the nature of the underlying transaction and demonstrates that the proceedings, at any rate on the facts of this case, relate to a commercial transaction.

I agree with Lord Collins that the expression "relating to" in section 3(1)(a) can be given a narrow or wide meaning. I also agree with him that these are proceedings relating to the foreign judgment. The question is whether they are also proceedings "relating to a commercial transaction" entered into by Argentina. I agree with Lord Collins... that the wider meaning would give effect to the practical reality that the proceedings relate to liability under the bonds, the issue of which was plainly a commercial transaction for the purposes of section 3. For my part, I see no reason why, in construing the meaning of "relating to", the court should not reflect that practical reality.

I agree with Lord Collins... that a potential overlap with the arbitration provision in section 9 does not support a narrow interpretation and that there is no warrant for holding that section 3(1)(a) should be interpreted as requiring a link with the territorial jurisdiction of the United Kingdom.... Finally I agree with Lord Collins that it is not likely that section 31 of the Civil Jurisdiction and Judgments Act 1982 would have been enacted in the form in which it was if Parliament had thought that the 1978 Act already applied to a class of foreign judgments.

However, Lord Collins accepts ... that neither of those points is conclusive as to the meaning of section 3. That is because there is no impediment in international law to the institution of proceedings to enforce a foreign judgment. Lord Collins adds that it is now possible to serve a foreign sovereign out of the jurisdiction and that the 1978 Act could be construed in the light of present circumstances.... I would go further and hold that it should be given an updated meaning. As Lord Clyde said in Fitzpatrick in the passage quoted above, the general presumption is that an updating construction is to be applied.

As I see it, once it is concluded that an updating construction should be applied, the wider meaning would give effect to the practical reality that the sole purpose of the proceedings is to enforce Argentina's liability under a commercial transaction and that there is no impediment to such a construction in international law, both policy and principle lead to the conclusion that the wider interpretation is to be preferred.

Lord Collins suggests... that, but for section 31 and the almost invariable employment of wide express waivers of immunity, it might have been desirable as a matter of policy to give section 3 the wider meaning. He adds that there would, however, be no principled basis for doing so. I

respectfully disagree. I do not think that either the enactment of section 31 or the fact that some parties use wide submission and waiver clauses points to a narrow meaning of "relating to", whether as a matter of policy or as a matter of principle. In my opinion, viewed as at the time the question has to be decided these proceedings relate both to the New York judgment and to the underlying commercial transaction

Sovereign Immunity and Enforcement of Judgments

Even where there is no immunity it may be difficult to obtain payment from a sovereign debtor. The sovereign may decline to satisfy the judgement and judgment creditors may have difficulty locating assets. Consider the 2nd Circuit's decisions in the NML Capital case from the first sovereign debt packet. Moneys intended to pay other creditors, such as investors in restructured bonds, do not benefit from sovereign immunity, under the commercial exception to immunity from attachment or execution.

In a case involving the Republic of Congo, the Court noted:

The Court may take judicial notice of the fact that the Congo is a oil-rich nation with more than sufficient assets to pay its debts but one of the world's most notorious debtors...Congo has repeatedly refused to honor court judgments, not only the judgments entered in London, but judgments entered in New York courts as well.[32]

An attempt by creditors of Argentina to seize an Argentinean naval training ship, ARA Libertad, in Ghana was impeded by the International Tribunal for the Law of the Sea (ITLOS) in December 2012.[33] Creditors sought to attach a building Argentina listed for sale and then withdrew from the market after the creditor sought attachment.[34]

SOLUTIONS TO THE HOLDOUT CREDITOR PROBLEM: ANTI VULTURE FUNDS LEGISLATION, COLLECTIVE ACTION CLAUSES AND A SOVEREIGN DEBT RESTRUCTURING MECHANISM

One response to the holdout creditor issue is the enactment of legislation to block recovery by vulture funds.[35] The UK enacted the Debt Recovery (Developing Countries)

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[32] *Kensington Int'l, Ltd.* v. *Republic of Congo*, 2005 U.S. Dist. LEXIS 4331 (SDNY 2005).

[33] The "ARA Libertad" Case (Argentina v Ghana), ITLOS, Case No. 20, Order (Dec. 15, 2012).

[34] TIG Insurance Co. v. Republic of Argentina, 967 F. 3d 778 (DC Cir. 2020)(whether property is used for commercial purposes depends on totality of the circumstances).

[35] *See, e.g.*, Lucas Wozny, *National Anti-Vulture Funds Legislation: Belgium's Turn*, COLUM. BUS. L. REV. 697 (2017).

Act in 2010,[36] initially for a 1 year term, which was then extended.[37] The statute is designed to limit available recovery to creditors of countries within the IMF's Heavily Indebted Poor Countries (HIPC) Initiative, and responded to litigation against Zambia and Liberia. An article in the Wall Street Journal has suggested that legislation to counteract vulture funds is planned for New York.[38]

Sovereign defaults have often led to restructuring transactions. Two proposals for how to deal with problems associated with sovereign defaults surfaced.[39] One set of proposals focused on developing formal procedures for states' financial problems which would be analogous to domestic insolvency regimes (a Sovereign Debt Restructuring Mechanism or SDRM);[40] the other focused on developing contractual provisions which financial institutions can include in contracts with sovereigns (collective action clauses (CACs)).[41] Although there is academic writing which critiques the emphasis on CACs as a solution to problems of sovereign debt,[42] considering the SDRM/CAC debate illustrates a more general phenomenon. Some people prefer regulatory solutions to problems, others prefer negotiated solutions. Do you think that formal instiututional solutions or market solutions are likely to be more effective. Are there reasons other than effectiveness for preferring one type of solution over another?

You will need to read the collective action clauses carefully if you are not familiar with complex contracts. The definition provisions are very important. Note the words you do not understand (and be sure they are not words defined in the definition provisions). Also think about how the various clauses fit together. Read the waiver of sovereign immunity carefully in the light of the material on sovereign immunity above. Notice the provision referring to the governing law.

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[36] Debt Relief (Developing Countries) Act 2010 c.22.

[37] The Debt Relief (Developing Countries) Act 2010 (Permanent Effect) Order 2011, SI 2011 No. 1336.

[38] Alexander Gladstone, New York Lawmakers Float Crackdown on Hedge Funds' Sovereign-Debt Tactics, Wall Street Journal (Feb. 8, 2021).

[39] *See, e.g.*, Thomas I. Palley, Sovereign Debt Restructuring Proposals: A Comparative Look, 17 Ethics & International Affairs (2003) *available at* http://www.thomaspalley.com/docs/articles/international_markets/sovereign_debt_restructuring.pdf.

[40] Steven Schwarcz suggests a Model SRDM Convention in Steven L. Schwarcz, *Sovereign Debt Restructuring Options: an Analytical Comparison*, 2 HARV. BUS. L. REV. 95 (2012).

[41] Such provisions have been traditional in English law governed bonds, but not in those governed by New York law.

[42] *See, e.g.*, Anna Gelpern & G. Mitu Gulati, *Of Lawyers, Leaders, And Returning Riddles in Sovereign Debt*, 73 L. & CONTEMP. PROBS. i (2010) (foreword to a special issue on sovereign debt).

A significant proportion of sovereign bond issues now includes collective action clauses. Rodrigo de Rato, at the time the Managing Director of the IMF, stated in 2005: "As of end-February 2005, over 45 percent of sovereign bond issues in international markets contained CAC's. This increasing use of CAC's is contributing to fill an important gap in the international financial architecture."[43] The UK adjusted the collective action clauses it uses to reflect the G10 Working Group's recommendations (see below):

"The inclusion of collective action clauses (CACs) in international bond issues can help strengthen the international financial system by facilitating debtor-creditor negotiations in cases where sovereign debt restructuring is necessary. While there is no intention to restructure any UK government or Bank of England debt, the UK authorities have included these CACs as part of their commitment to promoting wider adoption of appropriate contractual clauses in bond documentation. Other EU member states have also undertaken to include CACs in their international bonds and the aim is for these clauses to become the generally accepted standard in sovereign bonds issues...

While previous HMG foreign currency issues and Bank of England Euro Notes already included CACs, the UK authorities have chosen to update the CACs included in their foreign currency debt to reflect recent international initiatives in this area. The G10 Working Group on Contractual Clauses considered how sovereign debt contracts could be modified in order to make the resolution of debt crises more orderly, and has published a Report with its recommendations. The key features of the new UK CACs reflect these recommendations, and they are outlined in the attached table.

Some of the provisions are new compared with previous UK government foreign currency issues and Bank of England Euro Notes. For example, the new debt is issued under a Trust Deed where the trustee acts as a permanent representative of noteholders. The Trust Deed also includes features that should limit disruptive legal action: there are restrictions on individual noteholders initiating litigation, and any litigation proceeds would be distributed pro rata across noteholders.

