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Displaced Sovereignty:
U.S. Law and the Transformation of International Financial Space

By

Shaina S. Potts

A dissertation submitted in partial satisfaction of the
requirements for the degree of

Doctor of Philosophy

in

Geography

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Richard Walker
Professor Michael Watts
Professor Gillian Hart
Professor Jonathan Simon

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Abstract

Displaced Sovereignty: U.S. Law and the Transformation of International Financial Space

By

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Doctor of Philosophy in Geography

University of California, Berkeley

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A century ago, foreign governments and their actions were essentially beyond U.S. judicial reach. In the 1950s, however, U.S. courts began to govern more and more activities of foreign governments leading to a transformation in the *modality* of U.S. power directed abroad. Legal historians describe this as a transition from an “absolute” to a “restrictive” practice of sovereign immunity, and one dominant narrative explains the transition as a pragmatic move away from an obsolete model of “territorial sovereignty” to a more flexible, “de-territorialized” or even “de-spatialized” sovereignty better suited for a globalized economy. Through tracing key U.S. legal changes involving foreign sovereign governments from 1898 to 2014, with a focus on sovereign debt law, I argue that transnational sovereign economic activity in fact remains dependent as ever on national borders — albeit borders that are continually reconfigured through minute changes in U.S. common law.

Far from representing a homogeneous de-territorialization of the contemporary international legal order, I show that there has been an uneven re-territorialization that reduces the authority of most countries over their own economic decisions while expanding the *judicial* reach of a few — primarily the United States — and that New York state law has been especially important in this process. This has resulted not in a general restriction of state sovereignty in the face of “globalization,” but in a differential *displacement* of economic sovereignty from post-colonial, poor and indebted states to rich, industrialized ones. The legal structures developed since the 1960s have aimed at entrenching and extending U.S. dominance over the global capitalist order and presently function to perpetuate exploitative relations between sovereign debtors and private creditors.

U.S. judicial power has been a crucial and largely overlooked pillar of post-war U.S. hegemony. I show how judicial transformations of the past half-century have occurred in relation to changing economic conditions, including threats to U.S. property posed by Third World nationalizations in the 1950s to the 1970s, rising indebtedness since the 1970s, and an ongoing overaccumulation crisis. The expansion of U.S. judicial power has simultaneously been driven at every step by U.S. geopolitical interests, including, importantly, the desire to contain Communism and maintain the colonial *status quo* in the

context of the Cold War, widespread de-colonization and Third Worldist movements, and the reconstruction of U.S. dollar hegemony in the 1980s.

I argue that the expansion of U.S. judicial power in the past half-century should be understood as *territorial* insofar as it has defined the space over which the state (in the form of courts) may exercise authority. Through a critical analysis of this legal history I show how the reconceptualization of key legal dichotomies — most importantly, foreign/domestic, public/private, and political/legal — has been a fundamental *spatial* mechanism through which these legal territories are produced and contested. Since the 1960s, U.S. — especially New York — courts have increasingly reclassified foreign sovereign transnational activities as “private” (rather than “public” or “sovereign”) and *therefore* as properly within the scope of U.S. judicial (“legal”) rather than executive (“political”) authority. Foreign sovereign activities have also increasingly been reclassified from “foreign” (meaning outside the United States) to “domestic” (meaning inside the United States). Together, these interlinked changes have been used to bring activity that would previously have been considered beyond the authority of U.S. courts within U.S. judicial reach. This has expanded U.S. authority as a whole through the modality of judicial power, while simultaneously de-politicizing important social questions and removing them from even the possibility of democratic debate.

Until recently, this process has unfolded with explicit support from the U.S. executive branch, but tensions between the interests of the U.S. executive and those of the U.S. judiciary have grown. In *NML Capital v. Argentina*, despite strenuous objections from the executive branch, the New York and U.S. Supreme Courts inverted the reigning spatial logic of U.S. law in order to extend U.S. judicial authority over most of the world *outside* Argentina – with important ramifications for U.S. economic and geopolitical interests, for sovereign debt crises and restructurings, and for the global financial order. The critical genealogy of the expansion of U.S. juridico-economic territory since WWII that I present in this dissertation is crucial for understanding the transnational operation of U.S. judicial power today and how it might most effectively be contested.

Table of Contents

Acknowledgments.....	ii
Table of Cases.....	iv
Table of Auxiliary Case Documents: <i>NML Capital, Ltd. v. Republic of Argentina</i>	vii
Introduction.....	1
Chapter 1 – Situating U.S. Law: Form, Finance, Geography.....	9
Chapter 2 – Sovereign Disobedience.....	38
Chapter 3 – Domesticating the Foreign.....	65
Chapter 4 – Deep Finance.....	112
Chapter 5 – Rise of the Vultures.....	132
Chapter 6 – Sovereign Debt, Default, and Discipline Conclusion.....	159
Conclusion.....	189
References.....	194

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Introduction

In 1961, shortly after the Cuban Revolution, Cuba nationalized all majority-American owned sugar companies in its territory. Some former owners refused to accept the nationalization, claiming rights to proceeds from the sugar due to be paid in New York after the nationalization. Cuba sued for recovery of the proceeds in federal New York courts. In 1964, the Supreme Court of the United States ruled in Cuba's favor, directing that the proceeds be paid to Cuba. The decision rested largely on the fact that the sugar was in Cuba, and hence outside the United States, at the time of the nationalization. Questioning the validity of the nationalization was, therefore, beyond the proper scope of U.S. judicial authority. Congress objected to this ruling and, in an unprecedented move, legislatively overturned it. Over the next decade, the U.S. executive branch successfully urged the Court to rule against Cuba in other, similar nationalization cases.

Fifty years later, the U.S. Supreme Court made a very different decision. In 2001, Argentina had defaulted on nearly \$100 billion in sovereign debt. In 2005 and 2010, 93% of Argentina's creditors agreed to exchange that debt for new, restructured bonds at a reduced value. A minority of creditors, known as "vulture funds," refused. Instead, these funds purchased the debt for pennies on the dollar well after the default, and then sued Argentina in New York courts for full recovery of the face value of the bonds plus interest. The New York courts ruled, as usual in such cases, that Argentina's default was a breach of contract. But they went further than that. In 2014, the U.S. Supreme Court allowed two key lower court rulings to stand. The first ruling not only required Argentina to repay the vulture funds, but also, in a highly unusual move, prohibited Argentina from paying any of its other creditors until it had done so. This ruling also asserted the right of a U.S. court to punish any financier located outside Argentina, who helped Argentina make such payments. The second ruling determined that U.S. courts could demand information about any Argentinian assets located anywhere in the world, except in Argentina. In stark contrast to the 1960s, the executive branch (with little participation from Congress) strongly objected to what they saw as an *over*-extension of U.S. judicial reach in this case. First the Bush and then the Obama administrations criticized the rulings, arguing by the 2010s that the courts were pushing U.S. judicial reach too far, were violating the proper bounds of national territory and sovereignty, and were posing serious foreign relations risks for the United States.

The Cuban nationalization cases and today's sovereign debt cases (culminating in the Argentina litigation) are rarely understood in relation to one another, and indeed, superficially they emerge from very different circumstances. The Cuba litigation took place in the context of the Cold War, Third Worldist anti-imperialist movements and the Cuban Revolution, and involved a struggle between a country and American industrialists over rights to raw resources and their manufacture. The Argentina litigation occurred in the context of growing indebtedness worldwide, stagnant returns in many sectors, and growing markets in high risk, high yield financial assets, and it involved a struggle between a country and a group of specialized financial investors over distressed sovereign bonds.

Yet, these cases are closely linked in two major ways. First, the case or "common" law developed in the 1960s and 1970s through litigation with Cuba served as direct precedent for decisions in early sovereign debt litigation arising out of the Third World debt crises of the 1980s — sovereign debt litigation that has shaped all sovereign debt restructurings since, including Argentina's. The lack of attention to this connection in most legal scholarship on sovereign debt erases this fact. Second, and even more importantly, both cases have been central to the

development of a form of U.S. judicial power that operates transnationally to govern relations among private business, the United States and countries in the Global South. In both cases, a foreign government attempted to assert a sovereign right to “take” assets claimed by U.S. businesses. In both cases, that government sought to enforce this right not so much against direct U.S. coercion, military power or sanctions, but against U.S. courts. In both cases, the legal struggles were fought largely through arguments about the proper extent of economic sovereignty, national territory and U.S. judicial reach. My research examines how we got from one moment to the next.

The Supreme Court rulings against Argentina in June 2014 were condemned by politicians, scholars, and activists around the world, who saw the rulings as an outrageous victory for predatory investors and as a shocking and anomalous extension of U.S. jurisdiction over the sovereign decisions of a foreign country. Yet, although the extent and precise form of these rulings were new, domestic U.S. court rulings governing economic activities of foreign states are neither new nor unusual — they have been growing in frequency since the mid 20th century. In the 1960s, the U.S. executive branch and Congress pushed the Supreme Court, against the wishes of several Justices, to extend its authority further than ever before. Fifty years later, the executive branch urged the courts to restrain their judicial reach, but to no avail. In this dissertation, I document, interpret, and explore the consequences of this extremely significant, yet largely overlooked, transformation. My research has two primary goals: 1) understanding the changing role of U.S. judicial power in (re)producing the U.S. dominated, capitalist world order since World War II; and 2) understanding how these broader legal structures perpetuate unequal sovereign debt dynamics and increasing creditor power today.

A century ago, foreign governments were, indeed, essentially immune from prosecution in the United States, though certainly not from more direct U.S. interventions of other kinds. Since the 1950s, however, there has been an important shift in the *modality* of U.S. power that is most often directed abroad: U.S. judges have come to govern more and more activities of foreign governments. One important legal change enabling this shift has been the transition from an “absolute” to a “restrictive” practice of sovereign immunity in U.S. law. Legal scholars, policy makers and transnational capitalists usually present this transition as a pragmatic move away from an obsolete model of “territorial sovereignty,” in which governments (supposedly) had total authority over activities within their own borders, to a more modern, flexible, “de-territorialized” and even “de-spatialized” sovereignty better suited for a globalized economy. This restriction of national sovereignty is usually implicitly or explicitly presented as applying to all states equally, with little attention to differentiations in geography or the relative power of different states (*e.g.*, Diaz, 2003; Gruson, 1979; Raustiala, 2004; Schlossbach, 2000; Whytock, 2009; Wight, 1993).

In practice, these changes have been far from even-handed, and in no way de-spatialized. I argue that transnational sovereign economic activity today remains dependent as ever on national borders, although the form and shape of those borders have changed. The legal borders of nation-states have not been erased, but rather continually reconfigured through minute changes in U.S. common law. New York state law has been especially important in this process, because New York City courts (state and federal) are by far the most widely used courts for litigating transnational cases between private parties and between private parties and foreign governments. New York City’s role as global legal center both depends on and enhances its role as global financial center. For reasons elaborated in later chapters, the ability of New York courts and the U.S. Supreme Court to enforce their judgments against foreign sovereign governments is directly intertwined with the power and reach of New York finance.

Adapting Foucault's (2008) terminology, I refer to the transnational U.S. legal spaces produced in the past half-century as "juridico-economic territories." In general, the legal territories of a few powerful nations have been greatly expanded, while those of most other nations have been correspondingly reduced. Far from a de-territorialization of the contemporary international order, there has been an uneven re-territorialization that reduces the authority of most countries over their own economic decisions while expanding the *judicial* reach of a few — primarily the United States. This has resulted not in a general restriction of state sovereignty in the face of "globalization," but in a differential *displacement* of economic sovereignty from post-colonial, poor and indebted states to rich, industrialized ones.

My research has led me to four key claims about the transformation of U.S. law in the past half-century. First, the post-war U.S. global order has crucially depended on a juridico-economic order in which the power of the U.S. judiciary and U.S. common law have increasingly bolstered U.S. dominance and global financial power. Second, this order has operated through systematic expansions of U.S. legal territory, with corresponding reductions in the legal territories of other states. Third, this legal geography has been produced in response to changing economic conditions, including: de-colonization and widespread nationalizations of U.S. and European property from the 1950s to the 1970s; rising indebtedness and increasing financial power since the 1970s; and an ongoing overaccumulation crisis characterized by stagnant profits and low yields (Arrighi, 2010; R. Brenner, 2003; Harvey, 2003). The expansion of U.S. legal territory has generally favored private capital, although there are tensions among capitalists over the most desirable legal borders. Fourth, however, this transformation has not simply been about an unfolding relationship between law and capitalism. U.S. courts and common law are simultaneously part of the U.S. state and have complex relationships with other state apparatuses, and shifts in U.S. legal territory have occurred in relation not only to economic conditions, but also to shifting geopolitical dynamics and U.S. foreign policy interests. Law has been a key point of articulation between the history of capitalism and geopolitical struggles among states, although this role has been largely overlooked, even by critical economic geographers. At the same time, as judicial power has grown since World War II, tensions between U.S. courts and the U.S. executive branch have increased, to the point where U.S. judicial power may come to pose serious threats to other U.S. interests.

Legal boundaries have become more complicated and more dynamic since the mid-20th century, and the financialization of significant portions of the global economy and the proliferation of intangible financial instruments have contributed to this process. Yet, contrary to the conventional narrative, these changes have not made U.S. law less spatial or less territorial. Rather, as cross-border commercial transactions have become more frequent and more complicated, *more work* goes into producing the juridico-economic spaces through which these transactions operate. Although this process accelerated in the 1970s, the reconfiguration of U.S. law to extend the judicial territory of U.S. courts did not begin with the rise of financialization, nor was it primarily a response to increasing globalization. Rather, it emerged in a concerted way in the 1960s in the context of the Cold War, de-colonization and Third Worldist movements, and was designed to protect and expand the bounds of the capitalist world system, while simultaneously maintaining the pre-existing *status quo* by restricting the economic agency of Third World states, just as many were gaining formal sovereign status for the first time.

Using U.S. *law* rather than more classic forms of coercion to enforce U.S. claims to foreign property became central to legitimating and obscuring the workings of post-war U.S. power (and helping the United States represent itself as the protector of the "free world") by recasting this

power as the a-political, neutral and “civilized” rule of law — something difficult for most countries to reject outright. In addition, U.S. common law operates by establishing new decisions via contestation between litigating parties in a particular historical and political context. However, those decisions quickly become reified as “precedent,” erasing the original context and struggles through which the law was first established. Thus, while common law depends upon legal history, it also continuously produces historical amnesia.

Changes in common law take time, and the expansion of U.S. judicial reach over foreign government economic activity was gradual from the 1950s to the 1970s. In the mid to late 1970s, however, ongoing tensions with Cuba and the acceleration of neoliberal transformations produced a sudden, massive expansion of the spatial authority of U.S. courts. Since then, U.S. judicial reach has continued to expand in fits and starts. Before describing the specifics of this transformation, several key spatial characteristics of the expansion of U.S. judicial authority need to be explained. First, these legal changes have been territorial insofar as they have defined the space over which a certain state organ (the courts) may exercise authority, have frequently involved explicit debates about national borders, and have been hashed out through constant struggles over how those borders should be drawn.

Second, the expansion of U.S. judicial territory takes many forms, but a central strategy, which forms the focus of this dissertation, involves the redefinition of fundamental legal dichotomies. Three dichotomies have been especially important in cases involving foreign governments — foreign/domestic, public/private, and political/legal — but the definition of each term, and how the three dichotomies are interlinked have changed over time. These conceptual categories have frequently formed the terrain on which struggles among capitalists, between sovereigns and capitalists, and between the various branches of the U.S. government have been carried out.

Two over-arching trends have shaped the reconfiguration of these terms over the past half-century and enabled U.S. courts to govern more and more transnational economic activity involving foreign governments. There is a basic assumption in U.S. law dealing with transnational relations that “private” matters are to be governed by the “judiciary” and “public” matters are to be governed by the other two “political” branches. Since the 1960s, U.S. — especially New York — courts have increasingly reclassified foreign sovereign transnational activities as “private” (rather than “public” or “sovereign”) and *therefore* as properly within the scope of U.S. judicial (“legal”) rather than executive (“political”) authority. Beginning in the 1970s, the equation of private with “commercial” actions became central to this process. Second, foreign sovereign activities have increasingly been reclassified from “foreign” (meaning outside the United States) to “domestic” (meaning inside the United States). Together, these interlinked changes have been used to bring activity that would previously have been considered beyond the authority of U.S. courts within U.S. judicial reach. The purpose has been to expand U.S. authority through the modality of judicial power, while simultaneously de-politicizing important social questions and removing them from even the possibility of democratic debate.

The legal territories produced in this process are co-produced with other dimensions of U.S. economic geographies, especially with New York’s transnational financial space. They are shaped not only by economic forces, but by legal logics and temporalities, and by lawyers, judges and legal scholars. They are not exclusive, but rather overlapping and interpenetrating. They vary according to the precise modality of judicial power involved (e.g., powers of judgment, discovery, injunction or attachment — terms I define later), and according to the kind of activity in question (e.g., nationalizations, sovereign debt issuance, or terrorism). They are

changeable, though only with significant effort. They are convoluted, irregular, and legible only to a small number of law, business and policy specialists. I make no attempt to map this complicated U.S. legal territory in full. Rather, I trace the emergence of certain portions of this legal map that are of particular importance for understanding the relationship among indebted Third World states, American hegemony and private financiers today.

Outline of the Argument

Chapter 1 lays out the institutional and analytical framework needed to situate the legal practices investigated in this dissertation within a broader legal and historical context. After summarizing the existing literature on law, finance and geography, I discuss the origins of international law in the colonial period, and explain the differences between properly international law (produced through bi- and multi-lateral agreements, international organizations, etc.) and “transnational” law (the national laws that govern many cross-border relations between private parties and between private parties and national governments). Transnational U.S. law has received much less attention than international law in critical studies of law and capitalism, but is crucial for structuring economic relations among nation-states. New York law is especially important in this regard. I then contextualize the expansion of U.S. judicial reach in terms of a broader phenomenon of the “judicialization” of political activity, discussing insights and gaps in the existing literature on that topic. In brief, judicialization has rarely been discussed in relation to *economic* issues — a lack this study aims to address. With this institutional framework established, I turn to theorizing the relation between judicial power and U.S. post-war dominance. I present an argument about why the expansion of U.S. judicial authority over the economic decisions of foreign governments should be understood in territorial terms, and I discuss the role of the “aesthetics” of U.S. common law in producing legal space. These theoretical claims are developed through empirical evidence in the following chapters.

Chapter 2 focuses on recently concluded case of *NML Capital v. Argentina* to identify the legal issues regarding sovereignty, jurisdiction and enforcement it raised, and consider why it provoked such a strong and polarized response from legal scholars, financiers, international organizations and activists around the world. While the Supreme Court’s 2014 ruling against Argentina was widely perceived as an outrageous and unusual extension of U.S. judicial authority over the actions of a sovereign nation, most analysts have been unable to provide a satisfactory explanation for the Court’s behavior; many attribute it to the frustration of U.S. judges with Argentina’s supposedly unique “recalcitrance.” I argue, in contrast, that this case was neither unique nor sudden. It was only the most recent step in a long series of interrelated changes since World War II, especially the gradual expansion of U.S. juridico-economic territory, the increasing influence of neoliberal discourses within the law, and the growing independence of the U.S. judiciary from the U.S. executive. Understanding the conditions that made the predatory financial practices of vulture funds possible requires understanding how and why these changes occurred and what legal spaces were produced in the process. The rest of the dissertation traces and analyzes these transformations.

Chapter 3 examines early efforts to expand U.S. judicial territory by redefining the “Act of State Doctrine,” which had previously prevented U.S. courts from ruling on the validity of most foreign government acts. The gradual restriction of that doctrine and the corresponding expansion of US judicial authority are usually understood as reflecting the modernization, flexibilization and de-territorialization of U.S. law in response to increasing cross-border

economic developments after World War II. I argue, in contrast, that it was first and foremost a concerted response to changing geopolitical dynamics, including Third World nationalizations of the property of former colonial powers (formal or informal). In this context, the U.S. government was concerned with protecting U.S. property, especially in Cuba, with maintaining the extraction of physical resources from the Third World, and (as the defender of the “free world”) with containing Communism. The legal changes produced in this process laid the groundwork for the expansion of U.S. judicial power that has continued ever since.

By analyzing major act of state cases from the late 19th century through 1976, I show that, while the motivations for restricting the doctrine in the 1960s and 1970s were geopolitical, the mechanism was detailed technical changes in U.S. law, specifically the gradual re-definition of the public/private, political/legal and foreign/domestic distinctions that have remained the building blocks for all further reconfigurations of U.S. judicial territory. Before the 1960s, acts that occurred outside the United States and were public or sovereign in nature were considered to be outside U.S. judicial authority under the Act of State Doctrine. Seizures of property by foreign governments or government officials were primary examples of such acts. In 1964, the Supreme Court ruled in Cuba’s favor (as was usual in such cases). Yet, it modified the Act of State Doctrine in a crucial way. From then on, to be protected from U.S. judicial reach, an act had to be foreign, public *and also* “political,” where the latter was defined as meaning potentially politically sensitive for the U.S. government. This significantly altered the legal bounds of national territorial sovereignty and expanded U.S. judicial reach.

Further small expansions of U.S. judicial reach in relation to Cuban nationalizations over the rest of the 1960s and early 1970s were often *ad hoc*, but culminated in 1976 with the development of a general “commercial exception” to the act of state doctrine. In international cases before the 1970s, private essentially meant “personal” — as, for instance, actions driven by malice, greed, revenge, etc., even if done by a government official. In 1976, however, in a case involving nationalized Cuban cigar companies, the U.S. Supreme Court expanded the definition of private to include all things “commercial.” At the same time, all commercial acts were recast as automatically non-political, in the sense of posing no potential problems for U.S. foreign relations. Because the nationalization and subsequent running of a cigar company on Cuban soil was deemed a commercial and, therefore, private and non-political act, the Supreme Court declared that act invalid. The logic of this “commercial exception” resonated with the growing neoliberal turn in U.S. politics in the 1970s and was supported directly by the executive branch. In the same year, Congress codified a similar exception in foreign sovereign immunity law, allowing foreign countries to be sued by private parties in U.S. courts over commercial activity with some connection to the United States. Together, these commercial exceptions produced the single greatest expansion of U.S. judicial territory to date, and established the basic spatial framework within which sovereign debt cases have been fought out since.

Chapter 4 shifts away from detailed analyses of case law to examine how these legal changes became interrelated with the Third World debt crises of the 1980s. The World Bank and International Monetary Fund (IMF) implemented programs in response to these devastating crises that are widely understood as restricting debtors’ economic sovereignty and helping spread neoliberalism to indebted states. The crises, and the U.S.-led Brady restructurings with private creditors that eventually offered some debt relief, also led to the emergence of large secondary markets in distressed sovereign debt. I argue that the U.S. government promoted these Brady restructurings not only to avert the collapse of Western banks, but to ensure the continued extraction of interest payments from the Third World and to bolster the power of the U.S. dollar

as the United States embraced the shift towards prioritizing finance capital in the context of a growing overaccumulation crisis and stagnant profits. Contractual changes in sovereign bonds, made possible by the restrictions to sovereign immunity and the act of state doctrine explored in previous chapters, worked through debt restructurings to impose neoliberal discipline in tandem with IMF agreements, but in ways that have had even longer-lasting and less visible effects.

Chapter 5 explores how this “secondary market regime” has been underpinned, since the early 1980s, by the further expansion of U.S. judicial territory, in relation with the growing dominance of New York finance and the U.S. dollar. This expansion was produced in the course of holdout litigation against Third World debtors. Most significantly, in 1985, in a sovereign debt case involving Costa Rica, the legal “location” of a debt, which had previously been considered to be with the debtor, was redefined as being with the creditor, so that almost all Third World debt was suddenly “located” in New York City. The U.S. executive directly intervened to persuade the courts to adopt this change, arguing that upholding the rights of creditors to sue sovereign debtors was more important than promoting U.S. supported voluntary debt restructurings and IMF programs. In 1992, in a debt case involving Argentina, the Supreme Court further expanded U.S. judicial territory by reclassifying the act of issuing sovereign debt itself as commercial, and thus not protected by foreign sovereign immunity or by the Act of State Doctrine. I argue that these extensions of judicial territory facilitated the rise, in the 1990s, of vulture funds specializing in purchasing debts in order to litigate. I show how the U.S. executive, the New York judiciary and litigating creditors continued to shape the legal landscape during that period. Although the vulture fund strategy has now been loudly criticized, even by the IMF and the U.S. executive, these criticisms have almost never extended to distressed debt trading in general, or to the operation of secondary markets as a whole. Yet, from the beginning, the litigation strategy has actually worked in tandem with, not against, secondary market trading, restructuring strategies, and IMF-imposed neoliberalization.

With these necessary historical developments established, Chapter 6 returns to considering why the New York and Supreme Courts such extreme measures in the Argentina litigation. I provide a detailed analysis of the territorial struggles at the heart of *NML Capital v. Argentina* to show how vulture funds and U.S. courts used the case to further expand the judicial territory produced in the previous decades, this time further than even the U.S. executive is comfortable with. The Argentina litigation took place during a continuing overaccumulation crisis, in which extended periods of low yields across many sectors has fostered expanding markets in sovereign, household, and consumer distressed debt. In this context, both private creditors and the U.S. executive have been concerned with maintaining the extraction of interest from the indebted world, which now includes parts of Europe as well.

Yet, *NML v. Argentina* also produced new tensions and contradictions, which have yet to be resolved. First, by siding with the vulture funds, the courts not only ruled against the interests of a much greater number of financiers who had already restructured their debts with Argentina, but also ignored numerous complaints from the Federal Reserve Bank of New York, the Bank New York Mellon, and major payments processors in New York, Brussels and Luxembourg. Following the arguments of the vulture funds, New York courts and then the Supreme Court inverted the spatial logic that had previously prevailed, not only redefining further actions as “in the United States,” but also asserting judicial authority over a huge range of actors and activities outside the United States, just as long as they are *not* in Argentina. They also suggested repeatedly that there should be no distinction between a sovereign state and a private litigant. In multiple briefs, the U.S. executive branch strenuously objected to these claims as

“extraterritorial” expansions of U.S. judicial reach that could interfere with U.S. foreign relations, with U.S. economic interests abroad, and with the norms of territorial sovereignty. In a major reversal of their position from the 1960s through the 1990s, however, the courts now dismissed the executive’s concerns as irrelevant, on the grounds that this was a purely “commercial” case. This reversal shows just how successful the re-construction of judicial power since World War II has been.

I conclude Chapter 6 by discussing growing contradictions among financiers, and between the judiciary and the executive, over what form and scope of U.S. judicial territory is most desirable, and considering what these contradictions might mean for future debt crises, for the global financial system, and for the place of the United States in the world order. In a brief conclusion to the dissertation, I return to the question of how we moved from a situation in which the U.S. executive had to persuade the a reluctant Supreme Court to extend its power in 1964, to one in which the Supreme Court scornfully dismissed the executive’s concerns about extraterritorial overreach in 2014. I push further on where growing contradictions between U.S. executive and judicial power might lead, summarize the spatial lessons and methodological approaches developed in this study, and suggest several avenues for urgently needed further research.

Chapter 1 – Situating U.S. Law: Form, Finance, Geography

This chapter situates the expansion of U.S. judicial power in the context of several key empirical and theoretical debates. I first address relevant theories of law, finance and geography. I then discuss the colonial origins of international law, before considering a large literature in legal studies on the phenomenon of “judicialization” in the United States and around the world. I point out several key insights from this literature, but also its shortcomings, and explain how the processes I examine here help address the latter. After explaining why U.S. “transnational” law is distinct from, but just as important as, “international” law, I then turn to framing the key arguments of this dissertation. I discuss how U.S. hegemony and judicial power are related, present an argument for understanding these legal changes in territorial terms, and discuss key aspects of the “aesthetics” of U.S. common law.

Contract Fundamentalism and the Legal Underpinnings of Growing Creditor Power

In the first half of 2016, after more than a decade of fierce litigation, the Republic of Argentina paid over \$10 billion to a handful of creditors for bonds they had purchased after Argentina’s default in 2001. For some of those creditors, this amounted to a profit of over 1,000%. Known as “holdout creditors,” these are primarily institutional investors like hedge funds and make up a subset of a much larger group of “distressed sovereign debt traders,” who buy and sell the highly discounted, “risky” sovereign bonds of countries in crisis. Holdout creditors, in contrast to most distressed debt traders, refuse to participate in renegotiations of debt terms at all, instead suing governments for full recovery of the face value plus interest. Since the 1990s, these funds have leveraged the power of courts in New York and a few other jurisdictions to sue sovereign states in Latin America, Africa, Asia, Eastern Europe and, most recently, Western Europe. The number of creditor lawsuits outstanding against sovereign governments in U.S. and U.K. courts went from less than five every year from 1976-1989, to over 15 in 1990, and has ranged from around 18-50 every year since (Schumacher, Trebesch, & Enderlein, 2014).

The term “vulture funds” refers to funds that buy distressed debts of companies or countries during crises, and often specifically to those that buy these debts in order to sue. These latter have been critiqued by activists, scholars, the International Monetary Fund (IMF), the United States and other governments, sovereign debt lawyers and even other financiers, for moral and economic reasons. Yet this critique rarely extends to distressed debt traders as a whole, whose own exorbitant profits, as I show in Chapters 3 and 4, are intertwined with those of vulture funds. It almost never extends to secondary sovereign debt trading in general and to the legal framework upon which all these accumulation strategies are based.

The lack of critique is bolstered by the fact that sovereign debt actors and most would-be reformers today share an almost religious belief in the importance of upholding “contract rights.” Even a text whose authors include one of Argentina’s recent *defense* lawyers, for instance, begins with an approving reference to this astounding quote from Douglass North: “The inability of societies to develop effective, low-cost enforcement of contracts is *the most important source* of both historical stagnation and contemporary underdevelopment in the Third World” (emphasis added) (Lastra & Buchheit, 2014, p. 103). The same text ends by asserting that courts recognize the need to balance the interests of creditors and nation-states, as well as those “of the United States and the general well-being of the international economy.” The authors apparently see no contradiction between this and the following statement on the same page:

[In the] recognition of liability, courts have consistently found that contract rights outweigh any necessity of non-payment. Foreign states' defences against the enforceability of their debt instruments in US courts have therefore been largely unsuccessful. It is only when creditor arguments stray from the terms of the underlying debt instrument *and impinge upon the rights of other creditors* that a foreign state may succeed in defending such claims against its creditors (emphasis added) (Lastra & Buchheit, 2014, p. 115).

The thinly veiled moralism and historical amnesia evident in these and innumerable other texts on sovereign debt relations are, of course, part of the classic liberal faith in free contract and private property as the antidote to a Hobbesian world of violence and chaos. The close relationship between U.S. common law, contract rights and the interests of the capitalist class, especially since the early 19th century, has been well documented (Horwitz, 1975, 1979). Yet this relation is never static. The “freedom of contract” has never been absolute, and the legal scope of that freedom has changed over time.

Supporters now cite “freedom of contract” as the insuperable justification for all vulture fund activity. Yet just half a century ago, two prominent legal scholars explained that the U.S. executive branch (then a player in all such proceedings) would not support this kind of activity because, “If the Department of State ever sought to obtain the full par value of repudiated bonds when the claimants had acquired them at great discounts, an inequity would exist that would be hard to justify” (Lillich & Christenson, 1962, p. 83).

So what changed? After an early 20th century shift away from laissez-faire attitudes towards free contract in U.S. law, fueled in large part by the Legal Realist movement, there was a postwar resurgence of emphasis on the sanctity of “party autonomy” and free contract that became entwined with the rise of neoliberal economics over the following decades (Horwitz, 1992). By the 1970s, this had resulted in the neoliberal emphasis on law and contract rights that several scholars have noted (Foucault, 2008; Harvey, 2007; Peck, 2010). Of course, the legal and the economic have always been entwined under capitalism and most other economic systems, as well. As Foucault puts it, there is no one “capitalism” that is either helped or hindered by more or less favorable institutional arrangements; there has only ever been a historically specific “economic-institutional” singularity in which “economic processes and institutional framework call on each other, support each other, modify and shape each other in ceaseless reciprocity” (Foucault, 2008, p. 164).

Foucault argues that what is distinct about neoliberal *economics*, in contrast to laissez-faire economics, is that it embraces this interrelation, rather than asserting a strict separation between the state and the market — with, however, the role of the state, largely through law, being understood not to regulate the *economy* but rather to refashion *society* so as to create the right conditions for market competition. In other words, the goal under neoliberalism is to create “a general regulation of society by the market” (Foucault, 2008, p. 145). This observation illuminates crucial dimensions of neoliberal economic policies, as well as of the “law and economics” movement.¹ At the same time, the evidence in this dissertation suggests that our understanding of neoliberal economics should be moderated, or better enriched, by combining Foucault’s insights into the conscious neoliberal reconfiguration of legal and other institutional

¹ Rodgers (2011) provides an insightful study of this movement in context.

mechanisms, with a critical analysis of how strict dichotomies between politics and economics, and between law and politics, continue to operate in neoliberal theories and practices.²

The expansion of creditor power over sovereign debtors in the past half-century fits solidly within these broader changes. Despite protestations from some investors and lawyers (Fisch & Gentile, 2004)³, the expansion of creditor “rights” at the expense of debtor “rights” has been publicly recognized by many mainstream scholars (Bulow & Rogoff, 1989; Panizza, Sturzenegger, & Zettelmeyer, 2009; Weidemaier, 2015). In this study, I draw on existing analyses of neoliberalization, but add to them through a greater attention to law, geopolitics, and space. With some important exceptions (Barkan, 2011; Annelise Riles, 2011), very little work on neoliberalism or neoliberal economic globalization includes a sustained attention to the details of legal practice and to the many different registers in which law operates. Furthermore, in the context of relations between private capitalists and independent nation-states, the rise of pro-creditor, pro-contract practices cannot be fully explained in terms of neoliberal policy or ideological shifts, but rather requires a geopolitical analysis of struggles over the scope of national economic sovereignty and national borders. The argument here is that concrete legal practices are crucial elements of these geopolitical transformations and the neoliberalization of global economic relations. Specifically, this dissertation investigates the “transnationalization” of U.S. statutory and common laws that govern so many transnational commercial contracts today. In doing so, my work responds to Silbey’s (2001, p. 271) call for constructing sociolegal “counternarratives” that combat the obscurations of power and injustice that standard globalization narratives effect. As she says, law is everywhere, but it is not omnipotent; and for justice, “law is not enough” (p. 274).

Law, Finance, Geography

There is a robust literature on finance and the state (Arrighi, 2010; Gowan, 1999; Helleiner, 1994; Krippner, 2011). Yet while this scholarship frequently touches on particular laws, it has generally paid insufficient attention to the role of legal practice in the production of finance more broadly. Where it is discussed, law is often presented as either prohibiting or permitting (regulating or de-regulating) financial flows. Yet such statements overlook the many ways in which law fosters *certain* financial practices, while ignoring or even hindering others.

A small but growing number of scholars have addressed the role of law not in permitting or prohibiting but in *producing* financial space (Knuth & Potts, 2016). Blomley’s now classic works on legal geographies have contributed greatly to this conversation by focusing attention on the complicated legal structures constituting even seemingly simple rights to “tangible” property (Blomley, 1994, 2007; Blomley & Bakan, 1992). More recently, Christophers has shown how law’s “geographical imaginaries” shape dynamics of competition and monopoly (2015b, 2016).

² Foucault actually contrasts the ordo-liberal understanding of the “economic-juridical” system favorably with a “Marxist type” approach to understanding economics as base and law as superstructure (2008, pp. 163—164). I agree wholeheartedly with his critique of *economistic* Marxism, but point out that many more nuanced Marxists (especially those working in the traditions of Antonio Gramsci, Henri Lefebvre and Stuart Hall) have been as attuned to the relational co-production of economic and other processes as Foucault. Foucault, however, to my knowledge remains the theorist who has most concertedly and usefully addressed the role of the juridical in capitalism.

³ Interviews by author with: hedge fund manager, February 2015; and law professor, November 2014.

Others have explored the role of law in governing U.S. real estate markets (Christophers & Niedt, 2016; Teresa, 2016) and land markets (Kay, 2016). Pollard and Samers (2007) have considered Shari'a law and Islamic financial geographies.

Barkan and Maurer have done important work theorizing the role of law in producing transnational financial spaces. Barkan (2013) has analyzed law's spatialized role in the co-constitution of transnational corporate power and political sovereignty. Maurer and associates have studied jurisdictional fragmentation and offshore finance, the legal construction of jurisdiction and sovereignty, and the legal constructs that produce cross-border capital flows (Coutin, Maurer, & Yngvesson, 2002; Maurer, 1997). Such flows have increased since the mid-20th century, but this mobility is in large part legally constructed, and states are always central in this process. These flows have never been homogeneous or arbitrary, or even determined simply by financial profit-seeking. Rather they have been shaped by legal practices and geopolitical dynamics. A key function of law in the age of globalization is to get rid of *certain* borders, while producing others.

The concepts of juridico-economic territory and U.S. legal power I elaborate here are applicable to much transnational commercial activity today, including that between private parties (Potts, 2016). Yet, distinct economic processes are governed by distinct legal geographies. Here I focus on the particular legal geographies associated with sovereign debt litigation in U.S. courts. Sovereign debt dynamics are relatively unique insofar as they directly affect entire national economies all at once. The need to make high interest payments often interferes with government spending on a range of social needs. In addition, conditionalities attached to debt restructurings, whether mediated by the IMF and World Bank or imposed directly by private creditors, can affect major policy decisions on everything from tax structure, to tariffs, educational spending, and capital controls. Sovereign debt and the legal structures underpinning it, therefore, are central to questions of uneven global development. This is especially true given that global sovereign debt levels around the world have been rising since the 1970s (Dobbs, Lund, Woetzel, & Mutafchieva, 2015).

Furthermore, though they constitute only a minority of creditors, litigating vulture funds can illuminate much about sovereign debt in general. First, because their accumulation strategy is based on litigation, they make the legal structures governing sovereign debt relations unusually visible. As I will demonstrate, they also actively reshape those structures. Second, this minority of creditors exercises disproportionate influence over sovereign debtors, through their own exorbitant demands for repayment and through the threat of holdout participation, which influences the terms of the debt restructurings other creditors negotiate. "Restructuring creditors" and "holdout creditors" should be seen as part of a spectrum rather than as distinct categories, and the legal shifts I investigate have bolstered the power of this entire class of distressed debt traders, and reshaped sovereign debt markets for all countries in the process.

Sovereign debt litigation in the United States is governed by a combination of U.S. federal and New York state laws. English law constitutes the second most important legal space governing sovereign debt, but is largely outside the scope of this study. The vast majority of sovereign debt cases heard in the United States takes place in federal New York courts applying New York state law — specifically the Southern District Court of New York and the Second Circuit Court of Appeals, both located in lower Manhattan. If appealed further, cases go to the U.S. Supreme Court. These courts are used for two reasons. First, all sovereign debt contracts since roughly the 1980s have contained "governing law clauses" by which creditors and debtors select which courts and which law will govern their transaction in case of litigation. As of 2009,

an estimated 66% by volume of all outstanding emerging market sovereign bonds worldwide were governed by New York law, 28% by English law, 3% by German law, and 2% by Japanese law (Das, Papaioannou, & Trebesch, 2012).

The majority of emerging market bonds are, therefore, governed by New York state law. Under 28 U.S.C. § 1441(d), however, sovereigns are allowed to shift cases filed against them in state courts to federal courts, and most do. Under the “Erie Doctrine,”⁴ however, federal courts in cases involving parties from different jurisdictions must apply the substantive state law of the states they are in, while applying federal procedural law.

The prevalence of New York governing law clauses in sovereign bonds reflects New York’s dual status as global financial *and legal* center. New York and English law have been called the great legal utilities of the world (Allen & Overy, 2012). In contrast to other U.S. states, New York law is well known to be especially pro-contract, pro-employer and pro-creditor (G. P. Miller, 2009). I will show how New York’s roles as commercial center and unique legal space are intertwined, shaping material economic and legal geographies, including, for instance, such questions as “where” intangible financial assets like debts are legally located. U.S. juridico-economic territory is often *New York* juridico-economic territory.

Of course, this raises questions about what happens when the interests of the United States and New York conflict, and about whether transnational financial interests and U.S. hegemonic interests always line up. I return to this question in more detail at the end of Chapter 2 and throughout the dissertation. For now, I note that since World War II New York and U.S. goals in these matters have *usually* gone hand and hand.

In the rest of the introduction, I situate U.S. common law in a broader institutional context, specifically in relation to debates about international law, transnational law and the widespread “judicialization” of many legal systems since World War II. I then turn in more detail to the concepts of U.S. hegemony and juridico-economic territory. Finally, I elaborate an argument about why the material details of legal practice — or, as Riles (2005, p. 3) terms it, the “technical aesthetics of law” — have crucial geographical and geopolitical significance, with a focus on the legal dichotomies that have been most central in reshaping legal relations between private capital and sovereign governments.

The Origins of International Law

International law is inextricably imbricated with colonialism and imperialism. After World War II, many Third World lawyers from Latin America and the newly decolonizing states became invested in international law, in the hopes that it could be refashioned in a truly universal way, so as to rectify post-colonial inequalities (Anghie, 2007). Yet, as scholars who study Third World Approaches to International Law (TWAIL) have documented extensively, these efforts did not pan out as hoped. In the TWAIL Manifesto, Chimni (2006) makes a compelling case for using the category “Third World,” not to homogenize radically diverse states and peoples, but to call attention to how: 1) many Latin American, Asian and African states once subjected to colonialism continue to be exploited and recolonized via international law today; and 2) international law favors powerful states and transnational elites precisely by *imposing* a uniform set of codes that ignores crucial differences among states.

⁴ Named after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

In contrast to the traditional narrative of international law as mediating relations among equal sovereign states, prominent TWAIL scholar Antonio Anghie (2007) demonstrates that international law and European concepts of sovereignty originated to govern relations between European states and their colonies. After decolonization, this same law was used to deny claims for colonial reparations. Although the civilized/un-civilized dichotomy that had been central to international law into the 20th century was replaced by the language of advanced/backward and, eventually, developed/developing, international law continued to serve the same function of promoting the interests of the “West” over the “Rest” and to make the sovereignty of the latter concretely different from that of the former. Both Third World and Western lawyers recognized these imbalances. Yet, Western powers countered every attempt to refashion international law more equitably. Anghie shows how this played out in the United Nations (UN) in relation to legal doctrines of sovereignty, state responsibility, state succession and more, some details of which I return to in later chapters. The upshot was that former colonizers invoked “international law” to argue that newly sovereign states must uphold contracts that had been signed with Europeans before independence and to ensure that Third World resources remained in Western hands. In the process, Anghie argues, Western lawyers and politicians often responded to Third World attempts to make international law more egalitarian precisely “by asserting that the new states were violating hallowed and classical principles of international law, or else by themselves formulating new doctrines that were often presented as a firmly established part of international law” (2007, p. 198). In short, “even while the West asserted that colonialism was a thing of the past, it nevertheless relied precisely on those relationships of power and inequality that had been created by that colonial past to maintain its economic and political superiority which it then attempted to entrench through an ostensibly neutral international law” (Anghie, 2007, p. 215).

The inequalities built into international law persist to this day. The TWAIL Manifesto argues that the national economic sovereignty of Third World states has been increasingly displaced onto international institutions like the IMF, World Bank, World Trade Organization (WTO) and some organs of the UN, which were themselves designed by Western powers and whose primary project is to impose an international neoliberal property rights regime that benefits powerful Western states and transnational elites, including the elites of Third World states themselves. Bilateral and multi-lateral trade treaties, loan conditionalities and other factors constrain national decisions about finance, trade, labor and environmental policies. Other scholars agree. Schneiderman (2008), for example, argues that international investment law and institutions impose the norms of the Global North on the Global South under the guise of “international law” in order to protect the property rights of nationals of the former. International law aims to establish a neoliberal economic policy that “has as its object the placing of legal limits on the authority of government, isolating economic from political power, and assigning to investment interests the highest possible protection” (p. 4).⁵ Globalization, he argues, is far from formless, and one goal of his, which I share, is to illuminate the legal forms through which “economic globalization is being made tangible” (p. 3).

This dissertation aims to contribute to the projects of TWAIL and other critical scholars of international law and to expand their analyses in new ways. While most of these scholars have focused on international institutions *per se*, I call attention to the role of domestic U.S. courts in

⁵ These constraints operate in important ways within the Global North as well. Nicol (2010) makes a similar point about the way the WTO, European Union rules, and the European Convention on Human Rights impose neoliberal policies on, and restrict the democratic agency of, Britain.

restricting Third World sovereignty. This national judicial power is far more important than often recognized, while its role has been less visible than that of major international organizations.

In the rest of this section, I first put this postcolonial approach to international law in conversation with mainstream legal debates about the growing power of *judiciaries* (national and international) around the world. I then clarify the distinction between international law, which is the focus of most scholarship on law and capitalism, and *trans*-national law, which forms the centerpiece of this dissertation, though as I explain below, the two are deeply entangled. In the next section, I bring these insights together to discuss the particular influence of U.S. courts and U.S. hegemony in shaping the transnational legal regime — something that is glaringly absent from both the TWAIL and judicialization literatures.

Judicialization and Transnational Economic Relations

The extension of U.S. judicial reach is part of a broader process of the “judicialization” of politics — the process by which political decisions are subjected to judicial processes or decisions. As a major trend in global governance, judicialization has received far too little attention from social scientists. Scholars who do study judicialization, primarily from legal studies and political science, now generally agree that, in the past few decades, international and domestic judiciaries around the world have grown more powerful *vis-à-vis* other branches of government. In his entry in the *Oxford Handbook of Law and Politics*, Hirschl (2008) described this as “arguably one of the most significant phenomena of late twentieth- and early twenty-first-century government.” Yet, he noted elsewhere, work on the subject remained “surprisingly sketchy” (Hirschl, 2006, p. 272).

There have been several key modes of judicialization. First, many new countries have adopted Western-style constitutions that grant more significant powers of “judicial review” over executive, legislative and administrative decisions than major Western democracies themselves traditionally have. Second, many of these latter countries have themselves expanded powers of judicial review of their courts. Third, many countries have shown increasing deference to international courts and tribunals. Thornhill (2016, p. 208) argues that the first two processes have directly facilitated the third: “in short, contemporary constitutions are marked, almost generically, by a rise in judicial power, and, closely linked to this, by the intensified penetration of international law into domestic legal systems.”

There has been a polarized debate over the pros and cons of judicialization. Many condemn judicialization for transferring properly “political” matters from the sphere of public debate and democratic decision-making to the “legal” and supposedly a-political sphere of the judicial (Coletto & da Silva Moreira, 2015; Hirschl, 2006; Kramarz, Cosolo, & Rossi, 2017; Moulin-Doos, 2015). This is variously decried as the judicialization of politics and/or the politicization of the judiciary. Hirschl, who can be seen as representative of this view, is ambivalent about growing powers of what he calls “ordinary” judicial review over administrative decisions. Such cases, he argues, may have progressive effects when courts challenge state torture or breaches of privacy. Even so, he criticizes the extent of the influence of judicial review over such decisions and the way it perpetuates a false sense of the a-political character of law.

He is far more critical, however, of the judicialization of what he calls “pure” or “mega” politics, by which he means the growing power in many countries of national courts over such key political questions as the outcome of major elections, the validity of military coups, and core questions of national identity and citizenship. He argues that the growing deference of

legislatures and executives to judiciaries in such matters removes core political issues from democratic public debate. Mouline-Doos (2015, p. 68) goes beyond Hirschl in rooting this tendency in liberal democracy itself, arguing that, “The judicialisation/constitutionalisation of politics is the institutional consequence of liberalism and leads to an impoverishment or an annihilation of the political debate,” and that, “liberalism is relying on Law in order to limit or bypass politics.”

Some scholars, however, are ambivalent about the pros and cons of judicialization (Aydın-Çakır, 2014; Basil, 2011; Dressel & Mietzner, 2012; Tate & Vallinder, 1995; Yusuf, 2008). Still others applaud judicialization as *strengthening* democracy around the world. Thornhill (2016), for instance, admits that judicialization removes certain decisions from public debate and contestation, yet argues that this actually promotes political legitimacy. His argument rests on two key poles. First, he focuses almost exclusively on the rise of “judicial constitutionalism” in “post-authoritarian” countries and argues that expanded judicial power has been necessary to promote the transition to constitutional democracy and protect the state from capture by powerful interest groups. Second, he believes that by referencing international law, states are able “to acquire and presuppose some element of legitimacy for legislation, which these states are not expected to create for themselves” (p. 220). Who, precisely, does not expect these states to create legitimacy for themselves is unclear, but for Thornhill, it is because an *external* force (international law) allows national judiciaries to avoid domestic struggle that judicialization helps promote a liberal constitutional order. In short, it is precisely by *reducing* political contestation that judicialization promotes a secure and stable “political domain” (p. 225). This is essentially an updated version of a longstanding tendency among politicians and political theorists (including Alexander Hamilton and Alexis de Tocqueville) to see strong judiciaries as a useful check on the dangers of majoritarian politics (see discussion in Tate & Vallinder, 1995).

My argument aligns with the former camp: the expansion of judicial power over important political decisions has reduced the public sphere and actively de-politicized many decisions that should be democratic, thus institutionalizing structures of power that obstruct possibilities for progressive democratic change. At the same time, I reject the law/politics distinction that *both* camps in the judicialization debate employ. Law is *always* political, in that it mediates struggles over the distribution of power and resources in society. Of course, defining the political versus the judicial is hugely significant and a major theme of this dissertation. But judicialization does not actually de-politicize any issue. Rather, it determines what *modality* of power (judicial, legislative, executive etc.) it will be governed by. The question is not whether the proper line between law and politics has been blurred, but whether issues that should at least be potentially democratic have been removed from even the possibility of public debate.

This is not to say that judicialization always leads to bad outcomes. The landmark 1954 case *Brown v Board of Education*⁶, in which the U.S. Supreme Court stepped in to desegregate schools when politicians would not, is often cited as a prime example of judicialization. Indeed, the Warren Court in general, with its general push for progressive social policies, has been considered an especially “activist” court. At the time of writing, furthermore, when rightwing populist leaders have been elected in many countries, it is easy to be relieved that courts may be able to curb some of the worst excesses of these administrations, as they have already done in response to Donald Trump's travel ban on Muslims just weeks into his presidency (Pengelly, Helmore, & Yuhas, 2017).

⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954).

Nevertheless, the incredible expansion of judicial power over the past half century demands critical attention. The question is not whether the results have always been good or bad, or even whether every form of judicialization should be reversed. Rather, the question is *how* and *with what effects* the judicialization of certain practices has systematically restructured global governance and global power relations. I focus on an aspect of judicialization that has been almost entirely ignored in the judicialization literature: the judicialization of economic relations. The systematic judicialization of the economic decisions of foreign sovereign governments by, primarily, U.S. courts has overwhelmingly served the interests of powerful countries and transnational elites at the expense of the sovereignty and well-being of people across the Global South. Furthermore, this judicialization of economic relations has been facilitated as much by conservative as by liberal U.S. courts. The absence of attention to this dimension of judicialization in both the pro- and con- camps is due to common gaps in their approaches, including: a too-narrow definition of the political, an uncritical approach to international law and scale, and a general lack of attention to power and inequality.

Judicialization is not merely a result of power-hungry judges. Elected politicians have been complicit in this transfer of power to the judiciary. Hirschl (2006) and Tate (1995) argue that this has usually been a response to political weakness. Politicians may shift responsibility to courts in order to avoid political gridlock or blame for unpopular decisions. While these dynamics are important and point to broader processes of technocratic de-politicization, I demonstrate that the extension of U.S. judicial power over transnational economic activity has primarily been an offensive strategy, emerging out of and extending U.S. hegemony.

Multiple analytical gaps have prevented judicialization scholars from seeing this. First, the literature tends to be methodologically nationalist (Goswami, 2004), focusing on how national politicians transfer power to their own courts to avoid upsetting their domestic constituents. Even the internalization of international law through judicialization is presented as a response to primarily domestic dynamics (e.g., Thornhill, 2016). The overemphasis on a bounded national scale may also contribute to the literature's lack of attention to differentiation and inequalities among nation-states. Judicialization is generally presented as spreading homogeneously if gradually around the globe, with no attention to national or international geopolitical interests. This overlooks key trans-scalar dimensions of judicialization and the unique role of the United States in facilitating the judicialization of global economic activity. The processes I focus on, in contrast, involve transferring political economic decisions of *non-U.S.* states out of the *international* sphere of interactions between governments to domestic *U.S.* courts, not to avoid criticism from U.S. constituents, but to avoid *geopolitical* contestation from the foreign governments involved.

The United States is often regarded as the paradigmatic example of a highly judicialized society. In a major early study of judicialization, Shapiro (1995) discusses the judiciary's prominent role in U.S. politics since the American Revolution. As early as 1803, the Supreme Court exercised its power of judicial review over an executive branch act in *Marbury v. Madison*.⁷ This practice was well established by the late 19th century and became widespread in the early 20th. By the 1950s, U.S. interest groups lobbied courts as well as elected politicians, and Supreme Court appointments had become a major issue in national elections. This period also involved a significant expansion of the judicial review of administrative law: "by the 1980s

⁷ *Marbury v. Madison*, 5 U.S. 137 (1803).

nearly every significant decision of a federal regulatory agency was litigated in the federal courts” (Shapiro, 1995, p. 51).

Yet, despite the fact that judicialization constitutes a “move toward what all would recognize as the American pattern” (Tate & Vallinder, 1995, p. 2), most work on the subject only explores the judicialization of individual countries, with no acknowledgment of international dynamics, including U.S. interests, pushing the phenomenon. Nevertheless, this empirical work contains useful clues. Especially useful is Thornhill’s (2016) timeline of the spread of judicial constitutionalism after 1945 in Japan, West Germany and Italy; in Spain in the 1970s; in Latin America in the 1980s; in Europe after 1989; and in Sub-Saharan Africa from the early 1990s on. He characterizes each shift as marking the transition from authoritarian to democratic governance — a transition he argues was only possible due to the adoption in each place of constitutions granting significant power to judiciaries (“judicial constitutionalism”).

Many critiques can be made of Thornhill’s argument. For one thing, he fails to distinguish among different “authoritarianisms,” lumping Peronist Argentina together with Nazi Germany and Apartheid South Africa. For another, he argues that all were *caused* by the “hyper-politicization” of competing interest groups in the previous system. He therefore sees the *de*-politicization promised by judicialization as a necessary antidote. He ignores far more important factors fueling authoritarianism of various sorts, including, among many other things, European inter-imperialist rivalries, Cold War interventions in the Third World, and alliances between transnational and domestic elites against domestic working classes around the world.

What is useful about Thornhill’s research, however, is how clearly his timeline matches up with the spread of U.S. hegemonic influence after World War II. While Thornhill himself leaves the agency indeterminate, the constitutions implemented in the Axis states after their defeat in World War II, in Latin America in the context of the 1980s debt crises, and in the former Soviet Union after its collapse were directly influenced by the United States. The importance of each moment in spreading a liberalized economic order is well documented. The adoption of U.S.-style commercial laws in many countries has also been well documented (Dezalay & Garth, 1995; Symeonides, 2014). What Thornhill’s timeline helps clarify, however, is that the United States influenced more than particular economic laws and policies, but also institutional governance structures, specifically those granting judiciaries more power.

The scope of this transformation cannot be determined from Thornhill’s analysis alone. In fact, the extension of judicial power over the decisions of elected representatives has been documented in Canada, parts of Western Europe and, most recently, the UK (*e.g.*, Banfield & Flynn, 2015; Tate & Vallinder, 1995). In these countries, U.S. influence has been less direct, but resonates with the post-1989 Washington Consensus and the broader rise of US judicial power. More work is needed on how the United States and U.S.-trained technocrats have shaped other legal systems and to what end (*e.g.*, Dezalay & Garth, 2002). This dissertation approaches the subject from a different angle: the continued judicialization by *U.S. courts* of more and more transnational economic activity and its effects on economic geographies.

The failure of the judicialization literature to attend not only to transnational dynamics and U.S. influence, but to any economic questions results from another crucial assumption: that the economic is by definition not “political.” Since both its advocates and detractors see judicialization as referring to making “political” things “legal,” the idea that economic relations could be judicialized is by definition excluded. Judicialization scholars focus either on human rights, or on such matters as electoral policy, citizenship, healthcare and so on. Almost without exception, economic issues are ignored. This is even true of an author like Shapiro, whose

explanation of the *history* of U.S. judicialization emphasizes the way U.S. courts used judicial review to uphold private property interests. As Progressive reformers pushed for regulations to ameliorate social and economic suffering, Shapiro explains, the U.S. Supreme Court waded into the fray and “frequently portrayed itself as the protector of individual rights — in this instance property rights — against the occasional aberrations of democratically controlled legislatures” (Shapiro, 1995, p. 46). Yet property rights then drop out of Shapiro’s story. During the New Deal, he explains, frequent judicial review of legislation continued, with a shift in emphasis from protecting property rights to protecting “civil rights and liberties” (p. 46). In relation to *this* period and the Warren Court’s progressive positions on social issues, he concludes that the Burger and Rehnquist courts tended to be “less welcoming of rights initiatives” (p. 48). This enables him to posit, in 1995, that judicialization in the United States was actually on the *decline*.

This characterization of U.S. judicialization is only possible if one is focusing on civil rights, not economic issues, and on domestic, not transnational affairs. I argue throughout this dissertation that judicialization by U.S. courts actually *accelerated* from the 1950s on, expanding most dramatically in the 1970s, and has continued to expand gradually but systematically ever since. However, this has been the judicialization of (or the extension of U.S. juridico-economic territory over) *economic* matters.

The judiciary is traditionally understood as the guarantor of “rights,” often of the rights of minorities against the actions of majorities. The resurgence of “natural law” theories after World War II, as well as the emphasis on rights in the UN charter are therefore seen as contributing to widespread judicialization (Tate & Vallinder, 1995). The judicialization of economic relations has also been about minority rights in an important way. Namely, it has facilitated the protection of the property, contract, and creditor rights of a wealthy American and transnational minority from the political decisions of sovereign governments. This is not simply an ironic observation. Politicians and investors frequently invoke the language of human rights and property rights almost interchangeably, and they explain the international investment regime precisely as ensuring the protection of such rights (Chimni, 2006).

While I reject reified distinctions between law and politics or politics and economics, such distinctions are rooted in material differences and consequences. As I explore in more detail later, the (re)production of U.S. hegemony since World War II has been based on redefining more and more transnational economic activity that had previously been considered *political*, and thus solidly in the sphere of foreign policy, as, instead, non-political and *legal* in nature, and thus in the judicial domain. From the 1950s on, this occurred most importantly in relation to the economic activity of poor, post-colonial and indebted states. The judicialization of these relations has not actually occurred primarily on the terrain of international law, but rather through the *transnationalization* of U.S. law.

International vs. transnational law

The extension of U.S. law over foreign government transactions outside the United States is not the same as the increasing penetration of *international* law into national legal systems. The difference hinges on the distinction between trans- and inter-national law, and the ways the latter is often (mis)represented. International law is a slippery term. No international government creates and enforces certain rules within its territory. Yet politicians, scholars and activists frequently refer to the importance of upholding and obeying international law. Thornhill’s argument rests on a characterization of international law as non-political, objective and, as he

says, “abstract”, and “already existing”; basing their decisions on international law, rather than the biases of politicians, allows states to create a kind of “internal” legitimacy, in which “the law creates law” (2016, p. 222). As with much of the international law literature, this obscures how international law itself is produced by particular actors with particular interests in a spatio-historical context shaped by uneven power relations.

Just what is international law? Even among legal texts, definitions differ. Traditionally, international law (sometimes referred to as “public international law”) refers to the rules governing relations between or among equal sovereign states. These rules consist of a hodgepodge of “treaties, conventions, rules of international customary law, and general principles of law recognized by civilized nations.”⁸ This generally includes bilateral and multi-lateral treaties among states and the rules of international organizations and tribunals like the WTO, the International Court of Justice (ICJ) and the UN. Unlike the relation between citizens and national laws, countries are only bound by international rules to which they formally agree, and mechanisms for enforcing rules against unwilling states are indirect. The United States, for instance, is well known for refusing to sign on to many environmental and other international agreements. “Customary law” and “general principles of law” are much trickier concepts, which I address below.

“Private international law,” in contrast, generally refers to the rules governing cross-border transactions among private parties. It is sometimes used interchangeably with “conflict of laws,” that body of law which determines which legal system(s) (usually national or sub-national) will govern transactions that take place in or across multiple jurisdictions. Sometimes, private international law is defined more broadly to include “conventions, protocols, model laws, legal guides, uniform documents, case law, practice and custom, as well as other documents and instruments, which regulate relationships between individuals in an international context.”⁹

In practice, the lines between public and private international law are blurred. Since the 1950s, the concept of “transnational law” has often been used to refer to the rules governing cross-border relations between private parties or between states and private parties, in ways that may combine elements of domestic law and private or public international law.

Most work on international law and capitalism has focused on public international law, emphasizing the proliferation of bi- and multi-lateral treaties, international organizations and tribunals, UN conventions and so on. Schneiderman makes the important point that, while most conversations about economic globalization emphasize flux and uncertainty, in fact this ensemble of international rules and institutions actually operates to produce “fixity and security” and “challenges directly the proposition that global capital has no tangible, institutional fabric. This rules regime cumulatively attempts to fashion a global tapestry of economic policy, property rights, and constitutionalism that institutionalizes the political project called neo-liberalism” (Schneiderman, 2008, pp. 1-2). Furthermore, this regime is being increasingly internalized in new national economic rules around the world (no doubt facilitated by the processes of judicialization discussed above). These important lessons apply equally to transnational law.

The sometimes explicit implication in much work on international law, in and outside legal studies, is that it is increasingly *replacing* domestic courts in governing important economic processes around the world. Yet, as Gerber (2012, p. 20) notes, “In general, the laws that are

⁸ <http://legal-dictionary.thefreedictionary.com/international+law>

⁹ http://www.oas.org/en/sla/dil/private_international_law.asp

applied to global markets are not themselves global—or even transnational! Instead, the *laws of individual states govern global markets*” (also cited in Christophers, 2016). Certain national courts at least remain fundamental to the constitution of global capitalism. There is a large body of legal scholarship on specific aspects of transnational or private international law, including on sovereign debt litigation (Buchheit & Gulati, 2010; Buchheit & Pam, 2004; Gulati & Scott, 2012; Weidemaier, 2012, 2014; Weidemaier & Gelpert, 2014). Yet, due to the exclusion of the economic from the judicialization literature, the two processes have hardly been addressed together. In fact, the growing authority of U.S. courts over commercial matters formerly classified as political (*i.e.*, the increasing judicialization of transnational economic affairs) has reshaped transnational law since World War II and influenced geo-economic relations among states, as well as properly public international law itself.

A small literature within legal studies has recently addressed national courts as international *political* actors, though without including economic cases in the analysis. Schwartz (2015), for instance, argues that national courts have increasing international political power, in large part because international institutions remain dependent on national courts to enforce many of their rules. He emphasizes the way national courts influence relations between states by deciding on questions like extradition, sovereign immunities and universal jurisdiction. Sloss and Alstine (2015) further divide the international cases national courts may deal with into three categories: state-state relations, private-private relations, and “vertical” cases between states and private parties. They argue that, in general, national courts avoid ruling on the first category, almost always rule on the second category, and that the tricky questions involve the third category. Yet, like the judicialization literature, these authors themselves almost always exclude economic cases from their analysis of the political power of national courts, because they consider these questions to be definitively non-political. Sloss and Alstine, for instance, see national courts as refraining from ruling on state-state matters because those are too politically sensitive, while ruling frequently on private-private matters (including transnational divorce cases and commercial transactions) because these “rarely have sufficient political salience to become the subject of interstate diplomacy” (2015, p. 7). In such cases, they argue, judges’ ideological preferences and alliances “are of minimal relevance” (p. 21). The list they give of complicated state-private cases includes no economic topics, but only: “treaty law and customary international law related to refugees, human rights, and international humanitarian law” (p. 8). Yet, one goal of this dissertation is to show that if it is true that U.S. courts today routinely rule on vertical cases involving states and nationalizations or sovereign debts, it is only as a result of a concerted and successful, although still partial, redefinition of those issues as non-political.

A limited amount of work in legal studies has addressed the role of national courts in transnational economic matters, without clearly defining this as political. Whytock (2009) argues that the private law of torts, contracts and property is as much an instrument of global regulation as public law and that national courts are increasingly important in governing transnational relations between private parties or between states and private parties. He identifies two “global governance” functions for national courts. They allocate jurisdictional authority, determining which legal system will govern what, through, for instance, conflict of laws rules, the Act of State Doctrine and defining the extraterritorial reach of U.S. statutes. They also determine how rights and resources are distributed among parties. Both functions are relevant to the cases discussed in this dissertation, and Whytock himself lists sovereign debt as an example. Referencing a well-known phrase from Mnookin and Kornhauser (1979), he also points out that it is not only litigating parties that are regulated by national courts, but *all* transnational

economic actors insofar as they write contracts in the “transnational shadow of the law.” Furthermore, he sees national courts as intertwined with international courts and tribunals, but not subordinate to them. In these ways, Whytock’s work is directly relevant to my arguments. Nevertheless, like many inter- and transnational law scholars, Whytock’s analyses lack an attention to space, history and power, which causes him to overlook the inequalities and geopolitical struggles embodied in today’s transnational legal structures. Whytock can only explain the *expansion* of the role of national courts in economic governance by a vague reference to globalization. In fact, the history of transnational law is just as fraught as that of international law.

Transnational law emerged in the 1950s (Anghie, 2007; Whytock, 2009). Yet, MNCs were far from new. Powerful multinational corporations (MNCs), most famously the Dutch and British East India Companies, had been central to colonialism and even enjoyed a kind of quasi-sovereign status for much of that period (Barkan, 2013). By World War II, these MNCs had “firmly and expansively entrenched themselves in the economic affairs of the colonies by entering into concession agreements with the colonial authority for the exploitation of the colonial territory’s resources” (Anghie, 2007, p. 224). This cozy relationship was threatened by decolonization. Suddenly, MNCs’ practices in the Third World were to be regulated by newly independent sovereigns rather than by their Western colonizers, and the companies’ access to resources and concessions was in jeopardy. Transnational law, Anghie argues, emerged to deal with this threat.

Before the 1950s, no one had questioned the ability of sovereign (Western) states to assert power over corporations operating within their borders. “It was precisely these classic principles, however, that were questioned and challenged by the new phenomenon of transnational law, which was used to attempt to abridge the powers of the sovereign Third World state in a number of important respects” (Anghie, 2007, p. 225). This new law disproportionately affected Third World states, because it was there that “the activities of these corporations generated new and complex problems that required legal resolution” (p. 223). This was true early on in the context of nationalizations of former colonial property, as we will see in Chapter 3. It also affected contracts for natural resources and stabilization clauses, which are outside the scope of this dissertation. It has remained true in the context of sovereign debt cases since the 1980s. Only recently, have the transnational legal rules designed to regulate sovereign debt in the Third World been turned on Europe too. Anghie concludes that transnational law has amounted to a new form of domination of the Third World by the West. This is a far cry from seeing transnational law as a response to “globalization.”¹⁰

The Rhetoric of International Law and the Appearance of Global Consensus

One further aspect of the relationship between trans- and international law is important to the cases in this dissertation and to maintaining the racialized power of law more broadly. I call this “international law rhetoric,” by which I refer not to official rules and institutions but to the widespread practice of using *claims* about a supposed international law that does not actually exist in any formalized manner as part of a performative process of calling that law into being. It

¹⁰ Both Anghie (2007) and Barkan (2013) emphasize the role of international arbitration in this emerging transnational framework. Arbitration occurs outside courts altogether, including national courts, and it is very important, but beyond the scope of this dissertation.

is more commonly known as “customary international law” or “general principles” of international law. Until the 1960s it was often referred to as “the law of civilized nations.”

The ICJ’s Article 38(1), for instance, lists “international custom, as evidence of a general practice accepted as law” and “general principles of law recognized by civilized nations” as key sources of international law.¹¹ Determining the content of this law is supposed to be based on such considerations as whether there is a widespread repetition by nation-states of similar legal practices, whether a “significant number” of states accept the act, and whether they do so out of a sense of obligation (“*opinio juris*”) (Blutman, 2014; A. T. Guzman, 2005). The ICJ also lists scholarly teachings as a “subsidiary” means of identifying international law rules. Together, this makes the actions of lawyers and judges in courtrooms and of legal scholars more broadly key sites of the production of international law. At the same time, while in theory (sub)national legal acts produce customary international law, those very acts are often justified by invoking a customary international law that does not (yet) exist. We will see examples of this self-referential construction of the national and international in later chapters.

Legal actors recognize that customary international law is especially hard to pin down. However, this is usually presented as a technical problem — a matter of collating and analyzing enough evidence (*e.g.*, Goldsmith & Posner, 1999; Roberts, 2001; Vega & Constance, 2009). Furthermore, this is treated as an a-political and spatially abstract process. Despite widespread recognition that national courts contribute to international law by “interpreting,” “developing” and, some scholars admit, even “making” international law, there is almost no attention to the unequal influence of *particular* courts in doing so (*e.g.*, Sloss & Alstine, 2015; Whytock, 2009). The suggestion is usually that all national courts around the world are equal participants in this process. However, this is far from the case.

Most legal scholars now admit that old-fashioned claims about the “laws of civilized nations” were deeply Eurocentric, including only Europe, the United States and other predominantly white nations in the category of “civilized,” while excluding Latin American, African and most Asian states. However, many argue, the participation of more and more states in international treaties and other agreements *today*, shows that we have achieved true international “consensus” and that claims about “general principles of international law” are now justifiable (Schneiderman, 2014). There are multiple problems with this view.

First, as Chimni (2006, p. 8) argues in relation to multilateral policy conditionalities, even where Third World states have formally acquiesced to international agreements, this “acceptance is voluntary in the most tenuous sense.” The same can be said for the “acquiescence” of many debtor nations to highly disadvantageous sovereign debt contracts and transnational laws. Second, it ignores the fact that today’s international rules were forged in racist terms that have had long-lasting material legacies. Third, the rhetoric of customary international law *remains* deeply racialized. Although the language of civilized/uncivilized was phased out by the late 1960s, it was replaced with the thinly veiled language of advanced/backwards and later developed/developing with much the same implied spatial divisions and similar effects (Anghie, 2007; Schneiderman, 2014). To this day, in Western judicial decisions and legal scholarship, the vast majority of all examples of supposedly general legal practices come from the United States and Western Europe, even while the lawyers that use them talk about global consensus. International lawyers employ a language of universalism, while downplaying their own national

¹¹ <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

positions, “thereby parading as universal that which is local and provincial” (Schneiderman, 2014, p. 63).

Throughout the dissertation, I discuss examples of how international law rhetoric plays an important role in constructing both international laws and U.S. laws governing the global economy, while remaining a site for the perpetuation of thinly veiled racialized inequalities.

Theorizing U.S. Hegemony and Judicial Power

TWAIL scholars argue that international law continues to perform an imperial function by extracting payment from Third World countries and curbing Third World economic sovereignty. U.S. law, my research demonstrates, has a similar function. The expansion of U.S. judicial reach I document in this study is imperialist insofar as it involves the unilateral expansion of U.S. (judicial) territory and insofar as it operates to ensure the continued extraction of resources and debt payments from the Third World into the United States. At the same time, the very purpose of transferring decisions about relations with foreign governments from the executive to the judicial realm is to recast obviously uneven and often imperialist relations as apolitical, neutral and about the “rule of law” — a process that has by and large worked, insofar as other countries have increasingly accepted each new round of U.S. judicial expansion. This process makes imperial relations hegemonic not by eradicating dissent, but by successfully ensuring that contestation takes place on the terrain of the “rule of law” as defined by U.S. elites. From Cuba to Argentina, countries have tried to contest U.S. judicial power through the courts; they have hired lawyers, gone to trial, and by and large obeyed U.S. court orders once they are made, in ways that seriously constrain just how far their resistance can go. For this reason, in this dissertation I primarily use the term hegemony, because it allows us to see clearly how today’s transnational juridico-economic framework is dependent on a complicated combination of coercion and consent, and how it is the United States itself (and increasingly the U.S. courts) that establish the terms through which struggle is carried out (Forgacs, 2000).

Work on judicialization and the Americanization of law shows clearly how global legal power today is fueled by the voluntary (or not) adoption of U.S.-style legal practices in many places. My focus, in contrast, is on the direct *extension* of U.S. judicial reach over foreign states and the way most of these states obey U.S. court orders most of the time. This dynamic can be seen as hegemonic insofar as Third World countries have contested and struggled over the content of that judicial power from the beginning, but have done so largely *on the terrain* of Western style legal practice and debate (see Chapter 2 for further discussion).

U.S. influence on the global legal order has been best explored in terms of international institutions and treaties and the spread of American-style legal rules to other places (Dezalay & Garth, 2002; Gerber, 2012; Peet, 2003; Annelise Riles, 2011; Schneiderman, 2008). This dissertation contributes to these important conversations by bringing a sustained attention to legal changes *within* domestic U.S. common law, and more specifically within New York federal courts and the U.S. Supreme Court in order to show that U.S. *legal* power should be understood as constitutive of U.S. economic and, in particular, financial hegemony.

In making this argument, I seek to bridge the gap between macro-scale work on U.S. hegemonic power, on the one hand (Arrighi, 2010; Block, 1977; Gowan, 1999; Panitch & Gindin, 2009), and political economic analyses of the concrete details of legal practice, on the other (Barkan, 2013; G. L. Clark & Monk, 2012; Maurer, 1997; Annelise Riles, 2011). The goal

is not simply to gain a more fine-grained picture of the former. Rather, I suggest that these legal practices can only be fully understood if considered in terms of their geopolitical role, and, more importantly, that these legal details reveal important aspects of the operations of global power that are otherwise illegible. Crucially, thinking relationally about U.S. hegemony and common law practice enables us to see how contemporary forms of territory and sovereignty are constructed and reconstructed on the terrain of law.

U.S. common law is a good example of what Agnew (2013)¹² calls “low geopolitics.” That the geopolitical role of these minute practices has been largely unexamined is no accident, but part of how such “low” processes function precisely by obscuring their geopolitical salience. The growing reliance on law to achieve geopolitical goals since World War II is in this way part of the broader de-politicization of the public sphere and proliferation of techno-politics many have documented (Krippner, 2011; Mitchell, 2002).

Focusing on U.S. common law shifts the timeline of legal change. Aside from Thornhill, the mainstream literature on judicialization dates the process to the end of the Cold War in 1989, while much of the critical literature on neoliberalization and law sees it spreading to the Third World on a large scale as a result of the debt crises of the 1980s. Focusing on U.S. common law, in contrast, shifts the timeline in important ways. Although the judiciary has long had extensive powers of review in the United States, the judicialization of *transnational economic* relations previously considered political and therefore outside the judicial sphere really began in the 1950s and gathered steam in the 1960s in response to the Cuban Revolution, broader anti-imperialist dynamics and the Cold War. In the mid-1970s, this judicialization of economic relations became combined with rising neoliberal tendencies to create a massive expansion in judicial reach through the formalization of a “commercial exception” to two important legal doctrines: the Act of State Doctrine and foreign sovereign immunity (see Chapter 3). One effect of this was to bring what we could now call neoliberal logics to the legal governance of Third World states even before the 1980s debt crises began. Furthermore, the commercial exception itself actually has roots as early as the early 20th century, although it only achieved full force in relation to the judicialization of transnational economic practices from the 1950s on and their entanglement with the rise of neoliberalism in the 1970s. At the same time, these legal practices then actually shaped neoliberal structural adjustment programs in ways that have so far hardly been recognized (See Chapters 3 and 4).

The role of the U.S. dollar and U.S. financial hegemony in fostering and exacerbating Third World debt crises, and the role of those debt crises in cementing U.S. financial power have been well documented. The IMF and World Bank employ structural adjustment and stabilization programs during debt crises to spread liberalization, austerity and other neoliberal policies around the world, constraining the sovereignty of indebted states (*e.g.*, Federici, 1992; Harvey, 2003; Peet, 2003). Other scholars (*e.g.*, Gowan, 1999; Wade, 1998) have investigated ties among the IMF, the U.S. Treasury and Wall Street, and shown that IMF programs have been geopolitical as much as economic tools for the U.S., transforming social relations within countries across the Global South to the benefit of the United States, transnational capitalists and domestic elites around the world. In this dissertation, I draw on this work but add an attention to legal practices that has been missing from it. Such practices go beyond the more visible operations of international institutions like the IMF and the World Bank and constitute subtler mechanisms for conscripting sovereign states into the U.S. economic order. They also help us

¹² English version available at academia.edu.

understand the hotly debated relationship between neoliberalization and financialization; while both processes have histories dating back before the 1970s, since that time, law has formed a crucial hinge between the two.

Of course, the relationship between U.S. hegemony and U.S. law has changed over time, and the two have never been perfectly matched. U.S. judges do not simply do the bidding of either the U.S. executive or Congress, who, at any rate, often disagree with one another. Fashioning U.S. legal power has required continual re-negotiations among all three branches of the U.S. government. Throughout the dissertation, I trace these evolving alliances and tensions among branches, and among U.S. courts, as they relate to the cases I study. Furthermore, the materialities of U.S. legal practice (what I refer to below as the aesthetics of law) themselves place certain (though flexible) constraints on the pace and form of U.S. legal change, no matter what the political interests of the executive, Congress or U.S. judges are at any moment.

Just as important are potential conflicts between U.S. state interests and the interests of particular capitalists involved in litigation, and where judges position themselves in such instances. Since World War II, U.S. hegemonic and private financial interests have for the most part been in harmony. Yet, while private capitalists have fared better than foreign governments in most commercial cases since World War II, this does not mean courts simply do financiers' bidding. Holdout creditors are still losing many specific aspects of these cases (*e.g.*, in relation to seizing sovereign assets).

Nevertheless, while it has often been the U.S. executive and legislative branches that pressured courts for pro-capitalists legal changes, U.S. judges at the New York and Supreme Court level have become increasingly allied with private finance. In recent years, vulture fund litigation has pushed the U.S. judiciary beyond the comfort zone of both the Bush and Obama administrations, and revealed that New York judges and Supreme Court justices are now willing to side with these funds even against the wishes of the executive branch and, potentially, the best interests of U.S. hegemony. Nevertheless, even these cases remain about the extension of U.S. territorial space, whether U.S. political elites like it or not. This raises the fascinating question, considered but not fully answered in this dissertation, of whether U.S. legal power is or is not necessarily dependent on U.S. economic dominance.

Territory as State Space

In framing the spatial expansion of U.S. judicial authority in territorial terms, I bring existing work on inter- and transnational law into conversation with a rich social science literature on territory. In contrast to the usual narrative about globalization and the breakdown of national territories, Vandergeest and Peluso (1995, p. 391) argue that, "Territoriality, far from being undermined by global processes, is increasing in importance and sophistication as a state resource-control strategy." I agree with this analysis, but add an attention to the role of law¹³ in producing contemporary territories.

Modern political sovereignty has always been related to control over space. Wendy Brown (2010, p. 44) explains that, for Carl Schmitt, law or *nomos* is fundamentally spatial and land is "the foundation of political sovereignty... For Schmitt, 'land appropriation is the primary legal title that underlies all subsequent law.' It 'constitutes the original spatial order, the source of all

¹³ Elden (2010) mentions the importance of the legal and juridical to territory as a political technology several times, but does not elaborate on the relationship.

further concrete order and all further law.” Today, the extension of political sovereignty via law does not always require the physical annexation of land, yet it remains no less dependent on seizing control over space.

The legal spaces governing transnational commercial processes today remain national and sub-national *state* spaces. Working within a Lefebvrian framework, Brenner and Elden (2009) argue that territory is a particular kind of state space that must always be actively (re)produced; that states and territories are mutually interdependent under capitalism; and that territory and state power are always co-constituted. Other scholars (e.g., Elden, 2010; Ford, 1999; Watts, 2003) develop a Foucauldian conception of territory, not as *the* basis of state power it once was, but as a key element within the milieu of objects to be governed. Although Foucault himself may never fully have appreciated the continued importance of territory, the transition from territory to population as the main object of governance has not displaced territory altogether, but rather marked the birth of territory in its modern form (Elden, 2010). This does not mean that all state spaces are territorial or that legal territory is the only form of state territory (e.g., Mbembé & Rendall, 2000; Sack, 1983). Nor are all legal spaces necessarily territorial. Nevertheless, legal territory has been an especially important form of capitalist state space since World War II.

The role of law, a key state institution, in extending U.S. influence over transnational economic activity means U.S. power is necessarily imbricated with state space. Furthermore, the form of these legal spaces has been shaped by many U.S. state interests and strategies. Finally, the emphasis in this dissertation is on law’s role in explicitly defining national borders (when is something “in” Argentina or “in” the United States). Border-making is always about the distribution of and struggles over power. Transnational U.S. common law decisions determine the spatial limits of various modalities of state power (judicial, executive or legislative) beyond the political borders of the United States drawn on maps. While these territorial dynamics are perhaps most clearly illuminated in litigation involving foreign governments, they are also important for transnational transactions between private parties, insofar as transnational capital operates through particular (sub)national legal borders (Potts, 2016).

In conceptualizing legal territory, it is important to escape the “territorial trap” (Agnew, 1994) — in other words, not to fall into a kind of methodological nationalism that assumes a modular, bounded national space (Goswami, 2004). Such problematic conceptions of bounded national space tend to lead to narratives about the inevitable obliteration of national borders in the face of global finance. Sassen (2000), for example, projects back a supposed absolute national territoriality onto the pre-globalization period. Similarly, much legal scholarship sees a Westphalian “positivist” territoriality as having been supplanted by a more modern, flexible and de-territorialized legal order (see discussion in Buxbaum, 2009). Yet, national borders, legal or otherwise, were never as absolute or as static as these narratives suggest. Nor have they become obsolete. What is important about the Westphalian era is that there were certain widespread *efforts* to produce tightly defined and controlled national legal borders. Since the early 20th century, in contrast, U.S. legal actors have consciously redrawn legal spaces in more complex ways. These efforts, nevertheless, remain deeply rooted in conceptions of national state space.

“Territory” is not a universal. Territorial forms are always historically situated (Agnew, 1994; Elden, 2010; Ford, 1999). Post-World War II geopolitical and economic transformations have altered the conditions through which territories are produced. Territorial forms today are also geographically differentiated. The legal territories I study emerged in the United States and have since spread in similar forms to many parts of the world. However, while all states today must engage with U.S. juridico-economic territory, I make no claim that legal territory operates

the same way everywhere. The fact that many countries rely on civil rather than common law, for instance, suggests significant differences. Brenner and Elden's (2009) concept of a "territory effect" (cf. Mitchell, 1999), following Foucault, on the "state effect" as well as Maurer (1997) on the "sovereignty effect" is useful in resisting reification of the concept of territory. Territory is not an *object*. Rather, territory, like states and sovereignty, is constituted through a bundle of dynamic *practices* — practices with important material implications for the distribution of power and resources among states today. Agnew's (2010) notion of territorial "permanences" is useful as well, for emphasizing that although the juridico-economic territories produced through U.S. common law practices are not fixed, neither are they arbitrary or easily transformed.

This dynamic conception draws attention to the constant role of strategy and struggle in shaping juridico-economic space, or to the issue of *territoriality*. Sack (1983, p. 56) defines territoriality as "the attempt by an individual or group...to affect, influence, or control people, phenomena, and relationships...by delimiting and asserting control over a geographic area." Drawing on this definition, we can think about state territory as that space over which a state exercises control and about territoriality as the continuous struggle to maintain, extend, or redraw the borders of that space. Yet there are many modalities of state power that might be exercised over a given space. For the material considered here, the most important distinction is that between judicial and executive power. The United States may well exercise diplomatic, military or cultural authority over activities and places not within judicial reach. The expansion of U.S. judicial reach has meant the production of more and more spaces around the world over which U.S. *courts* exercise authority.

The implications of this for national economic sovereignty vary greatly. For many post-colonial, Third World and indebted states, though to different degrees, the extension of U.S. juridico-economic territory directly reduces that space over which those states can exercise economic agency. This has been the more or less explicit intention of private capital and U.S. officials since World War II. The effect of this on U.S. sovereignty is more complicated. On the whole, the expansion of U.S. juridico-economic territory has bolstered U.S. hegemony. Yet, as American-style legal practices have been adopted around the world and more cities have become major commercial centers, the United States has not been an uncontested winner. Nothing in principle prevents legal techniques developed by U.S. courts on behalf of U.S. interests from being turned against the United States in the future.

More immediately, just because the United States claims judicial authority over a transnational space does not mean that other countries will necessarily obey it. As we will see, such border contestation goes on all the time. A fuller conception of juridico-economic territory then implies not just that space over which U.S. courts have claimed authority, but that over which they have been able to exercise it. In other words, it is not just about legal practice, but also about power.

Law and territory

Most legal scholars have emphasized the de-territorialization of law and understood territory as being replaced by increasingly complex *jurisdictional* relations (see discussion in Buxbaum, 2009). While these analyses of jurisdictional complexity are important and provide useful insights for the arguments in this dissertation, the distinction between "jurisdiction" and "territory" is not merely terminological. Rather, analyses of jurisdictional flexibility tend to elide the geopolitical character of these processes, framing them in terms of a necessary and usually

homogeneous response to an increasingly globalized world, and losing sight of the continued role of *state power* in producing and shaping these transformations. Raustiala (2004, p. 2548) is an especially good example, because he offers an excellent account of the increasing complexity of these legal spaces and even, at moments, recognizes the unique role of the United States in producing them whether or not other states like it. Yet, in the end, the role of uneven power relations and the *strategic* importance of legal territories drops out of his analysis altogether. He deems all remaining “territorial” claims as obsolete and suggests that a fully “despatialized” U.S. law is both normatively desirable and best suited for “the evolution and increasing interdependence of the international system — in both economic and security terms” (p. 2548). Such an account confuses a potential de-territorialization in the Westphalian sense, with a utopian de-spatialization. It also, in ways common to many accounts of flexible jurisdiction, suggests that just because law is no longer as tied to standard national political borders as it once was, it is somehow divorced from the spatial extension of state power.

Gerber (2012), also emphasizes a shift from territorial to jurisdictional bases for law, but does also focus on what he calls “unilateral jurisdictionalism” and emphasizes the unequal influence of U.S. law in governing global competition rules. He provides a useful historical account of the rise of U.S. influence as a result of its economic and political dominance in the Cold War era. Yet, he suggests that the unfair extension of U.S. law today is a kind of accidental result of historical contingency. Specifically, had it not been for the Soviet Union, which unfortunately forced the United States to “take responsibility” for protecting transnational markets, a truly global, cooperative, and equal transnational legal regime would have developed instead. It is only because of this history, he says, that “Jurisdiction over private economic conduct now *became a politicized and highly contested* issue in the market-oriented portion of the world” (emphasis added) (p. 62). In other words, this view recognizes uneven power relations but only as an aberration in a system that can and should be returned to a neutral and level playing field. The lessons of legal geography and critical legal studies provide important tools for analyzing these dynamics from a very different perspective.