Another change is that voting on any proposed amendments to the terms of the debt would be based on total outstanding principal, rather than principal held by noteholders represented at a duly convened meeting. Amendments on "reserved matters" would require consent from noteholders holding 75% of outstanding principal, while changes to non-reserved matters could be agreed by noteholders representing 66 2/3 % of outstanding principal. All votes could be conducted in writing without a meeting, but there are also provisions enabling noteholders, the issuer, or trustee to organise meetings. The new debt also excludes from voting any notes owned or controlled, directly or indirectly, by the issuers."

The Idea of a Sovereign Debt Restructuring Mechanism

The following speech by Anne Krueger of the IMF described the IMF's original SDRM proposal (as well as collective action clauses):

Ever since the Mexican, Asian and Russian crises of the mid-l990s, efforts have been

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[43] Rodrigo de Rato, Managing Director of the International Monetary Fund, Capital Markets in a Global Economy—Recent Developments, Remarks at the Institute of International Finance Spring Membership Meeting, Madrid, Spain (April 1, 2005) *available at* http://www.imf.org/external/np/speeches/2005/040105.htm .

underway to find means for more effective prevention and resolution of currency-financial crises. Much has been done with respect to crisis prevention: exchange rate flexibility is much greater than it was; there is increased transparency and improved oversight of the financial system; and greater attention is paid to unsustainable policy stances. Work continues to strengthen economies' immunity to crises.

But no matter how much is done, there will inevitably be a crisis or crises. Much has already been learned with respect to crisis resolution and the international financial community is better equipped to cope with crises than was the case earlier. But, as with prevention, more can be done.

One item on the agenda, which should contribute both to prevention and to resolution, is dealing with unsustainable debt burdens of sovereigns. Two of the hallmarks of most of the l990s crises were, first, the importance of private capital flows, and their reversals, in triggering the crises and in intensifying their severity; and second, the involvement of the financial systems in them.

The countries afflicted by these crises were ones that had succeeded in raising per capita incomes and rates of economic growth. That success hinged in significant part on their having put in place economic policies that are conducive to economic growth, including a predictable legal framework, respect for property rights, openness to the international economy, and much more.

The fact that the policy framework was generally appropriate implied, among other things, that there were relatively high real returns to investment in these economies. That is of course the main reason why private investors were interested in them. At the same time, capital inflows permitted more rapid development than would otherwise be possible.

These associations of high real returns, growth, and appropriate policy stances continue. For these reasons, there is typically a strong stake for emerging markets to maintain international creditworthiness and policy makers go to great lengths to maintain their international reputations and market standings. An efficient private international capital market benefits both developing countries able to invest more than domestic savings at high real rates of return and investors in high-income countries realizing higher real returns and greater portfolio diversification than they could achieve without these investment opportunities.

Because countries are sovereign, their high stakes in maintaining creditworthiness are crucial for attracting international capital flows. For foreign creditors do not have the rights they do in domestic courts and hence must have other protections against default on the part of borrowers. This is especially true for sovereign borrowers; international lenders to private entities in emerging markets normally have the same protection as is afforded to domestic lenders. For sovereign borrowing, however, the chief protection foreign creditors have is the losses that would accrue to the sovereign debtor (both directly, through the future reduction in access to international credit markets, and through the effects on private economic activity of a sovereign default) in the event of failure to fulfill obligations. And these losses are heavy.

Failure of a sovereign to carry out debt-servicing obligations in accordance with contracts is therefore a last resort in emerging markets. The explosive growth of private international capital flows to sovereigns is one piece of evidence that private creditors believe that sovereigns will in general exert every effort to service their debts. And this belief appears to be well-founded.

However, there arises the occasional instance in which servicing debt according to existing contracts is not possible and debt is unsustainable. This can happen because of changes in external circumstances (a sharp and unanticipated permanent drop in the price of a key export, for example) or for other reasons. Often, all that is required is a flow rescheduling of

existing debts, maintaining net present value. But in some circumstances, a rescheduling that maintains net present value can leave a country with a debt overhang. Then, a reduction in debt and debt service, reducing the net present value of outstanding obligations is necessary. Henceforth, I refer to rescheduling as a circumstance in which net present value is maintained (and which can therefore generally be undertaken by the sovereign under existing international institutional arrangements) and a reduction in debt when net present value is reduced.

It is important to bear in mind the definition of unsustainability: it is a circumstance when, regardless of the sovereign's efforts, debt relative to GDP (and therefore debt servicing relative to GDP) will grow indefinitely. In those circumstances, the economic net present value of the sovereign's debt is less than the face value of the debt; moreover, it will likely continue to fall until a restructuring is undertaken and growth resumes.

In reality, of course, a judgment as to unsustainability must be made on a probabilistic basis: there is always a chance, however remote, that new natural resources will be discovered, that the terms of trade will shift in a country's favor by an exceptional amount, or that some other very low-probability event will change the outlook. However, as borrowing continues and debt servicing obligations as a percentage of GDP rise, the probability of the sovereign being able to honor the net present value of all existing contracts falls. As that happens, growth rates drop, real interest rates rise, and probabilities drop still further. The process can continue until the sovereign recognizes that further efforts to maintain debt service will not begin to address the problem.

Even when the authorities in an overly-indebted country begin to recognize their difficulties, there are disincentives for instigating the restructuring. There is always the hope that the highly improbable favorable shock will materialize. Meanwhile, the consequences of announcing an inability to continue voluntary debt servicing are immediate and negative. A turnaround in the economy will take place after restructuring only after some time. Given political time preferences, that may in itself induce the authorities to delay facing the inevitable. But, in addition, there are significant uncertainties as to how to proceed to deal with creditors.

This was always true, but the problem has intensified as private capital flows have increased relative to official flows. In the l980s debt crisis, private creditors held less than half of outstanding sovereign debt. In Latin America, for example, 66 per cent of debt was to official creditors in the l980-85 period. Many of the private creditors were banks, and usually fewer than 20 banks that represented a very high percentage of outstanding loans to sovereigns. Even then, it was not until the Brady plan in effect orchestrated a debt reduction, and economic policies had been altered, that growth resumed in many countries. By the late l990s, private creditors accounted for over two thirds of outstanding Latin American debt, with official debt only 28 percent. Moreover, the private creditor base was more diffuse, among both banks and bond holders.

While this has been helpful in terms of bringing additional sources of capital to the table and facilitating the diversification of risk, it has increased significantly the collective action problem.

Just as a bank run might be avoided if all depositors refrained from withdrawing, but occurs when each depositor has an incentive to be the first in line, so there is a danger that individual creditors will decline to participate in a voluntary restructuring in the hope of recovering payment on the original contractual terms, even though creditors - as a group - would be best served by agreeing to a restructuring.

The problem of collective action is most acute prior to a default, where creditors may have some reasonable hope of continuing to receive payments. A debtor that had reached agreement with the bulk of its creditors on a restructuring would doubtless hesitate to default on

a small amount of the original debt to secure unanimity. Recognizing this, holdout creditors may seek full payment once agreement has been reached with most.

Following a default, the options facing creditors, particularly those without an interest in litigation, are more limited and the problems of collective action may be less acute. There is no doubt that agreement on a restructuring would eventually be reached following a default. But there is substantial merit in trying to secure agreement on restructuring prior to default. A default, and the associated uncertainties regarding creditor-debtor relations, tends to be associated with widespread economic dislocation. This amplifies the costs that must be borne by debtors and their creditors.

If ways could be found for maintaining creditor rights and simultaneously reducing the duration and severity of the economic downturn associated with delays in debt reduction once it is evident to all that it must occur, there are potential gains for both creditors and debtor, and hence for the international economy.

There are two groups of proposals currently under consideration.1 The first calls for more widespread use of collective action clauses (CACs). A second calls for a statutory approach, providing a legal framework against or through which sovereign debt restructuring could take place. CACs would be placed in individual bond issues, and would bind all bond holders to accept debt reduction and restructurings where a specified super majority of holders consented to it. This already happens under English law, and recently the European Union has decided to call for CACs in contracts issued in member countries. The United States Treasury has also called for CACs in individual sovereign bond contracts.

The advantages of CACs include the ability to prevent holdout creditors of individual bond issues and the greater ease of solving the collective action problem (especially if a trustee structure is used) when any form of change in the terms, including rescheduling, may be necessary. Inclusion of clauses in all new contracts would not, however, address issues associated with the existing stock of bonds; the full force of CACs would therefore not be felt for some period into the future. Moreover, each bond issue would constitute a separate class and CACs would thus not solve intercreditor equity concerns and collective action problems across bond issues or between bonds and other creditors (most importantly banks).