The field of critical legal studies (CLS) was founded in the 1970s, and its adherents have long critiqued the closures, reifications and abstractness of mainstream law. Yet, this critique, like law more generally, has operated primarily through temporal analyses, focusing on the important task of denaturalizing supposedly rigid legal categories, but paying little attention to space. In the early 1990s, a small number of geographers, most notably Nicholas Blomley, combined lessons from CLS with a critical understanding of space and founded the still small, but growing field of critical legal geography (see Blomley, 1994 for a good summary of this history). More recently, there has been a “spatial turn” within CLS (*e.g.*, Brighenti, 2007; Butler, 2009; Valverde, 2008, 2009). Two key lessons from legal geography are: 1) that law does not interact *with* space, but rather always operates through multiple forms of spatio-temporality; and 2) that law is not discursive while space is material, but rather both law and space are simultaneously material and discursive (Blomley & Bakan, 1992; Blomley, 1994; Delaney et al., 2001).

Some of these scholars have studied law’s role in territorialization. In his 2011 article, Barkan suggests that legal institutions involved in economic regulation “are becoming more disconnected from territorial sovereignty as they simultaneously reflect and promote the capitalist world economy as both a globally extensive and deterritorialized system” (Barkan, 2011, pp. 7–8). In his 2013 book *Corporate Sovereignty*, however, he expands his analysis to discuss law’s role in “*establishing* borders and *territorializing* space,” and argues that “law

empowers through both its *application* and its *nonapplication* as well as through overlapping jurisdictions, extraterritorial extensions, and intersecting regimes of customary and formal legal orders” (emphasis in original) (Barkan, 2013, pp. 88, 18). Brighenti (2007, p. 74), in a somewhat different way, argues that there has been insufficient attention to territory within legal studies and that de- always implies re-territorialization, and explores the ways in which territory is not confined to operating in Cartesian space, but rather can be overlapping and even “translocal.” Legal geographer R. T. Ford (1999) explores at length the role of territorial jurisdiction as a fundamental technology of political liberalism.

Buxbaum (2009) argues that scholars should remain attuned to territory, and points out that nation-states often invoke claims about *extra*-territoriality as a way of protesting the extension of legal power by other states. Colangelo (2013), too, emphasizes “extraterritorial” law in ways that align closely with my own conception of “territoriality.” He explains that there has been a rise in extraterritorial extensions of U.S. legal power in the past half century, especially in relation to the extension of adjudicative and prescriptive jurisdiction, though less so in relation to enforcement jurisdiction (something that will be discussed in later chapters). He shows clearly how tenuous and how important spatial categories remain in U.S. law, noting that “courts have been willing to hang U.S. jurisdiction on the hook that some aspect of transnational activity comprising a claim falls within the geographic scope of U.S. authority, even if that aspect is fleeting and minor relative to the rest of the conduct comprising the claim” (Colangelo, 2013, p. 1306). He also notes that choice-of-law decisions often operate to extend the extraterritorial reach of U.S. federal and state laws, something I have written about elsewhere (Potts, 2016). Colangelo’s arguments are very useful, and in some cases the distinction between “territorial” and “extraterritorial” in the sense that he uses the latter may be unimportant. Still, “extraterritorial” is necessarily framed in relation to a supposedly static and identifiable national border that can be transgressed, which implies a national container that has never in fact existed. I would argue it is also not attentive to the ways in which U.S. courts have sometimes explicitly considered their own acts to be extraterritorial and justified, and at others have simply redefined the boundaries of “foreign” and “domestic” in order to declare their own actions to be wholly within the United States. I therefore use the term extraterritorial only to refer to explicit claims about extraterritoriality, whether from U.S. or non-U.S. actors.

Territorial spaces are not mutually exclusive, but rather overlapping and interpenetrating (Agnew, 1994; Brenner & Elden, 2009; Brighenti, 2007). Multiple states may have judicial authority over the same place, depending on the kind of activity in question. The legal spatiality of transnational divorce cases, for instance, may be totally different from that for derivatives. Critical legal studies scholars make a similar argument about overlapping and contradictory jurisdictional spaces (de Sousa Santos, 1987; Valverde, 2008), and jurisdiction and juridico-economic territory are clearly linked. Valverde’s investigations of the way jurisdiction determines the who, what, and how of governance at different scales are especially useful. Nevertheless, I use the concept of territory to refer not simply to that space over which U.S. courts claim jurisdiction, but more specifically to that space in which they regularly rule against foreign governments. For example, as discussed in multiple examples in Chapter 3, a court may claim jurisdiction to hear a case, but then determine that the Act of State Doctrine bars it from assessing the validity of a sovereign’s acts and therefore rule in favor of the sovereign. Although complicated, I consider this to be a situation in which the sovereign act in question remains “outside” U.S. juridico-economic territory, because such rulings are frequently based on an

assessment of whether or not U.S. courts do or do not have judicial authority over the kind and location of the act.

I also adopt a territorial frame to draw attention to the fact that the concept of territorial sovereignty remains far more powerful *in practice* than most legal scholarship suggests. While territorial sovereignty was never actually absolute, the attempt to act as if absolute territorial sovereignty existed was, indeed, more prevalent in the 19th century than today. Since the early 20th century, in part as classical legal thought gave way to legal realism, legal scholars, lawyers and judges have criticized this “territorial” discourse as old-fashioned, obsolete and positivist (see above citations). Yet, the idea of respecting territorial sovereignty remains central in litigation between private parties and foreign sovereigns, and huge amounts of ink continue to be devoted to defining and redefining the foreign/domestic divide. U.S. legal hegemony has not meant that U.S. courts simply claim authority over the *entire* world. Rather it has meant a gradual, heavily contested and ongoing struggle, through hundreds of individual cases, over the extension of U.S. judicial reach. Even in *NML Capital v. Argentina*, a case for which Judge Griesa has been widely accused of legal imperialism, there are many borders that Griesa will not (yet) cross (see Chapter 6).

Strategic claims about the *limits* of U.S. and New York space can also be important for some financiers and, at times, the U.S. executive. Most obviously, certain niche legal spaces are carefully defined as “offshore” and thus outside U.S. judicial reach and U.S. regulations. Yet these processes, too, remain territorial in that they are precisely about (re-)defining boundaries between American and, for example, Bermudan legal space. Offshore” spaces are never defined as “nowheres” (as has too often been suggested), but rather as very particular “elsewheres” (Appel, 2012; Maurer, 2008; Palan, Murphy, & Chavagneux, 2010). In contemporary capitalism, legal borders and the ability to arbitrage them are foundational to many accumulation strategies. The question is always who benefits from *which* borders. Speaking generally, the United States has pushed the expansion of its juridico-economic reach over debtor nations, while supporting sharp distinctions between the United States and offshore financial havens.

Finally, the juridico-economic territories I investigate contrast with much existing scholarship on territory and state space more broadly, in that they are not characterized by a strong tendency towards grid-like abstraction, homogeneity and the production of legibility (in contrast to those spaces explored, for instance, by Craib (2004), Scott (1998), and Vandergeest and Peluso (1995)). Brenner and Elden (2009) argue that Lefebvre’s “state mode of production” is characterized by a territorial strategy of “mondialization” that fits within Lefebvre’s broader concept of abstract space. Although they point out that abstract space is never in fact homogeneous but rather has homogeneity as its goal, this is still distinct from key transnational legal spaces today, which may be abstract, but tend to be far from homogenizing. As Valverde (2009) and Coombe (2001) have pointed out, the focus on homogenization can obscure spatial complexity. Despite the important “harmonization” of certain legal practices, the legal spaces governing transnational commercial flows are actually highly irregular, piecemeal, *ad hoc*, and convoluted.

These spaces are not intended to make people and social practices legible to the state, and the forces opposing abstraction here do not come from grassroots resistance movements. Rather, these are “expert” spaces, largely opaque except to a few specialists, and they constitute a convoluted capitalist space that is made more complicated from above, not from below. This complexity is both contingent and strategic. Law’s technicality is part of a strategy of closure that itself functions as a kind of repression (Blomley & Bakan, 1992). Breaking through this

closure, and understanding the geopolitical territorial struggles carried out on the terrain of transnational economic law requires careful analysis of those very technicalities.

The Technical Aesthetics of Law

Prominent legal scholar and anthropologist Annelise Riles has recently called for more attention to the “technical aesthetics of law,” including to “the ideologies,” “the actors,” “the problem-solving paradigm” and “the form of technical legal doctrine and argumentation” (2005, p. 3). Valverde (2009) makes a similar call, arguing that understanding the technicalities of law helps avoid the pitfall of reducing law to a mere expression or reflection of extra-legal power relations, by illuminating the internal legal logics that *shape* those relations. These perspectives underlie my methodological approach to the co-production of law, territory and U.S. hegemony.

The persistence of older rules, decisions and arguments in later judicial decisions is foundational to the common law system of case precedent. It is summed up in the legal doctrine of “*stare decisis*,” meaning “to stand by that which is decided.” This doctrine directs judges to abide by past judicial decisions in most cases. In theory, each new decision builds on, without contradicting, earlier decisions. Common law has therefore been characterized as a conservative (literally) counter to less predictable political change. Schneiderman makes a similar point about international law being “designed to bind states far into the future, whatever political combinations develop at home to counteract it, by imposing punishing monetary disciplines that make resistance difficult to sustain, if not futile” (2008, p. 6). In many ways, past U.S. case law performs this binding function on future decisions of U.S. courts.

At the same time, however, this conservative tendency is far from absolute. Edward Levi and other realist scholars showed decades ago that there is in fact constant change within legal argument, despite the supposed constraints of earlier decisions. In his reflections on analogical reasoning in the law, Levi (2013) showed that, as judges try to determine which past categories fit present cases, these categories themselves are constantly and necessarily re-defined. The legal rules bend to fit the desired result, not vice versa. The importance of precedent, in this analysis, is more in the possibilities for analogy it provides, than as a hard constraint. This flexibility is most important in common law, Levi shows, but also applies to the judicial interpretation of statutory and constitutional law. For Levi, this is not an excoriation of law, but rather what allows law the flexibility to be useful and to change as society changes.

Of course, even as analogy, past precedent *can* give lawyers and judges a mechanism for refusing to change the law in the present. This is true whether present definitions of “the law” are the same as those of the judge who wrote the older decision or not. In short, past law may shape present law, but not in any predictable way. The rules of common law reasoning mean that precedent provides certain parameters within which each new case is argued. Judges are steeped in certain traditions of legal argument and take these formal constraints seriously. In this way, they tend to slow the pace of common law change, although striking reinterpretations are also possible. U.S. courts may take years to fully develop the legal changes desired by the other branches or by private capital. This lag time is an important factor in shaping transnational political economic dynamics. While the common law changes steadily, changing it in any particular way is always difficult. Legal change involves long-term struggles in which the sharpness of legal argument is only one, and often not the most important, determinant of who comes out on top.

For convenience, I refer to the dual tendency towards constant change and relative permanence as legal “stickiness.” In transnational economic law, this stickiness, in combination with the highly technical and opaque nature of common law rules, is crucial to the construction of what, in Chapter 4, I call “deep finance.” In the neoliberal context, these largely unnoticed legal structures help maintain entrenched financial relations even in the face of organized political resistance to the more blatant *policies* of neoliberal governments. Illuminating these usually overlooked legal structures requires attention to the ways in which both common law permanences and changes are produced. In the rest of this section, I focus on the role of specific conceptual dichotomies that are especially important in transnational cases involving foreign governments.

Legal dichotomies and reification

Levi’s analysis of reasoning by analogy or category helps illuminate another foundational aspect of U.S. common law — reasoning by dichotomy. Each term of a dichotomy is a category in Levi’s sense, but one that is always defined in relation to its opposite, so that a redefinition of the first category always implies a redefinition of the second. For example, the vast expansion of the category of “commercial” in relation to acts by foreign governments since the mid-20th century has had enormous material implications not in and of itself, but because it had become equated¹⁴ with the “private” term in what is understood as a stark dichotomy between “public” and “private”.

The constant (re-)definition and reification of conceptual dichotomies is central to U.S. common law (Blomley, 1994; Blomley & Bakan, 1992; Horwitz, 1976, 1992). Among the most important in many areas of law are the public/private and the law/politics distinctions, both of which are crucial to the processes investigated here. A third key distinction in transnational law is the foreign/domestic divide.¹⁵ In U.S. law, such distinctions are treated not simply as pairs, but as logical opposites, meaning that something cannot legally be one and the other at the same time. Furthermore, for the dichotomies just identified at least, something *must* be one or the other. That is, these distinctions are seen as both exclusive and exhaustive.

As in modern Western thought more generally, these foundational dichotomies are interlinked, so that a change in one pair can ripple through to others. For instance, in sovereign debt cases, the public/private divide is essentially laid on top of the political/legal divide, so that moving an act from the public to the private side of the line *means* moving it from the political sphere (of executive action) to the legal sphere (of judicial action). The links between these two dichotomies and the foreign/domestic divide are not as direct, but are no less important — it is precisely the relation between the foreign/domestic divide, on the one hand, and the public/private and political/legal divides, on the other, that produces many juridico-economic borders. All three dichotomies should, therefore, be understood as operating spatially.

The power of dichotomies in U.S. law is in no way undermined by the fact that most legal actors’ since the Realist turn would admit that these categories are socially constructed and imperfect. Judges today can recognize that they are the ones establishing artificial conceptual boundaries and immediately assert the necessity of adhering to these boundaries once they have

¹⁴ The equation between commercial and private goes back much earlier in U.S. domestic law than it does in this transnational arena.

¹⁵ While this dichotomy is less important in wholly domestic U.S. cases, similar spatial distinctions involving state and other boundaries are at work in those cases as well and deserve further study.

been established — at least until the next time they are renegotiated. This is, arguably, necessary for enabling law to function. Yet, it also contributes to law's "frozen politics" — a continual naturalizing of the contingent and the historical (Blomley & Bakan, 1992, p. 688). At the same time, the fact that common law is developed through litigation means lawyers on one side or another are *always* trying to remap these distinctions. Like case law generally, legal dichotomies are *relatively* stable — they change frequently, but usually gradually and only as a result of concerted struggle.

Nor is the (temporary) logical rigidity of these categories diminished because, at any point in time, each term may have multiple, contrasting definitions depending on the legal context and multiple linkages with other dichotomies. For instance, the public/private divide plays out very differently at the transnational and household scales. In the former, defining something today as public or sovereign means it is *outside* the authority of U.S. courts, while private, commercial matters are within U.S. judicial reach. At the domestic and especially household scales, in contrast, being private is usually taken to mean something is *outside* the reach of law. *Roe v. Wade*,¹⁶ for instance, declared legislative prohibitions against abortion unconstitutional on the grounds that the right to personal privacy includes the right to determine whether or not to have a child.

Much of this dissertation is framed around a genealogical analysis of shifts in the three key dichotomies noted above (foreign/domestic, public/private and political/legal), while always putting those shifts in relation to broader struggles among the three branches of the U.S. government, the construction of U.S. hegemony and the conflicting interests of transnational capital and Third World states.

Public/private and political/legal: liberal, neoliberal, geopolitical

There is a huge literature in legal studies and legal geography on the public/private distinction in U.S. law (Blomley, 1994; Gavison, 1992; Gordon, 1984; Horwitz, 1982). Legal geographers have studied the spatial role of the public/private distinction in structuring U.S. homelessness and Apartheid South Africa among many other cases (Delaney et al., 2001). This distinction, and its entanglement with the political/economic distinction, has also long been important to the relationship between law and capitalism. Horwitz, for example, explains that the public/private distinction only became central to U.S. law in the 19th century alongside the emergence of the market as a "central legitimating institution" (Horwitz, 1982, p. 1424); "A picture of a decentralized, competitive, and self-regulating market lay at the core of all efforts to define the public-private distinction" (Horwitz, 1992, p. 206). Yet while the public/private distinction continues to serve the interests of American capitalism, its definition and function have never been static, and its relative importance has waxed and waned. Legal realists in the early 20th century often argued against the distinction and saw understanding its arbitrariness as a sign of "legal sophistication"; those thinkers, Horwitz believes, would have been very surprised to find that by 1980, "the public/private dichotomy would still be alive and, if anything, growing in influence" (Horwitz, 1982, p. 1426).

This resurgence was surely entangled with that of the closely linked law/politics distinction. After World War II, in many U.S. legal circles, there was a turn away from many of the insights of the Progressive Era Realists, and there were growing legal critiques of the regulatory New

¹⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

Deal state. Horwitz argues that attempts to “restore a sharp distinction between law and politics” were rooted in a reaction to totalitarianism, Nazism, and Stalinism, all understood as forms of excessive state intervention, and he cites the influence of early neoliberal economist Friedrich von Hayek on these legal thinkers, as well (Horwitz, 1992, p. 247).

The general trend in U.S. common law since World War II has been to expand the private sphere while shrinking the public one, and to expand the legal while shrinking the political. From the 1970s on, the equation of commercial with private in cases involving foreign governments (fostered by the neoliberal turn in policy and law) became a key mechanism for this expansion.

In addition to the anti-totalitarian backlash, a less well-explored aspect of the resurgence of the public/private distinction after World War II involved de-colonization movements and the status of newly independent states in the new international economic order. Anghie explains this succinctly:

[O]ne of the major responses of the West to the challenge of the Third World was to entrench neo-imperial economic relations in the private sphere. In the field of international economic law, it is this ‘post-colonial’ encounter that reconstitutes the division between the private and public sphere, establishes the content of each and proceeds to demarcate the boundaries between the private and the public that have to be maintained and elaborated.... The new states, then, sought to use their sovereign powers to transform the private law rules that played such a significant role in creating and furthering colonial inequalities. But rather than an expansion of public power over the private realm, transnational law was deployed for the purpose of achieving the reverse: of establishing that private law was not susceptible to amendment by the state (Anghie, 2007, p. 239).

I extend Anghie’s argument by rooting it in detailed legal struggles over the public/private distinction within U.S. courts. Neither postcolonial geopolitics nor the rise of neoliberal logics since the 1970s has completed the ascendancy of the private over the public; struggles over (re)defining the distinction continue to transform relations among the U.S., private capital and Third World states.

Law and space are always entangled with power. Yet the law/politics dichotomy remains fundamental to U.S. common law. This has been in no way undermined by the fact that, as Schwartz (2015, p. 99) puts it, “In the past two decades it became generally accepted that courts are political actors,” or that most legal scholars would readily concede that individual judges are swayed by “extra-legal” considerations, including their own political views and emotions. Despite the lessons of legal Realism, the material power of the law/politics distinction is immense. In cases involving foreign states, it determines what modality of state power (judicial, executive or legislative) should govern which activities where. At the same time as it distributes power in this way, it functions to de-politicize all activity falling on the law side of the division. In U.S. law, the legal not only implies the judicial, but the *a*-political and the technical, and it invokes a set of technopolitical discourses that serve to strategically de-politicize crucial (geo)political questions. In doing so, it has enabled the construction of a U.S. hegemonic order that can be presented as neutral, non-violent, civilized and modern.

Calling the law political is not in and of itself a criticism. Law may be either reactionary or progressive. The goal is not to purify the law by fully divorcing it from politics, as too many have tried to do (Horwitz, 1992). That would be akin to addressing the problems of “free-

market” capitalism by trying to sever the link between markets and politics once and for all. Just as there can never be an autonomous market, there can never be a neutral law. The point, rather, is to take responsibility for determining whose politics the law should promote. To date, U.S. common law has overwhelmingly favored U.S. hegemony and transnational capital. The question is whether this can be changed.

Conclusion

In sum, this dissertation has two primary aims: to contribute to and deepen existing understandings of U.S. economic and especially financial hegemony since World War II, by bringing to these debates a sustained attention to concrete legal practices; and to expose and analyze the legal structures that underpin the predatory financial practices of both restructuring and litigating secondary market creditors. I argue that mundane legal practices and global geopolitics are co-produced, and that U.S. common law and transnational legal relations have been especially powerful, though international law and claims about international law have been interrelated with this power in important ways. U.S. legal power has grown, first and foremost, through the gradual, but systematic judicialization of transnational economic relations that were once considered political matters to be handled by the U.S. executive branch. This expanding U.S. legal power has been a central pillar of U.S. dominance more broadly.

The expansion of judicial power, moreover, has taken the form of a territorial extension of U.S. judicial reach. Through the gradual accretion of hundreds of judicial decisions, U.S. law has refashioned national borders in the form of what I term juridico-economic territories, in ways that are more and more complicated, yet never arbitrary and often not all that flexible. In relation to transnational relations involving the actions of foreign sovereign governments, these territories have most frequently been re-mapped via the redefinition of three key conceptual dichotomies. First, more and more foreign government actions have been re-categorized as private or commercial rather than public, therefore as legal rather than political, and therefore as being in the domain of the judiciary rather than of the executive branch. At the same time, the “locations” of more and more economic processes have been re-categorized as domestic (in the United States), rather than foreign (outside the United States). These spatial reorganizations have expanded the juridico-economic territory of the United States, while correspondingly and strategically reducing that of other countries, especially Third World and more recently other indebted nation-states. This has operated to displace national economic sovereignty from these states to the United States, and more specifically to the U.S. judiciary.

These territorial legal processes have been shaped by and in turn have shaped transnational economic geographies. My research has focused specifically on sovereign debt dynamics and litigation involving foreign sovereigns or foreign sovereign actions in U.S. courts. New York’s juridico-economic territory and legal decisions have been the most important site for the extension of U.S. judicial power over these sovereign debt transactions, and my analysis illuminates important ties between New York’s financial and legal geographies. Throughout, I show how U.S. and New York common law has developed in relation to major sovereign debt crises, structural shifts in sovereign debt markets, and United States and IMF-led approaches to debt restructurings and economic “adjustment.” In the process, I expose key points of articulation between law, neoliberalization, and financialization and demonstrate that certain legal practices have operated as subtle and long-lasting mechanisms for enforcing neoliberal

discipline on sovereign states, in the service of transnational financiers, the geo-economic *status quo* and U.S. economic interests.

The transfer of authority over key transnational economic relations from the U.S. executive and legislative branches to the judiciary has served to de-politicize many crucial political questions. As many of these U.S.-style legal practices have spread to other countries, reversing or at least debating these legal developments becomes more and more difficult. Nevertheless, it is my hope that this dissertation will contribute to expanding the possibilities for democratic action in this domain by shedding light on these important processes.

Chapter 2 – Sovereign Disobedience

This chapter takes a first look at the litigation between Argentina and a handful of distressed debt investors that not only pitted financier against financier, but brought the U.S. judiciary and the U.S. executive into conflict. After introducing both the factual context of the case and key legal dimensions of sovereign debt law more broadly, I examine why and how *NML v. Argentina* produced such strong responses from so many quarters. I suggest that most analysts have been unable to adequately explain why not only Griesa, but the Second Circuit Court of Appeals and the U.S. Supreme Court have upheld such widely criticized legal rulings. I argue that the case is best understood in terms of Argentina's *limited* disobedience to the transnational U.S. juridico-economic order and the anger of the courts at being disobeyed after decades of growing power. It is this order that shapes the geopolitics of "private" contract law today. Understanding the conditions that made the predatory financial practices of vulture funds possible requires understanding how and why these changes occurred and what legal spaces were produced in the process. The rest of the dissertation traces and analyzes these transformations.

A Thwarted Attempt at International Reform

On February 3, 2015, representatives of the United Nations (UN) General Assembly gathered at the UN's New York headquarters on the banks of the East River to begin discussing how to overhaul the international framework for dealing with sovereign debt crises and defaults. It was the first of four *Ad hoc* committee meetings planned in the wake of General Assembly Resolution 68/304, titled "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes" (United Nations, 2014a). The resolution had passed the previous September by an overwhelming majority of 124 to 11, with 41 abstentions (United Nations, 2014b). It began by referencing the 2000 Millennium Development Goals and stressed the need for debt relief, cancellation and crisis prevention if those goals were to be achieved. Committee Chair, Bolivian Ambassador Sacha Llorentty Solíz, commenced the February 3 meetings by calling it a "historic day for both developing and developed countries," and affirmed the resolution's emphasis on the "sovereign right" of all states to restructure their debts, without being impeded by any other state. He noted the need in particular to deter disruptive litigation by private holdout creditors and welcomed the committee's "clear mandate" to elaborate a multilateral framework for sovereign debt through intergovernmental cooperation and with, of course, the participation of all "stakeholders," including civil society, the multilateral financial institutions and the private sector.¹⁷

Over the next three days, delegates from countries as diverse as Russia, South Africa and the Maldives issued statements in support of the resolution and heard talks from over a dozen sovereign debt policy and academic experts. The conversation went far beyond sovereign bonds to all dimensions of country debt, from commercial loans to public-private partnerships, and publicly guaranteed private debt. Debates ranged over topics such as whether notice of a restructuring should trigger an automatic suspension of all debt payments, whether lending into arrears should be continued, and what the proper definition of fair and responsible lending is.

¹⁷ Meetings attended by author, February 3-5, 2015. Quotes from author's notes. Video of proceedings available at <http://webtv.un.org/watch/ad-hoc-committee-on-sovereign-debt-restructuring-processes-general-assembly-1st-meeting-69th-session/4030515815001>.

Many speakers framed sovereign debt as being not merely about economic, but about social and political issues and even human rights. Most agreed that sovereign states must have the right to initiate and negotiate debt restructurings, though there were some differences of opinion over how binding any international framework should be, and a few of those present argued that the International Monetary Fund (IMF), not the UN, was the proper forum for such a mechanism.

Where perhaps everyone in the room agreed most definitively was on the need to prevent holdout creditors from disrupting sovereign debt restructurings. This consensus was unsurprising, since the proximate spur to the September 2014 resolution had been the widely decried July 2014 decision¹⁸ of the Supreme Court of the United States, which gave a group of hedge funds suing Argentina a major legal victory. *NML Capital, Ltd. v. Republic of Argentina* (*NML v. Argentina*),¹⁹ in combination with the ongoing European debt crises and growing sovereign debt burdens around the world, had made the threat of failed debt restructurings more urgent than ever and spurred the UN General Assembly to action.

Yet one thing cast a pall on the three days of celebratory statements and expert opinions. From the visitors' seats high in the back of the carpeted room, where I sat with perhaps 20 others in a space capable of holding a few hundred, I looked down at a sea of sleek brown desks and microphones — of which a startling number were empty. It is true that several countries from the Global South were absent because jointly represented by other states (South Africa spoke for the G77 plus China, the Maldives for the Alliance of Small Island States, for instance), but these were not the cause of consternation. Much more important was the absence of any representative from the United States, the United Kingdom or any other major Western nation. The September vote had broken down with few exceptions along the lines of the “Global South” versus the “Global North”, the “Third World” versus the “West.” Australia, Canada, the Czech Republic, Finland, Germany, Hungary, Ireland, Israel, Japan, the United Kingdom and the United States had all voted against the resolution. Every other European country (as well as Mexico, South Korea and Papua New Guinea) had abstained. Of the countries that did not vote for the resolution, only Mexico attended the meetings anyways. In addition to the missing country delegates, the absence of any representative from the IMF, the World Bank or (with the exception of one hedge fund manager) the private sector caused a great deal of concern. Despite the overwhelming majority vote for the resolution in the supposedly democratic General Assembly, every single major creditor power in the world boycotted the meeting.

These absences caused great discomfort. Speakers alluded to the absence of the United States and other powerful countries, as well as of the International Financial Institutions (IFIs) and private investors, announcing frequently that they hoped future meetings would include “all the relevant stakeholders.” Some affirmed their commitment to pursue the mandate of what they repeatedly framed as the world's most democratic and universal voting body, with or without the support of those missing. Yet, outside the UN Headquarters, sovereign debt actors with whom I spoke voiced the opinion, whether with regret or smug confidence, that no international sovereign debt framework could possibly move forward without the support of the United States, the IMF and the private sector.²⁰

¹⁸ *NML Capital, Ltd. v. Republic of Argentina*, Notice of denial of certiorari for Supreme Court No. 13-990, No. 12-105-cv(L) (2d Cir. June 16, 2014).

¹⁹ *NML Capital* is the lead creditor suing Argentina in this case, along with a coalition of other institutional and retail creditors. I refer to the plaintiffs in the aggregate for simplicity's sake as *NML et al.* or sometimes just *NML*.

²⁰ *E.g.*, interviews by author with: New York law professor, September 2014; New York lawyer, January 2015; Washington D.C. policy institute representative, January 2015; and New York hedge fund manager, February 2015;

In this chapter, I explore the stakes of *NML v. Argentina* and why it provoked such unprecedented furor on all sides, leading not only to massive media coverage and a General Assembly Resolution, but also to policy reports from the IMF and the International Capital Markets Association (ICMA), and countless official statements by governments around the world. Legal scholars specializing in sovereign debt and many academic economists criticized the District Court Judge Griesa's 2012 rulings against Argentina as bad law, against precedent and misguided. Nevertheless, I argue, these experts have been unable to offer a satisfactory explanation for why the apparently mistaken ruling of a district court judge was affirmed not only by the Second Circuit Court of Appeals, but by the Supreme Court of the United States. I demonstrate that we can only understand this case by contextualizing it within the judicialization of transnational economic relations by New York and a few other powerful courts, and the gradual restriction of economic sovereignty for most nations in the world. The emergence of vulture funds has been only one, particularly visible, symptom of these changes. Argentina's and other nations' struggles against vulture funds are worth exploring because, first, they make these broader changes visible in ways they usually are not, and, second, these cases themselves contribute to further legal changes.

The Argentine Case

In December 2001, the Argentine government unilaterally declared default on over \$80 billion of sovereign debt.²¹ At the time, it was the largest sovereign default in history. It came on the heels of two plus years of severe financial strain, rising unemployment, and desperate attempts to prevent Argentine banks from collapse by imposing, in December 2001, the vastly unpopular *corralitos*, which prevented depositors from accessing their own accounts. The latter sent thousands of protesters into the streets, banging pots and pans and demanding access to their savings and drastic economic change. In the end, the crisis led to the flight of the Argentine president by helicopter and a succession of several new presidents in less than three weeks. The default was not the start of Argentina's economic crisis, but rather an emergency measure meant to prevent the crisis from getting any worse. To a large extent, it worked. By declaring default on its sovereign bonds, Argentina gained an immediate respite from interest payments and found a breathing space from which, especially after the election of the populist Peronist leader Nestor Kirchner in 2003, to reconfigure its economic model.

Under Kirchner and then his wife Cristina Fernandez de Kirchner, Argentina pursued an anti-austerity approach combining industrial subsidies, increased welfare payments and other developmental interventionist policies. These, plus growing Chinese demand for soy, fueled an impressive economic recovery from 2003 on, reflected in decreasing unemployment and inequality, rising GDP and a large trade surplus (Wylde, 2016). The successes of this transition have been seen by some as a challenge to neoliberalism, the IMF and U.S. economic imperialism. Under president Carlos Menem in the 1990s, Argentina had been widely regarded as a poster child for the IMF and its neoliberal policy demands. The strains of the late 1990s, however, resulted precisely from these neoliberal policies. The IMF's indecisiveness in the early 2000s about whether to extend further bailout loans, further strained its relationship with Argentina (Cantamutto & Ozarow, 2016).

²¹ The history of the Argentine default and restructurings is covered extensively in many sources. For one good summary see (Cantamutto & Ozarow, 2016).

Though Argentina decided to default without the permission of the IMF or its commercial creditors, the country did not write off its debts entirely. Instead, between 2005 and 2010, it negotiated debt restructurings with almost all its creditors. In 2005, Argentina paid off its remaining \$9.8 billion to the IMF and declared the IMF and its monitoring programs unwelcome in Argentina. In the same year, 76% of its private bondholders agreed to swap their old bonds for new ones at a nominal loss of about 75%. In 2010, most of Argentina's remaining debt was restructured under the same terms. The new bonds were issued under U.S., English, Japanese and Argentine law, and in the respective currencies of each of those countries. These bonds immediately began trading on secondary markets. As of the early 2010s, those holding the "exchange bonds" included numerous hedge, mutual and other investment funds, many specializing in emerging markets and distressed debt, such as Gramercy Funds Management,²² Fintech Advisory, ICE Canyon, and Knighthead Capital. Although widely denounced as a unilateral "cram down," the restructuring deal was highly profitable for investors, many of whom had purchased the debts at extremely discounted rates. Cantamutto and Ozarow (2016) present evidence that, when all aspects of the exchange deal are taken into account, real debt reduction for Argentina over the long term is actually zero. In addition, the exchange contracts contain all the standard pro-creditor clauses, and the new bonds were issued under U.S. or English law, primarily in U.S. dollars or euros (not pounds) respectively.²³ Until summer 2014, Argentina made regular payments on these "exchange bonds."

Nevertheless, not all creditors participated in the exchanges. The owners of the remaining 7% of Argentina's bonds instead pursued the holdout strategy. Thousands of pensioners pursued the case through the World Bank's International Center for the Settlement of Investment Disputes.²⁴ The hedge funds, in contrast, sued in New York. The most prominent, NML Capital (a subsidiary of Elliott Management), first brought suit in 2003 on millions of dollars in defaulted debt, and continued purchasing highly discounted distressed Argentine debt on the secondary markets at least as late as 2007, even as it had failed to collect a cent in ongoing litigation. NML was officially joined in the case by distressed debt funds Aurelius Capital Management, Blue Angel Capital, Olifant Fund and others.

In the 2010s, the case gained considerable notoriety and was reported on in multiple languages in newspapers around the world. The predatory behavior of these litigating vulture funds has provoked well-deserved condemnation from the general public, debt activists, economists and scholars. In contrast, the restructuring creditors who did participate in the 2005 and 2010 exchanges are never criticized. Yet many of those restructuring creditors too were institutional investors specializing in distressed debt trading. In fact, I argue throughout this dissertation that the two strategies are intimately intertwined, and that we can only understand the real threat of litigating vulture funds if we understand their relationship with restructuring creditors more broadly. Vulture funds are not simply financial mavericks, but rather symptoms of much deeper, structural relations of debt and credit in the global economy. They are unique, however, in their constitutive role in fostering the power of private creditors as a whole by altering the legal system in the course of litigation. In *NML v. Argentina*, they have done so by

²² While a restructuring creditor in this case, Gramercy is currently suing Peru in another (Wigglesworth & Schipani, 2016).

²³ Argentina Trust Indenture dated 2 June 2005. Available at: www.bancasanmarco.it/uploads/media/Regolamento_Obbligazioni_-_2005.pdf

²⁴ *Abaclat and others (Case formerly known as Giovanna a Beccara and Others) vs. Argentine Republic* (ICSID Case No. ARB/07/5).

widening the possibilities for the *enforcement* of legal judgments against sovereigns further than they have ever been before.

The Enforcement Gap

Although the legal right of private actors to sue sovereign governments in another nation's courts is now considered normal among legal and business actors, this state of affairs is relatively recent. Creditor litigation against sovereign debtors only emerged in the 1980s. Since the early 1990s, however, distressed debt investors have sued sovereign debtors more and more often in New York, the U.K. and a smattering of other jurisdictions. These funds have won almost every case and collected payments from most of the countries sued, from Peru to Liberia (Schumacher et al., 2014). The existence of vulture funds and their success in collecting payments raises important questions about how sovereign debt functions, as well as about the very definition of national sovereignty. These questions are especially acute in light of the widely recognized "enforcement problem" at the heart of all sovereign debt litigation.

Although court judgments against sovereigns granting money to private creditors are now far from rare, there is in fact still no *formal* way to force a sovereign country to pay those judgments. Despite years of litigation against Argentina from 2004 on, with dozens of separate cases filed against the country in the Southern District of New York alone, and despite winning many money judgments against Argentina, by 2012 not a single creditor suing Argentina had collected on the defaulted bonds they held.

In domestic cases between individuals or firms, a legal judgment ultimately has power because the police can enforce it. Even in transnational cases, foreign individuals may sometimes be arrested through extradition treaties and so on. In contrast, a U.S. judge cannot order the arrest of a foreign president or any other official. This is true both because doing so would likely be considered an act of war and because of the legal principle of sovereign immunity. Even more indirect enforcement through the seizure or "attachment" of sovereign property located in the United States is often unavailable, since sovereign immunity currently applies not just to foreign officials, but also to Central Bank reserves and diplomatic or military assets. Thus, while the hedge funds suing Argentina won many money judgments against Argentina, they actually lost almost every one of their many attempts to attach Argentina's property (though we will see that *NML v. Argentina* has created important new law in this arena as well). Finally, a U.S. judge cannot unilaterally impose economic sanctions on a foreign sovereign - that is a foreign policy decision to be made by the U.S. executive and legislative branches.

The enforcement problem is widely recognized by lawyers, judges and investors. It is also officially enshrined in legal practice through careful legal distinctions between a U.S. court's right to issue money judgments or *some* attachment orders against a foreign government and its right to enforce those judgments. While some see this as a problematic limit on creditor rights, others see this enforcement "gap" as fundamental to protecting a certain amount of national sovereignty and to preserving the strange balance in the sovereign debt world between immunity from enforcement (giving debtors a certain power) and the lack of any kind of organized sovereign bankruptcy mechanism by which sovereign debts can be wiped clean (most accurately seen as contributing to the power of creditors) (Gelpern, 2013a; Gelpern & Gulati, 2006).

Still, this gap raises a series of interesting questions. Why do U.S. courts bother issuing judgments they cannot enforce? Why do countries like Zambia or Peru participate in foreign court proceedings in the first place despite the fact that no one can force them to obey a foreign

court order? And why, in practice, do most countries that have been ordered to pay vulture funds do just that. The short answer is that, while there is no *de jure* legal enforcement mechanism, there are many *de facto* enforcement mechanisms.

The standard response from lawyers and economists to the puzzle of why anyone lends to sovereigns and why sovereign ever repay their debts, despite the enforcement gap, is that there are “reputational costs” to a country for not paying (Panizza et al., 2009). Refusing to pay, that is, will likely make it very difficult to borrow in the future. This is especially important for the very poor countries that are often the target of vulture fund suits. These reputational incentives are usually reduced to some version of rational actor theory, in which it is assumed that all sides are weighing the costs of various actions, making it illogical for a country not to repay its debts in most cases, based on possible increased interest rates, capital flight and so on if it does not. However, such logic should be seen at most as the proximate cause for repayment. This behavior should really be understood in much broader terms of sovereign obedience to a set of rules that determine whether or not a country is allowed to participate in the international financial system at all. Following Gowan (1999) in his analysis of the international monetary system, debt repayment is about choice only in the most anemically technical sense of the word. The *fact* of sovereign obedience to the terms of international debt markets most of the time is not merely a reflection of basic market incentives, but the result of an underlying geopolitical arrangement based on the economic and legal power of a handful of states.

Despite its now hegemonic status, moreover, neither the existence nor the form of that arrangement has ever been static. The current juridico-economic order emerged in the context of the United States-led reshaping of the world economic system in the wake of World War II and widespread decolonization movements and has been continually reworked ever since. In other words, it is not just a matter of whether enforcement of the rules is or is not possible, but of what, precisely, is enforced.

Argentine Disobedience

Unlike most countries targeted by vulture funds, Argentina resisted paying the funds from 2003 until 2016, despite years of court judgments from the SDNY, the Second Circuit Court of Appeals and, eventually, the Supreme Court. Its ability to sustain this refusal was economic and political. Unlike many vulture fund targets, which have included some of the poorest countries in the world, Argentina’s size and status as a middle income country, combined with China’s growing demand for Argentine soy, enabled it to sustain relatively healthy economic growth for years without needing any new loans from foreign sources. This removed the vulture funds’ primary source of leverage over most indebted countries — the need for new financing to run the country and often to “rollover” old debts (*i.e.*, to take out new debts to pay off old ones).

Just as important as its relative economic autonomy was Argentina’s political willingness to remain aloof from official and private foreign creditors. Under the Kirchners, Argentina underwent a populist transition in which Menem’s neoliberal policies were explicitly rejected and anti-austerity measures celebrated. Cristina Kirchner nationalized the pension system in the late 2000s and the Spanish owned oil company YPF in 2012, to great international criticism and widespread domestic approval. The Kirchners further imposed strict capital controls and currency restrictions in order to combat inflation and capital flight. Just how anti-neoliberal the Kirchners have been is hotly debated in and outside Argentina, with some using the term *neodesarollismo* to suggest a combination of neoliberal and developmental approaches (Wylde,

2011). Either way, both Kirchner administrations made their rejection of U.S. economic imperialism, the IMF and neoliberalism central to the national narrative. There is even a small debt museum in Buenos Aires that tells the story of Argentina's debt struggle in explicitly anti-imperialist terms.²⁵ This political context, as much as the economic one, enabled Argentina to resist paying the vulture funds until 2016, after Cristina Kirchner lost the election to pro-business leader Mauricio Macri.

In line with Argentina's own frequent adoption of an anti-Western narrative, U.S. commentators, judges, and the vulture funds themselves have loudly denounced Argentina's behavior, declaring its refusal to pay a sign of its scorn for U.S. courts and invoking a binary opposition between obedience and disobedience to the rule of law (see below). The reality, however, is not so clear-cut. Despite vocal criticism of what it sees as biased judges and improper extraterritorial overreach, and despite multiple announcements that it would never pay the vulture funds, no matter how the U.S. courts rule, Argentina nevertheless continued to participate in over a decade of expensive litigation, hiring the world's most famous sovereign debt lawyers (Cleary, Gottlieb, Steen and Hamilton), and filing appeal after appeal in the U.S. courts. Those courts, for that matter, have continued to hear ongoing cases over money judgments and asset seizures, despite Argentina's open statements that it will never obey them. Outside the courtroom, Argentina has never pursued the more radical debt resistance option taken by Ecuador of auditing its debts and repudiating those determined to be illegitimate or "odious," despite the efforts of many individual Argentines to have debts incurred under the country's oppressive military dictatorship recognized as such (Lamarque, 2007). What's more, Argentine officials have repeatedly insisted that Argentina is in fact a *good* debtor who simply wants to pay its debts to the bondholders who accepted the 2005 and 2010 exchanges.

The question then is how to understand this *partial* participation in the world's most powerful legal system. Why has Argentina's disobedience to the international sovereign debt regime been both so visible and so incomplete? The short answer is that Argentina actually wants to maintain a certain respectability in an international system that places huge importance on the "rule of law." At least since 2012, as its economic condition deteriorated, some Argentine academics believed the government wanted to return to international credit markets.²⁶ In fact, in April 2015 Argentina successfully issued a few billion in new U.S. dollar bonds "outside the United States" in defiance of U.S. Judge Thomas Griesa's orders (Cotterill, 2015).

In other words, the struggle between Argentina and the vulture funds is not a battle over the existence or not of the hegemonic juridico-economic order, but, much more modestly, a struggle over the configuration of that system and, more specifically, over the construction of national sovereignty and territories within it. And it is not just Argentina that wants to reconfigure that order, but distressed debt investors and the U.S. courts as well. In sum, this case has been part of a larger struggle for power between states and private capital, between debtors and creditors, and between weak states and the richest countries in the world. But it is a struggle within the parameters of the dominant juridico-economic order, which means that it has largely been a struggle over the form and content of U.S. law.

Making New Law

²⁵ <http://museodeladeuda.econ.uba.ar/>

²⁶ Interviews by author with: Buenos Aires, professor of political science, September 2012; and Buenos Aires, professor of political economy, September 2012.