The proposal put forth by the IMF calls for a Sovereign Debt Restructuring Mechanism (SDRM), which is a statutory approach. The design of the SDRM has been guided by a number of principles. First, the mechanism should only be used to restructure debt that is judged unsustainable. Second, it should neither increase the likelihood of restructuring nor encourage defaults. Third, any interference with contractual relations should be limited to measures needed to resolve the most important collective action problems.

The principal feature of the SDRM is that it would allow a sovereign and a qualified majority of creditors to reach an agreement that would then be binding on all creditors subject to the restructuring, paying due regard to seniority among claims and the diversity of creditor interests. Giving creditors the ability to make this decision does not shift the legal leverage from creditors to the debtor; rather it increases the leverage of creditors over potential holdouts and free riders, enabling an agreement to be secured more rapidly.

The proposal does not contemplate an automatic stay on creditor enforcement or a general suspension of contractual provisions. Thus, it would not provide a debtor in default with the same type of legal protection found in corporate insolvencies. In ideal circumstances, a sovereign with unsustainable debt would use the SDRM before default, which is when there is greatest amount of value to be preserved but where collective action problems are most acute.

The proposal envisages that sovereign debt governed by foreign law would be covered by the SDRM; sovereign debt subject to domestic law would not be included. However, since

foreign creditors would be entitled to vote upon proposed debt reductions, they would clearly take into account issues of intercreditor equity between sovereign debt issued under domestic and foreign law.

The proposal is designed to promote greater transparency in the restructuring process. Under the SDRM, procedures would be established to enable creditors to have adequate access to information regarding the debtor's general situation, including its treatment of all creditors, including those not subject to the mechanism. The sovereign would provide the information at the time of activation of the mechanism.

Given the ability to invoke the SDRM on the part of the sovereign (or to convene creditors' groups "in the shadow of the SDRM"), there would be early and active participation of creditors during the restructuring process. The SDRM framework would enable creditors to play an active role at earlier stages than is now possible, including through the formation of creditors' committees. Creditors would have the right to declare that the debtors were not acting in good faith, which would terminate the SDRM. Once that happened, creditors' rights would be just the same as they are under existing practices.

In discussions of the SDRM proposal, some have argued that the existence of such a framework would alter, and presumably weaken, creditor rights. In fact, the design of the proposal has been structured in an effort to increase creditor value for reasons already discussed, by aggregating rights now held by individual creditors. This would, at least to some degree, address the collective action problem. In addition, the possibility, that incentives for delay when restructuring is inevitable would be reduced, should cut the losses that occur in the time prior to the sovereign's decision.

As currently discussed (and it is still a work in progress), creditors could, under the mechanism, declare the sovereign to be failing to negotiate in good faith, and could vote to disband the mechanism. In such an instance, creditors' rights would be just as they are under existing practices.

Creditors and the sovereign would negotiate once the SDRM was invoked and claims registered. When a supermajority reached agreement, it would be binding on all creditors. To be sure, creditors holding sovereign debt under foreign law would want to know the sovereign's treatment of domestic debt, but that would not be subject to the mechanism since it would be handled under domestic law. However, as already noted, to enable creditors to form a judgment as to intercreditor equity, the SDRM procedures would require sovereigns to disclose sufficient information about their outstanding debt, both foreign and domestic. Full disclosure could in itself constitute a significant improvement for creditors as they attempt to evaluate the needed degree of restructuring.

It should be evident that debt restructuring negotiations under the SDRM could begin more rapidly if there were CACs in individual bond contracts, as the problems of identifying creditors could be more rapidly resolved. Thus, proposals for CACs and SDRM are complementary, as is recognized by the international community.

The role of the International Monetary Fund (IMF) in the SDRM as currently proposed is minimal. Amending the Fund's Articles of Agreement appears to be a simple way of binding all IMF member countries to the SDRM framework, and thereby avoid the problems that could arise if the same structure were proposed under a new international treaty. This is because the failure of even a few countries to adopt the new treaty could enable creditors to issue debt outside the jurisdictions in which SDRM could be used, thus giving rise to circumvention. However, the proposed Sovereign Debt Dispute Resolution Forum (SDDRF-a legal body whose functions would be to register claims and resolve disputes) would be independent of the Fund and its Executive Board, in parallel with approaches used in other organizations.

One of the questions that has been raised with regard to the SDRM and CAC proposals is how they would affect the volume of private capital flows to sovereigns in emerging markets. There are two parts to the answer. First, provision of a more predictable framework should provide incentives for lenders to assess credit risks even more closely than is currently the case, thus increasing the spread differential between countries with differing soundness of economic policies and hence prospects. As such, countries confronting the lowest spreads might borrow somewhat more, but countries confronting high spreads would borrow less (and might even avoid debt unsustainability). However, insofar as the framework is more orderly and predictable, and the time period during which sovereigns are delaying the inevitable is reduced, creditors should expect on average to confront smaller losses in net present value than they can expect under current circumstances. To the degree that economic losses (in terms of foregone output in the period prior to the decision to restructure) are smaller, there are potentially higher returns, and total capital flows to emerging markets as a whole should increase. Given the infrequency of need for restructurings, however, it is not evident how quantitatively important this phenomenon would be.

To conclude, brief mention should be made of the current status of the CAC and SDRM proposals. The IMF is encouraging individual countries to put CAC clauses in their new bond issues, and, as already mentioned, in some countries they are now the established practice. For the SDRM, the International Monetary and Finance Committee has asked the IMF to bring a concrete proposal to its spring meetings...At that time, the international community will decide on what steps forward should be taken.[44]

Critics of the IMF proposal argued against an expanded role for the IMF:

Critics came from many quarters--from banks and funds, from economists and legal experts, from emerging nations and finally from the US Treasury. There was one common denominator in the protests: this is an expanded role for the IMF, whether by the institution itself or by the courts and committees it might control behind the scenes. And it is one that will increase--not decrease as claimed--the uncertainty that leads to volatility in markets and will result in less lending at higher costs for emerging economies.

There is fear that the policy objectives of dominant IMF members will influence decisions. There is anticipation of conflict of interest since the IMF and other multilateral agencies are large creditors that may not be forever immune to sharing in losses when debt is restructured. There is hostility to a rigid and static bureaucracy whose decisions are imposed by fiat and are difficult to predict. In sum, we are seeing another episode in the classic confrontation between regulation and free markets.

As the debate continues, the IMF is weakening its rhetoric but not its grip. Much is being made of the free will of debtors and creditors to determine outcomes. Little is being said about the expanded reach that the plan would invest in the IMF or in the allegedly independent courts and committees it would create. The IMF is counting on money, on its ability to grant or withhold massive amounts of desirable subsidized funding, to force debtors and creditors to comply with Fund wishes at every stage of the restructuring process.

Whether directly or indirectly, the IMF would be empowered to:

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[44] Anne Krueger, IMF First Deputy Managing Director, Sovereign Debt Restructuring: Messy or Messier?, Speech to the Annual Meeting of the American Economic Association,January 4, 2003, Washington, D.C., *available at* http://www.imf.org/external/np/speeches/2003/010403.htm

• Decide how long creditors can be prevented from suing a defaulted borrower.
• Rule on whether a nation's economic policies are sound and whether it is negotiating in good faith.
• Control access to interim financing while existing debt payments are suspended.
• Hold a veto over restructuring agreements reached by the debtor and its creditors.[45]

The IMF has subsequently revisited the issues relating to resolution of sovereign debt, most recently in a paper published in October 2020:[46] **The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors**. The Document examines a number of reform options, relating to an enhanced contractual approach, targeted legislative options, policcies of international financial institutions, debt transparency, and capacity development. The conclusions are:

58. On balance, the experience to date, while not extensive, suggests that the contractual framework for sovereign debt resolution with private creditors remains generally appropriate. Compared with previous periods, recent sovereign debt restructurings have generally proceeded smoothly, with shorter average duration and higher average creditor participation, and were largely preemptive, mainly due to the use of CACs. No ex-post litigation with private creditors has arisen when CACs were used. While creditor coordination has raised challenges, experience so far suggests these challenges can be managed, as reflected in the recent Argentina and Ecuador restructurings.
59. Notwithstanding the above, the framework can be further strengthened along a few key lines, with a view to closing key gaps in the system that could pose challenges:
• CACs. The IMF will continue to promote the inclusion of enhanced CACs in international sovereign bonds and periodically update the international community on the inclusion of enhanced CACs in international sovereign bonds. Sub-sovereign entities should also be encouraged to include enhanced CACs in their foreign law-governed bonds.
• Trust Structures. Sovereigns should be encouraged to issues bonds under trust structures.
• Model Majority Restructuring Loan Clauses for Payment Terms. Official and private sectors should cooperate to develop model majority restructuring clauses for payment terms in loans and encourage their widespread adoption.
• Negative Pledge Clauses. Official and private sectors should join forces in promoting greater disclosure about the use of collateral, enhanced authorization process for borrowers, increased awareness among borrowers and lenders alike to respect NPCs (and permitted lien obligations) of other lenders, and more rigorous enforcement of NPCs so as to disincentivize the excessive proliferation of new collateralized debt.
• Transparency. In line with ongoing international initiatives and reviews of IMF policies, debt transparency should be further enhanced and both creditors and the sovereign should be encouraged to clarify the perimeter of claims upfront.

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[45] *See, e.g.*, Adam Lerrick and Allan H. Meltzer, Sovereign Default the Private Sector Can Resolve Bankruptcy Without a Formal Court, Carnegie Mellon Quarterly International Economics Report, April 2002.

[46] IMF, The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors—Recent Developments, Challenges, And Reform Options (Oct. 2020) https://www.imf.org/-/media/Files/Publications/PP/2020/English/PPEA2020043.ashx.

State-Contingent Features. Increased use of state-contingent features, particularly to protect debtors against downside risks, such as natural catastrophes, could be considered.
• Insolvency Regime. SOEs[47] should be subject to a robust general insolvency regime in line with international best practices.
• Targeted Statutory Tools in Limited Circumstances. The desirability of wider application of targeted statutory tools of the kind already in place in a few countries to complement the contractual approach (i.e., "anti-vulture fund" legislation) could be further explored to limit holdout creditor recovery in specified circumstances, though they should be carefully designed to limit the impact on creditors' rights and avoid undermining the secondary market.
• Capacity development. IFIs and relevant public and private sector entities should continue to provide technical assistance and training in debt management and debt data reporting to enhance members' capacity.

60. Should a COVID-related systemic sovereign debt crisis requiring multiple deep restructurings materialize, the current resolution toolkit may not be adequate in addressing the crisis effectively and additional instruments may need to be activated at short notice. Since contractual reforms would require time to become effective, such instruments could only be either of a financial or statutory nature. The former could include IFI financing of cash or credit enhancements that lowers the risk, and hence increases the value, of the assets offered to creditors without reducing debt relief from the perspective of the debtor. However, to avoid undermining the de facto preferred creditor status of IFIs, the scale of such financing must necessarily remain limited. The latter could in principle include both targeted domestic law tools and international law options (such as a U.N. Security Council resolution), which could be used to limit creditor recovery or the timing of suits or to immunize specified assets from attachment by creditors. These instruments raise significant legal and policy issues, however, and would be expected to be used only as a last resort and on a time-bound basis to address the unique challenges posed by the crisis.

61. Going forward, the IMF has a rich work program on sovereign debt in which the IMF will review its relevant policies and collaborate closely with the World Bank, when necessary.
• Explore ways to enhance the market-based approach and the sovereign debt resolution architecture, including through the greater use of state-contingent debt instruments.
• Strengthen ex ante debt management through continued IMF and World Bank technical assistance.
• Review of the debt limits policy.
• Review of debt sustainability analysis for market access countries (MAC DSA).
• Continue with the multi-pronged approach to addressing debt vulnerabilities, jointly with the World Bank.
• Review of the arrears policies.

[47] State Owned Enterprises.

Collective Action Clauses
Report of the G10 Working Group on Contractual Clauses[48]

Model New York Law Collective Action Clauses

The model clauses annexed to this report were prepared at the direction of the Working Group on Contractual Clauses in the autumn of 2002 by a group of lawyers experienced in representing sovereign debtors and their creditors from the key issuing jurisdictions for sovereigns. The clauses, which are being published for illustrative purposes, were drafted for use in sovereign bonds governed by the laws of a U.S. jurisdiction and can be used as the basis for the development of clauses in specific issuances in the U.S. and in other jurisdictions in accordance with the laws of those jurisdictions. The clauses attempt to take into account existing market practice (particularly with respect to sovereign bonds issued under English law) and market acceptability at the time of their drafting. Use of the clauses in any particular jurisdiction will require consideration of the views of sovereign issuers and their creditors as to their acceptability in that jurisdiction, their compatibility with applicable law, and other important matters, such as the characteristics of a sovereign's investor base.

Proposed Insert to Terms and Conditions Governing the Bonds

___. Meetings of Holders; Modifications and Amendments

(a) Modifications and Amendments. Modifications, amendments and supplements to the Trust Indenture or the terms and conditions of the Bonds may be made pursuant to a written action of the Holders without the need for a meeting of Holders, or, in the circumstances described below, by vote of the Holders taken at a meeting of Holders, in each case in accordance with the terms of this Section ___ and the related provisions of the Trust Indenture.

(b) Meetings. The Issuer or the Trustee at any time may, and upon a request in writing made by Holders holding not less than 10% in aggregate principal amount of the Bonds at the time Outstanding the Trustee1 shall, convene a meeting of Holders of the Bonds. Any such request in writing by the Holders shall be delivered to the Trustee. Further provisions concerning meetings of the Holders are set forth in Section ___ of the Trust Indenture.

(c) Non-Reserve Matters. Any modifications, amendment, supplement or waiver of the Trust Indenture or the terms and conditions of the Bonds requiring the consent of Holders, other than a modification or amendment constituting a Reserve Matter (as defined below), may be made, and future compliance therewith may be waived, with the consent of the Issuer and the Holders of more than 66-2/3% in aggregate principal amount of the Bonds at the time Outstanding pursuant to a written action of the Holders[, or with the consent of the Issuer and more than 66-2/3% in aggregate principal amount of the Bonds at the time Outstanding entitled to vote at a meeting of Holders convened and conducted in accordance with this Section ___].

(d) Reserve Matters. Any modification, amendment, supplement or waiver of the Trust Indenture or the terms and conditions of the Bonds that would:

(i) change the date for payment of principal of, or any instalment of interest on, the Bonds;

(ii) reduce the principal amount or redemption price or premium, if any, payable under the Bonds;

(iii) reduce the portion of the principal amount which is payable in the event of an acceleration of the maturity of the Bonds;

(iv) reduce the interest rate on the Bonds;

(v) change the currency or place of payment of any amount payable under the Bonds;

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[48] http://www.bis.org/publ/gten08.pdf

(vi) change the obligation of the Issuer to pay Additional Amounts in accordance with the Trust Indenture,
(vii) change the definition of Outstanding or reduce the quorum requirements or the percentage of votes required for the taking of any action pursuant to this Section ___;
(viii) authorize the Trustee, on behalf of all Holders, to exchange or substitute the Bonds for, or convert the Bonds into, other obligations or securities of the Issuer or any other person;
(ix) instruct the Trustee, on behalf of all Holders, to settle or compromise any proceeding or claim asserted by the Trustee pursuant to Section ___;
(x) give to any person or group of persons, other than the Trustee, the exclusive right to enforce any provision of the Trust Indenture or the Bonds on behalf of all Holders; or
(xi) appoint any person or group of persons to represent the interests of the Holders in any discussions with the Issuer or any other creditors of the Issuer in connection with any proposed restructuring of the Bonds or other indebtedness of the Issuer. may be made with the consent of the Holders of more than 75% (or in the case of paragraph
(x) or (xi), 66-2/3%) in aggregate principal amount of the Bonds at the time Outstanding pursuant to a written action of the Holders; provided that modifications, amendments, supplements or waivers pursuant to paragraph (xi) of this subsection may also be made with the consent of the Holders of more than 66-2/3% in aggregate principal amount of the Bonds at the time Outstanding entitled to vote at a meeting of Holders convened and conducted in accordance with Section ___; provided further that modifications, amendments, supplements or waivers pursuant to paragraphs (i) through (vii) of this subsection also shall require the consent of the Issuer.
(e) Binding Effect. Any modification, amendment, supplement or waiver consented to or approved pursuant to this Section ___ will be conclusive and binding on all Holders of Bonds, whether or not they have given such consent or were present at a meeting of Holders at which such action was taken, and on all future Holders of Bonds whether or not notation of such modification, amendment, supplement or waiver is made upon the Bonds. Any instrument given by or on behalf of any Holder of a Bond in connection with any consent to or approval of any such modification, amendment, supplement or waiver will be irrevocable once given and will be conclusive and binding on all subsequent Holders of such Bond.
(f) Quorum. At a meeting (or at any reconvening of a meeting) of the Holders of the Bonds called for any purpose in accordance with Section ___ of the Trust Indenture, persons entitled to vote a majority in aggregate principal amount of the Bonds at that time Outstanding shall constitute a quorum.
(g) Non-Material Amendments. The Trust Indenture and the terms and conditions of the Bonds may be modified, amended, supplemented or waived by the Issuer and the Trustee, without the consent of the Holder of any Bond, for the purpose of adding to the covenants of the Issuer for the benefit of the Holders, surrendering any right or power conferred upon the Issuer, securing the Bonds, curing any ambiguity, correcting or supplementing any defective provision therein, or in any other manner which the Issuer and the Trustee may mutually deem necessary or desirable and which shall not adversely affect
the interests of the Holders of the Bonds in any material respect, to all of which each Holder of any Bond shall, by acceptance thereof, consent.
(h) Supplemental Indenture. The Trustee, on behalf of the Holders, and the Issuer may execute a Supplemental Indenture to reflect any modification, amendment, supplement or waiver consented to or approved in accordance with this Section ___.