Though classified as a common law system in contrast to the civil law systems of continental Europe, the United States operates with a mix of common law, statutory law and administrative law. U.S. court cases set precedents that may or may not be invoked in future cases. It is not only who wins a case that matters, but the reasoning by which they win. New case law is made as much by lawyers as by judges. The latter rarely introduce their own unique arguments into a case at the point of decision — rather, they accept, reject or decline to decide on the arguments submitted by each side. Once a decision is issued, one can never be sure which aspects of the case will be picked up by future litigators, but any aspect *might* be. Simultaneously, there is a large body of statutory law that is passed by Congress and legally binding on the courts. U.S. law is thus made out of case law and statutes and the often complex interplay between the two — it is often through court cases that the meaning of statutes gets established. To make matters even more complicated, lawyers cite not only case law and statutory law, but frequently invoke academic legal scholars and even *economists* in making their arguments. These authorities are listed at the start of legal briefs, and can be presented as crucial references for interpreting laws or clauses in particular ways, or for making arguments about the economic consequences of proposed actions. Prominent academics thus shape U.S. law, whether they intend to or not.

One consequence of this fragmented legal agency is that legal change is never fully planned.²⁷ In any given case, arguments are based on the immediate motives of the litigating parties, while judges often consider both the particular case and its broader legal and social consequences. But once new law (whether common or statutory) is produced, the dynamics of legal interpretation ensure that legal developments will take on a life of their own.

These formal characteristics of U.S. law ensure that the stakes of *NML v. Argentina* go far beyond the payment of a few billion dollars to a group of unsavory hedge funds. The fact of Argentina's unique resistance to the holdouts, *while continuing to participate in years of litigation*, has meant that far more law has been created in this case than in any previous vulture fund case. Indeed, Gelpert (2013b) has suggested that, for the vulture funds, this new law has been precisely the point. Putting aside for a moment the inevitable unintended implications of the Argentina case, what kinds of law precisely have the vulture funds been trying to produce? This brings us back to the enforcement question. Since at least the early 2010s, this case has been about far more than collecting money. It has been about trying to create new legal mechanisms with which to enforce U.S. court orders against foreign sovereigns. The vulture funds have pursued two main strategies with significant successes: discovery and *pari passu*.

Forging New Enforcement Techniques

In the absence of a formal enforcement mechanism, the attachment of the sovereign debtor's assets has long been considered a key informal mechanism for collecting on judgments, based more on harassing the debtor into payment than on successfully recovering the value of the debts through seizures themselves. In practice, it can be much harder for creditors to obtain attachment orders than money judgments. NML has actually lost most of its dozens of attempts to attach Argentine assets around the world. Through this case, however, it succeeded in pushing the rules of attachment and specifically "discovery" (uncovering information about potentially attachable assets) in significant ways.

²⁷ Christophers (2016) makes a related point about the complex and often contradictory aims of actors producing intellectual property and anti-trust law.

U.S. courts have long held that only sovereign property that is both commercial *and* located in the United States is potentially subject to attachment. Yet, on June 16, 2014, the Supreme Court affirmed the lower courts' decisions that creditors like NML can demand *discovery* about a country's assets anywhere in the world, despite the strenuous objections of the U.S. executive.²⁸ The lone dissenting justice, Justice Ginsburg, critiqued the allowance of such a "sweeping examination of Argentina's worldwide assets" as "exorbitant" and against the "international norm."²⁹ I will return to this discovery ruling in Chapter 6, but for now simply note that this decision may be just as important as the much more widely noticed *pari passu* rulings, which I focus on in the rest of this chapter.

By 2011, the hedge funds suing Argentina were no closer to collecting payment than they had been in 2003. It was then that Judge Griesa agreed to reconsider arguments about a relatively obscure clause in the 1994 bonds under dispute. *Pari passu* is usually translated from the Latin as meaning "on equal footing." *Pari passu* clauses have been standard (or "boilerplate") in corporate and sovereign bond contracts since at least the early 1900s. Their meaning, however, has been notoriously elusive. The exact text of the bonds reads:

The Securities will constitute the direct, unconditional, unsecured and unsubordinated obligations of the Republic. Each series will rank *pari passu* with each other Series, without any preference one over the other... and at least equally with all other present and future unsecured and unsubordinated External Indebtedness... of the Republic. (Fiscal Agency Agreement, 1994).³⁰

The question is, what precisely do "rank *pari passu*" and rank "equally" mean?

In their in-depth study of the sociology of boilerplate contract writing through an investigation of the *pari passu* clause and its history, Gulati and Scott (2012) observe that *pari passu* is a "chameleon" clause, so vague as to admit of all manner of interpretation. This concept of "chameleonness" should actually be extended to *all* legal language, whether involving contracts, statutes or case law. While *pari passu* may be especially flexible, the inherent slipperiness and flexibility of all legal interpretation is central to how the law functions. At the same time, new interpretations are never simply arbitrary. There must always be a reasonable way to argue that the interpretation is based on the text at hand. In this way, the aesthetics of law imposes its own logic on legal change, and thus on the dialectical transformations of laws, contracts, markets and the material economic geographies they produce.

While renowned sovereign debt lawyer Lee Buchheit had written about the strangely unclear clause nearly a decade before (Buchheit, 1991), the clause first made a big stir in 2000 when a Belgian court ordered Peru to pay vulture fund Elliott Management (the parent company of NML Capital), on the grounds that the *pari passu* clause in the defaulted Peruvian bonds in question meant that Peru was contractually forbidden from paying some creditors (those who had accepted Peru's Brady restructuring a few years before), without paying holdout creditors like

²⁸ *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. ____ (2014).

²⁹ *Id.*, (Ginsburg, J. dissenting, at 2259).

³⁰ Available at <http://argentine.shearman.com/>

Elliott at the same time.³¹ Peru caved shortly after and paid Elliott the amount demanded (Fisch & Gentile, 2004; Schumacher et al., 2014).

This Belgian ruling caused great consternation among sovereign debt experts (Gulati & Scott, 2012). Not only did most legal commentators criticize the court's interpretation as wrong, they also saw it as giving a major advantage to holdout creditors, already considered a hindrance to orderly sovereign debt restructurings. That case, in combination with Argentina's dramatic default less than two years later, even spurred the IMF's 2001 Sovereign Debt Restructuring Mechanism proposal, which would have established a binding international framework for restructuring sovereign debts during crises. The proposal was quickly squashed, most importantly by U.S. opposition (IMF, 2008). When Argentina's creditors raised the *pari passu* argument in 2004, the U.S. Department of Justice and other third parties filed briefs opposing the move. Griesa neither rejected nor affirmed the Belgian interpretation of *pari passu*, holding that the issue was not yet ripe for decision. In 2011, however, NML Capital raised the *pari passu* question again. This time Griesa listened.³²

Griesa justified his decision in part, but not definitively, on the fact that Argentina had passed Law 26,017 known as the "Lock Law" in 2005 that officially barred the government from offering better terms to any holdout creditor than those the exchange bondholders had received. NML Capital and Griesa argued that, if anything violated *pari passu*'s language about equal ranking, the Lock Law surely did. Griesa accepted the Belgian court's highly controversial interpretation of the *pari passu* clause, ruling that Argentina could not pay any of its exchange bondholders unless it paid the holdouts at the same time. The Second Circuit affirmed this interpretation in October 2012,³³ but sent the decision back to Griesa for a more precise definition of how much Argentina was required to pay the vulture funds. Argentina argued that equal payment should mean giving the holdouts the same amount of money as the exchange bondholders received, *i.e.*, as if they too had accepted the exchange offers. Griesa, however, followed the arguments of the vulture funds in ruling that *pari passu* implied proportional or "ratable" payment — in other words, that if the exchange bondholders received 100% of what they were owed on any particular date (an interest payment of, say, \$60 million), then the vulture funds must receive 100% of what they were owed at the same time (then the \$1.3 billion of full face value of the bonds plus interest and fees). This interpretation of ratable payment was upheld by the Second Circuit in August 2013.³⁴ These rulings caused an even bigger outcry than the Belgian court's had, because New York courts are much more important to global finance. Yet, on its own the ratable payment interpretation of *pari passu* was no more *enforceable* against a sovereign than any other court order. To fix this, Griesa had crafted a legal "injunction" to back up his *pari passu* ruling.³⁵ Though it has received much less attention, Weidemaier and Gelpern (2014) argue in their excellent article on the subject that this injunction may well have far more important consequences for national sovereignty than the *pari passu* interpretation itself.

³¹ *Elliott Assocs., L.P.*, General Docket No. 2000/QR/92, Cour d'Appel [CA] [Court of Appeal] Bruxelles, 8ème ch., Sept. 26, 2000 (Belg.).

³² Order, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG) (S.D.N.Y. Dec. 7, 2011).

³³ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d. Cir 2012).

³⁴ *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d. Cir 2013).

³⁵ Order, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG) (S.D.N.Y. Feb. 23, 2012); Amended February 23, 2012 Order, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG), 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012).

Court judgments are legally binding decisions based on existing common and statutory law. They themselves become common law and imply generalizability to future, similar cases. Injunctions, in contrast, are *ad hoc* remedies crafted in order to enforce a particular judgment when the judge feels that the equities weigh in favor of taking such steps. Injunctions do not have legal status as precedent *per se*, though other judges can, of course, informally copy them. They also cannot be directly challenged as legally right or wrong the way judgments can, though their validity and appropriateness can be contested in various ways. While not unheard of, injunctions have been rare in sovereign debt cases in which judgments have long been assumed *not* to be legally enforceable. Indeed, a direct injunction on sovereign behavior is no more enforceable than any other court order.

In order to force Argentina to pay the holdouts, Griesa therefore crafted an order that enjoins everybody *else*. In short, his injunction forbade almost any third party financier from helping Argentina pay the exchange bondholders. While Griesa's interpretation of *pari passu* made it illegal *not to pay* the vulture funds, the injunction made it illegal *to pay* the exchange bondholders, and declared that anyone who helped Argentina make such payments could be held in contempt of court and, presumably, have their assets seized or even be arrested. Griesa's injunction was unprecedented in scope. The exchange bondholders and multiple third party financiers involved in processing payments fiercely protested the injunction. Most have argued in response that they cannot be legally enjoined because they do not operate as agents of Argentina in processing these payments, but as agents of the exchange bondholders, who are *not* covered by the injunction, leading to intricate legal arguments over geographies of agency and ownership that will be explored in Chapter 6.

The power of the injunction is rooted in large part in the fact that almost all major financial institutions must do business in New York and thus, unlike Argentina, must come within Griesa's jurisdiction. However, the injunction also claimed unprecedented geographical sweep beyond U.S. borders. Throughout the case, Griesa insisted that his injunction applied equally to banks in New York and to payment intermediaries in Luxembourg and Belgium, and to not only New York but also English and Argentine law bonds (see Chapter 6 for details). This geographical scope was widely criticized in and out of the case documents as improperly extraterritorial. After the injunction was filed, the number of third parties filing briefs in the case increased dramatically, including many of the exchange bondholders and other financiers concerned with what they viewed as a U.S. court interfering with their mundane payment operations and contract rights. The U.S. executive branch strongly objected to both the range of third parties affected and the extraterritorial scope of the injunction, arguing that it threatened established norms of sovereign immunity and was a *de facto* attempt to seize immune assets.³⁶ The fraught geographies of ownership and borders raised by the injunction will be explored in detail in Chapter 6. Here, I turn to the immediate impact of these rulings.

Default and Backlash

After several rounds of appeals and stays of the *pari passu* and injunction orders, Argentina filed a writ of *certiorari* asking the Supreme Court to hear the case. This prompted another flurry

³⁶ Brief for the United States of America as Amicus Curiae in Support of Reversal, *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. Apr. 4, 2012) (No. 12-105-cv(L)); Brief for the United States of America as Amicus Curiae in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing En Banc, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 28, 2012).

of third party briefs (details in Chapter 6). After announcing that they would file on Argentina's side, the U.S. executive and the IMF suddenly changed their minds in July 2013 (Gelpern, 2013b). On June 16, 2014, the same day it released the discovery ruling, the Supreme Court declined to review the case, thus tacitly affirming the lower courts' rulings. Stays on the orders were officially lifted. Yet Argentina still refused to pay the holdouts. On June 30, Argentina made a scheduled payment of \$539 million to the exchange bondholders via the Bank of New York Mellon. Afraid of legal sanction, the bank did not pass on the money. After a 30-day grace period, in which the exchange bondholders received no funds, Argentina officially defaulted for the second time in less than 15 years.³⁷

The scale of reactions to the Supreme Court's decision was stunning. It is possible that no contracts case has ever received such public attention (Gulati & Scott, 2012). The public and academic response has been overwhelmingly critical, though the reasons vary. Some have spoken out of sympathy for Argentina. Many more have been outraged by what they see as the dangerous systemic implications of these rulings, arguing that the increased leverage this gives holdout funds will make all future restructurings difficult and other bondholders far less likely to agree to restructure. Argentina received official expressions of support in its struggle against vulture funds from the Economic Commission for Latin America and the Caribbean (CEPAL, 2014), PARLASUR (the parliamentary body of MERCOSUR) (Anon., 2014e), The Bolivarian Alliance for the Peoples of Our America - Peoples' Trade Treaty (Alba-TCP, 2015), the members of the 24th Ibero-American Summit (Anon., 2014j), and the Organization of American States (minus the United States) (OAS, 2014), each of which criticized predatory holdout funds and the U.S. court rulings and worried about negative effects on future restructurings. In a joint interview, Ambassadors to the UN from Bolivia, Cuba, Ecuador and Venezuela spoke more strongly, decrying the courts' extraterritorial overreach and violations of national sovereignty, and the use of debt as a tool of domination (Anon., 2014d). A year after the rulings, Bolivian president Evo Morales framed *NML v Argentina* as an example of Western economic aggression against anti-imperialist Latin American governments (López San Miguel, 2015).

Argentina received further expressions of support from union groups, NGOs, and individual politicians and intellectuals. Shortly before the final Supreme Court ruling, 106 British Members of Parliament (MPs) issued a motion criticizing the predatory strategies of vulture funds in Argentina and Europe, urging the extension of anti-vulture legislation in the U.K. and suggesting that their government should "share its experience of legislating on vulture funds with the U.S. administration" (EDM 666, 2013). Shortly after the rulings, another group of mostly British politicians, academics, journalists and activists signed a statement denouncing the U.S. Supreme Court's role in "upholding the interests of a small minority of rogue speculators," criticizing the courts for rejecting "any notion of creditor responsibility of bad debt," and calling the rulings a "serious threat...to all developing and developed countries" (Anon., 2014c). Notable signatories included British MP Jeremy Corbyn, Wikileaks founder Julian Assange, and journalist Tariq Ali. Like the British MPs a few weeks earlier, the group called for the establishment of a "fair, independent and transparent arbitration mechanism for sovereign debt." Across the Atlantic, over 100 high status economists warned the U.S. Congress that the decisions "could cause unnecessary economic damage to the international financial system, as well as to U.S. economic interests, Argentina, and fifteen years of U.S. bi-partisan debt relief policy." They criticized the modus operandi of holdout litigators and even suggested Congress "look for legislative solutions

³⁷ This default was widely considered a "technical default" by experts and by markets - in other words, the default did not reflect major problems in Argentina's economy, nor did it immediately affect Argentine stock prices, etc.

to prevent this court decision, or similar rulings, from causing unnecessary harm” (CEPR, 2014).

By far the most prominent economist to condemn the vulture funds was Nobel laureate Joseph Stiglitz. Along with colleague Martin Guzman, Stiglitz has long argued that the 2001 default was necessary and that the 2005 and 2010 restructurings were very successful, and has staunchly defended Argentina in its struggle against the funds. Since 2013, his critiques of the U.S. courts have grown increasingly severe. He called the Second Circuit’s 2013 ruling upholding the *pro rata* interpretation a “miscarriage of justice” and noted that “For those in developing and emerging-market countries who harbor grievances against the advanced countries, there is now one more reason for discontent with a brand of globalization that has been managed to serve rich countries’ interests (especially their financial sectors’ interests)” (Stiglitz, 2013). After the Supreme Court decision, Stiglitz and Guzman (2014) wrote that the ruling “encourages usurious behaviour, threatens the functioning of international financial markets, and defies a basic tenet of modern capitalism: insolvent debtors need a fresh start.” In the same article, they decried neoliberalism and the Washington Consensus and bemoaned the fact that “[t]he U.S. financial system, already practised at exploiting poor Americans, has extended its efforts globally. Sovereign borrowers will not — and should not — trust the fairness and competence of the U.S. judiciary.” “Perversely,” they wrote elsewhere, American law “protects the strong against the weak” (2015a).

Even within the business community, opinion was split. Veteran *Financial Times* writer Martin Wolf called the rulings “extortion backed by the U.S. judiciary” (Wolf, 2014a). “Servicing debt is indeed important,” Wolf wrote, “[b]ut it is not more important than everything else” (Wolf, 2014b). Bloomberg News editors, too, criticized the rulings for their negative consequences for future restructurings and urged a return to the idea of some kind of international sovereign bankruptcy regime. Perhaps one of the most excoriating critiques of Griesa’s orders was published by the hedge fund journal *Seeking Alpha*. In it, investment lawyer Hale Stewart called the injunction an “egregious extra-territorial extension of claimed jurisdiction,” and expressed outrage that Griesa would claim that an Argentine law could violate his U.S. court orders:

I don't remember Judge Griesa being made the King of Argentina. Let's be clear here: the new law passed by Argentina may violate the terms of its bond swap, and it may violate the orders of Judge Griesa in the U.S.. But for a U.S. judge to claim that a law passed by another country is *illegal*, and may not be obeyed, is a breathtaking usurpation of executive authority, and an imperial arrogation of Sovereignty over a foreign country...Judge Griesa has done quite enough damage already. He has now vastly overstepped the proper authority of a U.S. court, by effectively declaring himself the omnipotent Sovereign over another country. It is time for him to cease and desist, or to be *made* to cease and desist by the Obama Administration (emphasis in original) (Stewart, 2014).

The policy world reacted quickly as well. On September 9, 2014, just three months after the Supreme Court decision, the UN General Assembly passed its resolution in support of establishing a multilateral legal framework (United Nations, 2014a). In addition to many of those quoted above, others supporting this effort have included former Greek finance minister Yanis Varoufakis, economists Thomas Piketty and James Galbraith (Varoufakis, Piketty, & Galbraith,

2015), and Pope Francis (Jubilee USA, 2015). The same month the General Assembly resolution was passed, the UN Human Rights Council (UNHRC) passed its own even more strongly worded resolution detailing the negative effects of high debt burdens on human rights of all kinds and denouncing vulture funds for diverting poor countries' funds away from much needed social spending (United Nations, 2014c). The UNHRC Resolution went further than the General Assembly's, noting that vulture funds "are indicative of the unjust nature of the current system." It was adopted by 33 to 5, with 9 abstentions, in a vote that largely mirrored the geographical breakdown of the General Assembly vote. The Czech Republic, Germany, Japan, the UK and the United States voted against it. Every other European country then on the Council except for Russia abstained. All the BRICs and many other countries voted for the resolution.

Those who criticize holdouts but reject the idea of a multilateral legal framework in favor of contractual reform were just as swift in their response. The IMF and ICMA immediately drafted new model clauses designed to mitigate the holdout problem without requiring binding action. Both organizations soon issued formal recommendations that *pari passu* clauses be written to explicitly exclude the ratable payment interpretation and that stronger "collective action clauses" designed to make coordination among a majority of creditors binding on holdout minorities be used (IMF, 2014).³⁸ The G20 has expressed criticism of vulture funds, while also limiting their support for reforms to this contractual approach (Anon., 2014i).

The Rule of Law?

Not everyone disagreed with the courts. Those who cheered them did so largely in the same terms as the judges themselves, celebrating the decisions as a triumph for contract rights and the rule of law, and for putting Argentina in its place. The judges, vulture funds, and many financial journalists have cast Argentina and its officials, in tones ranging from bemused to outraged, as "serial defaulters," "recalcitrant debtors," "scofflaws," "recidivist deadbeats," "bloody-minded," "defiant," breathing "hellfire," full of "teenage narcissism," and "melodramatic" (Anon., 2012a, 2012b, 2014k, Cotterill, 2012a, 2013; Dugan, 2012; Hong, 2014; Newman, 2014; Norris, 2014). The unifying justification for all these accusations has been Argentina's dual refusal to make good on its debt contracts with the holdouts and to obey U.S. court orders — in other words, for flaunting contract rights and the rule of law.

The discourse of contract rights is fundamentally contradictory. Contracts are often cast as objective, technical and morally neutral. Simultaneously, and often by the same people, they are cast as fundamentally moral agreements whose breach implies moral failure.³⁹ Those who defend contracts tend to do so in terms just as value laden as those that argue for their ethical suspension. Contracts, such defenders argue, must be upheld in the name of fairness. Despite the tameness of the term, such calls can be far from mild. Respecting contracts, in this view, is seen as a principle not only of good business, but of just behavior. These seemingly dichotomous ways of presenting contracts as technical and neutral, on the one hand, and deeply moral, on the other, function in complementary ways in practice. Their interplay is key to governing behavior from the individual to the state level, influencing everything from litigation strategies to international policy debates.

³⁸ <http://www.icmagroup.org/resources/Sovereign-Debt-Information/>

³⁹ (Graeber, 2011).

In their limited press releases, the vulture funds themselves have relied largely on the neutral discourse of contract rights, portraying themselves as eminently reasonable investors who merely want to fulfill a valid contract and bemoaning Argentina's lack of willingness to "negotiate" (Armitage, 2014; Newman, 2013, 2014). Yet, even this neutral version is saturated with moral claims. Vulture funds often frame their work as helping fight corruption and promote good governance in developing countries. As Mark "The Terminator" Brodsky has said, "We at Aurelius believe in the rule of law. We believe wrongdoers should be held accountable rather than rewarded; and we have decided to make a stand" (Hals, 2011).

The vulture funds' lobbying organization American Task Force Argentina (ATFA), in contrast, took⁴⁰ the moralistic discourse of contract rights to the extreme, in ways that would be comical if they were not carefully calibrated to touch upon the crudest fears of the U.S. security state, invoking the specter of an America under threat from all sides — including from defaulted debtors. ATFA's website throughout the final years of the vulture litigation contained downloadable posters of Cristina Kirchner next to Iranian presidents, with captions like "Shameful Allies" and "A Pact with the Devil?" Another page dubbed Argentina "The New Narco State." The site was full of references to Argentina's "increasing defiance of international laws and norms," including a cartoon showing Argentina's lawyer Jonathan Blackman in court with the line: "Would you tell a judge that you're going to break the law? That's what Argentina did." Much could be said about ATFA's campaign. The point here is that the rhetorical move throughout all their materials is to present each issue as showing Argentina's defiance of "U.S. and international law" with no suggestion that there is a distinction between the two. The site thus implicitly suggested that disobedience in a contract case with private investors in U.S. courts is on par with Argentina's alleged support for terrorism, drug trafficking and rogue nations developing nuclear bombs. The law is not only presented as indistinguishable from contractual obligations, but as an undifferentiated, universal abstraction synonymous with ethical behavior.

Though ATFA is by far the most exaggerated, the critique of Argentina as a law-breaker goes far beyond the vulture funds and their supporters. Even many who disapproved of the rulings were deeply offended that Argentina would continue to disobey them once they had been upheld by the Supreme Court — once they had "become law." Bloomberg News' editors, for instance, were critical of Griesa's *pari passu* interpretation, and recommended that an international restructuring framework was urgently needed (Crook & Duenwald, 2014; Crook & Newman, 2014). Yet once Argentina fell into technical default and still refused to pay the holdouts, the editors grew more and more irate, assigning moral blame to the Argentine government for its failure to defend its people by obeying the U.S. orders (Gibney & Duenwald, 2014). Among mainstream journalists, legal scholars and even debt-relief NGOs critical of the vulture funds, it seems to be a requirement of respectability to clarify that one does not condone Argentina's bad behavior.

In short, Argentina has been widely condemned for disobeying the rule of law. At first glance, this might suggest that the case should be read in terms of those defending the current legal order and those challenging it. Yet appeals to the rule of law are just as strong from the other side. The Kirchner administration and other critics of vulture funds have cast those funds

⁴⁰ The information in this paragraph is from ATFA's website (www.atfa.org), as it existed until sometime in 2016 or early 2017. At some point in 2016, the site became password protected, and as of March 2017 (by which point NML Capital and most of the other vulture funds suing Argentina had been paid) had apparently been taken offline. The posters referenced can still be found in online articles and blogs (e.g., (Anon., 2013, 2014a; Elbaum, 2015).

and U.S. courts in language just as charged as that of those decrying Argentina. Kirchner officials alone have accused the funds of being “aggressive,” “predatory,” “despicable and repugnant,” “the scourge of the international financial system,” agents of “savage capitalism,” and “sinister masters of opulence” (Anon., 2015; Russo, 2015; Salmon, 2015; United Nations, 2014b). They have characterized Griesa and his rulings as “irrational,” “absurd trickery,” “biased,” “contrary to common sense,” “malpractice,” “folly,” and “legal colonialism” (Anon., 2014f, 2014g, 2014h; Cotterill, 2012; Khemlani, 2014; Koop, 2015; Salmon, 2015). Others have used language nearly as strong. Yet neither Argentina nor the vast majority of its supporters have made the argument that Argentina should not have to obey the rule of law or respect contract rights. They have, rather, repeatedly cast themselves as the ones *most* concerned about contract rights (those of the exchange bondholders) and about being good law-abiding members of the world order (Anon., 2014b; Salmon, 2015).

Within this framework, they have had to justify their defiance of U.S. courts in carefully circumscribed ways, by criticizing the rulings as bad or wrong, and thus disobedience to them as not in fact disobedience to *the* rule of law at all. Several prominent academics have taken this approach as well. In addition to Stiglitz (cited above), sociologist Saskia Sassen (2014) accused the New York courts of “perverting” international law for the sake of vulture funds. Economist Michael Hudson, who characterized the holdouts as “scavengers of the financial system” as early as 2011, later referred to Judge Griesa as a “nutcase,” making bad decisions because of his personal dislike for Argentina (2011, 2014). Economist and former World Bank president Jeffrey Sachs labeled the rulings an “enormous legal and political error,” without “economic sense” or “justice” (Franco, 2014).

A second move many of these scholars and the Argentine government have made is to distinguish between different bodies or scales of law. In other words, they have argued that U.S. law should not come before Argentine and especially not before international law. Much of the heated rhetoric about legal imperialism should be seen in this light, as should the widespread support this case has spurred for establishing an international sovereign debt restructuring mechanism of the sort called for by the General Assembly. Such a mechanism is usually framed as part of a supranational project that would elevate a higher level of law above those of individual nation states. In other words, this is a position supporting official international rather than transnational law.

What role then did a passion for enforcing contract rights and the rule of law play in shaping the judges’ decisions in this case? Invoking a ideology of contract as a cause for these decisions would in some ways be the simplest explanation. Simplest, first, because the judges themselves have adopted this narrative. And simplest from a critical perspective that has long understood the power of the faith in law and contract in preserving the *status quo* under liberal capitalism. This commitment to law and contracts cannot be dismissed as mere ideological window dressing. Rather, it is part of a powerful discourse with material implications, of which the vulture fund phenomenon is one example. Was Judge Griesa truly outraged at Argentina’s refusal to pay their debts despite his orders? It seems clear that he was.

Yet, the discourse of law and contracts has been *just as important* for Argentine officials, debt-relief activists, academics and international policy makers criticizing the holdouts. And it should be taken just as seriously. In the case of Argentina (and other debtors who also tend to stay within these rhetorical bounds), the invocation of the rule of law places real limits on the strategies available. For one thing, it has forced Argentina into spending millions of dollars participating in years of litigation in foreign courts whose orders it has repeatedly refused to

obey. No matter how strongly Argentina has condemned the U.S. courts, it has participated, as its officials have repeatedly stated, precisely because it wants to be seen as a law-abiding nation — as a reputable member of the global order.

Far from rejecting it as superficial or merely superstructural, then, I will argue that the discourse of law and contracts has been fundamental to *NML v. Argentina* and to the development of the entire holdout phenomenon. Indeed, throughout the dissertation, I return to the role of an *increasing* emphasis on law and contracts in the neoliberal period in shaping international debt geographies since the 1970s. Iweidemat is a discourse, however, that has suffused not just the actions of creditors and the judges that support them, but of *every* actor involved. This case has, therefore, not been about whether the rule of law matters, but rather about what, precisely, the rule of law *is*. From another angle, if this case has indeed created such a furor precisely because it is a prominent instance of “sovereign disobedience,” as I suggested above, then the question is: what exactly is it an instance of disobedience *to*?

Griesa’s Motives

While Griesa may not have expected the huge political and moral outcry his rulings would provoke from so many non-specialists, he was well aware of the debates over *pari passu*’s meaning in the wake of the 2000 Belgian ruling, and of the fact that most prominent sovereign debt legal scholars, along with the Bush administration, the Clearing House Association and the Federal Reserve Bank of New York, strongly disagreed with that interpretation (Buchheit & Pam, 2004; Panizza et al., 2009). They had argued that the ratable payment reading set bad precedent, threatened future debt restructurings and deviated from long accepted “settled market understandings” of the term. Since 2012, academic and industry writers have further criticized Griesa’s unusual injunction, arguing that it goes far beyond the usual bounds of injunctive relief, hurts innocent third parties and calls into question many accepted norms of foreign sovereign immunity (Allen & Overy, 2012; Salmon, 2014; Weidemaier & Gelpern, 2014; Wolf, 2014a). Why then did Griesa make these decisions? Why did he do it in 2012 and not during the prior eight years of litigation? Most importantly, if his orders were so deviant, why did the higher courts uphold them?

We have just seen that a faith in law and contract may have been important, but cannot have determined these outcomes. Law and contract have been just as important not only to Argentina and its supporters, but surely to the many established legal scholars who have voiced criticism of the rulings. The “rule of law” can never be an explanation in itself, because just what defines the rule of law is always being debated. So what possible explanations are left?

Those in law, policy and business circles seem incapable of explaining Griesa’s actions in a satisfactory way. Many of my interviewees,⁴¹ as well as financial journalists and academics, have ended up on a simple, affective answer: Griesa became so frustrated with Argentina’s protracted resistance, so angry at its lack of respect, that he made a bad decision (Anon., 2012; Cotterill, 2012; Gelpern, 2013a; Gulati & Scott, 2012; Weidemaier & Gelpern, 2014). These same people, however, have been unable to sufficiently explain why the Second Circuit and eventually the Supreme Court did not strike down these bad decisions of an ornery old man — despite dozens of opposition briefs from other financiers and from the U.S. government. I do not

⁴¹ Interviews by author with: New York scholar and former lawyer, September 2014; New York law professor, September 2014; New York lawyer, January 2015; Washington D.C. policy institute representative, January 2015; and New York hedge fund manager, February 2015.

argue that emotional reactions were unimportant (and it is worth noting here that the many legal professionals who gave me this explanation did so with no sense of shock or impropriety that personal emotions might determine the outcome). It is hard to believe, however, that not merely one, but many judges made bad legal decisions because they were “frustrated” with Argentina. If such frustration does have a role to play, then the extreme level of anger Argentina’s behavior provoked, despite full awareness of the enforcement gap in sovereign debt litigation, is itself something that needs explanation.

Those who see Argentina’s struggle as that of a poor debtor against a United States-dominated capitalist order have, in contrast, widely condemned Griesa as a tool of the vulture funds and of financial capitalism more broadly.⁴² This view is both accurate and incomplete. It is complicated by the fact that, in designing the injunction as he did, Griesa helped the holdouts but directly undermined many more financiers by preventing payments to the exchange bondholders (also major hedge funds), as well as aggravating several of the world’s most important banks and payments intermediaries. This leaves open the possibility that Griesa and the higher courts are allies not just of finance, but specifically of the most widely criticized and predatory of financiers. The reasons why this would be the case, however, are not entirely clear. Just as strikingly, Griesa and the courts above him also directly flouted the wishes of the finance-friendly U.S. executive branch, raising important questions about conflicting interests among U.S. and transnational elites.

The argument I develop in the rest of the dissertation is that the courts were so upset not because NML did not get paid, or even because a simple money judgment was not obeyed, but because of Argentina’s disobedience to an entire, globally dominant juridico-economic order, in which U.S. courts are at the apex. In short, the extent of the anger with Argentina in this case has to be understood in terms of the growing reach of U.S. juridico-economic territory I explained in Chapter 1, and with Argentina’s refusal to bow to an attempt by New York courts and vulture funds to expand that territory even further. It is only in the context of this complex economic, legal and political history that the vulture funds’ own self-interested strategies in this case could produce the new legal terrain they have. And it is this order that Argentina and its supporters have been *partially* contesting. This has been a struggle within the existing hegemonic order, over the relative power of United States law *vis-à-vis* Argentine and international law, of creditors *vis-à-vis* debtors, and of first world *vis-à-vis* Third World states. Argentina questioned the boundaries of the existing framework, but not its existence — and in the end, it lost. The vulture funds were a major point of contention in the country’s 2015 presidential election, and its inability to borrow more put increasing strains on the Argentine economy. Within months of taking office in December 2015, Macri issued \$15 billion in new bonds in order to pay off roughly \$10 billion to the holdouts and began reinstituting neoliberal policies that had been removed under the Kirchners.

NML and the Expansion of U.S. Juridico-Economic Territory

Law has always been part of capitalism, but its form and function have changed over time. As discussed in the introduction, the juridico-economic order in dispute in *NML v. Argentina* has its roots in the collapse of formal Western imperialism and the rise of U.S. hegemony after

⁴² In addition to those cited above see Lacunza, (2014), Stiglitz and Guzman (2014), and Toussaint (2014).

World War II. This confluence of forces catalyzed a series of legal shifts within U.S. law designed to bring a substantial amount of “sovereign” economic activity under the jurisdiction of U.S. courts, and thereby out of the hands of the new, often anti-Western and anti-Capitalist, nation-states. This process of the judicialization of transnational economic relations brought much foreign activity previously considered to be in the properly “political” realm of diplomacy, military intervention and foreign policy into the judicial realm for the first time.

The courts’ intense frustration with Argentina in *NML* is best understood in light of many decades of this expanding judicial power over more and more transnational commercial space and a concomitant growing expectation of compliance by judges. The case is also a further step in that expansion. Gelpert (2013a, p. 9) actually hints at this when she suggests that Griesa’s reactions arose out of a deeper concern with protecting the reputation of the courts themselves: “As he was ruling for the creditors, Judge Griesa seemed to suggest he expected to be reversed. But by then, the goal had become to give creditors leverage — any leverage, it seems — and to recapture some dignity for the court itself, now feeling slighted and ignored.” Elsewhere Weidemaier and Gelpert (2014) analyze Griesa’s unprecedentedly broad injunction as a risk for the courts, but one driven by a desire to have its authority affirmed: “Money judgments often go unenforced, but this does not seriously call into question the legitimacy or credibility of courts... By contrast, defiance of an injunction is a direct challenge to the court’s authority — contempt of court” (pp. 32–33). If the court succeeds, they explain, “it will have done the impossible, compelled a foreign sovereign to pay — and may well get a reputational boost. But if the court guesses wrong, it will lose face and may be implicated in substantial and wide-ranging public harm resulting from the foreign sovereign’s defiance” (p. 39). I take Weidemaier and Gelpert’s arguments to heart, but argue further that the courts’ desire for dignity and authority must be historicized in terms of the longer spatial transformations of U.S. authority over foreign governments.

This search for “dignity” brings us straight back to the enforcement question. We saw above that the absence of a formal legal mechanism for enforcing a court order against a sovereign is well recognized, and that the standard explanation for why sovereign lending and borrowing occurs anyways is that debtors do not want to risk getting a bad reputation and thus not being able to borrow more. Attaching property has also been understood as an indirect enforcement technique. In fact, over time, many other enforcement techniques have developed, both *de jure* and *de facto*.

The two most dramatic legal changes affecting the authority of U.S. courts over foreign sovereigns since World War II have involved the related doctrines of the “act of state” and “foreign sovereign immunity,” dealing with justiciability and jurisdiction respectively.⁴³ This history will be analyzed in Chapter 3. In sum, both doctrines long served to maintain limits to the authority of U.S. courts over activities involving foreign sovereigns. Both were sharply weakened in 1976 with the development of a common law “commercial exception” to the Act of State Doctrine in *Dunhill v. Cuba*⁴⁴ and, a few months later, the codification of a similar exception to sovereign immunity in the statutory Foreign Sovereign Immunities Act (FSIA). The FSIA codified a shift from an absolute to a restrictive theory of sovereign immunity by establishing that U.S. courts could now claim jurisdiction over the activity of a sovereign as long

⁴³ Jurisdiction refers to a given court’s right to exercise legal authority over a person, subject matter or territory. Justiciability is a distinct concept that refers to whether the kind of issue in question is of the sort that courts in general may exercise authority over.

⁴⁴ *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976).

as that activity was commercial, as opposed, say, to military or diplomatic and occurred in the United States. *Dunhill* instituted a similar exception to the Act of State Doctrine, with a different territorial logic. As I show in detail in Chapter 3, the territorial legal tactic of reclassifying formerly political and public activity as judicial and private, and formerly foreign activity as domestic, did not begin in 1976. Since that moment, however, territorial struggles in sovereign debt cases have frequently occurred in relation to *Dunhill* and the FSIA.

The FSIA's "commercial exception" has been widely understood as expanding the jurisdiction of U.S. courts, though it still did not provide a legal mechanism for *enforcing* court orders against foreign sovereigns. At about the same time, "governing law clauses," by which contracting parties may select the governing jurisdiction of their choice, regardless of where the transaction occurs, gained widespread use. New York and England have been by far the most commonly selected jurisdictions for major commercial contracts, including sovereign debt contracts. In combination with the FSIA, such clauses expanded the reach of U.S. and U.K. courts over even more foreign sovereign activity (Potts, 2016). The FSIA also made some commercial property of sovereigns located in the U.S. attachable in U.S. courts. Though enforcing attachments has remained far more difficult than getting judgments, more and more kinds of sovereign property have been accepted as susceptible to attachment, especially as "creditors have gradually demanded ever-broader waivers of sovereign immunity" in relation to that property (Weidemaier & Gulati, 2015, p. 404). As I discuss in Chapters 3 and 4, further legal developments in the 1980s and 1990s pared back the power of both the Act of State Doctrine and foreign sovereign immunity even more, even as other legal changes facilitated the rise of secondary distressed debt markets that could take advantage of these developments.

Along the way, these extensions of U.S. jurisdiction and justiciability have meant the simultaneous extension of U.S. juridico-economic territory and corresponding reduction of the territorial sovereignty of foreign states. Even where formal legal barriers to enforcement remain, jurisdictional expansion, combined with the fact that most sovereigns do obey U.S. court orders most of the time, means that *in practice* U.S. enforcement powers have greatly expanded. This is especially important in the context of rising sovereign debt levels since the 1970s. As new legal mechanisms have increased the jurisdiction of U.S. courts in theory, higher debt burdens, more debt crises and increasing holdout litigation have made that jurisdiction more and more powerful in practice.

Griesa's *pari passu* order and injunction took this territorial logic a major step further, by asserting a significant extension of judicial reach over new kinds of activity within the United States and over a huge swathe of the world outside it. This raised a whole set of territorial legal debates, which I explore in detail in Chapter 6. In short, from 2012 on, *NML v. Argentina* consisted largely in a struggle over space and borders as participants argued about, for instance, whether payments to European exchange bondholders do or do not go "through" the United States, "where" in the payment chain ownership passes from Argentina to the bondholders, whether the FSIA applies to property outside the United States at all, or whether Argentina's April 2015 bond issuance occurred completely "in" Argentina or not.

In emphasizing the longstanding *de facto* enforcement power of U.S. courts over sovereigns, I am not disagreeing with legal commentators who see *NML v. Argentina* as a potentially huge step towards making sovereign debt legally enforceable. The point, rather, is that these recent changes should be seen not as a total rupture with past cases, but in the context of a much longer history of the spatial expansion of the real power of U.S. courts and, through this mechanism, of private creditors. The primary victory of the vulture funds in this case has been not so much in

earning a few billion dollars, though these amounts are significant for Argentina. Rather, the main victory has been in producing yet further expansions of U.S. juridico-economic territory, which these litigating creditors are poised to exploit.

Judicial, Contractual, Financial

In Chapter 1, I argued that participation in the post World War II world economic system has more and more come to mean participation in a world juridical system dominated by U.S. courts. The growing power of finance has been closely intertwined with this growing power of the judiciary. More broadly, the power of private *contracts* is necessarily intertwined with the power of the judiciary and the common law that governs contractual claims in case of breach. The possibility of judicial enforcement is the cornerstone of the contract system. While most contracts are never litigated, they are generally written in accordance with formal and informal rules and expectations of the legal system under which they would be litigated if needed. In the neoliberal era, increasing support for the freedom of contract has been widespread, but also uneven. Even compared to other U.S. courts, New York courts have been especially prominent in this trend (G. P. Miller, 2009). In combination with the increasing influence of finance and rising debt levels, the emphasis on contract rights has meant a particular emphasis on creditor rights. In the sovereign debt context, this is reflected in a common discourse about private creditors struggling to protect themselves from the sovereign debtors who threaten them.

As U.S. courts have extended their judicial reach over more and more sovereign economic activity, this has frequently been cast as a push for contractual as *versus* statutory governance. Contractual in this narrative is usually simplistically identified with private or market activity. It should, however, always be understood as implicating judicial power as well, and thus *state* power — but in a particular form. The defeat of the IMF's own proposal for a Sovereign Debt Restructuring Mechanism in the early 2000s was framed precisely in terms of contractual versus statutory action (Gelpern & Gulati, 2013), and this debate has been reenergized in the context of the UN General Assembly's recent efforts. Many scholars rightly argue that the binary opposition between contractual and statutory change is overstated and that the two can and should be usefully combined (Gelpern, 2013a; Gelpern & Gulati, 2013; Weidemaier, Gulati, & Gelpern, 2015). Their arguments, however, tend to miss the fact that the emphasis on contractual approaches among financiers and policy makers is not actually about feasibility or efficiency, but about the distribution of power in the financial system. In short, relying on contractual solutions to sovereign debt crises enhances the relative power of private bondholders and the U.S. courts who govern those contracts at the expense of alternative national or supra-national bodies that could otherwise govern debt crises.

Growing Judicial Autonomy

The U.S. executive and legislative branches have been staunchly behind much of the transfer of power to the courts since World War II, at times even against the wishes of the judiciary, as we will see in subsequent chapters. Since the moment many countries gained formal sovereign status, the content of that sovereignty has been curtailed by shifting large amounts of economic activity from the sovereign/political category to the private/judicial/*contractual* category. This was a useful way for the newly dominant United States to shift economic agency officially out of

the hands of *all* sovereign governments, while maintaining control over that activity through its own courts, which were and still are by far the most powerful in the world.

Nevertheless, over time this transfer has made U.S. courts increasingly independent from the other branches of government. This independence is not reducible to the separation of powers that has been a cornerstone of U.S. government since 1776; where that line is drawn has never been stable. U.S. courts have frequently, though not always, deferred to the executive in foreign policy matters, and they continue to do so much of the time in areas such as national security and terrorism. Since the 1990s, however, courts have become less and less likely to defer to the executive branch in transnational economic cases concerning sovereigns — even when the executive branch *now* argues that those cases have foreign policy significance. The growing autonomy of the judiciary in such cases is the result of the very processes the executive branch had long pushed.