Proposed Insert to the Events of Default Section

___. Acceleration. If an Event of Default occurs and is continuing, then, and in every such case, the Trustee may, or shall upon the instruction of the Holders of not less than 25% in aggregate principal amount of the Bonds Outstanding at that time, declare the principal of, and any interest accrued on, all the Bonds to be due and payable immediately by a notice in writing to the Issuer, and upon any such declaration such principal and interest shall become immediately due and payable.

___. Rescission of Acceleration. If any and all existing Events of Default hereunder, other than the non-payment of the principal of the Bonds which shall have become due solely by acceleration, shall have been cured, waived or otherwise remedied as provided herein, then, and in every such case, the Holders of 66-2/3% in aggregate principal amount of the Bonds Outstanding at that time, by written notice to the Issuer and to the Trustee as set forth in the Trust Indenture, may, on behalf of all the Holders, rescind and annul any prior declaration of the acceleration of the principal of and interest accrued on the Bonds and its consequences, but no such rescission and annulment shall extend to or affect any subsequent default, or shall impair any right consequent thereon. Actions by Holders pursuant to this Section ___ may be taken by written action of the Holders.

Proposed Insert to the Remedies Section

___. Limitations on Suits

(a) Collection of Indebtedness and Suits for Enforcement by Trustee

The Trustee, in its own name and as a trustee of an express trust, may institute a judicial proceeding for the collection of the sums due and unpaid under this Trust Indenture or the Bonds, and may prosecute such proceeding to judgment or final decree, and may enforce the same against the Issuer or any other obligor and collect the moneys adjudged or decreed to be payable in the manner provided by law out of the property of the Issuer or any other obligor upon the Bonds, wherever situated.

If an Event of Default occurs and is continuing, the Trustee may in its discretion proceed to protect and enforce its rights and the rights of the Holders by such appropriate judicial proceedings as the Trustee shall deem most effectual to protect and enforce any such rights, whether for the specific enforcement of any covenant or agreement in this Indenture or in aid of the exercise of any power granted herein, or to enforce any other proper remedy. All rights of action and claims under this Indenture or the Bonds or coupons may be prosecuted and enforced by the Trustee without the possession of any of the Bonds or coupons or the production thereof in any proceeding relating thereto, and any such proceeding instituted by the Trustee shall be brought in its own name as trustee of an express trust, and any recovery of judgment shall, after provision for the payment of the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, be for the rateable benefit of the Holders of the Bonds and coupons in respect of which such judgment has been recovered.

(b) Control by Holders

The Holders of a majority in principal amount of the Outstanding Bonds shall have the right to direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee; provided that

(i) such direction shall not be in conflict with any rule of law or this Indenture;

(ii) the Trustee shall not determine that the action so directed would be unjustly prejudicial to the Holders not taking part in such direction, and

(iii) the Trustee may take any other action deemed proper by the Trustee that is not inconsistent with such direction.

(c) Limitation on Suits
No Holder of any Bond or coupon shall have any right to institute any proceeding, judicial or otherwise, with respect to the Bonds or this Indenture, or for the appointment of a receiver or trustee, or for any other remedy hereunder, unless
(i) such Holder has previously given written notice to the Trustee of a continuing Event of Default;
(ii) the Holders of not less than 25% in aggregate principal amount of the Bonds Outstanding at that time shall have made written request to the Trustee to institute proceedings in respect of such Event of Default in its own name as Trustee hereunder;
(iii) such Holder or Holders shall have offered to the Trustee reasonable indemnity against the costs, expenses and liabilities to be incurred in compliance with such request;
(iv) the Trustee for 90 days after its receipt of such notice, request and offer of indemnity shall have failed to institute such a proceeding; and
(v) no direction inconsistent with such written request has been given to the Trustee during such 90 day period by the Holders of a majority in principal amount of the Bonds Outstanding at that time;
it being understood and intended that no one or more Holders of Bonds or coupons shall have any right in any manner whatever by virtue of, or by availing of, any provisions of this Indenture to affect, disturb or prejudice the rights of any other Holders of Bonds or coupons, or to obtain or seek to obtain priority or preference over any other Holders or to enforce any right under this Indenture, except in the manner herein provided and for the equal and rateable benefit of all the Holders of Bonds and coupons.

Proposed Insert to Covenants of the Issuer
___. Provision of Information. Following occurrence of any Event of Default of the kind referred to in subsection [payment default] or [declaration of moratorium], the Issuer shall provide to the Trustee (for onward dissemination to each Holder) on a regular basis information in reasonable detail concerning the Issuer's economic and financial position.
Under these circumstances, the Issuer shall also in a similar manner provide information concerning (i) the Issuer's proposed treatment of its other material creditor groups, including, where appropriate, bilateral (Paris Club) creditors, (ii) information concerning any standby or similar program negotiated with the International Monetary Fund (including a copy of the related Technical Memorandum) and (iii) such other information as the Trustee (on its own or at the instruction of the Holders of not less than 10% in aggregate principal amount of the Bonds Outstanding at that time) may from time to time reasonably request. [Issuers and underwriters to discuss in the context of particular transactions whether additional periodic information should be provided prior to default, and if so, what the scope and frequency of such reporting should be.]

Proposed Insert to the Modifications and Amendments Section
___. "Outstanding" Defined. For purposes of the provisions of this Trust Indenture and the Bonds, any Bond authenticated and delivered pursuant to this Trust Indenture shall, as of any date of determination, be deemed to be "Outstanding", except:
(i) Bonds theretofore cancelled by the Trustee or delivered to the Trustee for cancellation or held by the Trustee for reissuance but not reissued by the Trustee;
(ii) Bonds that have been called for redemption in accordance with their terms or which have become due and payable at maturity or otherwise and with respect to which monies sufficient to pay the principal thereof (and premium, if any) and any interest thereon shall have been made available to the Trustee; or

(iii) Bonds in lieu of or in substitution for which other Bonds shall have been authenticated and delivered pursuant to this Trust Indenture; provided, however, that in determining whether the Holders of the requisite principal amount of Outstanding Bonds are present at a meeting of Holders of Bonds for quorum purposes or have consented to or voted in favour of any request, demand, authorisation, direction, notice, consent, waiver, amendment, modification or supplement hereunder, Bonds owned or controlled, directly or indirectly, by the Issuer or by any public sector instrumentality of the Issuer shall be disregarded and deemed not to be Outstanding, except that in determining whether the Trustee shall be protected in relying upon any such request, demand, authorization, direction, notice, consent, waiver, amendment, modification or supplement, only Bonds which the Trustee knows to be so owned or controlled shall be so disregarded

EMCA Model Covenants for New Sovereign Debt Issues [49]

Amendments
"Amendments." No amendment or waiver of any provision of the Bonds or the Fiscal Agency Agreement, nor consent to any departure by the Issuer therefrom, shall in any event be effective unless in writing and consented to (including by electronic mail) by Bondholders holding at least 75% in principal amount of the Bonds then outstanding, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given; provided that no amendment, waiver or consent shall, unless in writing and consented to by Bondholders holding at least 95% in principal amount of the Bonds then outstanding, do any of the following: (a) subject the Bondholders to any additional obligations, (b) reduce the principal of, or interest on any of the Bonds, (c) change the currency of payment of the principal or interest on any Bond; (d) change any date fixed for any payment in respect of principal of, or interest on, any of the Bonds, or (e) waive, modify or otherwise affect [insert cross-references to any Sections containing provisions relating to: pari passu protection, negative pledge covenant, cross-default and cross-acceleration, requirement that Issuer cancel any exchanged indebtedness, eligibility for debt conversion programs, restrictions on incurrence of additional indebtedness, requirement of listing on stock exchange, waiver of immunities, choice of law, consent to jurisdiction and service of process],; provided further that no amendment, waiver or consent shall, unless in writing and consented to by all of the Bondholders, change this Section; provided further that no amendment, waiver or consent shall, unless in writing and consented to by the Fiscal Agent in addition to the Bondholders required hereinabove to take such action, affect the rights or duties of the Fiscal Agent under the Fiscal Agency Agreement.
For purposes of calculating the percentage of principal amount of Bonds outstanding under this Section, there shall be excluded any Bonds held by the Issuer or any governmental or

[49] *See, e.g.*, Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 WASH. U. L. REV. 1627, 1686 (2006)("Publicly, EMCA styled itself as the voice of the bondholder grassroots, and had initially distanced itself from the older, more professionalized trade groups with significant sell-side membership and roots in the 1980s debt crisis. EMCA's penchant for public purity positioned it as the enemy of both SDRM and CACs. Yet the group was the first on the investor side to propose a package of clauses that included majority amendment. EMCA's "Model Covenants for New Sovereign Debt Issues" circulated informally as early as May 2002, four months before the G-10 clauses and eight months before the consensus clauses later endorsed by seven market associations, including EMCA itself.")

quasigovernmental agency, instrumentality or entity under the jurisdiction of or formally affiliated with, or under the control of, the Issuer or the Central Bank of the Issuer.