In *NML v. Argentina*, the courts' refusal to defer to the U.S. executive branch despite the latter's strenuous insistence that this *was, indeed*, a foreign policy case, should be seen as part of this longer trend. Most legal scholars I interviewed⁴⁵ were unwilling or unable to say whether this trend towards judicial independence in cases involving sovereigns existed. Some said it was simply too complicated to generalize. Several noted that it has never been standard for the executive to interfere in a "contract case," and that it was in fact entirely inappropriate for the executive to interfere in a purely private matter. Yet this is precisely the point. In order for *NML v. Argentina* to be seen as merely a contract case and thus outside the bounds of proper executive intervention, a whole series of developments recasting sovereign activity as private and commercial rather than sovereign and political had to have already occurred.

In fact, the Department of Justice, the State Department and the U.S. Treasury had serious concerns about Griesa's rulings. They argued in briefs at the district, circuit, and Supreme Court levels that the issues involved were of major political importance. They were concerned that the *pari passu* and injunction orders would destabilize the international financial system and the existing sovereign debt regime. They also expressed serious concerns that the case would upset existing norms of sovereign immunity and territorial boundaries, and they criticized the injunction as a disguised attachment attempt that violated the FSIA and implied extraterritorial overreach in its extension to European payments systems. They argued strongly against the expansion of discovery rights abroad. As we will discuss in more detail in Chapter 6, however, the courts roundly dismissed each of these worries and dismissed the executive's opinions as inaccurate and irrelevant.

These tensions between the judiciary and executive branches demand a more fine-grained analysis of the position of the U.S. "state" in these sovereign debt struggles. Weidemaier and Gelpert (2014) have referred to Griesa's injunction as a "court-imposed embargo" — that is, a court-based version of a political strategy usually strictly reserved for use in executive-led foreign policy matters. If, as I have argued, these legal struggles are properly seen as territorial struggles over authority within certain spaces, the question becomes: when do the territorial interests of the U.S. government overlap or not with those of its courts? Insofar as courts get their power from being organs of the U.S. state, the territorial extension of court influence is an extension of *U.S.* reach, as well. *NML v. Argentina* makes clear, however, that sometimes the extension of court power can conflict with other U.S. interests.

⁴⁵ *E.g.*, interviews by author with: New York scholar and former lawyer, September 2014; New York law professor, September 2014; New York law professor, October 2014; New York law professor, November 2014; and New York lawyer, January 2015.

This tension is due in part to the unique position of New York City as both important national city and world financial center, with contradictory interests as the former and the latter. It is also about a deeper tension between executive and judicial power. Though the U.S. government demanded many of the shifts towards expanded court power after World War II, those shifts have since created the potential for undermining the United States' *own* national sovereignty. The legal changes developed in the service of U.S. hegemony may eventually outrun it, through the growing autonomy of its own judiciary, as well as through the spread of U.S.-style legal practices to the rest of the globe (including to those countries most exploited by it). This raises the question of to what extent New York City's legal-financial power is still and must remain dependent on the United States' hegemonic status. To put it crudely, the United States may not always be necessary to the maintenance of the juridico-economic order it has created. New York courts and the Supreme Court have shown themselves to be both tied to U.S. state power and to prioritize the interests of private capital. The question is what happens when those interests collide.

The upshot of all this for now is that the U.S. executive is in a contradictory position with respect to sovereign debt practices. Though it filed multiple briefs on Argentina's behalf, it suddenly withdrew its promised brief in the *pari passu* Supreme Court case, and at the policy level, it continues to support only a limited contractual response to the holdout problem. My arguments in this dissertation help make sense of this. The United States wants to preserve its position as world economic hegemon within an order that has used judicial power as a geopolitical tool for maintaining the international economic *status quo*. At the same time, as a sovereign state, the United States does not want the extension of judicial power over sovereign activity to go too far. Certainly, it does not want a world in which its own behavior can be challenged by foreign judiciaries. This concern surely grows more serious as the United States loses its unquestioned political and economic dominance, most immediately to China. As a sovereign, the United States wants to maintain the sanctity of some amount of territorial sovereignty. The question is how much exactly? And just what do we mean by "sovereignty" anyways?

The Geopolitics of Private Contract Law

It is in the context of these longer developments in the status of judicial and contractual power within the overarching juridico-economic order that the hotly debated UN General Assembly Resolution of September 2014 must be understood. In the statements following the vote for Resolution 68/304, "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes," the resolution's supporters congratulated each other on this overwhelming majority vote, calling it a "historic day" for all peoples, especially of the developing world (United Nations, 2014b, p. 11). Many expressed disappointment at the lack of *total* consensus, namely from the more powerful states. The representative for El Salvador noted that the resolution was "not aimed at creditors as a whole, whether Governments or private bond holders, but rather at the disproportionate profits of those speculating on margin, who have the power to derail restructuring processes and to disrupt the proper functioning of debt markets, with the support of the law in the respective jurisdictions. It is therefore difficult for us to understand the refusal of a small number of developed countries to address this scourge, when it has been speculators themselves who have engaged in such practices, including vulture funds,

that generated the bubbles that plunged us and other developing countries into the worst global economic crisis of the past 80 years” (p. 13).

Other speakers expressed less surprise. Argentine finance minister Hector Timerman addressed his remarks “with full respect to the countries that did not vote for the resolution that we just adopted, specifically those where the majority of international financial activity is centered” (p. 6). The real point, as many of those present recognized, was that the resolution *was* about far more than a small group of speculating creditors. The resolution asserted the “sovereign right of any State to restructure its sovereign debt,” and speaker after speaker framed the vote as a step towards redressing power imbalances in the global economy as a whole. Ecuador’s representative, for instance, stated that, “It is deplorable that a small percentage of financial speculators is continuing to endanger an entire debt-restructuring system, affecting not only the sovereignty of a nation but also the future of many... The lack of regulation, transparency and accountability in the international financial system has led to the creation of veritable empires that have so much power that they are able to conduct ever-riskier financial operations, knowing full well that it is the people that will have to pay for their bankruptcies, so that the economic system does not collapse. This we know as privatizing profit while socializing losses”(p. 10). Cuba’s representative cited Castro on the relationship between the debts of “underdeveloped countries” and “the monetary manipulations of the major capitalist [p]owers” and noted that, “foreign debt has become a tool for looting developing countries” (p. 11). Venezuela’s representative remarked that, “vulture funds are behaving in line with the selfish logic of capitalism” and that it would like to see “the development of new international geopolitics in which a multicentric, polycentric world takes shape that will lead to the achievement of global harmony and guarantee peace in the world” (pp. 18–19). Syria’s critiqued the major international financial institutions for being stuck in the 1940s and emphasized the “imperative to reform those enormous international institutions, which are failing to uphold the principle of justice in the distribution of wealth” (p. 15).

Even those less inclined to directly criticize the most powerful countries spoke forcefully about the need for a more egalitarian world. Timerman concluded with a call to “work together to continue building a free, fair and sovereign world” (p. 7). Many emphasized the obstacles excessive debts have presented to the achievement of “development, economic growth and the eradication of poverty” (p. 17), and some tied this directly to the question of human rights for all. Algeria’s representative ended the session on a particularly forceful note, saying that we need a debt restructuring process that “places States and peoples at the heart of the system, thereby preventing financial institutions devoid of any form of scruples from hijacking the development process of a nation or its sovereignty... This goes beyond the Argentine debt: freedom and democracy are at stake” (pp. 19–20).

In contrast to the sweeping concerns of those in support of the resolution, those who voted against it raised some procedural questions about the haste with which the vote had been taken and otherwise framed their remarks squarely in terms of the propriety of contractual versus statutory responses to sovereign debt crises. Invariably invoking the neutral/technical version of the contract discourse, several speakers argued that holdout creditors should be dealt with through contractual reforms of the sort already being developed by the IMF, and that *were* a debt restructuring mechanism of any kind to be developed, it should be developed by and housed at the IMF and not the UN. The U.S. representative stated that a “statutory mechanism for debt restructurings would create uncertainty in financial markets” and thus higher interest rates for developing countries, and expressed his support for “market-oriented approaches.” He further

noted “work on this technically complex issue is ongoing in other forums, including the International Monetary Fund and non-governmental bodies such as the International Capital Market Association” (p. 5). Japan also reiterated this preference for the IMF, arguing that these issues “require technical expertise and knowledge” (p. 5). Italy, Mexico, and Australia all expressed concerns that the UN was an inappropriate forum for these discussions. Canada made the contract-as-neutral argument explicit, arguing that, “bringing this issue into the United Nations... *further politicizes a technical issue*...” (emphasis added) (p. 5).

The resolution’s supporters in turn rebuffed these arguments about the proper forum. Brazil noted mildly, “We were surprised by allegations that this topic was not suitable for treatment at the United Nations. Development has never been a taboo issue for the General Assembly, including in its aspects related to debt sustainability and debt restructuring” (p. 5). Others emphasized the fact that the General Assembly “is the sole universal body with equal representation of all Member States” (Nicaragua) and “is the most democratic organ of this institution where the entire membership is represented on an equal footing” (Uruguay) (p. 5). Algeria, in a statement that responded neatly to Canada’s, said, “We cannot countenance having invisible groups behind the scenes deciding on the stability and fate of peoples, countries and citizens without their knowledge. This is not a technical issue; it is a hard-wired political one” (p. 5).

The resolution’s supporters also explicitly rejected the legal versus political dichotomy, arguing that this was a deeply political question *and* that establishing a UN-based debt restructuring mechanism would promote the rule of law. Bolivia critiqued the “failures and gaps” in the “market-based, *ad hoc*, contractual approaches” to sovereign debt restructuring (p. 5). Timmerman said, “the time has come to provide to the financial system a legal framework for restructuring sovereign debt” (p. 5), and Cuba said, “International law must live up to the requirements of a peaceful world in which full human rights for all is a reality” (p. 5). In other words, the resolution’s supporters saw their work as being precisely about “the law,” but a law that was statutory rather than merely contractual, and supra-national rather than national. This point makes the stakes of the UN Resolution clear. Despite its modest immediate goals of hindering the most predatory of speculative creditors, if successful, an international, binding sovereign debt restructuring mechanism would entail a significant departure from the juridico-economic order supported by the United States and most other Western states since World War II — an order designed precisely to remove control over state economic activity from the Third World in the wake of decolonization and leftist anti-imperialist movements.

In the end, the power of the existing order was neatly demonstrated by the utter failure of the UN efforts more than two years after the September 2014 resolution’s resounding victory in the General Assembly. In over a year of meetings, in which the United States, the United Kingdom and every major European power, as well as the IMF refused to participate, another resolution was submitted for vote in September 2015. Rather than “implementing” anything, Resolution 69/319 offered a list of “Basic Principles on Sovereign Debt Restructuring Processes” (United Nations, 2015a). It was applauded in the press and by many present as a victory in the fight against predatory creditors (*e.g.*, Stiglitz and Guzman, CADTM (Stiglitz & Guzman, 2015b; Third World Network, 2015). Yet it was far *less* radical than the resolution passed the year before.

Five of the nine “principles” were in whole or in part about *protecting creditors from sovereign debtors*. Principle 1 ends with the line “Restructuring should be done as the last resort and preserving at the outset creditors’ rights.” Principle 2 asserts the importance of

“constructive” negotiations in order to achieve “a prompt and durable re-establishment of debt sustainability and debt servicing” (*i.e.*, not, primarily, to achieve economic health for the debtor), and ends with a line about the importance of “achieving the support of a critical mass of creditors.” Principle 5 is worth quoting at length: “Equitable treatment imposes on States the duty to refrain from arbitrarily discriminating among creditors, unless a different treatment is justified under the law... No creditors or creditor groups should be excluded *ex ante* from the sovereign debt restructuring process.” Just what the “law” is here is left vague, but this is clarified in Principle 7: “Legitimacy entails that the establishment of institutions and the operations related to sovereign debt restructuring workouts respect requirements of inclusiveness and the rule of law, at all levels. The terms and conditions of the original contracts should remain valid until such time as they are modified by a restructuring agreement.” In other words, the “rule of law” is here neatly equated with upholding *contracts*. This is distinctly *not* the language of law in terms of the kind of statutory, multilateral legal framework the original resolution supported. Principle 8 does note the importance of “promoting sustained and inclusive economic growth and sustainable development, minimizing economic and social costs, warranting the stability of the international financial system and respecting human rights.” But *first* it says we must do this while “preserving at the outset creditors’ rights.” Even the final Principle, which directly criticizes holdout creditors, does so by warning of the need to protect the “qualified majority of the creditors” from interference by “other States *or* a non-representative minority of creditors...” That principle ends by encouraging the use of collective action clauses — a purely contractual response to the holdout problem.

There is no mention at all of a “multilateral legal framework” — the very starting point of the previous resolution and supposedly the goal of all the intervening committee meetings. The closest it comes is ending with a vague statement about continuing “to consider improved approaches,” and “taking into account the Basic Principles set out above *and work carried out by the international financial institutions*” (emphasis added). Yet despite the total capitulation to the desires of the United States, the IMF and the private sector, the United States and most other Western nations *still* refused to vote for this document. This time the resolution was adopted by an even greater majority of 135 votes to 6, with 42 abstentions (United Nations, 2015b). The United States, the United Kingdom, Germany, Canada, Japan and Israel remained in the no camp, while Australia and the other no-votes switched to abstaining. Iceland, Montenegro, Serbia, and Ukraine did vote for this resolution, but every other European country present abstained yet again.

In the post-vote speeches, some of those objecting to the resolution raised the same procedural complaints they had a year before and reiterated the belief that the IMF is the only appropriate forum for sovereign debt discussions. The U.S. representative, however, made the real sticking point clear. In addition to noting concerns that the principles adopted might “undermine the enforcement of contractual terms” (though it is hard to see how), he said the principles are “problematic in several respects, including language that could be construed as acknowledging a certain right to restructure sovereign debt that does not exist” (United Nations, 2015b, p. 10). He was referring, presumably, to the one point that was retained from the previous year’s resolution. Principle 1 begins: “A Sovereign State has the right, in the exercise of its discretion, to design its macroeconomic policy, including restructuring its sovereign debt, which should not be frustrated or impeded by any abusive measures.” Elsewhere the resolution says that “Sovereign immunity...is a right of States before foreign domestic courts and exceptions should be restrictively interpreted.” In other words, at the heart of these debates about sovereign

debt restructuring is the very definition of sovereignty itself, and what kind of economic activity is or is not included in its ambit.

Conclusion

We can only understand the economic and geopolitical stakes of *NML v. Argentina* and other sovereign debt cases if we resist seeing them as individual instances of contractual breach or predatory finance, and instead understand them in terms of longer histories of legal, economic and political change that have shaped geographies of wealth and power since the early 20th century. The U.S. juridico-economic order established after World War II remains strong. The outcome of *NML v. Argentina* and the failure of the General Assembly efforts suggest it is only growing stronger. The upshot of this case has been that creditors and courts have received a powerful new enforcement mechanism in the form of existing *pari passu* clauses and, more importantly, Griesa-style injunctions. Meanwhile, the only policy responses adopted so far in response to the widely decried holdout problem have been in the form of the IMF and ICMA's suggestions for tweaking future sovereign debt contracts. Such changes are clearly inadequate. Most experts agree that the collective action clauses these organizations so strongly favor can be a partial solution at best, and that these reforms do nothing to change the many billions of dollars in already existing sovereign bond contracts (Gelpern, 2013a; Schumacher et al., 2014). More importantly, in my opinion, is that these reforms are *only intended* to prevent holdout litigation, and do nothing to alter the relative balance of power between debtors and creditors in general, or among nation states. That, in fact, is surely the point.

Chapter 3 – Domesticating the Foreign

Chapter 3 examines the emergence of the current juridico-economic order in the post-war period, and the crucial role of Cuba and its nationalizations of U.S. property in shaping this transformation. Concretely, I offer a new interpretation of the history of the Act of State Doctrine, which, before the 1950s, had mostly prevented U.S. courts from asserting authority over the actions of foreign governments abroad. I argue that, contrary to conventional interpretations, the doctrine's reformulation in the 1960s did not make territory less important, but rather re-territorialized and complicated U.S. legal space in crucial ways. Through a careful analysis of Act of State Cases from the 1890s through 1976, I show how the foreign/domestic, public/private and political/legal dichotomies were always central to the doctrine's functioning, but that the definition of each term, and the relations among them were reconfigured in the context of multiple cases with Cuba in the 1960s and 1970s, as the New York courts, Congress, the U.S. executive branch and, after initial resistance, the Supreme Court, figured out how to bring foreign nationalizations within U.S. judicial reach in a way that satisfied all three branches of the U.S. government. This process culminated, most importantly, in the development of a systematic "commercial exception" to the Act of State Doctrine, and established the spatio-legal framework that would soon come to shape sovereign debt litigation in the 1980s and beyond.

The Act of State Doctrine and the Expansion of Judicial Power

The Act of State Doctrine in U.S. law has helped govern relations between the United States and other nation-states for over a century. In brief, the Act of State Doctrine determines when a U.S. court may or may not consider the validity of a foreign state's action. The Act of State Doctrine is distinct from the issue of foreign sovereign immunity. The Act of State Doctrine determines not "jurisdiction" but "justiciability" — that is, even given jurisdiction over a case, when should the court refuse to rule on a certain activity because it is not properly a judicial matter. Furthermore, unlike with foreign sovereign immunity, the Act of State Doctrine may apply not only to whether the sovereign himself (*e.g.*, the king, president, or the government) may be sued, but to assessing the validity of an *act* done by a sovereign, even as it applies to third parties. Both foreign sovereign immunity and the Act of State Doctrine changed around the mid 20th century from more "absolute" to more "restrictive" doctrines, each of which extended the juridico-economic reach of U.S. courts. This chapter is primarily focused on the spatial history of the Act of State Doctrine, but ends with a brief summary of the parallel history of foreign sovereign immunity. Foreign sovereign immunity is discussed in more detail in later chapters.

In *Underhill v Hernandez* in 1897,⁴⁶ Chief Justice Fuller of the Supreme Court wrote: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory" (at 252). This statement was considered the definitive expression of U.S. courts on the Act of State Doctrine for the next half-century. *Underhill* is still cited today, but it is widely understood to have been tempered by a 1964 case, *Banco Nacional de Cuba v*

⁴⁶ *Underhill v. Hernandez*, 168 U.S. 250 (1897).

Sabbatino.⁴⁷ In *Sabbatino*, the Supreme Court upheld the Act of State Doctrine to rule that U.S. courts could not question the validity of Cuba's 1960 nationalization of U.S. sugar companies. However, the grounds for upholding the Act of State Doctrine were distinct from those in *Underhill* and other preceding act of state cases. Where the earlier "traditional" act of state cases had espoused a fairly strict respect for the principle of territorial sovereignty, *Sabbatino* made the rule heavily dependent on the desirability of maintaining "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs" (at 427-428). The "separation of powers" approach elaborated in *Sabbatino* is still considered "the most recent, authoritative enunciation" of the Act of State Doctrine (Lastra & Buchheit, 2014, p. 107).

There is an extensive legal history on the Act of State Doctrine. Legal scholars typically narrate the shift from *Underhill* to *Sabbatino* as demonstrating a move from an old-fashioned territorial understanding of sovereignty to a more modern approach better suited for a flexible, interconnected world economy. Schlossbach (2000, p. 143), for instance, sees the strong version of the Act of State Doctrine in *Underhill* as consistent with the concept of absolute sovereignty that reigned until the mid-20th century and describes the latter as driven by "the positivist view that sovereign states are inherently equal, wield essentially absolute jurisdictional power within their own territorial borders, and are essentially powerless elsewhere." As with most legal scholars, he narrates the relatively simultaneous shifts towards a restrictive version of foreign sovereign immunity and act of state in terms of increasing economic interconnections, with no mention of shifting political relations or the shift from a colonial to a post-colonial world order underway at the time:

As American businesses increasingly engaged in commercial relationships with foreign sovereigns in the twentieth century, a heightened desire arose within the U.S. government, to protect those businesses. Responding to U.S. Executive branch concerns that U.S. businesses had no legal recourse against foreign sovereigns that breached their business obligations, American courts gradually abandoned the theory of absolute sovereign immunity for what is now known as the 'restrictive' theory of sovereign immunity. Ultimately, this restrictive theory was codified in the Foreign Sovereign Immunities Act of 1976 (Schlossbach, 2000, p. 144).

Patterson (2008, pp. 120–121) likewise picks up on these economic themes, but frames the these more explicitly as being intertwined with a changing postwar legal order. It is worth quoting at length because it represents the standard narrative so well:

The move towards freer scrutiny of state actions is best explainable by the drastic changes in international law and foreign affairs that occurred in the decades between *Underhill* and *Sabbatino*. The legal order created after World War II focused on strengthening international legal regimes and accountability. Individual rights gained more stature in the international political order, embodied in the 1948 Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, drafted two years after *Sabbatino*... Expanding international trade meant foreign sovereigns would increasingly butt heads over issues that might be properly resolved in

⁴⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

legal orders. Similarly, governments intervened more and more in what were previously private markets. This made governments more likely to be a party to cases not involving issues of core sovereignty such as territory, defense, or diplomatic privileges.

Commercial or other issues that did not trigger the concerns over international peace inherent in high politics are much more suitable to adjudication. The increasingly tight regulatory, commercial and economic ties between western powers made adjudication of innocuous disputes seem less like a violation of sovereignty. Western regimes were drawing ever closer in shared democratic values and political interests.

While scholars differ over whether the current Act of State Doctrine should be strengthened (e.g., Schlossbach, 2000), abolished (e.g., Bazylar, 1986) or left as is (e.g., Patterson, 2008), almost all share certain assumptions about the doctrine's history: 1) that the primary purpose of restricting the Act of State Doctrine was to foster international economic relations; 2) that this reflected the ascendance of a new, more modern international legal order; 3) that economic and legal concerns are not important to sovereignty and inter-state relations; and 4) that this new, democratic legal order was pioneered by the "West." Though there are distinctions over how complete the break is seen to be, all scholars agree that the *Sabbatino* case marked a key turning point towards this new international legal order.

In this chapter, I present an alternative interpretation of the changing application of the Act of State Doctrine. First, I agree with scholars like Patterson that, while important, the change from *Underhill* to *Sabbatino* is not nearly so big of a rupture as commonly suggested. Despite its supposed territorial positivism, there was a great deal of discussion of the proper relationships between the judiciary and the executive branch in *Underhill*, as some legal scholars have since noted. More importantly, but less widely acknowledged, *spatial* (and I argue specifically territorial) considerations remain central to *Sabbatino* and to all the act of state cases since — while they do shift after *Sabbatino*, they actually become *more* complicated and, eventually, even more central to legal arguments about act of state and foreign sovereign immunity than before.

Furthermore, while the conventional narrative explains the *Sabbatino* shift in relation to an increasingly globalized world economy supported by a more and more civilized and peaceful international legal framework, I argue in contrast that the transformation of the Act of State Doctrine was part of a highly contentious geopolitical shift, whose primary function was to maintain a United States and Europe dominated international economic order by restricting the definition of national sovereignty, just as 1) more states than ever before were gaining formal equality on the world stage and trying to improve their economic positions, often through nationalizations of colonial/imperialist property; and 2) the Cold War was making the question of what kind of economic order states would pursue especially fraught. For both reasons, the restriction of sovereignty was aimed primarily at national *economic* sovereignty, which is why I end this chapter not with the *Sabbatino* case, but rather, a decade later, with *Dunhill v. Cuba*⁴⁸ in which a commercial exception to the Act of State Doctrine was formulated by the Supreme Court. The outcome of these changes was to entrench a strict divide between the political and commercial acts of sovereign governments, just as the Cold War was making the debate over the politics of different kinds of economic relations the defining issue of the mid-20th century.

⁴⁸ *Alfred Dunhill of London, Inc. v. Republic of Cuba*. 4 U.S. 682 (1976).

The two-decade long struggle between the United States and Third World states and among the U.S. branches of government after World War II over whether and how to transform the Act of State Doctrine should be understood not in terms of establishing an “international” legal order in which the sovereignty of *all* states was equally restricted, but rather as a concerted effort to extend U.S. hegemony via a newly transformed *legal* system. The traditional “territorial” Act of State Doctrine was formulated at the height of the era of “gunboat diplomacy,” in which the United States and other powerful states would sometimes enforce unpaid debts, for instance, with military action. An act of state ruling barring U.S. courts from assessing the validity of a foreign act never meant that the U.S. government as a whole could not question that act. Rather, the Act of State Doctrine barred U.S. *courts* from doing so. As early act of state cases made explicit, the executive branch always remained free to pursue compensation through political channels, namely diplomacy or war.

I argue that the *Sabbatino* decision has to be understood in the context of a concerted, though fraught, struggle among all three branches of government from the 1950s on, over how to shift responsibility for the kinds of relations usually considered in the realm of foreign policy and the executive branch to the judiciary. In other words, this was a struggle over what modality of U.S. power would be exercised over transnational affairs. Shifting certain foreign government activity from the political to the legal domain functioned to supplant outright imperialist domination with an apparently neutral, rule-based and de-politicized system that could be framed as more legitimate in the modern era. But that shift was firmly rooted not in courts in general, but rather in the most “established” courts of the Western states. Only in this light can we understand not just *Sabbatino* but the other, only partially successful attempts to accomplish this shift through several distinct strategies: 1) executive override of the Act of State Doctrine in the context of Nazi confiscations (the first Bernstein exception); 2) claims that international law violations should supersede the Act of State Doctrine; 3) the separation of powers approach formulated in *Sabbatino*; 4) congressional override of the *Sabbatino* decision through the Hickenlooper Amendment; 5) executive override of the Act of State Doctrine through the “Bernstein exception” round 2; and 6) a commercial exception to the Act of State Doctrine.

While partially successful, the first five strategies on their own ultimately failed to cement the transfer of foreign economic activity from the executive to the judicial sphere. In contrast, despite the fact that it has never been fully recognized as part of the Act of State Doctrine (see Schlossbach, 2000), the sixth strategy greatly reduced the scope of the Act of State Doctrine in ways that incorporated aspects of each of the other strategies. Understanding the history of the Act of State Doctrine in this way relativizes the position of *Sabbatino*. Although the *Sabbatino* court actually *upheld* the Act of State Doctrine, the way it did so opened the way to extending the judiciary’s authority over matters of foreign affairs and contributed to the eventual success of the commercial exception override that vastly reduced the scope of act of state cases. That transition culminated in the implementation of the commercial exception in *Dunhill* in 1976, which removed a significant swathe of foreign government activity from the realm of protected “sovereign” action all at once.

This act of state story relates to the overarching argument of the dissertation in multiple ways. First, this is an important episode in the changing treatment of national sovereignty in U.S. law more generally. The shift in the Act of State Doctrine illustrates a key moment in the construction of a new kind of postwar U.S. legal power. The fact that since the 1970s there has continued to be some flexibility in the way the doctrine has been applied further supports this

view. Patterson's (2008, pp. 120–121) summary of this uneven application is telling, but only partially accurate:

Indeed, one influential commentator believes the act of state doctrine is applied systematically to countries outside the international legal order established by western states after the Second World War. This view is consistent with the approach in this article. Courts realize that states that are reticent about supranational or international legal regimes are more likely to be offended by other states adjudicating their behavior. The Cold War and the specter of nuclear war made courts keenly aware of why deference might be extended to countries politically and militarily opposed to the United States.

The examples he gives, however, show that only *powerful* countries opposed to the United States, like the Soviet Union and major Middle Eastern oil producers, receive this favorable treatment.

In fact, the restrictive version of the Act of State Doctrine was reformulated through multiple cases involving Cuba in the 1960s and the 1970s, despite the United States' claims that Cuba was precisely outside the international legal order. And, as we will see in later chapters, the exceptions to the Act of State Doctrine have since been applied to many other, especially indebted, countries around the world. While the executive and legislative branches were firmly behind this change in the period discussed here, one effect was the growing autonomy of the judiciary *vis-à-vis* the executive branch of the United States in "commercial" cases involving foreign sovereigns. This, in combination with related changes to foreign sovereign immunity, have been central to the growing role of the legal in governing global geopolitical relations ever since and, specifically, the increasing incidence of litigation by private creditors against sovereign debtors from the 1970s on — a trend that has continued even in the face of eventual executive opposition.

Second, I show throughout this chapter how the same three common law distinctions that remain crucial to vulture fund litigation in the 21st century were at the center of the act of state cases from the start. In other words, the *mechanism* by which the Act of State Doctrine was reconfigured was the gradual common law redefinition of three interlinked dichotomies: public/private, foreign/domestic and political/legal. All three are as active in *Underhill* as they are in *Sabbatino*, but their content changes. In brief, in the 1960s/1970s, the category of "private" suddenly expands to include "commercial" activity in a way that had not previously been the case in *international* affairs. At around the same time, there is enormous upheaval in how to define the political/legal distinction, which is closely tied to the separation of powers debates. Eventually, the use of the commercial exception allows all the branches to settle on a somewhat new, but still sharp distinction between the two spheres, while the longstanding association of public with political and private with legal remains intact. In combination with the private/public shift, commercial and private are from then on firmly associated with the non-political legal sphere.

Finally, despite the standard narrative about the de-territorialization of the Act of State Doctrine after *Sabbatino*, spatial considerations in the form of the foreign/domestic distinction remain central to all Act of State Doctrine cases, although they do become more *complicated*. Indeed, the more complex or "flexible" they become, the *more* time and energy are spent on defining these spatial categories. This is especially true once the commercial exception strategy becomes primary. Furthermore, a key argument throughout this chapter is that the geographical

implications of the foreign/domestic distinction should never be understood in isolation but rather as co-constituted with the public/private and the political/legal divides. It is the changing configuration of all three distinctions that re-shapes geographies of national sovereignty throughout the period.

Methodological note

In presenting this revised history of the Act of State Doctrine, as in the following chapters, I have made no attempt to uncover long lost or “surprising” cases about sovereignty traditionally ignored by legal historians. Rather, I have focused on precisely the most canonical act of state cases from the late 19th to the mid 20th centuries. More precisely, this chapter is based on my analysis of 11 cases between 1898 and 1976, in which the Act of State Doctrine was a central issue. Many of these cases were initiated in federal New York courts, one in the UK, and a few in the 5th Circuit, and all but two of the U.S. cases went to the Supreme Court. Where available, I have examined lower court and dissenting decisions, as well. This chapter is therefore based on thirty-five case opinions, as well as a number of U.S. executive and legislative documents, and some Cuban documents. My goal has not been to try to identify misreadings of particular lines or words, but rather to approach these cases from an entirely different framework from that taken by most scholars. In short, to do a close reading of the role of three key conceptual distinctions noted above in each case, as well as of international law, the judiciary/executive relationship, definitions of sovereignty, and relevant historical context.

In presenting my conclusions, I make no claim that any particular case represents the first moment in which an idea was expressed. Indeed, most ideas that make it into a judge’s decision have already been articulated by one of the lawyers involved, and frequently by other legal scholars. Case decisions can nevertheless be effective markers for the moment at which an idea gains enough sway to be recorded in case law. In addition, given the nature of the common law system, once an idea officially enters the case law, the likelihood that it will influence further legal practice is significantly enhanced. It is not the result of a case alone that is important in this way, but which of the many possible rationalizations a judge chooses to use.

The Public/Private Distinction as a Territorial Boundary

In this chapter, I analyze the territorial geographies produced in *Underhill* and later act of state cases in order to show how spatial claims established by the foreign/domestic distinction have always been articulated with the political/legal and the governmental/not governmental (or public/private) distinctions. I will argue, in other words, that the so-called positivist territorial definition of absolute sovereignty in *Underhill* was never as absolute as later scholars have suggested — and even after the political/legal and public/private distinctions became more central to defining the Act of State Doctrine, these considerations have remained deeply spatial. The foreign/domestic divide was always qualified by the political/legal distinction, insofar as a ruling that the Act of State Doctrine applied never meant that the United States as a whole could not act, but only that the matter was suited for executive rather than judicial action. It was also always qualified by the public/private distinction. The public/private distinction has long been central to liberal capitalism. Yet how the distinction is drawn has never been static, and defining that boundary has been a central and dynamic site of struggle among governments, lawyers, and

others for over a century. While the *tendency* since the 1950s has been to reclassify more and more formerly public or governmental activity as private, there has also been pushback, primarily from non-U.S. states, but also occasionally from vulture funds and other financiers themselves (see Chapter 6).

The classic formulation of the Act of State Doctrine cited above (“Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory” (*Underhill*, 1987 at 252)) has been described as the territorial formulation of the Act of State Doctrine because of the seemingly sweeping phrase “within its own territory.” However, in the early Act of State Doctrine case history, the phrase “the acts of the government” turns out to be just as important. In fact, in most of these cases in which the location of the act was early on determined to be in the foreign state, the bulk of the argument went into defining the nature of the act.

Underhill took place in the context of a civil war in Venezuela in the late 19th century. In 1892, revolutionary General Hernandez assumed command of the city of Bolivar. Underhill was a U.S. citizen living in Bolivar at the time, who had constructed and was operating the city’s waterworks as well as a machine-repair shop. For two months after Hernandez first occupied the city, he prevented Underhill from leaving. When Underhill returned to the United States, he sued Hernandez in New York federal court for refusing to issue him a passport and for “false imprisonment and assault and battery” (at 578).⁴⁹ The Second Circuit court, whose judgment the Supreme Court later affirmed, based their claim that this was an act of government on several points. First, Hernandez was acting on behalf of the “revolutionary party,” which constituted a “*de facto* government” (at 583). While the court emphasized his military role, they specifically noted that he was “civil and military chief” of Bolivar during the period in question (at 578). This court also affirmed the East District of New York trial court’s findings that Hernandez undertook his actions on behalf of “the community and the revolutionary forces,” and that he was not “actuated by malice, or any personal or private motive” (at 579). The opposition between government and private act is clear, with the latter associated with the interest of an individual rather than the state. The Second Circuit text further illustrates the linked categorizations in play when it says the court cannot “permit the *sovereign* acts or *political* transactions of states to be subjected to the examination of the legal tribunals of other states... [C]ourts and publicists have recognized the immunity of *public* agents from suits brought in foreign tribunals for acts done within their own states *in the exercise of the sovereignty* thereof” (emphasis added) (at 579). Government here is presented as synonymous with sovereign, political and public as *versus* non-political, legal and private. The Supreme Court affirmed these lower court rulings in 1897 noting that the seizure and detention of Underhill were “the acts of a military commander representing the authority of the revolutionary party as a government” and that there was no evidence that the acts were “actuated by malice or any personal or private motive” (at 254). Furthermore, whether the revolutionary government was *de facto* or *de jure*, whether it eventually prevailed or not, was irrelevant. “[A]cts of legitimate warfare” simply could not be judged by foreign courts (at 253).

It is only once the natures of both the actor and the act have been deemed public that the next, explicitly spatial, phase of the formulation becomes decisive. The implication of these careful legal debates is that, even in the late 19th century period of Westphalian positivism, U.S. courts could in fact pass judgment on actions occurring outside the United States, so long as

⁴⁹ *Underhill v. Hernandez*, 65 Fed. 577 (2d Cir. 1985).

those actions were deemed to be private. Only the combined qualities of being both foreign *and public* place another government's actions beyond the reach of U.S. courts. If we understand sovereign territory to be that space over which a sovereign government exercises ultimate authority, then we see that the public/private distinction in act of state cases is just as central to defining the borders of that territory as the foreign/domestic distinction is. It also suggests that sovereign territory as defined by the legal modality of power must be understood not as simply co-equal with the borders drawn on maps, but as more or less extensive depending on the particular act in question. This helps explain why, as we will see, there have been such heated debates about how to define the public/private distinction in transnational cases; such debates are part of territorial struggles over the borders of sovereign space.

This articulation between public/private and foreign/domestic remains central to all the classic act of state cases. In *American Banana*, American Banana tried to sue another company, United Fruit, under the Sherman act for anti-competitive behavior. The plaintiff alleged that, in 1904, Costa Rican officials and soldiers seized its plantation in Panama on behalf of United Fruit. The courts found that this was really an accusation against Costa Rica, not United Fruit, and was clearly an act of the Costa Rican government, committed by, as the Second Circuit put it, "either military or civil" officials of Costa Rica or the soldiers of that government (at 185).⁵⁰ United Fruit's private motives ("malice, intention, or expected profit") in persuading Costa Rica to act made no difference (at 188). While disagreeing with some of the lower court's points, the Supreme Court⁵¹ affirmed the ruling and went so far as to say that "it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper... The very meaning of sovereignty is that the decree of the sovereign makes law."

The Court here asserted a very strong version of the sovereignty/territory link.⁵² What is most interesting about this case is that the territory in question is actually technically Panama's. Yet, the judges do not simply say they have no extraterritorial authority to evaluate actions beyond U.S. borders. Again, clearly there are situations in which the U.S. courts would extend their reach beyond the United States' physical boundaries. Rather, they argue that although the land is in Panama by treaty, *in fact* Costa Rica has control and thus, as the Second Circuit put it, "an asserted right of sovereignty" (at 186). The Court explained: "Both Costa Rico[sic] and Panama are sovereign independent nations... The action of Costa Rico constituted an invasion of the territorial rights of Panama -- in which invasion, however, Panama has acquiesced down to the time of the beginning of this action, and the fact of such acquiescence in the *de facto* sovereignty of Costa Rico over the premises in question has been recognized by the Department of State of the United States" (at 186). The Supreme Court asserted, echoing *Underhill*, that "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," and, "The fact, if it be one, that *de jure* the estate is in Panama does not matter in the least; sovereignty is pure fact" (at 356, 358).

⁵⁰ *American Banana Co. v. United Fruit Co.*, 160 F. 184 (2d. Cir. 1908).

⁵¹ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

⁵² *American Banana* is sometimes considered not to be an act of state case, because it was arguably decided on other grounds. However, for our purposes, whether ultimately decided on act of state grounds or not, what matters is that the territorial logic at work in *American Banana* is cited as relevant in the most famous succeeding act of state cases.

Having established that the act was, *de facto*, in Costa Rica and thus the act of a government “within its own territory,” the Court makes two further spatial points. First, the Court denies that the U.S. Sherman Act can be seen to apply to banana operations in Latin America, since unless otherwise specified, “All legislation is *prima facie* territorial” (citation omitted) (at 357). Furthermore, that United Fruit’s plans may have been originally hatched in the United States is of no importance: “A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law” (at 359). Only the physical location of the seizure itself is relevant. It is worth noting that the plaintiffs in this case were already attempting to strategically redefine the spatial terms in play. Although unsuccessful in 1909 and, in act of state cases, for the next few decades, similar spatial claims would eventually be treated very differently.

Throughout the first half of the 20th century, the articulation between foreign/domestic and public/private found in *Underhill* remained similar in other act of state cases. In *Oetjen v. Central Leather Company* (1918),⁵³ a group of U.S. citizens formerly in Mexico sought redress for a number of hides that had been confiscated by revolutionary forces (of the side that eventually won) during the Mexican Civil War. The group sued the current owner of the hides, who had purchased them from the Mexican forces, but the Court upheld the Act of State Doctrine, ruling that the seizure was “[p]lainly...the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen...” (at 303). As in *Underhill*, the fact that the revolution had not yet been won at the time of seizure was seen as irrelevant. Spatially, there was some rhetorical suggestion that the defendant’s Mexican nationality made the act even more foreign. However, in a decision issued the same day in a very similar case involving the confiscation of lead bullion (*Ricaud*⁵⁴), the Court clarified that the plaintiff’s citizenship was irrelevant: “The fact that the title to the property in controversy may have been in an American citizen, who was not in or resident of Mexico at the time it was seized for military purposes by the legitimate Government of Mexico, does not affect the rule of law that the act within its own boundaries of one sovereign State cannot become the subject of reexamination and modification in the courts of another” (at 310). Only the physical location of the property, in combination with the public nature of the act, mattered. In *Oetjen*, the Court further rejected the idea that the location of the goods in question at *the time of suit* could change the foreign/domestic determination. The Act of State Doctrine was determined to be “as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country” (at 303). This, too, would later be reevaluated.

It’s worth noting that, by this point in 1918, the need for official U.S. recognition of foreign sovereignty was starting to take on more weight. In *American Banana* the Court explicitly stated that *de facto* sovereignty was enough to make the Act of State Doctrine applicable. In *Oetjen*, in contrast, the Court noted that it would “take judicial notice” of the fact that sometime after the seizure in question the United States recognized the Carranza government, first “as the *de facto* government of the Republic of Mexico” and later “as the *de jure* government” (at 301). In *Ricaud*, the Court further explained that this “recognition is retroactive in effect and validates all the actions of the Carranza Government from the commencement of its existence” (at 309). Though the Court does not quite say that this U.S. recognition is necessary for the act to be

⁵³ *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918).

⁵⁴ *Ricaud v. American Metal Co., Ltd.*, 246 U.S. 304 (1918).

considered an act of government, there is a clear suggestion that this lends weight to the characterization. In short, the courts were beginning to put more weight on the internal relations among U.S. branches of government and to see the executive branch's opinion as relevant to defining the nature of the foreign act as public or private.

Similarly, in the British case *Luther v. Sagor* (1921),⁵⁵ a Russian timber company headquartered in Estonia sued for ownership of goods that had been confiscated in Russia after the Russian revolution before being sold to defendant timber importer in England. The lower British court first ruled in favor of the plaintiffs on grounds that because Britain had not formally recognized the validity of the Soviet state, the seizure did not qualify as a sovereign act. While the case was on appeal, Britain informed the court of its formal recognition of the Soviet Union. The High Court then overturned the lower decision on the grounds that, given such recognition, whether *de facto* or *de jure* by His Majesty's Government, a British court could not question the "legislative or executive" acts of the Russian government taken "in Russian territory." Furthermore, Britain's recognition of the Soviet government was retroactive, dating back to establishment of the Soviet Union.⁵⁶ The Court cited *Underhill*, *Oetjen* and other U.S. cases. *Luther* was, in turn, frequently cited by U.S. courts in later act of state cases.

Almost twenty years later, the articulation of the public and the foreign in triggering the Act of State Doctrine remained robust. In a spatially complicated case (*Shapleigh v. Mier*, 1937),⁵⁷ a group of U.S. citizens sued a Mexican citizen for ownership of a parcel of land on the Texas-Mexico border. The land had formerly been in Mexico and under ownership of the U.S. citizens, but in 1922 the governor of Chihuahua expropriated this and other lands as part of a process of land redistribution. The land was sold to Mexican citizen Mier. In 1926, due to changes in the river's course and a 1905 treaty, the land passed into U.S. control, but was still, as by treaty, owned by Mier. In this case, the plaintiffs tried but failed to get around the Act of State Doctrine by making a spatio-temporal argument about territory. Since the land in question was in Mexico at the time of the land redistribution, but later passed into U.S. hands, the plaintiffs argued that the Act of State Doctrine *no longer* applied to protect the action from review by U.S. courts. Yet both the Fifth Circuit⁵⁸ and the Supreme Court rejected this temporal distinction, maintaining that all that mattered was the location of the act when it occurred. That established, the courts then confirmed that the transfer was a public act. As the Fifth Circuit put it, the act was carried out by "the chief executive of the state of Chihuahua," "under color of the Constitution and the law" and that his seizure of the land in question "can be nothing else than an act of government within its own domain" (at 676). Thus, that court concluded, the plaintiff's accusations are "to be handled through diplomatic channels only" (at 676). The Supreme Court affirmed this judgment. It also rejected the plaintiff's attempt to displace the whole Act of State Doctrine framework by claiming that the transfer was illegal under *Mexican* law. In the 1960s and 1970s, several judges also tried out this "conflict of laws" move. In *Shapleigh*, however, the Court roundly rejected it, explaining that the question is not whether the act was legal in Mexico or not, but whether it was a sovereign act of the Mexican government. In short, the Act of State Doctrine was not simply about competing legal systems; it was about a higher principle of territorial sovereignty.