Assets
“Assets” means assets, property and rights in property of any kind whatsoever. For the avoidance of doubt, the term “Assets” as used in this Agreement means property and property rights in their broadest senses, including all forms of tangible property (including without limitation both personal and real property, regardless of its use or intended use) and all forms of intangible property (including without limitation claims, causes of action and rights to receive any form of payments, whether described as revenues, cash or in-kind royalties, concession fees, taxes, income, or the proceeds of sales of natural resources). Further, the term “Assets” as used in this Agreement includes any International Monetary Assets as defined herein; and further includes any assets, property and rights in property of any kind whatsoever held in the name of or otherwise under the control of any agency or instrumentality of the Issuer, including without limitation any such assets, property or rights in property held in the name, or on behalf, of the Issuer or the Central Bank of Issuer.

Event of Default; Acceleration
Each of the following constitutes an event of default:
1. Non-Payment: the Issuer does not pay principal or interest in respect of the Bonds when due and such failure continues for 30 calendar days.
2. Breach of Other Obligations : the Issuer fails to perform any other material obligation contained in the Bonds or Fiscal Agency Agreement (including but not limited to [crossreference section of Fiscal Agency Agreement regarding Bondholder representatives’ fees and expenses]) and that failure continues for 30 calendar days after any holder gives written notice to the Issuer to remedy the failure and gives a copy of that notice to the Fiscal Agent.
3. Cross Acceleration: any External Public Indebtedness of the Issuer in principal amount equal to or greater than $25,000,000 or its equivalent in other currencies is accelerated, other than by optional or mandatory prepayment or redemption.
4. Moratorium: the Issuer declares a general moratorium on the payment of its External Public Indebtedness.
5. Validity: the Issuer contests the validity of any Bonds in a formal administrative, legislative or judicial proceeding.
6. Failure of Authorization: any legislative, executive or constitutional authorization necessary for the Issuer to perform its material obligations under any Bond ceases to be in full force and effect or is modified in a manner which adversely affects the rights and claims of any of the holders.
7. Material Adverse Change : any event or condition (including, but not limited to, any material adverse change in the economic or financial condition of the Issuer or its Central Bank) that gives reasonable grounds to apprehend, in the reasonable judgment of the holders of at least [25%] of the principal amount of Bonds then outstanding, that the Issuer will not, or will be unable to, perform or observe in the normal course its obligations under the Bonds and the Fiscal Agency Agreement.
If any of the above events of default occurs and is continuing, holders of Bonds representing at least 25 % in principal amount of the Bonds then outstanding may declare the principal amount of the Bond to be due and payable immediately by giving written notice to the Issuer and to the Fiscal Agent. Upon such declaration, the Fiscal Agent shall promptly give notice thereof to the holders of Bonds. Such an acceleration may only be rescinded with the consent of holders of Bonds representing at least 75 % in principal amount of the Bonds then outstanding.

External Indebtedness
“External Indebtedness” means (i) each obligation to repay a loan, deposit, advance or similar extension of credit (including without limitation any extension of credit under a refinancing or rescheduling agreement), (ii) each obligation evidenced by a Bond, bond, debenture or similar written evidence of indebtedness and (iii) each guarantee of an obligation constituting External Indebtedness of another; provided in each case that such obligation is governed by the law of a country other than that of the Issuer.

Governing Law
“Governing Law.” The Bonds and the Fiscal Agency Agreement are governed by, and shall be construed in accordance with, the laws of the State of New York. In the event of any doubt or uncertainty as to the state of the applicable law, all such doubts and uncertainties shall be resolved so as to give effect to the plain language of this Agreement.

Internal Indebtedness
“Internal Indebtedness” means (i) each obligation to repay a loan, deposit, advance or similar extension of credit (including without limitation any extension of credit under a refinancing or rescheduling agreement), (ii) each obligation evidenced by a Bond, bond, debenture or similar written evidence of indebtedness and (iii) each guarantee of an obligation constituting Internal Indebtedness of another; provided in each case that such obligation is governed by the domestic law of the Issuer.

International Monetary Assets
“International Monetary Assets” means all (i) gold, (ii) Special Drawing Rights, (iii) Reserve Positions in the Fund, and (iv) Foreign Exchange, which is owned or held by the Issuer or the Central Bank of Issuer in their own names or for their benefit. For purposes of this definition, the terms “Special Drawing Rights,” “Reserve Positions in the Fund” and “Foreign Exchange” have, as to the types of assets included, the meanings given to them in the IMF’s publication entitled “International Financial Statistics,” or such other meanings as shall be formally adopted by the IMF from time to time.

Jurisdiction, Waiver, etc.
“Consent to Jurisdiction; Service of Process; Waiver of Immunities.”
(a) The Issuer hereby irrevocably submits itself and its Assets to the non-exclusive jurisdiction of the High Court of Justice in London and any New York State or United States Federal court sitting in New York State and any appellate court in any action or other proceeding arising out of or relating to the Bonds or the Fiscal Agency Agreement. The Issuer hereby irrevocably agrees that all claims in respect of any such action or proceeding may be heard and determined in the High Court of Justice in London or such New York State or United States Federal court or any such appellate court. The Issuer hereby irrevocably appoints (i) The Law Debenture Corporation, Limited (the “London Process Agent”), at its offices in London, England, as its agent to receive on behalf of itself and its Assets service of copies of the summons and complaint and any other process which may be served in any such action or proceeding before the High Court of Justice in London and (ii) CT Corporation System (the “New York Process Agent”, and together with the London Process Agent being collectively the “Process Agents” and each a “Process Agent”), at its offices in New York, New York, United States, as its agent to receive on behalf of itself and its Assets service of copies of the summons and complaint and any other process which may be served in any such action or proceeding before any such New York State or United States

Federal Court. Further, in the event of any proceeding brought in any court in the United Kingdom or in any State or Federal Court in the United States to enforce any judgment rendered in any such action, service of any process, pleadings, discovery requests or any other materials shall be validly made by delivery to the London or New York Process Agents respectively, regardless whether the proceeding is lodged in London or New York. Service of process in accordance with this Section may be made by delivering a copy of such process to the Issuer in care of the appropriate Process Agent at such Process Agent's then-current address, and the Issuer expressly and irrevocably authorizes and directs each Process Agent to accept such service on its behalf. Service upon such Process Agents shall be valid service on the Issuer or with respect to its Assets regardless whether the Issuer shall have ceased to pay any fees of such Process Agent and regardless whether the Issuer shall have purported unilaterally to withdraw its consent to such service.

(b) The Issuer agrees that a final judgment in any action or proceeding to determine any of the rights of the parties to this Agreement shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

(c) Nothing in this Section shall be deemed to limit or otherwise affect the right of any Bondholder or the Fiscal Agent to serve legal process in any other manner permitted by law or affect the right of any Bondholder or the Fiscal Agent to bring any action or proceeding against the Issuer or any of its Assets in the courts of any jurisdictions.

(d) The Issuer irrevocably agrees with respect to itself and its Assets not to claim or assert in any pleading, and irrevocably waives, any and all immunity from suit, from the personal or subject matter jurisdiction of any court (including without limitation any court of the United States of America, the State of New York or the United Kingdom), from attachment prior to judgment, from attachment in aid of execution on a judgment, from execution on a judgment, from discovery proceedings, from injunctive proceedings (including without limitation proceedings for the specific enforcement of any covenants of the Issuer), or from the giving of any other relief or issue of any process. To the extent that in any jurisdiction there may be attributed such an immunity (whether or not claimed) with respect to the Bonds or the Fiscal Agency Agreement or any judgment based on its obligations hereunder, the Issuer irrevocably agrees not to assert or claim any such immunity for itself or its Assets. The Issuer expressly and irrevocably consents to discovery of any documents and to the giving of testimonial evidence in any prejudgment or post-judgment proceeding with respect to the nature and location of its Assets worldwide. Without limitation of the foregoing, the Issuer's waiver of immunity from execution with respect to itself and its Assets is, and shall be construed as, a knowing, voluntary and intentional waiver and relinquishment of any form of immunity purportedly recognized or conferred by the laws of any country, including without limitation by Section 1609 of the Foreign Sovereign Immunities Act of 1976, and shall further be construed to subject any of the Issuer's Assets to seizure and execution in aid of any judgment entered under the Bonds or the Fiscal Agency Agreement against the Issuer, regardless whether such property is deemed or characterized by any person as "commercial" or not, regardless whether such property is held in the name of the Central Bank of Issuer or of any other agency or instrumentality of the Issuer, regardless of the purportedly separate juridical status of the Central Bank of Issuer or any other agency or instrumentality of the Issuer, and notwithstanding any immunities from execution purportedly recognized or conferred by the laws of any country, including without limitation Sections 1610-11 of the Foreign Sovereign Immunities Act of 1976.

(e) Without limitation of any of the foregoing, the Issuer expressly and irrevocably agrees that performance of its covenants and obligations under the Bonds or the Fiscal Agency Agreement (including without limitation its obligations under [insert cross-references to Sections concerning

pari passu and negative pledge covenants]) may be enforced by injunction. The Issuer hereby consents with respect to itself and its Assets to the jurisdiction of any court where any proceeding to obtain such injunctive or other relief may be brought. The Issuer further agrees that its covenant herein not to plead or otherwise assert any such immunity may be specifically enforced against it by injunction and that no third party, including without limitation any garnishees, any government entities or officials of any country, or any entities or officials of any inter-governmental or supra-national agency, shall be entitled to assert such immunity on behalf of the Issuer or its Assets.
(f) In the event that notwithstanding the waivers of immunity set forth herein (and thus contrary to the parties' intent that such waivers be enforced as written), any court in any jurisdiction denies an attachment, execution, injunction or other relief on grounds of any alleged or imputed immunity of the Issuer or its Assets from such proceedings, such denial shall not have and shall not be given effect in any other enforcement proceedings in any other jurisdiction, whether by collateral estoppel, res judicata, as a matter of comity, or otherwise.
Lien
"Lien" means any lien, mortgage, deed of trust, charge, pledge, security interest or other encumbrance on or with respect to any Asset, or any preferential arrangement which has the practical effect of constituting a security interest, including without limitation rights of set off, with respect to the payment of any obligation with or from the proceeds of any Asset.

Negative Pledge
"Negative Pledge." So long as any Bond shall remain outstanding, the Issuer will not create or permit to be created and continue, nor permit the Central Bank of Issuer, or any other agency or instrumentality of the Issuer, to create or permit to be created and continue, (a) any Lien for any purpose upon or with respect to any International Monetary Assets;
(b) any Lien upon or with respect to any Asset of the Issuer, the Central Bank of Issuer, or any agency or instrumentality of the Issuer, to secure or provide for the payment of External Indebtedness of any person; or
(c) any Lien upon or with respect to any Assets of any person to secure or provide for the payment of External Indebtedness incurred or guaranteed by the Issuer, the Central Bank of Issuer, or any agency or instrumentality of the Issuer, other than Permitted Liens [to be separately defined and itemized on a Schedule].
(i) Enter into any credit agreement or other contract for External Indebtedness, nor permit the Central Bank of Issuer or any agency or instrumentality of Issuer, to enter into any credit agreement or other
contract for External Indebtedness, which grants by contract to any other person any right of set off, banker's lien, counter-claim or similar contractual right, or otherwise has the practical effect of granting such person preferential access over the creditors hereunder to the Assets of Issuer, the Central Bank of Issuer, or any agency or instrumentality of Issuer, or granting such person payment rights in derogation of the pari passu treatment set forth in Section ___ of the Bonds or the Fiscal Agency Agreement.
(ii) Restructure, redenominate or recharacterize any existing credit agreement or other contract for External Indebtedness as a loan or other contract for Local Indebtedness, with the legal or practical effect of granting local creditors preferential or other payment rights senior to the creditors hereunder or in derogation of the pari passu treatment set forth in Section ___ of the Bonds or the Fiscal Agency Agreement.

Pari Passu and other Affirmative Covenants

“Affirmative Covenants.” So long as any Bond shall remain outstanding, the Issuer will: (a) Undertake to include in its budget for each of its fiscal years amounts sufficient to repay principal of and interest on the Bonds and all other amounts payable by the Issuer hereunder in accordance with the terms hereof.
(b) Duly obtain and maintain in full force and effect all governmental approvals (including any exchange control approvals) which may be necessary under the laws of Issuer for the execution, delivery and performance of the Bonds and the Fiscal Agency Agreement by the Issuer or for the validity or enforceability hereof and duly take all necessary and appropriate governmental and administrative action in Issuer in order to make all payments to be made hereunder as required by the Bonds and the Fiscal Agency Agreement.
(c) Ensure that at all times its payment obligations hereunder constitute unconditional general obligations of the Issuer ranking at least pari passu in priority of payment with all other External Indebtedness of the Issuer or any of its agencies or instrumentalities now or hereafter outstanding, and will be paid as such. For the avoidance of doubt, the Issuer’s covenant to maintain the pari passu status of the Bonds and its payment obligations hereunder means that the Issuer will service the Bonds on a pari passu basis. Accordingly, if an event of default under the Bonds or any other External Indebtedness of the Issuer or of any of its agencies or instrumentalities has occurred and is continuing, the Issuer shall not make (or authorize) any payment of principal or interest in respect of any other such External Indebtedness (whether regularly scheduled or otherwise) without simultaneously making a proportionate payment of principal and/or interest in respect of the Bonds.
(d) Furnish to the Fiscal Agent in sufficient copies for distribution to each Bondholder:
i. Semiannually, a reasonably detailed report and analysis of the financial condition of the Issuer as of the end of each prior calendar year or halfyear, as the case may be;
ii. Within 30 days after delivery to the Issuer, each annual report prepared by the IMF staff after the date hereof on the economy and international balance of payments of the Issuer or any report prepared by the IMF staff in lieu of such an annual report;
iii. Promptly after it is entered into, each agreement, undertaking and understanding reached by the Issuer, the Central Bank of Issuer, or any agency or instrumentality of Issuer after the date hereof with the IMF or any international development banks;
iv. Within 30 days after the transmittal to the IMF or any international development banks, copies of all economic or financial reports on the performance of the economy or financial condition of the Issuer;
v. Such other financial, statistical and general information as may be requested by the Fiscal Agent on behalf of the Bondholders or by Bondholders holding at least 5% in principal amount of the Bonds then
outstanding.
(e) To assure performance of the foregoing subparagraphs, Issuer shall at the closing execute (and whether or not so executed this Agreement shall constitute) an irrevocable instruction to the IMF and any multinational development banks directing them to provide to the Fiscal Agent and the Bondholders any information required hereunder to the extent not provided by Issuer.

Purchase and Cancellation
The Issuer, the Central Bank of Issuer, and any agencies or instrumentalities of Issuer may, if an event of default has not occurred, purchase any Bonds in the open market or otherwise and at any price. Any Bonds so purchased may be cancelled or held and resold. Any Bond so purchased, while held by or on behalf of the Issuer, Central Bank of Issuer, and any agencies or instrumentalities of Issuer, shall be deemed not to be outstanding. The Issuer must inform the

Fiscal Agent of any Bond that is held by itself, Central Bank of Issuer, and any agencies or instrumentalities of Issuer. Any Bonds so cancelled will not be reissued.

[In the Form of Bond]
Meetings of Bondholders.
(a) The Issuer at any time may, and (i) upon a request in writing to the Fiscal Agent made at any time by Bondholders holding not less than 10% of the aggregate outstanding principal amount of the Bonds or (ii) following receipt of notice from Bondholders holding not less than [5%] of the aggregate outstanding principal amount of the Bonds that an even of default has occurred and is continuing, the Fiscal Agent shall promptly, convene a meeting of Bondholders.
(b) At a meeting of the holders of the Bonds called for any of the above purposes, persons entitled to vote 75% in aggregate principal amount of the Bonds at the time outstanding shall constitute a quorum.
(c) Further provisions concerning meetings of Bondholders are set forth in the Fiscal Agency Agreement.