⁵⁵ *A. M. Luther v. James Sagor & Co.*, L.R. (1921) 3 K.B. 532.

⁵⁶ Quotes taken from summary of the case in the International Law Reports, retrieved from <https://library.justis.com>.

⁵⁷ *Shapleigh et al. v. Mier*, 299 U.S. 468 (1937).

⁵⁸ *Shapleigh et al. v. Mier*, 83 F.2d 673 (5th Cir. 1936).

The Bernstein Exception, Round 1: Executive Override of the Act of State Doctrine

The first real cracks in this fairly strict application of the Act of State Doctrine emerged after World War II in the context of cases involving Nazi seizures of Jewish property. Even then, the change took time. In *Bernstein v. Van Heyghen*,⁵⁹ decided by the Second Circuit in 1947, the plaintiff Mr. Bernstein was a German Jew who had been imprisoned by Nazi officials and forced to sign over his company to a third party, who later transferred assets of that company to the Belgian corporation named in the suit. On grounds that the transfer had been coerced and unlawful, Bernstein sought to recover damages, profits and insurance proceeds from the corporation. Despite what the court recognized as the exceptional offensiveness of the Nazi seizures, the Second Circuit rejected Bernstein's arguments on standard act of state grounds. No serious questions were raised about where the act occurred, and, as in *Shapleigh*, the court rejected an attempt to reframe the issue in terms of the seizure's legality under German law. What mattered was that the act was an act of government in its own territory:

Does that phrase [Nazi officials] in the context in which the plaintiff used it 'clearly indicate' that the duress under which he acted was imposed by persons who were acting, or who purported to be acting, as *officials* of the Third Reich?... [W]ho else but an accredited *agent of the government* would have 'imprisoned' him 'in a jail in Hamburg'; or who else would have proceeded by means of a 'Nazi designee' ...the plaintiff left no question that he meant to allege that he had been a victim of that *governmental* prosecution of Jews, which went so far to build up the universal execration of the regime (emphasis added) (at 248).

Despite upholding a traditional act of state argument for not ruling on the validity of the seizures, the court raised a question (at 250) that would soon pave the way for overcoming the traditional version of the Act of State Doctrine: had the U.S. government "acted to relieve its courts of restraint upon the exercise of their jurisdiction" in this case? Since the U.S. executive had made no official statement to that effect, the Act of State Doctrine was upheld and the case dismissed. Notably, the one dissenting judge picked up on precisely this point, arguing that the court should have solicited the executive's opinion directly, and that this case was qualitatively different from all former act of state cases in a key respect: the German government that committed the action was *no longer recognized* by the United States. The possibility for executive override hinted at in this case soon materialized as the first major strategy for overcoming the Act of State Doctrine.

In 1949, Bernstein brought a new case,⁶⁰ based on similar facts, against defendant N. V. *Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, who had taken possession of Bernstein's Red Star Line ship operating company, and third party defendant Chemical Bank & Trust Co., which had overseen the transfer. This time, Bernstein tried to get around the Act of State Doctrine by casting his persecutors as non-public. That is, he amended his complaint to leave out all mention of Nazi officials, not specifying who it was that had mistreated him. The

⁵⁹ *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947).

⁶⁰ *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949).

courts were sympathetic to this attempt, but they concluded that he would have to show who *did* perpetrate the duress to prove his case. The case was therefore again dismissed under the Act of State Doctrine. Five years later, however, the Second Circuit heard the case again,⁶¹ and this time things were different. In the meantime, the Department of State had issued a formal statement expressing the executive's wish that the Act of State Doctrine not be applied to cases involving claims brought in the United States for acts committed by the Nazis in Germany. In light of this "Bernstein Letter," the Second Circuit ruled in a very short opinion that, "In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question" (at 376). They remanded the case to the District Court for a full trial.

This was the first major case overriding the Act of State Doctrine in a situation in which the act in question was deemed to have been the act of a sovereign that was both public and foreign. Rather than redefine either category, the Bernstein Letter's acceptance by the courts in this case signified that the executive's opinion simply superseded the Act of State Doctrine. This went much further than earlier cases in which the executive's recognition of a foreign sovereign was considered. Although not made explicit, the 1954 *Bernstein* decision marks the point at which defining the proper relationship among the U.S. branches of government, rather than just between the United States and foreign nations, became a significant part of act of state cases. When these questions were picked up again in the 1960s, it would be clear that the Bernstein Letter signified the start of a trend in which the political/legal divide would, for two decades, become the center of the act of state question.

Since *Underhill*, the Act of State Doctrine had been used to determine whether a foreign act was properly in the *judicial* domain of U.S. court power or in the *political* domain of foreign relations. The Bernstein decision simultaneously entrenched and blurred that divide. The executive did not say that the courts should waive the Act of State Doctrine because it no longer considered foreign seizures of private property to be within the political domain. Rather, the executive said that U.S. policy on Nazi seizures was *so* strong that the executive wished the courts to get involved. The *Bernstein* Court quoted directly from a State Department press release from April 27, 1949, referencing a letter from two weeks earlier written by Department of State Acting Legal Advisor Jack B. Tate:

The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials (at 376).

A range of reactions circulated among legal scholars of the time. Some applauded the way this enabled U.S. courts to act in the service of justice. Others worried that, no matter the justness of the cause, such a move by the executive improperly disturbed the proper separation of powers within the United States. They believed reparations for the Nazi's victims should continue to be

⁶¹ *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

handled, as it was already, through political channels. This latter point is important for understanding the implications of the Bernstein Letter. As in all Act of State Doctrine cases going back to *Underhill*, the question at issue in *Bernstein* was not whether Mr. Bernstein could or could not attempt to recover the assets seized by him from the Nazis. Rather, the question was through *what mode* could he do so. The United States was already pursuing reparations through other means. The question was whether in addition to these explicitly political channels, a legal modality of redress could also be invoked.

The point is not to question whether the Bernstein exception was or was not legally or ethically valid. Opening the courts in this way may well have expanded the scope of the restitution that could be provided to the victims of Nazi persecution. The point is simply that this decision had important implications for the way act of state debates unfolded over the next two decades. The executive's deliberate intervention in an ongoing court case in this way was, apparently, an unprecedented act.⁶² While it was framed in terms of the exceptionality of the Holocaust, it was soon invoked as precedent in a very different situation. In retrospect, we can see that the Bernstein letter was the first important step in what would become a concerted effort by multiple forces within the United States to effect a more general and more permanent transfer of power from the executive to the judiciary.

***Banco Nacional de Cuba v. Sabbatino*: Refashioning the Act of State Doctrine**

The most important changes to the Act of State Doctrine came in an entirely different context: a series of cases arising from Cuba's nationalizations of U.S. property after the Cuban Revolution. As some of the earlier act of state cases show, up through the 1940s at least, the right of sovereign governments to nationalize property, with or without compensation, had been essentially unquestioned. From the 1950s on, however, first in Europe and then, with the Cuban revolution, in the United States, courts began searching for a way to weaken this right. The most well known of these cases in the United States, *Banco Nacional de Cuba v. Sabbatino*, involved the rights to proceeds from the sale of sugar that had been nationalized by the Cuban government in 1960. Castro's government had taken power in 1959. In February and July 1960, the American company Farr, Whitlock & Co. had contracted to buy Cuban sugar from Compania Azucarera Vertientes-Camaguey de Cuba (C. A. V.), a company "organized under Cuban law whose capital stock was owned principally by United States residents" (*Sabbatino*, 1964 at 401).⁶³ On August 6, 1960, in response to the U.S. Congress's decision to amend the Sugar Act of 1948 so as to reduce the amount of sugar Cuba was allowed to export to the United States, the Cuban government issued passed legislation providing for "the compulsory expropriation of all property and enterprises, and of rights and interests arising therefrom, of certain listed companies, including C. A. V., wholly or principally owned by American nationals" (*id.*, at 403). Farr, Whitlock entered into new contracts with an agency of the Cuban Government, and the sugar was shipped a few days later. When Cuba's agent attempted to collect payment from Farr, Whitlock in New York as agreed, the latter refused, because C.A.V. had filed a claim in New York that it was entitled to the proceeds from the sugar. Soon after, the New York Supreme

⁶² See *Banco Nacional De Cuba v. the First National City Bank of New York*, 442 F.2d 530 (2d Cir. 1971).

⁶³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

Court appointed Sabbatino to hold the money in question on behalf of C.A.V. pending judicial determination of ownership.

Most summaries of the Act of State Doctrine today focus on the 1964 Supreme Court decision in *Sabbatino*, in which the Act of State Doctrine was upheld, but with important changes. The case is presented as marking a transition away from the old territorial version of the Act of State Doctrine, to one in which the separation of powers is primary. It is true that *Sabbatino* increases the emphasis on the separation of powers, though, as I will show below, all three key distinctions remain central to the Court's analysis. In analyzing the *Sabbatino* case, two points should be kept in mind. First, this increased emphasis on the proper role of different branches should be understood in terms of the longer tendency towards growing emphasis on the political/legal distinction that we saw in *Bernstein* a decade earlier. More importantly, it is not just that the Act of State Doctrine was reframed in separation of powers terms at this point, but *how* that separation gets redefined through this case that matters. *Sabbatino* is one moment in a heated and still ongoing struggle over how to define the domain of each branch of the U.S. government. Understanding the case in terms of this broader struggle requires considering not only the Supreme Court decision, but the District Court and Second Circuit decisions against the Act of State Doctrine, as well as the Congressional amendment that effectively overrode the *Sabbatino* decision.

Sabbatino and the international law strategy

On March 31, 1961, Judge Dimock of the Southern District of New York ruled, first, that the Act of State Doctrine did not apply to the Cuban nationalization of U.S. sugar companies, and, second, that Cuba's claim was invalid.⁶⁴ There was no *Bernstein* letter in this case. Rather, Dimock declared that the Cuban nationalization of U.S. property was a violation of "international law." On July 6, 1962, the Second Circuit court upheld his ruling.⁶⁵ Although their arguments were later struck down by the Supreme Court, the lower courts' opinions are worth discussing, for two reasons. First, they constitute the second major strategy deployed for attempting to shift responsibility for Act of State Doctrine cases from the executive to the judiciary, by invoking international law. Second, this invocation of international law, while not directly successful, illuminates key characteristics of the legal as a modality of power — characteristics that remain central to the eventual reconfiguration of the Act of State Doctrine via the commercial exception in the 1970s.

As usual under a common law system, Judge Dimock did not simply assert that he was rewriting the Act of State Doctrine. Rather, he cited all the classic act of state cases to explain why he could not refuse to enforce the nationalization (and thus Cuba's claim) just because the nationalization offended the public policies of New York or the United States, or because it might violate Cuban law. He rejected the defendants' arguments that the sugar was not "in" Cuba at the time of the nationalization decree, noting that "the ship was loaded...inside a well-defined archipelago and that the line of keys forming this archipelago is part of Cuban territory" (1961, at 379). He also had no doubts as to the governmental nature of the nationalization, which was carried out by the Cuban government itself by official decree.

⁶⁴ *Banco Nacional De Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961).

⁶⁵ *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962).

Rather than using any of the usual means for questioning an act of state claim, Dimock declared that he was doing something entirely new: “The crucial question remains, however, whether this court can examine the validity of the Cuban act under international law and refuse recognition to the act if it is in violation of international law. Apparently, no court in this country has passed on the question” (at 380). In justifying this unprecedented step, he was careful to point out that, since the State Department itself already considered the nationalization to be in violation of international law, his consideration of the matter could hardly embarrass the executive branch. But he also asserted that he was not simply allowing the executive to determine important legal questions. In other words, he did not make a Bernstein-style argument about executive override. Rather, he affirmed his respect for territorial sovereignty, but argued that something called “international law” *superseded* that sovereignty.

This important move was not made in total isolation from earlier act of state logics. The finding that the nationalization was indeed a violation of this international law rested entirely on declaring the act *private*. The expropriation of U.S. sugar, he decided:

was not reasonably related to a public purpose involving the use of such property. The taking of the property was not justified by Cuba on the ground that the state required the property for some legitimate purpose or that transfer of ownership of the property was necessary for the security, defense or social good of the state. The taking was avowedly in retaliation for acts by the Government of the United States, and was totally unconnected with the subsequent use of the property being nationalized. This fact alone is sufficient to render the taking violative of international law (at 384-385).

In addition to being “retaliatory,” Judge Dimock found the nationalization to be “discriminatory” because it “classifies United States nationals separately from all other nationals, and provides no reasonable basis for such a classification” (at 385). “Doubtless,” he concluded, “the measures which states may employ in their rivalries are of great variety but they do not include the taking of the property of the nationals of the rival government” (*id.*). Why seizing property is more reprehensible than that sacred and unquestioned prerogative of the state — war — he does not explain.

Cuba’s counter-arguments that the nationalizations were absolutely public acts were ignored. The point, however, is not to hash out whether the District Court or Cuba was more correct about the definition of “public,” but to show that the international law strategy for transferring power over nationalizations to the judiciary was firmly rooted in redrawing the public/private distinction. The terms “discriminatory” and “retaliatory” are reminiscent of the “malice” mentioned in earlier act of state cases. Here, however, the personal element cited in those cases (the judges in *Underhill* considered, for instance, whether Hernandez was acting only in his own interests rather than in the service of his government) is absent. It is not one official’s, but a sovereign government’s actions that are cast as private. The precedent he relies on for this is not these early act of state cases, but rather the racist acts of Nazi Germany. He identifies the kind of discrimination at issue in *Sabbatino* explicitly with that in Nazi Germany, citing a Nuremberg trials case to the effect that “no person can be deprived of his property solely on the ground of his nationality” (at 386). Fifteen years earlier in *Bernstein*, no one had tried to make such an argument.

Just as important as this public/private redefinition is that the Judge did not simply say the act was private and therefore the U.S. Act of State Doctrine does not apply. Rather, the claim was

based on *international* law: “Since the Cuban expropriation measure is a patent violation of international law, this court will not enforce it” (at 386). It is as if the classification of private would not have been strong enough to justify such a big move away from prior act of state cases — something much bolder was needed. In doing this, Dimock made the relationship between his actions and the standard approach to national sovereignty explicit: “There is an end to the right of national sovereignty when the sovereign's acts impinge on international law” (at 381). While the U.S. government's foreign policy concerns and considerations of national sovereignty had long been considered beyond the power of the judiciary, Dimock seems to suggest here that international law is even “higher” up the chain than the domain of political sovereignty.

In 1962, the Second Circuit affirmed the lower court's ruling that the Act of State Doctrine did not apply because Cuba's nationalization violated international law, while at the same time being more careful not to seem to be dismissing act of state precedent nor to be disrespectful of the executive branch. Writing for the court, Judge Waterman stated that three primary principles had long underpinned the Act of State Doctrine. First was “[t]he desire by the judiciary to avoid possible conflict with or embarrassment to the executive and legislative branches of our Government in our dealings with foreign nations” (at 857). Unless this is identified with concerns about international comity, such a principle is at most implicit in the earlier act of state cases and was never the primary principle behind the Act of State Doctrine, but it is this that gets picked up by the Supreme Court in 1964. Second, the judge cited “a positivistic concept of territorial sovereignty” (*id.*). By using the term “positivistic,” the court is already labeling the explicitly spatial dimension as obsolete — something the Supreme Court also picks up on. This re-characterization of earlier act of state cases as being simplistically territorial is central to what has become the standard narrative about the Act of State Doctrine, in which the shift to a separation of powers-based doctrine is seen as equivalent to its modernization. Third, the judge listed “a fear of hampering international trade by rendering titles insecure” (*id.*). This concern about commerce was not central in any of the classic act of state cases, though the court does cite a 1940 case⁶⁶ of a different kind in support of this point.

Like the District Court, Judge Waterman then turned to the question of international law, though with a bit more circumspection. In the meantime, the State Department had expressed official indifference to the application of the Act of State Doctrine in the Cuban cases, writing: “Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine” (cited in *Sabbatino*, 1962 at 858). While not equivalent to a Bernstein letter directing that the Act of State Doctrine should not apply, Waterman concluded that the statement expressed “a belief on the part of those responsible for the conduct of our foreign affairs that the courts here should decide the status here of Cuban decrees” (at 858). Since, *Bernstein* aside, the executive had never issued such statements of indifference in earlier act of state cases, the judge declared that this case could be differentiated from those cases without contradicting precedent. (The really interesting question, of course, is *why* the executive suddenly went out of its way to note this “indifference”). Having thus shown deference to the proper separation of the political and legal spheres, Judge Waterman, like Judge Dimock, ruled that the Act of State Doctrine need not apply because the nationalization was not for public purposes and thus violated international law. Like Dimock, Waterman made the implications of this for defining national sovereignty explicit: “the very proposition that something known as international law exists carries with it the implication that national sovereignty is not absolute but

⁶⁶ *Banco De Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940).

is limited, where the international law impinges, by the dictates of this international law” (at 860). But what exactly is international law?

In his District Court decision, Dimock had declared that he was the first judge in the United States to determine whether international law could supersede the Act of State Doctrine. While he undoubtedly was the first to rule that the answer to this question was “yes,” the topic of international law had actually been raised in many earlier act of state cases. A brief overview of this history illustrates how it was not only the Act of State Doctrine, but also the concept of international law that was changing in this period. There is no such thing as a readily identifiable body of “international law” in the way that there is a body of New York or U.S. statutory, administrative or common law — most simply because there is no international authority to make and enforce that law (see Chapter 1). The term international law can refer to numerous bilateral and multilateral treaties, United Nations (UN) resolutions, and other agreements among countries, as well as to the decisions of certain international courts like the International Court of Justice, with very specific jurisdictional scope.

International law in *Sabbatino* and the earlier act of state cases refers to none of these things. The international law invoked in these cases is a very powerful concept, but a largely rhetorical one, and its referent changed significantly in the mid-20th century. Even in *Underhill* the court declared that the Act of State Doctrine was important for fostering “comity” among nations and upholding “established rules of international law” (1985 at 580). The fact that international law was at stake, however, precisely did *not* mean that the U.S. courts had better get involved. Rather, invoking international law in the 1890s was a way to affirm the *political* importance of the situation. Mr. Underhill may or may not have a right to redress against Hernandez, the Second Circuit said, but this must be “adjudicated by the two governments by international action, according to the principles of International law applicable to such cases” (1985 at 583). In other words, international law was considered to be in the political realm of diplomacy, war and so on — not the judicial realm at all. There was no suggestion that these international law rules, political or otherwise, were codified anywhere — this was a more rhetorical reference to something much more nebulous. References to this international law in the early act of state cases were primarily invoked in order to support the application of the Act of State Doctrine. In *American Banana*, for instance, the court cited the “general and almost universal rule” (essentially a reference to customary international law) that “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done” (1909 at 356). Invoking international law in these cases merely marked a certain claim to what the courts considered to be international norms.

The equation of international law with the *political* sphere is even more interesting in *Oetjen*. In that case, the plaintiffs did invoke a more precise form of international law as treaty, arguing that the Act of State Doctrine should be superseded because the Mexican officer’s seizure of their property violated the 1907 Hague Conventions. The Supreme Court rejected this reasoning, responding that “the Hague Conventions are international in character, designed and adapted to regulate international warfare, and that they do not, in terms or in purpose, apply to a civil war” (at 301). In other words, in 1918, the “international” was seen to apply to relations between countries (the technical definition of the term), *i.e.*, to the political realm of foreign relations. Most importantly, the Court stated unequivocally: “It is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general, under rules of international law applicable to the situation, since the subject is not open to reexamination by this or any other American court” (at 304). In other words, it explicitly

declared that even an international law violation would not supersede the Act of State Doctrine. Two decades later, in *Shapleigh*, the Supreme Court likewise ruled that, “The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedy to be followed is along the channels of diplomacy” (at 471). In other words, by 1937 international law was still understood as something to be dealt with in the political realm, by the executive branch, *not* by the judiciary.⁶⁷

Judge Dimock failed to address any of these prior examples in making his own international law decision. Rather, he cited several *European* courts as having “evidenced some willingness to examine [the] validity of foreign acts under international law” (at 380). But, Dimock went on to say, “by far the strongest support for such examination has come from legal commentators and textwriters” (*id.*). Ignoring statements in many of the earlier act of state cases, Dimock further asserted that even if there were an international law requiring the Act of State Doctrine, “such a requirement clearly would not extend to an act of state which was in violation of international law” (at 381). The one U.S. case he did cite for this international law claim was not an act of state case at all. *The Paquete Habana* (1900)⁶⁸ took place in the context of the Spanish-American War, when a U.S. squadron seized two Spanish fishing vessels in Spanish territorial waters off the coast of Cuba. While the District Court for the Southern District of Florida held the seizures of the vessels and their cargoes to be lawful prizes of war, the Supreme Court overturned on the grounds that the ships were engaged only in small-scale, non-commercial fishing and thus not valid targets of military seizure. In the process, the Court relied on an extended discussion of international law on wartime maritime seizures and held that U.S. courts must take international law into account “where there is no treaty and no controlling executive or legislative act or judicial decision” (at 700).

A few points about the *Paquete Habana* are worth making here. First, Judge Dimock’s use of the case, which had not been cited for international law issues in any prior major act of state case,⁶⁹ is not about some kind of discovery of a long lost case that suddenly brought new precedent to light (as, for example, happens in nearly every Hollywood courtroom drama). The *Paquete Habana* was cited in at least 17 Supreme Court cases between 1900 and 1964, none of which had anything to do with the Act of State Doctrine.⁷⁰ Rather, this is a good example of how the common law frequently works more through selective “leapfrogging” than through linear development. Many potential precedents are available in any given case. The question is why do certain precedents get picked up at some moments and not at others, and this is always a *strategic*, not a merely formal question. In this situation, it would hardly have made sense to cite the *Paquete Habana* in earlier act of state cases. First, international law was seen to apply in the *Paquete Habana* precisely in the absence of relevant executive, legislative or judicial decisions — not to supersede them. Second, the general view among U.S. judges until the mid 20th century was that the Act of State Doctrine was itself in line with international law or superseded international law in a given court decision. It only made sense to invoke this case once there was a suggestion that international law claims were a matter for courts beyond the wishes of the

⁶⁷ Interestingly, international law is not significant in either Bernstein case.

⁶⁸ *The Paquete Habana*, 175 U.S. 677 (1900).

⁶⁹ It was cited in *American Banana* but for a totally different point.

⁷⁰ Based on LexisNexis shephardize function and case notes - I say “at least” because these do not catch everything.

political branches and that there was something about government seizures of property that could be considered illegal.

Though created in a very different context, the *Paquete Habana* decision illuminates two things about international law in 1900 that were still true about international law in the 1960s and remain true today: it is incredibly nebulous and incredibly U.S./Euro-centric. The *Paquete Habana* decision acknowledged the difficulty of establishing consensus in international law on any issue, and spent twenty-five pages amassing citations from a variety of legal scholars going back as early as 1403 to try to draw out what the judges considered to be a convincing enough conclusion. The Western biases inherent in this approach are blatant. The document is full of language from the Justice himself and the cited authors about international law being drawn from the customs of “civilized” nations. In one quote from Mr. Justice Strong, the decision notes that, “Like all the laws of nations, [the law of the sea] rests upon the common consent of civilized communities... it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world” (at 711). In combination with the geographically limited citations, this excludes, for instance, all of Asia and Africa from both the civilized and the commercial worlds. Every “authority” cited was either European or American, with the exception of the famous Argentine legal scholar Carlos Calvo who spent much of his life in Paris and Berlin, and of one ordinance from Japan, referred to as “the last state admitted into the rank of civilized nations” (at 700).

By the time of *Sabbatino*, the international law surrounding nationalizations was still just as nebulous and just as biased. In Dimock’s decision too, nearly every text cited as an authority on “international” law is either European or American. He cites several cases involving the Anglo-Iranian Oil Company’s attempts in Aden, Italy and Japan to recover its former property after Iran nationalized its oil in 1951 — shortly thereafter provoking the United States backed coup against Prime Minister Mossadeq. In *Anglo-Iranian Oil Co., Ltd. v. S.U.P.O.R. Co.*,⁷¹ the Italian court found that it “must refuse to apply in Italy any foreign law which decrees an expropriation, not for reasons of public interest but for purely political, persecutory, discriminatory, racial and confiscatory motives” (cited in *Sabbatino*, 1961 at 386). Dimock does not mention that in that particular case the Italian court found that Iran had acted in the public interest and had declared the nationalization to be a protected foreign act (Lauterpacht, 1988). He also cites multiple scholars discussing the Indonesian expropriation of Dutch colonial property in support of his decision. In other words, these citations not only show the Eurocentric bias of his approach to international law. More importantly, they make clear that the debate about international law and nationalizations arose only in the context of post-colonial and anti-imperialist expropriations of U.S. and European property.⁷²

The Second Circuit’s decision in *Sabbatino* also cited almost entirely U.S. and European scholars, and many of the same cases involving Iran and Indonesia as well as some involving British claims in Morocco, U.S. claims in Romania, and a few others. At the same time, that Court was more concerned not to seem too parochial or biased in its judgments. They wanted to avoid seeming to suggest a “nationalistic, or municipal, solution of a problem that is clearly

⁷¹ Italy, Civil Court of Rome (1954), 1955 Int’l L.Rep. 23, 42

⁷² These references to foreign courts and to a wide range of legal “authorities” are not unusual. The accretion of U.S. common law is far from a linear or coherent progression of case precedents, but rather is shaped by a range of actors, in and out of the courtroom, and in and out of the country.

international” (at 859), and they acknowledged, citing one Third World scholar,⁷³ that just because something is part of U.S. policy, it is not necessarily “a principle so cherished by other civilized peoples... [W]e must take a more cosmopolitan view of things and recognize that the rule of law which we municipally announce must be a rule applicable to sovereignties with social and economic patterns very different from our own” (at 861). The argument that unfolds in the decision shows clearly how invoking international law was designed precisely to overcome the appearance of such national biases. “Although the law of nations is a hazy concept,” Waterman conceded, “its rules are more limited in scope than the public policy concepts of a particular nation within the family of nations” (at 859). Thus, basing an exception to the Act of State Doctrine on international law is “wiser” than basing it on U.S. policy (*id.*). In asserting the universality of international law, however, he went even further than the Supreme Court in the *Paquete Habana*: “International law is derived indeed from the customs and usages of civilized nations, but its concepts are subject to generally accepted principles of morality whether most men live by these principles or not” (at 860). He thus asserted the existence of absolute principles of international law even *beyond* those that could be identified in Western legal practice, in a move that became crucial to ruling against Cuba.

Despite these concerns about appearing biased, his judgment remained highly partial to European and U.S. standards. Waterman spent several pages trying to determine what the relevant international law is, and, unlike Dimock, he was careful to note (citing the 1962 draft of the Restatement, Foreign Relations Law of the United States, as well as certain remarks by Mexican and Iranian officials) a broader range of opinions on nationalization: “Many countries have acted upon the principle that, in order to carry out desired economic and social reforms of vast magnitude, they must have the right to seize private property without providing compensation for the taking” (at 864). *Nevertheless*, Waterman added, “The constitutions of most of the states in the Western Hemisphere contain language which appears to uphold the right of the owner to receive just compensation upon a governmental taking of private property” (at 862). Still, in a show of deference to socio-political variation, he did eventually conclude that the court will not declare a nationalization invalid just because no compensation is given. But surely, he went on, all could agree that a nationalization without compensation that is *also* retaliatory and discriminatory (*i.e.*, not *public*) violates international law. In support of this, he cited Lord McNair’s comments regarding the Indonesian seizure of former Dutch property, that in the “absence of a bona fide, social or economic purpose involving the property nationalized,” that nationalization should be considered “unlawful” (at 866). Without any further evidence about what the same countries who support nationalizations without compensation might have to say about such retaliatory situations, Waterman concluded that, “confiscation without compensation when the expropriation is an act of reprisal does not have significant support among disinterested international law commentators from any country. And despite our best efforts to deal fairly with political and social doctrines vastly different from our own, we also cannot find any reasonable justification for such procedure” (*id.*). In other words, the decision came right back to the public/private distinction, redefined as in the District Court’s decision to exclude even many official government actions, but now with the shroud of neutrality provided by the international law rhetoric pulled more snugly about its shoulders.

There is an even more telling move involved in this reasoning. Waterman went beyond even the *Paquete Habana*, in which international law was equated with the common usage of

⁷³ Jorge Castañeda - The Underdeveloped Nations and the Development of International Law, 15 Int’l Org. 38-44 (1961).

“civilized nations,” by suggesting that a far more absolute source of legitimacy supports his conclusions: “generally accepted principles of morality” (at 860). After a great deal of discussion about the norms of international law and acknowledgment of the differences among nations on the question of nationalizations, Waterman in the end equated international law with a universal morality. I point this out not just to criticize these judges for their Western bias, but because I want to suggest that, given the lack of a codified international legal system and courts to enforce it, international law claims *always*, more or less blatantly, depend on claims to some kind of supra-national authority — whether some kind of non-existent supra-sovereign, or, as in this case, God. This is important to keep in mind given the extensive rhetoric about development, modernization and international law that persists to this day. When considering any international law claim not based on a reference to a specific convention or treaty, the question should always be, *what* authority is being implicitly invoked — and whose authority is in fact being bolstered?

Whatever the individual justices in the lower *Sabbatino* decisions may have intended, had it succeeded, the international law strategy they elaborated for avoiding the Act of State Doctrine would have had huge implications not just for Cuba, but for the modality of U.S. power in the world. This is because while the *claim* was to some kind of supra-national, objective authority, in fact, this strategy put control over the elaboration of the rules governing state nationalizations squarely in the hands of (sub)national courts. The Second Circuit *Sabbatino* Court itself admitted as much: “until the day of capable international adjudication among countries, the municipal courts must be the custodians of the concepts of international law, and they must expound, apply and develop that law whenever they are called upon to do so” (at 861). Indeed, Waterman argued, this is not just the courts’ right, but also their “duty” (at 860). In other words, after determining that something called international law supersedes national sovereignty, the court then admitted that only *sub*-national courts can determine the content of that international law. International law is invoked in this case in order to lever things otherwise considered fully within the realm of territorial sovereignty, *out of* the political sphere of foreign policy and *into* the thoroughly (sub)national sphere of U.S. courts.

This is quite different from the Bernstein letter strategy for overcoming the Act of State Doctrine. In that case, the State Department made no claims to impartiality. Rather, it claimed the right, as the political branch of the United States, to relegate power for a deeply political issue to the U.S. judiciary. The international law strategy also shifts power over the behavior of foreign states to the U.S. judiciary, but in a very different way — by declaring that the issue in question is so much *more* important than national political issues that it supersedes the political and can only be handled by neutral, objective courts.

A Bernstein letter, furthermore, could only ever be a sporadic way of intervening in inter-state relations. The international law strategy, in contrast, would have created a generalizable rule that applied to all similar cases with no need for executive action. This would have meant a significant transfer of authority from the executive to the judiciary, yet the executive branch’s letters of asserted indifference in *Sabbatino* suggest that it would have acceded to this in 1962. This is not necessarily surprising. In shifting authority for nationalization cases from the executive to the judiciary, these cases remain absolutely within the purview of U.S. power. In fact, I argue that this sort of international law move would have extended the juridico-economic territory of the United States in a more systematic and less politically noisy way than the more *ad hoc* Bernstein approach could have — something the U.S. government likely valued in a context of global reorganization and the growing illegitimacy (and expense) of direct military action.

Although this international law strategy was partially struck down by the Supreme Court in 1964, I emphasize its implications for two reasons. First, it shows how geopolitical relations, explicit and implicit, get carried over into U.S. (and European) legal decisions in ways that have ramifications for the geopolitical *status quo*. The legal logics deployed in cases concerning Cuba in the 1960s, like the post-colonial European cases they reference, cannot be divorced from the dynamics of de-colonization, anti-imperialism, and the Cold War. The fact that these biases get reasoned away or dismissed as irrelevant is a major function of the legal modality of power, which encodes all decisions, once made, as rule-based, neutral and rational. We will see throughout the book, that U.S. legal decisions involving transnational relations are always inflected by changing geopolitical circumstances. Second, I have emphasized the state of international law in the early 1960s because, despite being overtly dismissed in 1964, these international law claims remained central to act of state cases over the next decade, and eventually encoded these same imperialist and racist biases in the supposedly non-political commercial exception strategy that ultimately prevailed.

Sabbatino: From the territorial to the separation of powers approach to the Act of State Doctrine

On March 23, 1964, the Supreme Court issued an opinion reversing the lower courts' decisions and upholding the Act of State Doctrine. The Second Circuit had claimed that an international law violation, at least in combination with the executive branch's expression of non-interest, overrides the territorial sovereignty of foreign states. Writing for the eight-person majority, Justice Harlan ruled in Cuba's favor on the grounds that the Act of State Doctrine prohibited U.S. courts from ruling on the validity of Cuba's nationalization of U.S. sugar companies. In the process, however, he actually affirmed some aspects of the international law strategy for later courts to draw on and, more importantly, redefined the Act of State Doctrine in ways that would end up unseating the traditional "territorial" even without the international law strategy. Although the Court did not want responsibility over the Cuban nationalizations in this instance, their formulation of what would become known as the separation of powers approach to the Act of State Doctrine should still be understood as part of the longer struggle among the U.S. branches of government over what modalities of power would govern what kinds of foreign activity. The Court's solution in this case, while not going as far as the lower courts wanted, still carved out more space for the judiciary than had existed in earlier act of state cases.

Harlan's opinion centered primarily around defining the political/legal distinction, not only in order to formulate a new Act of State Doctrine, but also to reject the lower courts' international law strategy. Harlan acknowledged that the State Department had declared the Cuban nationalization to be "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory" (at 402-403). Yet, he went on, international law can neither prescribe nor prohibit the application of the Act of State Doctrine. While agreeing that U.S. courts should sometimes apply international law, he refused the move of simply allowing international law to trump national sovereignty: "[T]he public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders" (at 422). Unlike the lower courts, Harlan noted that this was consistent with earlier act of state cases: "the plain implication of all these opinions, and the import of express statements in *Oetjen*...and

Shapleigh...is that the act of state doctrine is applicable even if international law has been violated” (at 431).

Yet the Court still did not completely reject the international law approach. Rather, it suggested that “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it” (at 428). Where the Second Circuit had emphasized the importance of consensus in ensuring that the courts did not seem too parochial, Harlan’s concern had more to do with avoiding claims about international law that might contradict either “international justice” *or* “the national interest” (*id.*). His primary concern was that no judicial decision on international matters should interfere with the United States’ political interests. Thus, Court suggested, the less important an international law question is to the foreign policy concerns of the U.S. “political branches,” the more acceptable it might be for the judiciary to evaluate it (*id.*). Like the lower courts, and in contrast to the earlier Act of State Doctrine decisions, the Supreme Court’s definition of international law equated it with the judicial realm. But they rejected the lower courts’ suggestions that international law necessarily supersedes the political domain. The status of international law in this case was much more ambiguous and would have to be decided based on careful consideration of the policy implications in each case.

Harlan, therefore, did not reject the international law strategy altogether, but rather limited his arguments for the time being to a narrow subset of cases: “Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law” (at 428). The Court actually based this ruling in part on the same logic as the lower courts, but with different conclusions. First, they affirmed the public nature of the act, calling it a “public law which, as here, has been fully executed within the foreign state” (at 414). They also, though without comment, referenced Cuba’s own explanations of the political importance of the action in “serving as an example for other countries to follow ‘in their struggle to free themselves from the brutal claws of Imperialism’” (at 403). More importantly, they disagreed with the lower courts’ assertions that an international consensus on the nationalization question existed, giving greater weight to the views of Cuba and other non-Western countries:

However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect “imperialist” interests and are inappropriate to the circumstances of emergent states (at 429).

And:

[There is] an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and

those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations (at 430).

That the Court was far more explicit about the geopolitical situation at hand than the lower courts lends weight to the geopolitical analysis of these court decisions. As the Warren Court was phased out by new judicial appointments over the next decade, this frankness would also disappear. At the same time, the last sentence of this quote is crucial. The Court did not raise these points simply to relativize the question of values in international law, but to explain that, given these varying opinions, adjudicating these issues might be a *politically* sensitive act. This left the option of expanding the role of the judiciary in adjudicating international law claims in future cases wide open. As they put it: “There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law” (at 430). In contrast to statements in *Oetjen*, Harlan said, “it cannot of course be thought that ‘every case or controversy which touches foreign relations lies beyond judicial cognizance.’ *Baker v. Carr*, 369 U.S. 186, 211. The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state” (at 423).

The careful way the Court tread this line, upholding the doctrine in this case, but leaving room to reject it in others, shows clearly that the separation of powers strategy is part of the longer trend towards reconfiguring the modalities of governance of transnational relations with foreign countries and granting more authority to the judiciary in such matters. At the same time, the rejection of the lower court rulings and the immense care with which the Supreme Court tried to hammer out the proper way to define the legal versus the political domain show that this was not simply a smooth transition, but one whose contours were intensely fought over. In the end, as we will see in discussing the *First National* and *Dunhill* cases below, the Warren Court ultimately lost the battle to forces in and out of the judiciary who wanted a much more sweeping transfer of political to judicial authority. But how the *Sabbatino* Court redefined the Act of State Doctrine had far-reaching implications for these later cases.

The Court did not simply reaffirm the territorial version of the Act of State Doctrine. While they observed that *Underhill* was the classic formulation and that none of the subsequent Act of State Doctrine cases “manifest any retreat from *Underhill*” (at 416), they nevertheless suggested these cases were based on an obsolete understanding of national sovereignty:

We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, or by some principle of international law. If a transaction take place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty (at 421).

For instance, they pointed out, it is not unheard of for a forum to apply its own laws to foreign actions (*e.g.*, in the refusal to enforce the penal laws of another country). Furthermore, “While *historic notions* of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence” (emphasis added) (at 421). What is important, Harlan

explained, is that “since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders” (at 432). This downgraded the whole question of territorial sovereignty from a fact of international relations to an old-fashioned, though admittedly powerful concept that may *embarrass* foreign states — and create political problems for the U.S. executive. With this move, the foreign/domestic distinction (in combination with the public/private distinction) was de-centered from the Act of State Doctrine logic and replaced by the question of the proper distinction between the political and legal domains of U.S. governance. The Court summed up this change in a much-cited passage in which it argued that, while not required by the constitution:

The act of state doctrine does, however, have “constitutional” underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere (at 423).

And further down: the Act of State Doctrine’s “continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs” (at 427-428).

That in *Sabbatino* the nationalization was deemed to remain in the political sphere in no way diminishes the importance of this transformation. It is no wonder that *Sabbatino* continues to be understood as the point at which the old, territorial version of the Act of State Doctrine was replaced by a non-territorial, separation of powers version. A more sophisticated understanding of territory, however, shows that the rupture was never total. This is true, first, in that the foreign/domestic and public/private distinctions do not lose their relevance. The fact that the sugar was deemed to be in Cuban waters and that the nationalization was a governmental act activated the Act of State Doctrine in *Sabbatino* in the first place. With this ruling, however, the scope for the doctrine became more restricted. In earlier act of state cases, a behavior had to be foreign and public to be deemed protected by territorial sovereignty. With *Sabbatino*, a behavior now had to be foreign, public *and political* — where public refers to the nature of the act from the foreign sovereign’s perspective and political refers to its importance *to the U.S. executive*.

The public/private and political/legal distinctions are distinct, but closely intertwined, tending to swap terms fluidly. Political was often another synonym for governmental, as we saw in some examples above, and thus contrasted to private. But if political is the opposite of legal and also the opposite of private then the legal and the private are equated as well. This was already true to an extent in the early act of state cases. If a seizure of property in Venezuela were deemed to be personal rather than governmental, the courts would have exercised jurisdiction over the act. With the elevation of the political/legal split and separation of powers concerns, the public/private distinction gets imbued with renewed vigor, particularly once the commercial exception is invoked. In making the political/legal central, while retaining the importance of the foreign/domestic and public/private distinctions, the case opened the way for any future attempts

to get around the Act of State Doctrine to focus on any or all of these three distinctions. The effect, we will see, is that while the spatial element does indeed become less straightforward, it actually becomes *more* important to future cases, not less.

In addition to the continued importance of complex spatial logics and the definition of foreign sovereign territory in making act of state determinations, the doctrine also affects the kinds of territories produced. As I suggested above, national territory can be usefully understood as that space over which a state has authority, and the *kind* of territorial reach is as important as the extent. The separation of powers approach further illuminates what was already true: that the Act of State Doctrine is not about whether the United States as a whole will have power or not over a given foreign activity, but about what *modality* of U.S. power — political or legal — will apply to what situations. In other words, reconfiguring the Act of State Doctrine along separation of powers lines implied a correlated reconfiguration of the extent of U.S. juridico-economic territory — of the range of economic behaviors of foreign states over which the U.S. judiciary would exercise authority.

This is not simply a matter of switching out one kind of power for another. Each modality of power has its strengths and weaknesses. Relegating something to the political sphere means the U.S. *might* decide to exert authority over the situation via diplomacy or even war. Or it might not. Or it might try to and be rebuffed. Relegating something to the legal sphere, in contrast, means U.S. courts *will* hear a case and pass judgment. Whether the courts rule for or against the foreign sovereign, and whether they will be able to enforce a judgment against that sovereign will depend on many factors. Still, while an assertion of legal authority is less potentially spectacular than an assertion of political authority, it is also more certain and more pervasive.

Once the political/legal distinction was made central, the question became how to define that boundary. Crucially, while the Court upheld the Act of State Doctrine on the basis of protecting the prerogative of the executive in foreign political matters, it also attempted to preserve significant judicial power to define the political. The executive, Harlan argued, cannot simply decide whether something is political or legal. He roundly rejected the possibility of a reverse Bernstein exception, in which executive action would be required not to waive the Act of State Doctrine but to apply it. Such a rule, he suggested, could itself seriously hinder U.S. diplomacy. For one thing, the transitory political interests of one administration might lead to consequences that could damage the goals of the next. Specifically, the Court argued, the executive cannot simply declare something to be against international law and expect to determine the Court's decisions: "When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns" (at 432-433). In other words, the executive tries to *shape* international law — not to be an impartial arbiter of it. By the same token, whichever way the executive wished the court to rule, for the courts to pass judgment on an international issue *because* the executive says it should, might greatly embarrass the executive if that ruling did not go the way it had hoped. The *Sabbatino* decision established that it was up to the courts to determine the proper extent of the judicial and political realms, by carefully weighing the particular geopolitical, domestic and legal factors of each case.

The *Sabbatino* ruling is still cited as the most recent authoritative statement of the Act of State Doctrine. Yet, though it has had an important legacy, it did not move the Cuba nationalization cases definitively from the executive to the judicial branches as many wanted. It

was, therefore, immediately overturned by Congress, in a move that sparked a heated struggle among all three branches over how to define the political/legal divide.

The Hickenlooper Amendment: Congressional Override of the Act of State Doctrine

Eight Supreme Court Justices joined the majority *Sabbatino* opinion. Justice White, however, rejected the majority view, primarily on the same international law grounds as the lower courts, arguing, contra the majority, that the Act of State Doctrine itself is really a principle of international law.⁷⁴ He dismissed earlier Act of State Doctrine precedent on the grounds that there was no international law *violation* in those cases and declared that maintaining the Act of State Doctrine in *Sabbatino* was a “backward-looking doctrine, never before declared in this Court” (at 439). He thus decried the *Sabbatino* ruling as an unprecedented extension of the doctrine even as the doctrine was actually being pared back — a common legal tactic in these cases. Like the lower courts, he asserted that international law supersedes national sovereignty:

The reasons for nonreview, based as they are on traditional concepts of territorial sovereignty, lose much of their force when the foreign act of state is shown to be a violation of international law. All legitimate exercises of sovereign power, whether territorial or otherwise, should be exercised consistently with rules of international law, including those rules which mark the bounds of lawful state action against aliens or their property located within the territorial confines of the foreign state (at 457).