Notices.
(a) All notices to Bondholders will be given by publication in The Wall Street Journal, The Financial Times and, so long as the Bonds are listed on the Luxembourg Stock Exchange and it is so required for continued listing thereon, in the Luxemburger Wort.
(b) In addition, all notices to Bondholders will be given to EMTA for publication on its website (www.emta.org) and to EMCA for publication on its website (www.emcreditors.com) and for other distribution to their members.

[In the Fiscal Agency Agreement]
Meetings of Bondholders.
(a) The Issuer may at any time call a meeting of the Bondholders, such meeting to be held at such time and at such place in [New York City] as the Issuer shall determine, for any purpose referred to in the Bonds. (i) Upon a request in writing to the Fiscal Agent made at any time by holders of not less than 10% of the aggregate outstanding principal amount of the Bonds, or (ii) following receipt of notice from Bondholders holding not less than [5%] of the aggregate outstanding principal amount of the Bonds that an event of default under the Bonds has occurred and is continuing, the Fiscal Agent shall convene a meeting of Bondholders and such meeting shall be held at such time and at such place in [New York City] as the Fiscal Agent shall determine. Prior to any such meeting, the Fiscal Agent shall distribute to the Bondholders such written materials or proposals as may be delivered to it by holders of not less than 10% of the aggregate outstanding principal amount of the Bonds. Notice of any meeting of Bondholders, setting forth the time and place of such meeting and in general terms the action proposed to be taken at such meeting, shall be given by the Fiscal Agent to the Bondholders at least twice by publication in accordance with the notice provisions contained in the Bonds, the first notice to be given not less than 15 nor more than 45 days before the date fixed for the meeting. [To be entitled to vote at any meeting of Bondholders, a person must be (x) a holder of one or more Bonds or (y) a person appointed by an instrument in writing as proxy by the holder of one or more Bonds. The only persons who shall be entitled to be present or to speak at any meeting of Bondholders shall be the persons entitled to vote at such meeting and their counsel and any representatives of the Fiscal Agent and their counsel and, in the case of any such meeting called by (or to which the Issuer is otherwise invited), representatives of the Issuer and its counsel.]
(b) The quorum requirements at any meeting of Bondholders are set forth in the Bonds.

No business shall be transacted in the absence of a quorum, unless a quorum is present when the meeting is called to order. In the absence of a quorum within 30 minutes of the time appointed for any such meeting, the meeting may be adjourned for a period of not less than ten days as determined by the temporary chairman of the meeting appointed pursuant to paragraph (d) below. Notice of the reconvening of any adjourned meeting shall be given as provided above except that such notice need be given only once but must be given not less than five days before the date on which the meeting is scheduled to be reconvened.
(c) Any Bondholder who has executed an instrument in writing appointing a person as proxy shall be deemed to be present for the purposes of determining a quorum and be deemed to have voted in accordance with the vote of the person appointed as such proxy; provided that such Bondholder shall be considered as present or voting only with respect to the matters voted on by such person in accordance with such instrument in writing. Any resolution passed or decision taken at any meeting of Bondholders duly held in accordance with this Section shall be binding on all the Bondholders whether or not present or represented at the meeting.
(d) The Fiscal Agent shall appoint a temporary chairman of the meeting. A permanent chairman and a permanent secretary of the meeting shall be elected by vote of the holders of a majority in principal amount of the Bonds represented at the meeting. At any meeting of Bondholders, each Bondholder or proxy shall be entitled to one vote for each U.S. $1,000 in principal amount of Bonds held or represented by him; provided that no vote shall be cast or counted at any meeting in respect of any Bond challenged as not outstanding and ruled by the chairman of the meeting to be not outstanding. The chairman of the meeting shall have no right to vote except as a Bondholder or proxy. Any meeting of Bondholders duly called at which a quorum is present may be adjourned from time to time, and the meeting may be held as so adjourned without further notice.
(e) At any Bondholder meeting after an event of default held pursuant to paragraph (a) (ii) above, the Bondholders may appoint a representative and/or Bondholder committee, which in turn may engage independent legal counsel and/or financial advisors to represent the collective interests of the Bondholders. Any such Bondholder committee shall meet at such times and places, adopt such internal rules to govern its meetings, engage in such discussions with the Issuer, and coordinate with such other creditor groups, as it deems appropriate. The Issuer shall pay the fees of any such representative and the expenses of any such representative and/or Bondholder committee (including the fees and expenses of any such legal counsel or financial advisors within 30 calendar days after delivery to the Issuer of an invoice (with appropriate supporting documentation) itemizing such fees and expenses).
(f) The holding of Bonds shall be proved by the registry books maintained in accordance with [Section hereof] or by a certificate or certificates of the Registrar. The Issuer may, at its option, fix a record date (not less than 15 nor more than 45 days before the date fixed for such meeting) for the determination of holders entitled to vote at any meeting, but shall have no obligation to do so.

[Incurrence of Indebtedness Covenants]
Without proposing specific language at this time, it is EMCA’s position that Issuers should agree to so-called “incurrence” covenants modeled on those common in high yield debt instruments, whereby the Issuer is permitted to engage in future borrowings and privatizations or other sales of assets, but only when it is in compliance with certain financial ratios, or the action is otherwise permitted by certain well-defined criteria to be negotiated on a country-by-country basis.

Here is one argument from Federico Weinschelbaum and Jose Wynne that a SDRM-type procedure might be preferable to CACs:

CACs introduce flexibility in situations of financial distress by facilitating renegotiation. In their absence, bondholders have no incentives to enter into the renegotiation process since, individually, they are unable to affect the probability of repayment (as long as the debt is not held by a large lender). CACs solve the problem of free riding among creditors within a legal jurisdiction because a supermajority of bondholders can make the outcome of the renegotiation mandatory for all. But the existence of CACs does not always imply a friendly restructuring process. Sovereigns tend to issue debt in different jurisdictions, and while CACs coordinate creditors within each one, the free riding problem between jurisdictions remains. This is a feature of the 1990s not present in the 1980s, when few banks concentrated most of the sovereign bonds. To attend to this problem, the idea of an international bankruptcy procedure (or an SDRM), to coordinate creditors in different jurisdictions, has been put forward.
It has been argued that facilitating renegotiation can have both positive and negative consequences. Because renegotiation relieves countries from debt overhang, governments might run reckless fiscal policies that increase the likelihood of financial crisis. Since lenders anticipate this behavior, the cost of the lack of commitment to run responsible fiscal policies is borne by the country itself. In the end, the severity of the moral hazard problem determines whether facilitating renegotiation, by creating an SDRM, make countries worse or better off. The debate about the value of an SDRM lies precisely on this trade off.[50]

In 2013 the IMF began to review its sovereign debt restructuring policies and practices, after experience with recent cases including Greece and Argentina:

In this paper, we look at the nine new restructuring cases that have taken place since the last comprehensive review in 2005. There are two main findings that come out of that review. First, it appears that debt restructurings often come too late and are too limited to really restore debt sustainability. This can be very costly. When a country is laboring under an excessive debt burden, this debt overhang hinders market access and growth. It damages confidence and deters investment. So the economic recovery that the country needs may not materialize.
Also, if it's apparent to us that the debt is unsustainable before it's restructured, it's likely to be apparent to the markets, too. So investors will be in the process of exiting. What happens then is that while the official sector—including the IMF—is trying to support the country, our money is going in while the private creditors' money is going out. This is inconsistent with the IMF's lending principles—we're putting money into a situation where we're not actually solving the problem, and the country is just exchanging one type of debt for another. That is the first main finding that we need to think about and consider whether it warrants a change in our policies.
The second finding is that the current contractual, market-based approach to debt restructuring may be becoming less potent in overcoming collective action problems. In recent years, debt restructurings have been done through a market-based approach that is increasingly based on collective action clauses built into debt contracts. The purpose of these clauses is to reduce the incentive for individual creditors to hold out and not to participate in a restructuring in the hope that they can get paid in full. Obviously, if you have too many people doing that, it undermines

[50] Federico Weinschelbaum & Jose Wynne, *Renegotiation, Collective Action Clauses and Sovereign Debt Markets,* 67 J. OF INT'L ECON. 47-72 (2005).

the whole restructuring operation. This market-based approach has been working reasonably well, but there are signs in some recent cases that it may be becoming less effective in overcoming collective action problems...
As regards the collective action problem, one way to solve it would be through a statutory approach like the sovereign debt restructuring mechanism we discussed in 2003. But there is not sufficient support in the international community for this type of approach. Our work in the coming months will therefore focus mainly on strengthening the contractual approach.[51]

As you can see, by October 2020, the IMF is suggesting a more comprehensive appoach to sovereign debt restructuring issues.

[51] IMF, IMF Launches Discussion of Sovereign Debt Restructuring (May 23, 2013) at http://www.imf.org/external/pubs/ft/survey/so/2013/pol052313a.htm.