He rejected what he framed, somewhat simplistically, as the majority’s ruling that the Court could never intervene in foreign affairs: “Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch... But this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs or that the validity of a foreign act of state is necessarily a political question” (at 461).

Like the lower courts, he drew direct parallels between Nazi racism and the Cuban nationalizations, but he also drew links not made in previous act of state decisions between *commercial attitudes* and “civilization,” arguing that the majority’s refusal to consider the validity of Cuba’s actions effectively lent “the full protection of the United States courts, police and governmental agencies to commercial property transactions which are contrary to the minimum standard of civilized conduct . . .” (citing the Association of the Bar of the City of New York, at 466). Although his opinion did not prevail in the *Sabbatino* Supreme Court decision, this aspect of his approach would show up in later Cuba cases and in the eventual commercial exception. First, however, both the international law claim and the commercial dimensions of his argument were encoded in the Hickenlooper Amendment.

In September 1964, while the *Sabbatino* case was on remand to the District Court for the purposes of calculating the money owed to Cuba, Congress passed a Foreign Assistance Act with a rider that would soon come to be known as the Hickenlooper Amendment. The Hickenlooper Amendment was explicitly targeted at overriding the *Sabbatino* decision — an apparently unprecedented move. The Amendment was another, especially blatant attempt to shift responsibility for dealing with the Cuban nationalizations from the realm of foreign policy to that

⁷⁴ He also suggested that act of state cases in general could be subsumed under conflict of law reasoning — another tactic aimed at undoing the Act of State Doctrine as we saw above, and one that would continue to crop up in *First National* and *Dunhill* as well.

of the judiciary. The Act picked up on the international law strategy of the lower courts and Justice White, legislating that:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection.⁷⁵

Congress did not simply legislate that the Act of State Doctrine was no longer valid, nor even that it did not apply to foreign nationalizations of U.S. property. Rather, they directed the courts to rule according to the “principles of international law.” In a paragraph already added to the same subsection by the *first* Hickenlooper Amendment of 1962, Congress had already asserted that “speedy compensation for such [nationalized or expropriated] property in convertible foreign exchange, equivalent to the full value thereof” is “required by international law.”⁷⁶ Thus, they overcame all the ambiguities as to the content of international law identified in *Sabbatino* by deciding what that international law was. Contra the lower court rulings and contra the Supreme Court, here a political branch simply defined international law and, in so doing, the political/legal distinction with regard to nationalizations. This was a deeply imperialist move, in which Congress took on the role of the supra-sovereign hinted at in the lower *Sabbatino* decisions. But there was hardly any pretense about that supra-sovereign being “above” all states; rather, a state asserted that it could define international law for the whole world. Furthermore, the geopolitical goals of this move were explicit. January 1, 1959, as Hickenlooper himself pointed out, was “the date of the coming to power of the Castro regime in Cuba and the beginning of the greatest series of illegal takings of American property in recent history.”⁷⁷

The amendment also explicitly aimed to reverse *Sabbatino*, and represented a moment of heightened struggle among the branches over who would get to define not just the Act of State Doctrine, but the proper separation of powers among branches. A Senate report explained: “The effect of the amendment is to achieve a reversal of presumptions. Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.”⁷⁸ Hickenlooper himself tried to soften the appearance of simply overturning the Supreme Court: “It should be noted that the amendment is not intended to reinstate the broad holding established in the trial court. It only modifies the Supreme Court decision in the matter of presumptions. We think it perfectly proper

⁷⁵ Foreign Assistance Act of 1961 (P.L. 87—195), Sec. 620, p. 301 (relevant line added in 1964).

⁷⁶ *Id.*, p. 300 (relevant line added in 1962).

⁷⁷ 110 Cong.Rec.18936 (daily ed. Aug. 14, 1964), cited at 965 in *Banco Nacional De Cuba v. Farr*, 272 F. Supp. 836 (S.D.N.Y. 1965).

⁷⁸ U.S. Code Cong. and Adm. News 1964, p. 3852, cited at 963 in *Banco Nacional De Cuba v. Farr* (1965).

that the Congress of the United States should have the last word on this important policy question.”⁷⁹ In other words, directly contra the concerns of the Court in *Sabbatino*, Congress asserted that these matters were so political that Congress had a right to define them as legal.

The amendment marked an important struggle between Congress and the executive branch. Framing the nationalization as primarily about commerce and the protection of international investment was central to justifying Congress’ unusual intervention in an act of state matter, since Congress could claim a right to govern such issues under the Commerce Clause of the Constitution. In fact, the executive’s stance in 1964 was ambivalent. The executive apparently did not approve of the amendment.⁸⁰ After the Amendment passed, the State Department stated formally that they did not believe the amendment applied retroactively to the *Sabbatino* case. Nevertheless, they conceded that, if it did apply, it was not unconstitutional. In *Banco Nacional de Cuba v. Farr* (1965), the next stage of the *Sabbatino* litigation, the District Court determined that the Amendment did in fact override the Supreme Court in this case, and therefore ruled against Cuba after all. In 1967, the Second Circuit affirmed the decision,⁸¹ and this time the Supreme Court declined to hear the case.

How anomalous this Congressional behavior was is further proof of the importance of this struggle over the form and extent of U.S. power. The Second Circuit noted that, “We have learned of no case involving the effect on the rights of litigants of a federal statute, inconsistent with a Supreme Court mandate, which became law after the Supreme Court had remanded a case to the trial court but before the trial court had acted upon the merits after the remand. None has been called to our attention by the parties and we have found none by independent research” (at 178). The Second Circuit considered but rejected the plaintiff’s arguments that the Amendment itself violated the U.S. separation of powers.

The District Court, this time under Judge Bryan, had also rejected charges that Congress was impinging on the executive’s role in foreign relations. First, he pointed out that the amendment did leave a *reverse* Bernstein route open for the executive to intervene if he so desired. Quoting *Oetjen*, Bryan also noted that the Constitution assigns governance of foreign affairs to the executive *and* legislative branches (at 973). He picked up on Congress’s own strategy of affirming its right, enshrined in the Commerce Clause, to intervene by stressing the commercial dimension of the nationalizations in ways Dimock had not done in 1962. “Congress,” Judge Bryan explained, “was of the view that the weapons available to the political branches to insure fair treatment of United States nationals investing abroad were inadequate. A major purpose of the Amendment was to afford additional protection to such investors against foreign confiscation” (972). He further noted that this was “part of a consistent pattern of legislation, the purpose of which was to protect private investment abroad and to discourage foreign expropriations” (at 966). This was a far cry from the concerns about racial discrimination and moral repugnance that had formed the basis of the District Court’s decision three years earlier.

While admitting that the Amendment could override the Supreme Court to remove the bar of the Act of State Doctrine, both courts did attempt to preserve some judicial autonomy by basing their findings that the nationalization did violate international law not on the Amendment but on the prior *Sabbatino* rulings. Bryan argued that the Second Circuit had already so determined and that the Supreme Court’s decision did not undo that holding because, “Its discussion of

⁷⁹ 110 Cong.Rec.18936 (daily ed. Aug. 14, 1964), cited at 969 in *Banco Nacional De Cuba v. Farr* (1965).

⁸⁰ Discussed in *Banco Nacional De Cuba v. Farr* (1965).

⁸¹ *Banco Nacional De Cuba v. Farr*, 383 F.2d 166, 2d Cir. (1967).

international law was limited to the question of compensation and did not relate to questions of discrimination and retaliation” (at 980). The Second Circuit agreed, framing the Supreme Court’s decision as having primarily emphasized the need to weigh the political effects of a foreign action and downplaying their discussion of the ambiguity of international law on nationalizations. He pointed out that his own previous decision that the nationalization was a violation of international law was actually more restrictive than the Hickenlooper Amendment’s because it had found that the nationalization not only was without compensation, but was also discriminatory and retaliatory. Thus: “As we held that the taking before us violated international law under the possibly less exacting standards which we then applied, the application of the new statutory standards would not affect our decision here. This allows us to leave undecided whether the standard set forth in the Hickenlooper Amendment differs from the standard which we applied on the former appeal, and which we now apply again” (at 185). Furthermore, he wrote, it “also allows us to avoid the question of whether Congress can thus specify how our United States courts must decide questions of international law” (*id.*). They do nevertheless quote the Constitution to the effect that, “The Congress shall have Power [t]o define and punish ... Offences against the Law of Nations” (*id.*). Of course, as discussed above, the Constitution was written in a context in which “the law of nations” was considered precisely to be in the political and *not* the judicial domain.

Waterman did try, less than persuasively, to extricate the court from charges that they were simply bowing to Congress in considering the validity of the act at all: “Inasmuch as we hold that the question presented here is justiciable, we do not reach the issue suggested by appellant that our approval of the congressional direction to the courts here requires us to consider whether there might be a constitutional compulsion that the courts accept the direction of Congress even as to issues the Court has held to be nonjusticiable because they are ‘political questions’” (at 181). Of course, it was only because of the Hickenlooper Amendment that a case declared not justiciable by the Supreme Court was being treated as justiciable again.

In brief, both lower courts accepted the Hickenlooper Amendment as a way to move the nationalization at issue in *Sabbatino* from the executive to the judicial sphere, while simultaneously trying to preserve at least some judicial authority over constructing international law and defining the political/legal distinction. These struggles among the various branches of government only became more contentious in the ensuing Cuba cases. The Hickenlooper Amendment strategy was to prove short-lived, however, largely because the courts were in fact uncomfortable with what they viewed as Congress stepping on the judiciary’s toes. They thus immediately set out to limit the reach of the Hickenlooper Amendment. Many judges searched simultaneously for other ways to undercut the Act of State Doctrine in order to shift control over other cases involving Cuba from the political to the judicial sphere. In one of the most important of these cases, *First National*,⁸² the Supreme Court rejected the Hickenlooper Amendment and instead invoked a revised Bernstein Exception rule to make this happen.

***Banco Nacional v. First National* (or The Bernstein Exception, Round 2):**

This case is important for showing how fraught the struggle was over the form and extent of U.S. power in the second half of the 20th century. All the judges involved roundly rejected

⁸² *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

Congressional interference via the Hickenlooper Amendment — but the debate about the proper confines of executive interference burst wide open. The outcome, in which the Act of State Doctrine was once more overturned, was tenuous at best, and would set the stage for all three branches to seize upon the commercial exception approach in *Dunhill* a few years later.

First National was a complicated case. In 1958, First National City Bank of New York had lent \$15 million to a predecessor of Banco Nacional, which had secured the loan with U.S. government bonds held as collateral by First National. In 1960, with \$10 million of that loan left to repay, the Cuban government seized all of First National's branches in Cuba. In retaliation, First National sold off the collateral, receiving almost \$2 million in excess of the \$10 million it was still owed. Banco Nacional sued the bank for recovery of that \$2 million. First National responded that it deserved to keep the "setoff" against the damages it had suffered as a result of the nationalization of its property in Cuba.

Although the District Court ruled in First National's favor in 1967⁸³ on the grounds that the Hickenlooper Amendment had overruled *Sabbatino* and that the Cuban nationalization violated international law, the Second Circuit⁸⁴ rejected this move, arguing that Hickenlooper did not apply because the property at issue was not the same property that had been seized by Cuba. Thus, Judge Lumbard wrote in the Second Circuit's opinion, the 1964 *Sabbatino* decision controlled, and the Act of State Doctrine prevented the court from considering the validity of the nationalization. The Court (composed of three different judges from the panel that had heard the 1962 *Sabbatino* Second Circuit case) made no mention of whether the act had been discriminatory or retaliatory. They cited the 1964 *Sabbatino* ruling on the lack of consensus in international law regarding such issues and applied the separation of powers argument for upholding the Act of State Doctrine, noting that First National's claims might directly interfere with ongoing U.S. efforts to deal with Cuban assets in the United States through the Foreign Settlement Claims Commission.

The case was appealed to the Supreme Court. In the meantime, the executive branch, now under Nixon, issued a letter expressing surprise that the Hickenlooper Amendment had been ruled inapplicable and citing the Bernstein case as precedent for their intervention and assertion that the Act of State Doctrine need not be applicable to a "certain class of cases" defined as follows:

The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff, for the purpose of recovering deposits or sums owed them in the United States without taking into account the institutions' counterclaims for their assets expropriated in the foreign country (cited in *First National*, 1971⁸⁵ at 537).

Thus, the State Department letter collapsed the "class of cases" including Nazi seizures of Jewish property with all those nationalizations of U.S. property occurring in the context of leftist post-colonial and anti-imperialist movements in the 1960s. By suggesting that this 1970 letter should override the Act of State Doctrine in an entire class of cases, the State Department was

⁸³ *Banco Nacional de Cuba v. First National City Bank of New York*, 270 F. Supp. 1004 (S.D.N.Y. 1967).

⁸⁴ *Banco Nacional de Cuba v. First National City Bank of New York*, 431 F.2d 394 (2d Cir. 1970).

⁸⁵ *Banco Nacional De Cuba v. the First National City Bank of New York*, 442 F.2d 530 (2d Cir. 1971).

also attempting to turn the Bernstein Exception from a technique of direct, but *ad hoc* executive intervention to a sweeping legal rule applying to any expropriation of U.S. property. In support, the letter cited a case ruling that sovereigns who entered U.S. courts as plaintiff waived their sovereign *immunity*, arguing that this was “applicable by analogy” to act of state cases — something several members of the Supreme Court would strongly disagree with.

The Supreme Court remanded the case to the Second Circuit for consideration in light of the letter.⁸⁶ But in quite a change from their position in *Sabbatino*, that court ruled that, upon reconsideration, they saw no reason to change their ruling and again upheld the Act of State Doctrine in April 1971.⁸⁷ Crucially, this set off a heated struggle between the judiciary and the executive over who would get to define the scope of justiciability in such cases. In his 1971 opinion, Judge Lumbard noted that such a letter had been issued only once before, in *Bernstein*, and that the dissimilarities between Nazi Germany and Castro’s Cuba made the Bernstein case inapplicable:

The acts of state there were performed by a German government with which this country had gone to war and which was no longer in existence at the time of the State Department's letter. Here, on the other hand, we have never been at war with Castro's Cuban government, and that government is both extant and recognized by the United States... the Nazi government's actions, such as those of which Bernstein complained, had been condemned throughout the world as crimes against humanity. Furthermore, the letter in Bernstein went so far as to indicate that it was the affirmative policy of our government to restitute identifiable property to all those victimized by the Nazi confiscation, not merely, as the letter indicates in this case, to those who assert counterclaims or setoffs (at 534).

By limiting the scope in which a Bernstein letter could override the Act of State Doctrine, the court asserted the independence of the judiciary from the executive branch in determining whether an act is properly considered within the legal or the political domain. Yet even within the court, this sparked divisions. One of the three judges to hear the case dissented, not by defending the applicability of Hickenlooper, but by arguing that the Bernstein exception must apply, and that: “applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve. The recognition of this conflict is the very reason for the Bernstein exception... I must dissent from what I consider to be a deviation from our judicial function” (at 538).

The debate went back to the Supreme Court again.⁸⁸ Not a single Justice argued that Hickenlooper applied — Congressional interference had been decisively rejected by the judiciary as a whole. However, the argument over whether the Bernstein strategy could override the Act of State Doctrine was so contentious that it split the court into a 4-way decision in 1972. The outcome illustrates both the high stakes of the struggle over defining what modality of U.S. power should be extended to these nationalization cases and the way that the Supreme Court was by then shifting away from the practices of the Warren Court, with major implications for the

⁸⁶ *First National City Bank v. Banco Nacional de Cuba*, 400 U.S. 1019 (1971).

⁸⁷ *Banco Nacional de Cuba v. First National City Bank*, 442 F.2d 530 (2d Cir. 1971).

⁸⁸ *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

kind of transnational legal power that would shape the rest of the 20th century. In short, in the plurality (*i.e.*, the winning, but not majority) opinion, written by Justice Rehnquist, who had been appointed to the court the year, the Supreme Court ruled that the Act of State Doctrine was superseded by the executive's letter in a new Bernstein ruling. Two other judges concurred on different grounds. Four judges (two of whom had been on the *Sabbatino* Court) dissented, holding that *Sabbatino* was still controlling.

In the plurality opinion, Rehnquist reversed the Second Circuit's ruling that the Bernstein exception did not apply. He cited the *Sabbatino* separation of powers argument at length, but concluded that,

It would be wholly illogical to insist that such a rule, fashioned because of fear that adjudication would interfere with the conduct of foreign relations, be applied in the face of an assurance from that branch of the Federal Government that conducts foreign relations that such a result would not obtain. Our holding confines the courts to adjudication of the case before them, and leaves to the Executive Branch the conduct of foreign relations (at 769-770).

In short, Rehnquist made the political/legal split central and placed the political branches in control of defining that distinction. This is very different from the international law violation strategy that had tried to bypass the executive altogether in order to waive the Act of State Doctrine. Here the Court latched onto the primacy of the executive in "political" matters in order to assert judicial authority over "legal" questions. Using the separation of powers language from *Sabbatino*, Rehnquist was able to frame his decision as showing deference to the executive and as following the Supreme Court's own rules. Still, only two other justices joined him in this opinion.

Two others attempted to maintain the result of overriding the Act of State Doctrine while strongly rejecting the Bernstein exception. Justice Douglas argued that the Bernstein approach made the judiciary an "errand boy" for the executive (at 773). He invoked a foreign sovereign immunity case⁸⁹ that he considered applicable to overriding Cuba's sovereignty instead. Like Douglas, Justice Powell rejected the Bernstein exception because "he would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine" (*id.*). Unlike Douglas, he criticized the conflation of an act of state issue with the question of foreign sovereign immunity. Instead, he went back to the international law violation strategy of the lower *Sabbatino* court, asserting, somewhat strangely, that the *Sabbatino* Supreme Court decision was wrong.⁹⁰ While a lone voice in *First National*, Powell's revamping of the international law strategy is worth noting because it would actually be woven together with the commercial exception in *Dunhill*.

⁸⁹ *National City Bank v. Republic of China*, 348 U.S. 356 (1955).

⁹⁰ "Admittedly," he conceded, "international legal disputes are not as separable from politics as are domestic legal disputes, but I am not prepared to say that international law may never be determined and applied by the judiciary where there has been an 'act of state.' Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law. There is less hope for progress in this long-neglected area if the resolution of all disputes involving an 'act of state' is relegated to political rather than judicial processes" (at 775).

The four dissenting justices, in contrast, argued vehemently that the *Sabbatino* decision was still valid and barred any consideration of the validity of Cuba's actions. In an opinion by Justice Brennan, they stressed that the Bernstein exception was *not* affirmed by *First National* since only three judges actually supported it (and indeed, *Bernstein v. Nederlandsche* has been cited only very infrequently since the 1970s and only once in a Supreme Court decision).⁹¹ They critiqued Douglas' conflation of foreign sovereign immunity and the Act of State Doctrine and Powell's one-man revision of the international law ruling in *Sabbatino*. Most importantly, they criticized Rehnquist for having a crude understanding of *Sabbatino*, pointing out that embarrassment to the executive was only *one* of several considerations in that case, and citing the other arguments in *Sabbatino* about why the executive should not have sole power to determine where the political ends and the legal begins. Indeed, they argued, while arguably the separation of powers approach to upholding the Act of State Doctrine might not apply where the executive expressed *indifference* to the outcome of a case, where the executive had expressed its own view on the proper ruling, as here, bowing to the executive's wishes clearly violated the proper separation of powers. In other words, accepting a Bernstein letter in a case like this in which the executive expressed what outcome it would like to see (a win for *First National*), would mean either granting the political branches the right to determine what ruling the court's will issue, or leaving open the possibility that the courts could rule against the wishes of the executive. "Thus, the assumption that the Legal Adviser's letter removes the possibility of interference with the Executive in the conduct of foreign affairs is plainly mistaken" (at 785).

Rehnquist's conclusions, Brennan wrote, are "with all respect, mechanical and fallacious" (778). Furthermore, accepting the Bernstein approach, as Rehnquist had might actually damage the proper operation of government in the long run. Paraphrasing from another recent case, Brennan wrote, "Resolution of so fundamental [an] issue [as the basic division of functions between the Executive and the Judicial Branches] cannot vary from day to day with the shifting winds at the State Department. Today, we are told, [judicial review of a foreign act of state] does not conflict with the national interest. Tomorrow it may" (brackets in original) (at 792-793). The issues surrounding *First National* were, Brennan declared, absolutely political:

[T]he absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed all point toward the existence of a 'political question'... The Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim (788-789).

All the fractured opinions in *First National* make clear that justices at the time understood themselves to be arguing about the proper definitions of the political and the legal. While Rehnquist's three-justice opinion granted significant power to the executive in this regard, the remaining six justices all tried to maintain the judiciary's prerogative in defining these lines. As the dissent wrote:

⁹¹ *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

The task of defining the contours of a political question such as the act of state doctrine is exclusively the function of this Court... The ‘Bernstein’ exception relinquishes the function to the Executive by requiring blind adherence to its requests that foreign acts of state be reviewed. Conversely, it politicizes the judiciary. For the Executive’s invitation to lift the act of state bar can only be accepted at the expense of supplanting the political branch in its role as a constituent of the international law-making community (at 790).

Furthermore, the Bernstein approach “assigns the task of advocacy to the judiciary by calling for a judgment where consensus on controlling legal principles is absent... Thus, it countenances an exchange of roles between the judiciary and the Executive, contrary to the firm insistence in *Sabbatino* on the separation of powers” (at 791).

Brennan and the other dissenting judges were concerned not only about protecting the proper separation of powers and their image as apolitical judges, but about the supposedly neutral status of the law more broadly. Rehnquist’s decision, Brennan wrote, “would require us to abdicate our judicial responsibility to define the contours of the act of state doctrine so that the judiciary does not become embroiled in the politics of international relations to the damage not only of the courts and the Executive but of the rule of law” (at 778). This last point, not explicit in *Sabbatino*, can be seen as a reaction to what these justices perceived as increasing interference by the other branches in the affairs of the courts. They feared that the *First National* ruling might actually render the court’s actions biased in the eyes of the world.⁹²

In the end, the case was again remanded to the Second Circuit and this time the three-judge panel ruled unanimously that the Bernstein exception meant the Act of State Doctrine did not apply, and that, since the Cuban nationalizations had already been declared in violation of international law in 1962, there was no reason to change their decision.⁹³ The set-off was granted. In other words, the Bernstein exception was weakly affirmed, and *in combination* with the international law violation claim, used to extend US judicial power over Cuba’s foreign behavior. Yet this strategy was incomplete, because the Bernstein exception reasoning had not gained an outright majority in the case, and because it still suffered the same drawbacks as before — overriding the Act of State Doctrine in this way would make the extension of judicial power dependent on *ad hoc* actions by the executive branch in each case. Not only would this be domestically messy, as the heated arguments among various justices in this case showed, it was also inefficient. Thus, although the dissenting view in *First National* failed, their concerns about protecting judicial independence and the appearance of legal neutrality would shape the eventual outcome of these struggles. The commercial exception would draw much of its strength from the ability to claim such neutrality and to replace the *ad hoc* demands of a Bernstein approach with one, sweeping rule.

⁹² “No less important than fair and equal treatment to individual litigants is the concern that decisions of our courts command respect as dispassionate opinions of principle. Nothing less will suffice for the rule of law. Yet the ‘Bernstein’ approach is calculated only to undermine regard for international law. It is, after all, as *Sabbatino* said, 376 U.S., at 434-435, a ‘sanguine presupposition that the decisions of the courts of the world’s major capital exporting country and principal exponent of the free-enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies.’ This is particularly so where, as under the ‘Bernstein’ approach, the determination of international law is made to depend upon a prior political authorization” (at 793).

⁹³ *Banco Nacional de Cuba v. First National City Bank*, 478 F.2d 191 (2d Cir. 1973).

Alfred Dunhill v. the Republic of Cuba: Fashioning the Commercial Exception

In 1976, after over a decade of contestation among various courts, the executive branch, and Congress over how, precisely, the political/legal divide should be defined, in the context of multiple attempts to shift responsibility for cases involving foreign nationalizations of U.S. property in Cuba from the executive to the judicial branch, in *Dunhill* the Supreme Court invoked a “commercial exception” to the Act of State Doctrine.⁹⁴ With this move, it neatly sidestepped the entire debate about the proper separation of powers by declaring that the commercial is by definition *not* political, which is to say that the commercial is private and legal, and that commercial issues involving foreign sovereigns do not trigger the Act of State Doctrine and should be considered as under the judicial and not the executive or legislative domain. Although not uncontested, the commercial exception strategy succeeded in doing what the international law strategy, the Hickenlooper Amendment and the Bernstein Exception had failed to do, while leaving the *Sabbatino* separation of powers argument ostensibly intact. In the process, it re-affirmed the basic public/private split as being at the heart of the Act of State Doctrine and created an exception to that doctrine that was far broader than any of the previous strategies. It did so by basing the exception neither on the fairly restricted tenets of a supposed supra-national legal code nor on the *ad hoc* interventions of the executive or legislative branches, but rather on a redefinition of the public/private divide *within* U.S. The commercial exception created an override to the Act of State Doctrine that would extend U.S. legal power over a wide range of so-called commercial transactions taking place abroad in one fell swoop. At the same time, by largely sidestepping the political/legal split, it returned both the public/private and, more surprisingly, the foreign/domestic distinctions to prominence within Act of State Doctrine cases.

The facts of *Dunhill* are even more complicated than those of *First National*.⁹⁵ Nine separate actions were first consolidated into one.⁹⁶ The actions all revolved around Cuba’s nationalization of five different cigar companies owned by Cuban nationals. The Cuban government (through its “interventors”) continued to operate the cigar companies, manufacturing the same cigars, under the same brands and to export them to the same U.S. importers. At the time of suit, the importers claimed they had already paid the Cuban interventors for some shipments that had been made before the nationalization. The importers had also accepted shipments of cigars after the nationalization, but not yet paid for them. The previous owners, meanwhile, having fled to the United States, initiated suit in New York against the importers, claiming that the payments for both the pre- and post-seizures shipments should be made to the previous owners and not to the Cuban government.

The rulings in this case were suitably complex as well. In the consolidated 1972 action, Judge Bryan of the Southern District Court of New York upheld the validity of the nationalization in regard to the post-intervention shipments. He argued that because the nationalization was aimed at Cuban, not U.S. nationals, it did not violate international law or trigger the Hickenlooper Amendment. This respect for the nationalization itself as a sovereign act wholly within Cuban territory was upheld by the higher courts. The pre-intervention payments, however, were another matter. Bryan ruled that the payments for the pre-intervention

⁹⁴ *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976).

⁹⁵ I do not deny *that* there is any increasing economic interconnection/complexity, etc. by the mid-20th century, but rather argue that the legal changes in question were not motivated primarily by a desire for “certainty” and “stability” in international markets, but rather by geopolitical interests and the protection of U.S. capital.

⁹⁶ *Menendez et al., Cuba et al. v. Faber, Coe & Gregg et al.*, 345 F.Supp. 527 (S.D.N.Y. 1972).

shipments should have been made to the previous owners not to Cuba. Therefore, the importers still owed that money to the previous owners, and Cuba had to return that money to the importers. Thus, Bryan concluded, the “mistaken” payments made for the pre-intervention shipments should be offset against the amounts owed for the post-intervention shipments (at 545). To Cuba’s claim that the nationalization had included the accounts of the cigar companies as well as their physical property, Bryan responded with an interesting spatial argument. He ruled that at the time of the intervention, the “debt” owed by the importers to the cigar companies was not located in Cuba at all, but in the United States, because: “It is well established that the situs of a debt is located with the debtor [*i.e.*, the importers]” (at 538).

We will return to the changing arguments about the location or “*situs*” of debts and other forms of intangible property in Chapter 5.⁹⁷ For now, there are a few key points of relevance. First, it is worth noting that the question of the *situs* of debts arises in this case at a moment when the financial sector was expanding and would shape the legal arguments about Third World debts that would become widespread in the 1980s. Second, this is an example of how the foreign/domestic question returns to prominence in this case, and is thoroughly integrated with questions about sovereignty and territory.

Bryan also rejected Cuba’s argument that, if the debts had not been included in the nationalization, then Cuba had later repudiated those debts, and that that repudiation was protected by the Act of State Doctrine. The judge rejected the claim based both on the argument that the debt to be repudiated was not located in Cuba and that there had been no formal decree or other act declaring the repudiation, and that it was thus too informal (not governmental or public enough) to be considered an act of state. He thus ruled that the importers could “set off” the amount of the mistaken payments against what they owed to the interventors. In all but one case, the importer owed more to Cuba for the post-intervention shipments than it was owed by Cuba for the mistaken payments. One of the importers, Alfred Dunhill of London, however, was owed more than it owed to Cuba. Bryan ruled that Cuba therefore was required to pay Dunhill this excess amount.

The case was appealed to the Second Circuit.⁹⁸ Writing for the Court, Justice Mansfield agreed with the District Court that the importers owed Cuba for the post-intervention shipments, but that they should have paid the original owners for the pre-intervention shipments. He disagreed with Bryan’s reasoning about the supposed *situs* of the debts or the lack of formality making the Act of State Doctrine inapplicable to Cuba’s repudiation of the debts based on the mistaken payments. Nevertheless, he ruled that, based on *First National*, while the repudiation was an act of state, the Act of State Doctrine was superseded by the Bernstein exception and/or *National City Bank v. China* (the foreign sovereign immunity case cited by Justice Douglas in *First National*). However, following the *First National* decision with regard to setoffs, Mansfield reversed the lower court’s ruling that Cuba had to pay Dunhill the *excess* amount.

It was this question of the “excess” that became central to the Supreme Court case in 1976. In another split opinion, Justice White, joined by Rehnquist and Burger, reversed the Second Circuit’s ruling that Cuba’s repudiation of its debts to the importers was an act of state at all. In the first two sections of the opinion, supported by five justices, the court first affirmed the District Court’s arguments that a lack of properly official trappings could make an act insufficiently sovereign. The Court projected this back onto the earlier act of state cases,

⁹⁷ There is also an interesting discussion in this case about the *situs* of trademarks, which I will not get into here.

⁹⁸ *Menendez, Garcia & Co. v. Faber, Coe & Gregg*, 485 F.2d 1355 (2d Cir. 1973).

although this was certainly not discussed in those cases. White set up his ultimate move by framing this formal/informal distinction itself in terms of a governmental vs. commercial distinction, asserting that, “Here there is no more reason to suppose that the interventors possess governmental, as opposed to commercial, authority” (at 693). He cited a 1924 foreign sovereign immunity case⁹⁹ in support. “In both cases,” he wrote, “a party claimed to have had the authority to exercise sovereign power. In both, the only authority shown is commercial authority” (at 694).

After setting up a commercial vs. governmental distinction with regards to the type of power possessed by the agents of the government appointed to oversee the nationalized companies, White, in an argument joined only by four justices, then jumped to the explicit commercial exception. He argued that *even if* the Court granted that the repudiation was an act of state, “we are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities. Our cases have not yet gone so far, and we decline to expand their reach to the extent necessary to affirm the Court of Appeals” (at 695). In other words, White adopted a commercial exception argument to the application of the Act of State Doctrine.

This move was bolstered by the opinion of the executive branch, now under President Ford. As White explained, the Solicitor General argued in an *amicus* brief — written by none other than a young Antonin Scalia — that, “such a line should be drawn in defining the outer limits of the act of state concept and that repudiations by a foreign sovereign of its commercial debts should not be considered to be acts of state beyond legal question in our courts” (at 696). In a 1975 letter, the Department of State agreed: “[W]e do not believe that the Dunhill case raises an act of state question because the case involves an act which is commercial, and not public, in nature” (cited in *Dunhill* at 67).

With these moves, the Supreme Court and the executive branch asserted a strict dichotomy between commercial acts and public/governmental/sovereign acts, thereby equating the commercial not only with the private, but also with the legal domain. In support of this commercial exception strategy, both White and the State Department cited not act of state cases, but precedent from foreign sovereign immunity cases, especially after 1952. The fact that the commercial exception was invoked earlier in sovereign immunity than in act of state cases is itself interesting (see below). For now, it’s worth noting how this illustrates the way the public/private distinction is not drawn all at once, nor for “the law” as a whole, but always in piecemeal fashion, taking on certain content in some spheres while simultaneously being defined differently in others.

This is also why *struggling over* the public/private distinction has remained central to transnational legal cases involving sovereigns ever since. This was not simply settled with Dunhill, or with any of the sovereign immunity cases. Even in Dunhill, crucially, White never argued that nationalizations *per se* were “commercial” and thus private acts. Rather, he said,

Cuba's debt to Dunhill arose out of the conduct by Cuba's agents of a commercial business for profit. The same may not be said of conventional expropriations of foreign assets located ab initio inside a country's territorial borders... The debt would never have arisen if Cuba's agents had not gone into the cigar business and sold to Dunhill. This case

⁹⁹ Gul Djemal, 264 U.S. 90 (1924).

is therefore no different from any case in which a buyer overpays for goods sold by a commercial business operated by a foreign government - a commonplace event in international commerce (at 697).

Of course, why this is any different from the Soviet Union seizing and running a timber company in *Luther* is unclear. The important point is that, in 1976, it was actually not acceptable to simply rule *all* nationalizations commercial, non-sovereign actions. This remains technically true today. Nevertheless, since there are presumably few cases in which a state would nationalize a company and *not* continue to run it, this ruling *effectively* excepts nationalizations from protection by the Act of State Doctrine. They may still be respected as valid in international litigation, but only as long as compensation is paid.

Justice Powell concurred with White's decision, arguing, if anything for an even broader exception to the Act of State Doctrine that would include many political acts as well. Interestingly, he based this argument precisely on the fact that "the line between commercial and political acts of a foreign state often will be difficult to delineate" (at 715). Justice Stevens, in contrast, concurred with White's rejection of the act of state defense in this case, but not with the commercial exception argument, offering no elaboration of this view.

In a dissenting opinion by Justice Marshall, four justices vehemently disagreed with the rest of the court, rejecting both the formal/informal and the commercial exception arguments and stating that, "While it is true that an act of state generally takes the form of an executive or legislative step formalized in a decree or measure... that is only because duly constituted governments generally act through formal means. When they do not, their acts are no less the acts of a state, and the doctrine, being a practical one, is no less applicable" (at 718-719). "Under any realistic view of the facts of this case," Marshall argued, "the intervenors' retention of and refusal to return funds paid to them by Dunhill constitute an act of state, and no affirmative recovery by Dunhill can rest on the invalidity of that conduct" (at 716).

Marshall further emphasized that since it had not received the support of a majority of the Court, the commercial exception had *not* been adopted by the Supreme Court, and noted, "I find it difficult to accept [Mr. Justice White's] characterization of the course of conduct involved here as 'purely commercial'" (at 729). While Marshall did not go so far as to suggest that there could never be an appropriate commercial exception, he argued firmly that it was not appropriate here:

Cuba's retention of and refusal to repay the funds at issue in this case took place against the background of the intervention, or nationalization, of the businesses and assets of five cigar manufacturers... The seizure of the funds, like the initial seizures on September 15, reflected a purpose to exert sovereign power to its territorial limits in order to effectuate the intervention of ongoing cigar manufacturing businesses... Cuba retained the money in the course of its program of expropriating what it viewed as part and parcel of the businesses" (at 729).

In other words, Marshall argued that the seizure of the "mistaken" payments was part of the original nationalization of the cigar companies — an act that all the courts involved had already agreed was indeed a sovereign, *i.e.*, a political, act.

Redefining the "commercial"

As we saw in several prior act of state cases, in *Dunhill* Justice White employed the tactic of suggesting that it would have been an unprecedented *extension* of the Act of State Doctrine to apply it to commercial cases. In fact, implementing a commercial exception to the Act of State Doctrine was a radical change from the classic act of state cases, and greatly restricted the doctrine's reach. It did so by reconfiguring the public/private divide so that commercial was equated with private in a way that had not been the case in any of the early act of state cases or even *Sabbatino* or *First National*. Given the imbrication of the public/private and political/legal distinctions via the equation of public and political, this change meant that commercial was simultaneously defined as private and as legal. As we have seen, the public/private distinction has long been crucial to defining the extent and mode of the United States' territorial reach, and this radical redefinition has had especially far-reaching implications.

Justice White backed up his commercial exception argument in *Dunhill* by arguing that, "Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach" (at 695). In addition to citing the foreign sovereign immunity history, he cited a number of *domestic* U.S. cases having to do with the relationship between the states and the federal government. This assertion that purely domestic U.S. questions are equivalent to inter-national questions was quite unusual at the time, though as we will see in Chapter 6, it has become more common. At least within the history of the Act of State Doctrine, it can itself be seen as part of a broader move to reframe what had been considered exceptional political issues considered *more* important or sensitive than domestic commercial issues as simply an extended version of normal commercial behavior. While White generalized from these early U.S. cases to imply that the equation of commercial with private goes back to the 19th century in U.S. law, a brief look at the classic act of state cases shows that this was not true, at least in cases involving foreign sovereigns.

While White at one point emphasized the military character of the action in *Underhill*, for instance, the Second Circuit in that case referred to Hernandez as a "civil and military" chief (1895 at 578). The specific issue in question furthermore was a seizure of private property (a waterworks operation), and the attempt to get *Underhill* to continue running his business. More to the point, in its discussion of whether the seizure constituted an act of state, the Court nowhere used the terms commercial or non-commercial. Rather, the Supreme Court directly affirmed the lower court's finding that that the act was public because it done for the "benefit of the community and the revolutionary forces" and not on account of "malice or any personal or private motive" (1898 at 254). That is "private" was equated with individual rather than social motives, not with commercial or not.

American Banana makes this all the more clear, since the issue in question there was not military at all, but rather involved one private corporation getting help from Costa Rican officials in order to protect its monopoly interests in a banana plantation. The Second Circuit decision in that case listed both military and civil officials as being protected by the Act of State Doctrine. As with *Underhill*, that Court also noted (at 188) that United Fruit's "malice, intention, or expected profit" doesn't matter, since the act was done by Costa Rica — thus showing that "private" was still associated with these kinds of personal motives at the time in 1908. The Supreme Court decision was even more direct, stating that if a government does something, it is by definition a governmental act, since "The very meaning of sovereignty is that the decree of the sovereign makes law" (at 358).

Similarly, while the acts in *Oetjen* and *Ricaud* were carried out by Mexican military officials, those acts primarily involved the seizure and selling of private property in order to make money.

The fact that it was used towards the war effort is mentioned in those cases, suggesting that military activity is seen as being *especially* public, but the Courts in these cases never said that a non-military act, let alone a “purely commercial” action by a governmental actor, would not be protected under the Act of State Doctrine. In *Luther*, the military was not involved at all — the Russian government seized the factories and other property of a private timber company in order to continue running it as a state-owned business. In *Shapleigh*, likewise, there were no military officials. The seizure of private property was carried out by the governor of a province in order to redistribute the land. In other words, nearly *all* the classic Act of State Doctrine cases involved the seemingly commercial acts of seizing private property in order to sell it for money or to continue running the seized businesses. Yet, in none of these cases did the injured parties claim that the act was commercial.

One more non-act of state case is worth mentioning again in this respect, because it was cited extensively in the lower *Sabbatino* decisions. In the *Paquete Habana*, not only was the private not equated with the commercial, but the commercial was explicitly equated with the *public and political*. In that case, small-scale subsistence fishing vessels were considered to be immune from wartime seizures because they were engaged in personal activity only. This was contrasted to ships involved in the large scale “great fishery” of the high seas, which “are, in effect, considered as devoted to operations which are at once commercial and industrial,” and thus *not* exempt from wartime seizures (at 704). In other words, in this case the military and public was directly associated with the commercial, as versus the personal or private. The dissenting judge too reaffirmed this distinction, arguing precisely that the ships in question were large enough to be considered commercial and thus should not have been held to be exempt from seizure. The association of the private with the personal in this case resonates strongly with the association of the private with motives like malice in *Underhill* and other act of state cases.

Even once some started trying to restrict the scope of the Act of State Doctrine, it was over twenty years before the commercial exception argument was invoked. In *Bernstein*, in which the Act of State Doctrine was overturned by the executive branch, no attempt was made to bolster this intervention by arguing that the act in question was simply about the seizure and selling of private property, although Bernstein’s lawyers did try to argue that the seizure should be declared invalid because the coercion made it fraudulent.

In *Sabbatino*, as we saw above, the public/private distinction was indeed central to the lower courts’ attempts to get around the Act of State Doctrine, but not by defining the nationalization of certain sugar companies as a commercial and thus private act. Rather the courts defined the nationalization as motivated by retaliatory and discriminatory and thus *private* motives — a definition of private much closer to that in *Underhill* and *American Banana* than in *Dunhill*. Furthermore, in arguing that the allegedly private nature of the Cuban nationalization made it a violation of international law, the lower *Sabbatino* courts cited McNair and other authorities in saying that nationalizations should be for “a bona fide, social or economic purpose involving the property nationalized” — suggesting that the private was still not being defined in terms of the “economic” at least (1962 at 866). Likewise, the courts cited an Italian case to the effect that courts should not uphold nationalizations carried out “not for reasons of public interest, but for purely political persecutory, discriminatory, racial and confiscatory motives” (*id.*) — again, with no suggestion that the opposite of public has anything to do with being commercial.¹⁰⁰ The

¹⁰⁰ Note here that the merely political is defined as *not* public — this is a different definition of political than we have been using, and a verbal ambiguity that comes up in several of these cases but that does not seem to affect the overall functioning of the linked public/private and political/legal dichotomies.

Supreme Court of course rejected these arguments in part on the grounds that even this definition of public vs. private did not hold up.

Only with the dissent in *Sabbatino*, was there some significant foregrounding of the commercial framing of the Cuban nationalizations, when Justice White referred to the them as “commercial property transactions which are contrary to the minimum standard of civilized conduct . . .” (at 466). Nevertheless, his argument was not that they were private, but that they violated international law. Still, it was with this dissent, and the Hickenlooper Amendment that followed, that the commercial consequences of such nationalizations did begin to get more attention in these documents, with statements in *Banco Nacional v. Farr* (1965 at 966), for example, framing Hickenlooper as “part of a consistent pattern of legislation, the purpose of which was to protect private investment abroad and to discourage foreign expropriations,” and many other similar quotes. These were not the kinds of arguments made in prior act of state cases, even where large-scale seizures of private property by a foreign government were at issue.

As we saw above, one impetus behind this shift was to justify why Congress, not just the executive branch, should have the authority to intervene in the Cuban act of state cases. This should, of course, be contextualized in terms of growing concern with the international economy in general after World War II. Nevertheless, even after Hickenlooper, and despite it being in use already in foreign sovereign immunity cases, the commercial exception argument still did not become the immediate strategy for overcoming the Act of State Doctrine. Even the plurality opinion in *First National*, upholding the Bernstein Exception strategy, accepted that the nationalization of U.S. bank branches in Cuba was a public act and involved no particular discussion of whether it was commercial or not. Yet, in 1976, four justices in *Dunhill* embraced the idea of a commercial exception to the Act of State Doctrine.

White’s argument in *Dunhill* was not just yet another strategy for getting around the Act of State Doctrine, after twenty years of attempts to do so. It built on each prior strategy in important ways. The timing of the adoption of the commercial exception argument seems to have been at least partially motivated by the continuing messiness of trying to define the political/legal distinction in order to restrict the scope of the Act of State Doctrine, as evidenced by the contentiously split court in *First National*. Intentional or not, adopting the commercial exception to the Act of State Doctrine had the *effect* of sidestepping the complicated separation of powers arguments altogether by declaring, for the first time in a major Act of State Doctrine case, that commercial activities are, by definition, not political and thus that they fall under a judicial modality of governance. White’s opinion made his recognition of this clear. In a nod to the separation of powers ruling in *Sabbatino*, he argued that:

[S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on “national nerves” (at 704).

In promoting this logic, the commercial exception strategy in *Dunhill* greatly extended the United States’ judicial power over international commercial transactions that would previously

have been protected by the Act of State Doctrine, while maintaining a semblance of respecting national sovereignty by defining the commercial as not part of the sovereign.

White also fused the separation of powers and international law concerns from *Sabbatino* by arguing that:

There may be little codification or consensus as to the rules of international law concerning exercises of governmental powers, including military powers and expropriations, within a sovereign state's borders affecting the property or persons of aliens. However, more discernible rules of international law have emerged with regard to the commercial dealings of private parties in the international market (at 704).

To support this statement he cites a few authors discussing socialist economies, all from one edited volume put together by a German-British legal scholar.¹⁰¹ Thus, even though the case was not explicitly based on an argument about violations of international law, consistency with international law was invoked to lend authority to the decision. The State Department, too, made this move in its letter to the Court, citing its own past support for a commercial exception in sovereign immunity and saying that: "Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations" (reproduced in *Dunhill* at 707). The letter, furthermore, raised the Bernstein exception strategy as relevant to *Dunhill*, noting that the executive branch had made official notice to the courts in *Bernstein*, *Sabbatino* and *First National*, and that these cases:

each involved an Executive Branch determination which opened the way for U.S. courts to review an act of state on the merits under international law. In each of these cases, the claim or counterclaim in question alleged that an act of state violated customary international law. Thus, at least on a case-by-case basis, the trend in Executive Branch pronouncements has been that foreign relations considerations do not require application of the act of state doctrine to bar adjudications under international law.

The letter thus drew in a somewhat slippery way on the international law, Bernstein and commercial exception strategies to explain why the Act of State Doctrine need not apply in *Dunhill*. Here, executive intervention in a court case is presented as part of opening U.S. courts to international law in matters that are *not* political — rather than, as in *Bernstein*, invoking political authority to supersede judicial authority *because* an issue is so politically important. Although these first three strategies each failed to fully unseat the Act of State Doctrine, they all became entangled in getting the commercial exception in place.

Once the commercial exception was in place, however, these other strategies, particularly executive action, were no longer necessary. The commercial exception created a sweeping rationale for overriding the Act of State Doctrine in the case of many foreign state actions that had previously been considered sovereign and political. In doing so, this shift bolstered American hegemony by extending U.S. territory via judicial power. The lessons from the international law strategy discussion above are useful in understanding the implications of this. Not only does getting rid of the need for specific executive action in each case make the change far more sweeping than the Bernstein exception alone would have, it also bolstered U.S.

¹⁰¹ (Schmitthoff, 1964).

hegemony through the specific characteristics of the legal in liberalism. Its rhetorical power as a symbol of universality and neutrality gives legal power a kind of international legitimacy that it is difficult for blatantly political actions to achieve. In other words, the commercial exception, in combination with overwhelming U.S. economic dominance after World War II, smuggled the “universality” of U.S. law in through the back door.

This was aimed in particular at post-colonial and other Third World countries attempting to use nationalizations to bolster their economic and political standing, in order to give substantive meaning to their newly formalized sovereign status. This also meant, crucially, that the commercial was defined as *not* political precisely at the height of the Cold War, when the question of the proper arrangement of economic relations was arguably *the* key political issue of the 20th century — as evidenced by Cuba and other countries’ vigorous counter arguments about their nationalizations of tangible and intangible property serving important public needs. In the process, the Court asserted, in a huge reversal from decades of act of state cases, not only that commercial actions are irrelevant to the exercise of national sovereignty, but that private commercial concerns actually *outweigh* foreign policy considerations: “The State Department has concluded that in the commercial area the need for merchants ‘to have their rights determined in courts’ outweighs any injury to foreign policy” (at 706). This reversal must of course be contextualized in terms of the rising prominence of neoliberal ideas, the growing power of transnational corporations, and economic globalization — but my argument is that the way this was fought out, in a fumbling way, in the context of Third World nationalizations of U.S. property show that it must also be understood as an explicitly geopolitical move, not merely an economic one.

While the Court remained split over the commercial exception to the Act of State Doctrine in *Dunhill*, this would nevertheless initiate a *de facto* if not a total or formal shift towards a commercial exception to the Act of State Doctrine. Schlossbach (2000, p. 155) explains that, due to the plurality but not majority opinion in *Dunhill*, courts have remained split, but that as a rule, “district courts in the Second, Third, Fourth, Fifth, Seventh, and Eleventh Circuits have either explicitly or implicitly endorsed the commercial activity exception.” At the circuit court level, only the Second Circuit has basically adopted the commercial exception, favorably citing White’s opinion on the split between public and governmental on the one hand and private and commercial on the other on many occasions. Although not every Circuit court has endorsed such an exception, Schlossbach himself explains that the Second Circuit’s doing so is especially important, “because Second Circuit cases account for a disproportionately large percentage of the total number of Act of State Doctrine decisions,” due to the fact that “the Second Circuit includes New York City, one of the world’s primary international trade centers. Thus...a surprisingly high percentage of Act of State cases, which might not otherwise be adjudicated, would be adjudicated by the Second Circuit on commercial activity grounds” (p. 153). Schlossbach concludes more broadly that “there is a general trend toward acceptance of the commercial activity exception within the federal court system” (p. 156) and that, while there is less consensus about the scope of that exception (as we will discuss in the following chapters), “courts seem to have gradually lowered the threshold for finding ‘commercial activity’” (p. 160).

As Patterson’s (2008) analysis of the continued “foreign relations” element of the Act of State Doctrine reasoning since *Sabbatino* and *Dunhill* shows, the commercial exception (as well as other exceptions for torture or corruption) is more likely to be applied, the less powerful a country in question is. Thus, he points out, the Act of State Doctrine is more likely to be used to prevent a judgment against a major OPEC country than against Nauru or Papua New Guinea.

Patterson argues persuasively that this is consistent with the separation of powers approach to the Act of State Doctrine from *Sabbatino*, because “courts understand that the foreign policy impact of angering a major ally or foe is greater than alienating an isolated or ineffective government” (p. 140). But this only shows even more clearly that the entire post-Sabbatino turn, including the implementation of a commercial exception based on a supposed distinction between the commercial and the political, in a geopolitical transformation.

The Foreign Sovereign Immunities Act and the Other Commercial Exception

A few months after *Dunhill*, a commercial exception to another key legal doctrine, foreign sovereign immunity, was codified in the Foreign Sovereign Immunities Act (FSIA) of 1976. In short, the FSIA determined that foreign sovereigns would no longer be considered absolutely immune from suit in U.S. courts. Most importantly, immunity would no longer apply to suits arising from commercial activity. Specifically, the Act provides, that:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case...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 (28 U.S.C. § 1605(a)2).

The FSIA cemented a transition from an “absolute” to a “restrictive” theory of sovereign immunity that had been underway for some time. This transition has been extensively documented by legal scholars (see *e.g.*, Weidemaier (2014) for a discussion of this shift in relation to sovereign bonds in particular). The history of the commercial exception to foreign sovereign immunity resonates with that of the commercial exception to the Act of State Doctrine, but is not identical.¹⁰² Some aspects of the commercial exception logic to sovereign immunity go back to the early 20th century, earlier than in the act of state history. Nevertheless, by and large, U.S. courts followed the absolute version of sovereign immunity until 1952, when the State Department issued a formal notice of its own support (the Tate Letter) for the restrictive theory.¹⁰³

In the letter, Secretary of State Jack B. Tate informed the U.S. Attorney General that the State Department had decided to support the restrictive theory of sovereign immunity rather than the absolute theory it had supported until that point. He defined the former as excluding immunity in the case of “private acts” (*Dunhill* at 711). The shift to restrictive sovereign immunity is almost always framed in terms of being a practical or even necessary response to increasing global economic developments — in short, to globalization (see Chapter 1). Yet important aspects of the *geopolitics* of the State Department’s decision can be discerned from the letter.

First, Tate invokes international law in the customary sense to show that some countries had

¹⁰² I will explore the unique spatial history of foreign sovereign immunity in U.S. law, and its imbrication with the rise of financial power from the 1970s on in later publications.

¹⁰³ Tate Letter, reproduced in *Dunhill* at 711-715.

already made this transition (although the list he provides is far from evidence of consensus). The list (*id.* at 712 - 713) is less Euro-centric than usual, perhaps because only a few nations had definitively adopted the restrictive theory: Belgium, Italy, Egypt, Switzerland, France, Austria, Greece, Rumania, Peru and “possibly Denmark.” Those still following the absolute theory, Tate concedes, included the United States, the British Commonwealth, Czechoslovakia, Estonia, “probably Poland,” Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal. But, he says, there are some signs that the Netherlands, Sweden, Germany and Argentina are or would move towards the restrictive theory. Furthermore, he says, even in those countries still following the absolute theory, there are “influential writers favoring the restrictive theory” (*id.* at 713).

Where the geography is more clear-cut, however, is in the fact that “little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity... The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy” (*id.* at 714). In other words, the Cold War is directly invoked as a justification for the shift in U.S. policy. Only *after* that does Tate say that the policy change is also supported by “the widespread and increasing practice on the part of governments of engaging in commercial activities” (*id.*). This comment, too, makes most sense in the context of the increasing use of state-owned enterprises in socialist countries.

The Tate Letter was a key development, because through the mid-twentieth century, U.S. courts almost always deferred to the U.S. executive branch in cases involving foreign sovereigns (Weidemaier, 2014). Yet the Tate Letter did not complete the shift to the restrictive theory of foreign sovereign immunity. Rather, from 1952 on, the State Department would often recommend to the court whether or not to waive immunity in particular cases. The application of foreign sovereign immunity by U.S. courts after 1952 was thus inconsistent even with respect to commercial activities.

The codification of the restrictive theory of immunity in the FSIA in 1976 was designed to take the State Department out of the equation altogether. Just as we saw above in relation to the Act of State Doctrine, Weidemaier makes the important point that this was a “self-serving” move by U.S. politicians: “[it] promised to insulate political actors from pressure by both U.S. citizens and foreign states” (2014, p. 82). Even this did not do away with the importance of foreign sovereign immunity as a legal defense for sovereign countries altogether. Very importantly, while the FSIA created important exceptions to immunity from *judgment* by U.S. courts, it left immunity from “execution” or the attachment of assets largely intact. This meant, for one thing, that there were still major limits to the ability of U.S. courts to *enforce* their judgments against sovereigns. Nevertheless, with both *Dunhill* and the FSIA, 1976 saw a significant expansion in U.S. juridico-economic territory, and a corresponding reduction in the economic sovereignty of many other countries.¹⁰⁴

Conclusion

Though separate in important ways, the stories of the Act of State Doctrine and foreign sovereign immunity are clearly connected. They also became directly entwined in 1976.

¹⁰⁴ The United Kingdom passed a similar act in 1978.

Although the dissenting Justices in *Dunhill* critiqued the plurality's conflation of act of state and foreign sovereign immunity logics, the winning opinion cited the Tate Letter and the growing prevalence of the restrictive theory of sovereign immunity as lending credibility to its commercial exception to the Act of State Doctrine. Because the FSIA was passed months after *Dunhill*, *Dunhill*'s reasoning in turn has been taken to provide a clue as to how the FSIA's commercial exception should be interpreted (as we will see, for example, in *NML v. Argentina* in Chapter 6).

It is also of course not irrelevant that both exceptions were adopted in the mid-1970s as neoliberal political ideologies were growing stronger in the context of the United States' and New York City's economic crises, and efforts to reinvent the United States and specifically New York as the financial capital of the world. In sum, the eventual articulation of a not-quite-definitive commercial exception to the Act of State Doctrine, combined with a much more definitive commercial exception to foreign sovereign immunity was a major step in making U.S. domestic law governing transnational economic relations between private companies and foreign states far more favorable to the former. As soon as the FSIA was passed, sovereign bond and other major commercial contracts began incorporating "governing law clauses" at a much higher rate than previously, as well as explicit waivers of immunity, to back up the legal changes in the FSIA. These clauses allow parties to a transaction to select which laws and which jurisdiction will govern their transaction. New York quickly became the most common choice for sovereign bonds. The power of New York courts over these transactions was increased yet further in 1984, when the New York legislature passed a law requiring New York courts to apply governing law clauses selecting New York in all major commercial contracts, even if there was *no spatial connection* between the transaction and New York. Together, these developments set the legal stage on which the debt crises of the 1980s and 1990s would play out. Yet it did not put an end to the legal struggles over the bounds of national economic sovereignty — it only shifted the terrain. For one thing, as we will see in the next two chapters, in 1976, sovereign debt issuance itself was still legally classified as a *public* activity, and the legal "location" of an intangible debt was far from settled.

The transformation of the Act of State Doctrine was primarily a geopolitical, not merely a technical legal or economic change. Insofar as this rested on a transfer of significant aspects of foreign government activity from the political to the judicial realm, this was a deeply territorial shift that altered both the extent and the modality of U.S. power over international economic relations. Redefining first the political versus the legal, and then, in linked ways, the public versus the commercial was central to accomplishing this. Yet, the change did not end there. Once the "fact" of a split between the commercial and the public was legally established, formally in foreign sovereign immunity, and sweepingly if not totally in the Act of State Doctrine, the *scope* of the commercial became a central target of debate, and one that has continued up to today. I have spent so much time on the territorial dimensions of the changes discussed here, because continuing struggles over the definition of the commercial in cases involving foreign sovereigns remain central to defining the extent and form of national territorial relations. Furthermore, the public/private and the foreign/domestic distinctions remain deeply entangled. In a context of not only continued geoeconomic inequality, but growing financialization and sovereign debt burdens, these legal debates become fundamental to how the debt crises of the 1980s play out. Indeed, as debt and defaults become a defining feature of the relationship between first and Third World states, both the nature of financial sovereignty and the "location" of various kinds of intangible property become ripe for debate. The growing complexity of international economic

transactions does not make borders and territory irrelevant — rather, the more “fluid” a border becomes in U.S. law, the *more* work goes into trying to define it.

Chapter 4 – Deep Finance

In the early 1980s, after just two or three decades of political independence for many Third World countries, and while the Cold War was still raging, most of the Third World was devastated by crippling debt crises. These crises, and the response to them, formed an important conjuncture in which the post-World War II hegemonic model was temporarily threatened and then reconstituted in key ways. In this chapter, I step back from the detailed analysis of legal texts to extend the arguments I have been making in earlier chapters and elaborate a distinct argument specific to the changing dynamics of sovereign debt. The juridico-economic regime and the transformations in economic sovereignty and territory we have been tracing shaped, and were themselves reshaped by, events surrounding the debt crises of the 1980s. In the previous chapter, I considered cases involving nationalizations of private property. Following the growing dominance of the financial sector and rising Third World indebtedness, the 1980s saw a growing number of legal cases involving sovereign *debt*. This transition and the legal changes that accompanied it eventually paved the way for the rise of the “vulture fund” strategy and eventually for the Argentina case with which we began and will end this study.

Sovereign Debt Crises and the Secondary Market “Fix”

I argue in this chapter that what I term a “secondary market regime” in sovereign debt, as constituted by both market and legal practices, has transformed sovereign debt relations since the 1980s. This regime has been based on the growing volume of trading in distressed debt. ‘High yield’ refers to low grade, high-risk assets sold at discounted prices that offer higher returns than investment grade assets. ‘Distressed’ assets are very high yield, often defined as trading at less than 70 cents on the dollar and/or offering more than 10 per cent (1000 basis points) over so-called ‘risk-free’ assets like U.S. Treasuries. Sovereign debt markets have received little attention outside business and economics, and distressed sovereign debt markets even less (see Chiong, Dymski, & Hernandez, 2014 for an exception). While vulture funds have been widely criticized, most calls for sovereign debt reform focus on the initial moment of debt issuance or the final moment of restructuring during a crisis, as, for example, in the debate about a contractual versus a statutory response to the problem of litigating holdout creditors during debt crises (see Chapter 2). Yet, there has been almost no discussion of the extensive trading that goes on in between. This “secondary” market activity has been increasingly important.

In response to the Third World debt crises of the 1980s, the United States -led Brady Plan fueled a shift from loans to bonds as the primary form of sovereign financing. I argue that the expanding secondary market in high risk, high yield trading this produced has facilitated the buildup of more, riskier sovereign debts ever since. The primary purpose of debt restructurings under this system has been to maintain, not reduce, sovereign debts, while enabling the credit system as a whole to muddle through each new crisis. This secondary market regime increasingly constrains the economic sovereignty of indebted states not only through higher debts, but through the spatial and temporal differentiation of secondary market strategies, which has facilitated the rise of specialized distressed debt traders. These traders have benefited from and furthered a trend towards legal changes favoring creditors, and have increasingly shaped the management of crises when debts go bad.

In the next section, I explore the theoretical implications of these dynamics for understanding the relationship between neoliberalization and financialization since the 1970s. After a brief

overview of the origins of today's secondary sovereign bond markets in the debt crises of the 1980s, I elaborate a new interpretation of the Brady Plan that ended the crises, proposing that it should be seen as a politically engineered geographical reorganization of debt relations closely linked to the end of the Cold War and the spread of neoliberalism, and that its primary financial effect was to *maintain* and *extend* sovereign debts. Each sovereign debt crisis since has been met by a similar secondary market "fix." In the next section, I explore how this secondary market regime has altered geographies of credit, debt and risk, allowing some creditors to specialize in healthy and others in distressed debt investing. I then show how this differentiation in creditor strategies has resulted in these specialized investors dictating the outcomes of sovereign debt crises. I identify two key distressed debt strategies, based on restructuring (discussed in this chapter) and litigation (discussed in the next chapter), and I link their development to ongoing transformations in the public/private divide discussed in Chapter 3. I show that these strategies enable creditors to impose conditions on sovereign debtors that are linked to, but distinct from, those associated with structural adjustment and stabilization programs, and explain how their growing influence is dependent on legal developments in contracting terms, litigation and legislation.

Sovereign Debt, Neoliberalism and Financialization

From the beginning, the secondary debt market has been a key point of intersection between financialization and neoliberalization. Each process is widely seen to have characterized global capitalism since the 1970s, and the two are generally assumed to be linked, though the nature of that link (and even the definition of each term) remains hotly debated. Financialization is most often understood as an aspect of neoliberalization (French, Leyshon, & Wainwright, 2011), but Christophers (2015b) argues that the concept of financialization, in contrast to neoliberalization, is too incoherent and ahistorical to be useful, while Fine (2010, p. 12) argues that it is neoliberalism that is "illusory" and that all work on neoliberalism is really about financialization. In this paper, I use "neoliberalism" to refer to the spread of such free market policies as trade and capital liberalization, fiscal austerity, and privatization of state-owned enterprises, as well as, crucially, a growing emphasis on law and the ideology of free contract (Foucault, 2008; Harvey, 2007; Peck, 2010). I use "financialization" in an empirically narrow sense here to refer to the growing power of financiers over sovereign debtors since the 1970s, and to the growth and securitization of secondary markets in sovereign debt. I do not offer a definitive account of the direction of causality between the two processes.

Aspects of what we now consider neoliberalism clearly have roots extending well before the 1970s. Indeed, the neoliberalization of legal theory and practice seems to predate the move of economic neoliberalism from the fringes to the mainstream. There have also been several previous phases of intensive financial accumulation under capitalism (Arrighi, 2010). Yet, neoliberal policies and ideologies only achieved widespread influence alongside the most recent rise to dominance of finance capital within the United States and the United Kingdom and the simultaneous expansion of debt in the Third World. I suggest in this chapter that the debt crises of the 1980s formed a conjuncture of worldwide significance in which relations between neoliberalization and financialization were both revealed and altered on an international scale. Furthermore, this cemented the role of law and contracts in linking these two processes, in ways that have shaped the geographies of the dominant juridico-economic order ever since.

In undertaking a detailed investigation of the secondary market regime, this chapter responds to French et al.'s (2011) call for further international studies of financialization. Scholars have long recognized how the International Monetary Fund (IMF) and World Bank employ stabilization and structural adjustment programs during debt crises to spread trade and capital account liberalization, austerity and other neoliberal policies around the world, constraining the sovereignty of indebted states (*e.g.*, Federici, 1992; Harvey, 2003; Peet, 2003). Others (*e.g.*, Gowan, 1999; Wade, 1998) have analyzed ties among the IMF, the U.S. Treasury and Wall Street, and shown that IMF programs have been geopolitical as well as economic tools, transforming social relations within countries across the Global South to the benefit of national elites and powerful states. I begin from these insights, but further unpack the Wall Street pillar of the IMF-Treasury-Wall Street nexus to deepen our understanding of how sovereign debt markets are linked to the growing dominance of financial over industrial capital and to IMF-led neoliberalization. I show that IMF and World Bank conditionalities have bolstered the secondary market regime, but that the latter's effects are distinct from those in the structural adjustment story. The secondary market regime not only imposes different and in some ways harsher terms than the IMF and World Bank, but, through market dynamics and through its own modes of legal governance, remains active even where the IMF and World Bank were never or are no longer involved. Indeed, even in periods of temporary pushback against neoliberalism, the "deep" debt structures produced by the secondary market regime act as a disciplining mechanism that forces countries (back) to the neoliberal fold.

In other words, understanding the form of national sovereignty in the post-1970s period requires contextualizing the changing U.S. legal definitions of sovereignty and territory we have been considering alongside the rising power of markets and development agencies like the IMF. Scholars have long seen structural adjustment programs and rising debt burdens as a form of neocolonialism or neo-imperialism (Anghie, 2007; Federici, 1992). I agree with this, but add the legal and contractual power that the rise of secondary bond markets intensified. Conversely, drawing attention to the relationship between neoliberalization and U.S. law shows that the "neocolonial" period did not begin with the debt crises of the 1980s, but should be understood in terms of the gradual replacement after World War II of an explicitly colonial regime by the U.S.-dominated juridico-economic order I have been exploring in this book. In addition, the rising power of development agencies and their policy conditionalities and the rising power of private creditors are not separate. Rather, the International Financial Institutions (IFIs) have worked to bolster expanding private market power, even when the latter has demanded concessions beyond those recommended by the former, and private creditors have often depended on the "success" of IFI conditionalities. And both processes have been linked with the continued expansion of the reach of U.S. courts over Third World economic decisions.

All of this is crucial for thinking about national economic sovereignty. This chapter moves beyond the legal terms in which we have been considering sovereignty until now, situating it in a broader macroeconomic and geopolitical context. While the IFIs and secondary debt markets work in tandem, they have distinct geographies. As I elaborate below, until recently a number of the poorest states in the world received conditional loans from the World Bank and IMF, but had no active private debt markets. In others, the amount of commercial lending far outweighed credit from the IFIs. These proportions have changed in different places, to different degrees at different times. Seeing the secondary market, not just IMF conditionalities, as directly affecting national economic sovereignty requires understanding that sovereignty is geographically and

economically differentiated. One goal of this and the following chapters is to identify how these geographies have shifted over time.

Finally, emphasizing the way these relations are connected to legal, not just market, changes complicates simplistic narratives about the growing power of IFIs over the Third World and the growing power of markets over states in general. Private and official creditors have clearly gained power *vis-à-vis* sovereign debtors. Yet we should move away from a kind of see-saw understanding of the power of markets and of states. State power of some kind necessarily remains a part of market power, funneled crucially through the form of national law. The point is to understand how different states are positioned differently in relation to process of financialization, legal power, neoliberalization and debt.

From Bank Loans to Bonds: Origins of the Secondary Market Regime

The secondary market regime for sovereign debt arose from the collapse of the bank loan model that had been the primary form of sovereign lending since bond markets failed in the Great Depression. In the 1970s, loans to what were generally called the “less developed countries” (LDCs) in Latin America, Africa, Eastern Europe and Southeast Asia increased immensely, fueled by lack of profitable investment opportunities and an excess of U.S. dollars in the rich countries. The latter was spurred by massive deficit financing of the Vietnam War, growing Eurodollar markets (dollars deposited outside the United States, primarily in London), and the 1973 and 1978 oil crises that released a flood of “petrodollars” from OPEC countries into the biggest U.S. and European banks. Many of these excess dollars were “recycled” to LDCs as low interest (often variable rate), dollar-denominated, syndicated bank loans, in which major banks pooled their resources with those of smaller banks. Total outstanding debt of LDC governments, including commercial as well as bilateral and multilateral loans, rose from less than \$50 billion in 1970 to around \$450 billion in 1980 and \$775 billion in 1986 (Corbridge, 1993; Roddick, 1988; Strange, 1997). These loans were made to many different governments, including military dictatorships that had the backing of the United States in the context of the Cold War. Some governments took loans for one purpose and appropriated the money to support state violence against their own citizens, and lenders made no effort to curtail lending to authoritarian and otherwise violent regimes, leading to later debates about whether such illegitimate or “odious” debts should be honored at all (Lienau, 2014; Roddick, 1988). Yet once the debt crisis hit, the discourse of government corruption and irresponsibility as the leading cause of the crisis immediately gained currency. In fact, while many loans surely did go to unsavory ends, including capital flight, many went to coping with the rising price of oil, sustaining faltering industrial programs and other standard development needs. Roddick (1988) explains that the majority of the loans were not initially made to governments at all, but to private companies within the LDCs. Many of these had, however, been guaranteed by Third World governments in order to promote investment, and when the debt crisis hit, many others were taken over, as well.

Commercial lending in this period was fostered by Citibank (the most internationalized bank at the time) and by the U.S. government, which altered capital controls and banking rules to facilitate these loans, hoping they would bolster the stumbling U.S. dollar and the spread of capitalism. The 1970s was a moment of international crisis for the United States (R. Brenner, 2006; Gowan, 1999; Helleiner, 1994; Kapstein, 1994). In addition to the

massive deficit spending it generated, the Vietnam War was going badly and damaging U.S. international legitimacy. Rising competition from Japan and Germany was hurting U.S. manufacturing interests, and the 1971 shift to floating exchange rates had led to increasingly volatile exchange markets. For the United States and other major industrialized countries, the 1970s was a decade of “stagflation” — low economic growth, high unemployment and dollar inflation, all at once. In this context, the United States was interested in recycling dollars to the Third World in order to cut down on the excess liquidity sloshing around the system and because, to paraphrase Walter Wriston, a dollar anywhere in the world has to find its way back to U.S. banks eventually.

Doing so, however, required convincing many commercial banks to make large loans to places that had long been considered too risky for Western capital. The U.S. government facilitated this by altering the regulatory framework for transnational loans. Bank capital-asset ratios plunged during the 1970s, as a direct result of the petrodollar lending surge. U.S. regulators debated the issue for years, but no final decisions were made until 1981 (Kapstein, 1994; Zweig, 1995). After the second oil shock of 1979, U.S. regulators intervened more directly by changing a longstanding rule that had restricted American banks from lending more than 10% of their capital to a single “person, copartnership, association or corporation,” with sovereign governments traditionally defined as a single “person” for this purpose. The U.S. Comptroller of the Currency changed the definition of “person” to refer to individual agencies *within* governments, thus allowing governments as a whole to receive far more than 10% of any single bank's capital holdings (Kapstein, 1994, p. 77). This change, coming on the heels of the biggest surge of petrodollars yet, unleashed a new flood of funds to the LDCs.

The IMF and the World Bank encouraged this process by using their data and expertise to help Citibank develop a new field of country risk analysis. They also facilitated private lending to countries already receiving IMF funds, since bankers believed no country could risk defaulting on its private loans if it wanted to continue receiving IMF aid and since the conditionalities attached to that aid made borrowers appear more creditworthy (Zweig, 1995). Bankers believed (accurately) that the IMF and major industrialized countries would be “lenders of last resort” should there be a major crisis — bailing out troubled countries to ensure repayment to the banks (Kapstein, 1994). In short, banks were not simply forced by bad economic conditions to make increasingly risky loans to Third World governments as some have suggested (*e.g.*, Arrighi, 2007). Creditworthiness is never an inherent property of a debtor, but a measure of how likely a debtor is to be able to continue servicing a debt within a given economic and institutional context. Citibank, U.S. officials and the IFIs *made* LDC loans safe in the 1970s — temporarily.

As stagflation worsened in the United States, Federal Reserve chair Paul Volcker raised the U.S. federal funds rate from an already high 11% in 1979 to as high as 20% in 1981. This, too, was part of the United States’ broader effort to restore the power of the U.S. dollar and represented the ascendancy of neoliberal thought by the late 1970s and the temporary victory of Milton Friedman’s strict monetarist theories. The rate hike succeeded in reversing dollar inflation and greatly strengthened the dollar against other currencies. This signaled a definitive victory for the financial over the industrial sector, as a strong dollar and high interest attracted money from all over the world to U.S. financial institutions, while at the same time hurting U.S. manufacturing by making exports more costly and setting off a sharp recession in the United States.

Volker's actions also triggered a massive interest rate rise on the billions of dollars in variable rate commercial loans that had been made to the LDCs over the past decade. Suddenly, countries that had been creditworthy under conditions of loose U.S. monetary policy, high liquidity and low interest rates were so no longer. Rising interest rates, combined with falling commodity prices and weakened markets for their exports in the industrialized world, triggered economic collapse, massive development crises and near defaults across much of Africa and Latin America and parts of Asia. In doing so, it created new problems for U.S. and European banks. When Mexico defaulted in 1982, many banks were so exposed to LDC debt that immediate loan write-offs would have exceeded their total capital. For the rest of the 1980s, banks and the U.S. government responded to the crisis by deferring debt defaults long enough to save the United States and United Kingdom-based financial system from collapse.

Citibank president Walter Wriston is supposed to have declared that countries don't go bankrupt. He was right. Unlike for corporations or individuals, there has never been a bankruptcy regime for sovereign debt. This does not mean countries always pay their debts. Rather, every crisis is handled in an *ad hoc* way, through negotiations between debtors and creditors across a variety of forums for bilateral, multilateral and private debts. Despite numerous, temporary suspensions of debt payments during the 1980s, there was no coordinated refusal to pay across the developing world, due partly to the implicit threat of economic sanctions from the Global North, partly to creditor interference with debtor collectivization (Roddick, 1988), and partly to the rise of neoliberal governments in many debtor countries, often emerging from military dictatorships and concerned with maintaining good international standing as the Cold War ended, signaling the apparent victory of the "Washington Consensus" (Federici, 1992). The 1980s was thus a period not of defaults but of IMF and World Bank bailouts, structural adjustment programs, private loan restructurings (also known as reschedulings), and additional private lending to debtors. The last was a standard part of the rollover model that had long characterized sovereign financing — countries were not meant to pay off debts in full, but instead to take out new loans to pay off old ones.

The total debt of Latin America and the Caribbean nearly doubled between 1982 and 1989 (Corbridge, 1993). While the bank loan model was clearly defunct, the delays had given banks time to shield themselves from real debt relief by building up reserves to offset impending losses, changing accounting standards, and, for some, selling their loans at highly discounted prices to an emerging group of distressed debt traders. From 1982 to 1989, this secondary market in discounted bank loans grew from an estimated face value of about \$600 million to over \$60 billion; though it remained relatively small and *ad hoc*, this market was a necessary precursor to the United States-led Brady Plan that would help end the crisis (Buckley, 1999).

The Brady Plan converted bank loans into bonds, offering relief to debtors either through reduced principal with high variable interest rates or the original principal with below-market fixed interest rates. Both were typically issued at thirty-year maturities (longer than the original loans), primarily in U.S. dollars. Bonds are more easily traded than loans because they are issued in smaller amounts and registered through third party intermediaries that help track and direct payments to the proper bondholder. The original banks quickly sold Brady bonds to the distressed debt investors, who had emerged during the 1980s along with vastly expanded secondary debt markets. A Brady deal, granted in tandem with IMF programs, became a symbol that a country had returned to creditworthiness. Countries undergoing Brady restructurings could, therefore, issue new, non-discounted bonds, further swelling secondary markets. In the early 1990s, Brady bonds were issued by Argentina, Brazil, Bulgaria, Costa Rica, Dominican

Republic, Ecuador, Cote D'Ivoire, Jordan, Nigeria, Panama, Peru, Philippines, Poland, Russia, Uruguay, Venezuela and Vietnam. Other countries were able to tap into the expanding desire for high yield sovereign bonds by issuing debts that helped them escape the immediate crisis. In 1989-1995 alone, the LDC debt market (soon rebranded the "emerging market") grew by 4,000% to an estimated \$2.7 trillion, according to the Emerging Markets Traders Association (EMTA, 1995).

Still, the 1980s did not complete the transition to a secondary market regime in sovereign debt. The crisis affected much of Latin America, Eastern Europe, large parts of Africa and some of South Asia. Yet *commercial* lending (the only kind targeted by the Brady Plan) was concentrated in Latin America and the Caribbean, though it was also important in Nigeria and parts of Eastern Europe, the Middle East and Southeast Asia. South Asia and most of sub-Saharan Africa, in contrast, relied almost entirely on bilateral creditors, the World Bank and the IMF (Corbridge, 1993). The secondary market facilitated by the Brady Plan was spatially uneven. Of nearly \$2 trillion in emerging market trading in 1993, only 13.5% involved debt outside Latin America (Buckley, 1997).

Secondary sovereign debt markets have since spread to the rest of the world. In the late 1990s, the Asian Financial Crisis became the entry point for IMF-led reforms that paved the way for sovereign debt markets to expand in the region. That crisis originated with corporate debt. Most governments involved had very low sovereign debt stocks, until the crisis forced them to take loans from the IMF and impose liberalization, austerity, and privatization, leading to what may be the "the biggest peacetime transfer of assets from domestic to foreign owners in the past 50 years anywhere in the world, dwarfing the transfers from domestic to U.S. owners that occurred in Latin America in the 1980s or in Mexico after 1994" (Wade, 1998, p. 1547). The crisis catapulted these countries into secondary markets and long-term debts. South Korea's debt, for instance, went from 8.24% of GDP in 1996 to 35.98% in 2014, while Thailand's surged from 15.2% in 1996 to 57.8% in 1999, and has since averaged in the mid 40s.¹⁰⁵

From 2008 on, a European debt crisis brought new countries into the secondary market regime. Although these countries had been issuing bonds for years, with much higher debt to GDP ratios than many Third World countries,¹⁰⁶ they were not considered heavily indebted until the global financial crisis made *servicing* those debts a problem. Since then, the IMF has turned to Europe for the first time in decades, and distressed debt investors have been purchasing debts in Ireland, Portugal, Spain, Cyprus, Italy and Greece. To avoid litigation in its 2012 restructuring, Greece paid holdout creditors of over €6 billion in Greek foreign law bonds in full (Zettelmeyer, Trebesch, & Gulati, 2013). The ongoing privatization of Greek assets means distressed asset investors are still increasing their hold over the country. The most stringent reforms have been demanded by European Union policy makers, who strongly defend the need for markets to discipline governments (Rommerskirchen, 2015), while the IMF has warned the EU's demands are too harsh. Greece's restructured bonds and bailout loans are now held primarily by official creditors, but can eventually be sold back to the private sector; in the meantime, several hedge funds remain "very enthusiastic" about distressed Greek bonds (Bit & Spezzati, 2015). Greece has

¹⁰⁵ <http://www.tradingeconomics.com/countries>

¹⁰⁶ In 2005, Italy and Greece already had debt to GDP ratios of over 100%, Cyprus around 60%, and Spain around 40%. Today, the United States is at 104%, the United Kingdom at 89%, and Germany at 71%. In contrast, Venezuela, on the verge of collapse, is at just under 50% (<http://www.tradingeconomics.com/>).

been subjected to both bailout terms *and* restructured bond contracts. A clear example of how deep financial structures constrain national economic sovereignty was provided by the summer 2015 referendum in which the Greek people voted by a resounding majority to reject their creditors' austerity demands — only to be overturned by the very president who called the vote.

Many African countries have recently been brought within the secondary market regime, in a shift that was actually enabled by official debt relief granted to Highly Indebted Poor Countries through the World Bank's Multilateral Debt Relief Initiative in 2005. Their entry into private bond markets has been celebrated as signifying their graduation to "frontier market" status, and Africa's accelerating growth rates, rising GDPs and high debt yields have attracted significant foreign interest. African sovereign bond issuance has grown immensely since 2008, nearly doubling in sub-Saharan Africa between 2012 and 2014, from \$6 billion to \$11 billion (Greene, 2015). Most of this is denominated in U.S. dollars. Investors applaud the "very rational" decisions by African governments to take advantage of historically low interest rates — in a story reminiscent of LDC bank loans in the 1970s. Yet, investors are flocking to this debt precisely because they "are searching for yield, which emerging and frontier markets offer to a much greater extent than developed markets" (Greene, 2015). That is, these bonds are higher risk, higher yield and *higher interest* than their developed country counterparts. It is sometimes suggested that commercial debt gives governments more freedom than official loans with conditionalities attached, and governments in the 1970s may even have pursued private loans for this reason (Buckley, 1997; Lienau, 2014). Yet, as I discuss in the rest of this chapter, sovereign bonds and secondary trading themselves constrain the economic choices of debtor countries, and the more debt there is, the more serious these constraints become.

The Geopolitics of the Brady Plan

The financial industry's narrative is that the Brady Plan succeeded in doing two things. First, by securitizing troubled bank loans through breaking them into bonds, it created a wider, safer distribution of risk among investors. Second, it brought substantial debt relief, ending the crises of the 1980s (*e.g.*, Committeri & Spadafora, 2013; Das, Papaioannou, & Trebesch, 2012; see also www.emta.org). Before exploring each of these claims, I explain how debt relief under the Brady Plan was also a part of broader U.S. economic and political strategies.

First, by 1989 when the Brady Plan was implemented, debt relief was widely understood to be in the United States' own economic and political interests. Debt relief in Latin America in particular was considered important for restoring markets for U.S. goods. In a Senate Subcommittee hearing on the Implementation of the Brady Plan (1990), U.S. Senator Bill Bradley summed up the United States' concerns about the developing world debt crises: "This impoverishment offends our humanity, could endanger our national security, and directly affects our economic interests through reduced U.S. exports" (p. 2). Another speaker from the Overseas Development Council echoed these concerns, stating that the "United States has two substantive reasons for doing something about the debt crisis: (1) we have a self-interest (in markets, job creation, investment opportunities); and (2) there is a humanitarian crisis out there in the debtor countries that we ought to address..." He went on to say that the former part had been heard "many times before. There have been hundreds of thousands of U.S. jobs lost because of the debt

crisis due to our lost exports” (p. 4). In the face of rising manufacturing competition from Japan and Germany, this concern was all the more pressing.

These quotes illustrate the way U.S. humanitarian concerns were explicitly mixed and often subordinated to economic and political concerns. It is also a sign of the ascendancy of financial interests over U.S. policy since the 1970s. It is not that the United States stopped trying to support the industrial and agricultural sectors; but it did subordinate the needs of these sectors to those of finance for many years. Waiting until the late 1980s to think about debt relief not only put the banks’ interests above those of debtor countries, but also above those of U.S. exporters and workers, who had been sorely hurt by falling exports as a result of the crisis. Only after the banking crisis was over, was debt relief that would have helped those sectors politically feasible. This is not surprising given that both United States support for the LDC loans in the 1970s and the Volcker spike that led to the crisis had been part of figuring out how to restore the power of the U.S. dollar in the world in a way that definitively entrenched the interests of finance capital over those of other sectors within the United States.

After 1989, the United States was concerned about protecting its new Cold War victory in two ways: preventing debtor countries from turning towards socialism and bolstering the emerging “Washington Consensus” that espoused a neoliberal brand of free market practice. During the 1980s, many Latin American states had overturned military dictatorships and instituted electoral democracies, and these new states officially assumed the debts of their predecessors (Lienau, 2014). As debt crises hit, creditor countries began to use conditionalities attached to IMF and World Bank loans to restructure the internal relations of debtor countries to the advantage of U.S. capital, most notably through encouraging trade and capital liberalization, fiscal austerity with its associated cuts to social programs and government jobs, and privatization of national assets (Federici, 1992; Gowan, 1999). By and large, the elites of these newly democratized countries eventually expressed support for these “reforms,” to the extent that development officials could praise the supposed “consensus” reached among debtor nations that structural adjustment was the only path to economic recovery. At the March, 1989 conference¹⁰⁷ at which Treasury Secretary Nicholas Brady officially announced U.S. support for debt reduction, he praised some debtor nations for “their commitment to vital macroeconomic and structural reforms,” including privatizing nationalized industries, liberalizing trade and capital rules, and reducing current account deficits, and advancing towards “more democratic regimes” (Fried & Trezise, 1989, pp. 70–71). World Bank president Barber Conable’s remarks on the matter were summarized by the editors of the report on the conference: “One of the most encouraging features of the past decade has been the emergence of a consensus, not just in Latin America but in other debtor countries, that greater efficiency in the use of resources is the essential basis for resolving both development and debt problems. That proposition is now accepted in Latin America as it is in Africa. In Africa, more than twenty-five countries have come to the World Bank to say that they recognize the need to adjust their economies; they ask how it can best be accomplished... [In Latin America t]here are trouble spots, but major adjustment programs are under way in most countries” (p. 30).

By 1989, with the Soviet Union crumbling, there was a strong sense that the world was transitioning to something new. At the Brady conference, Representative Jim Leach of Iowa

¹⁰⁷ It is significant that out of roughly 250 people listed as attending this conference, only three were representatives of debtor countries: the Ambassador of Peru, a member of the Mexican Embassy and the former Mexican Minister of Finance. The rest of the participants included U.S. and other creditor country officials, bankers, academics, and members of trade and investment groups, NGOs, think tanks and corporations.

expressed this sentiment in the context of debt relations: “we are on the edge of a paradigm shift in international affairs, from an emphasis on East-West to an emphasis on North-South relations, from an obsession with geopolitical to a focus on geoeconomic challenges, from concerns with military parity to ones of social balance” (p. 84). The Chairman of American Express cited “evidence that market-oriented economies are the clear winners, as even the Soviet Union now recognizes” (p. 102). At the same time, U.S. policy makers and economists were deeply concerned about increasing unrest, especially among Latin American populations in the United States’ back yard. Living standards in Latin America had declined precipitously since the debt crisis began. By 1989, it was fully understood by the politicians, development officials and bankers present at the Brady conference that not only high debts *per se*, but IMF and World Bank austerity programs were imposing hardships that were causing increasing social unrest and even anti-IMF riots in many places.

The editors of the published report of the 1989 conference proceedings made this clear. They considered two main reasons for the turnaround in U.S. government attitudes to debt relief at that moment. First, it had become clear that despite the Baker Plan and subsequent efforts in the 1980s, there was now a negative net outflow from the “heavily indebted middle-income countries” to private creditors. The second “disturbing development” was “the changing political situation in Latin America” (Fried & Trezise, 1989, p. 4). The editors cite riots in Venezuela and political tension in Mexico as key examples. At the same conference, Michel Camdessus, Managing Director of the IMF, made the connection between unrest and austerity explicit: “[adjustment] efforts are extremely difficult, as the unrest in Caracas in March demonstrated. Yet they are essential” (pp. 23–24). U.S. Senator Paul Sarbanes cited austerity programs as threatening democracies in the region and encouraging “demagogues of both left and right” (p. 81). At the Subcommittee Hearing the following year, Jeffrey Sachs also explicitly linked growing social unrest in Latin America to economic reforms, noting that Venezuela had “started out an extraordinarily ambitious reform program with very tough austerity measures, which we know prompted an enormous human tragedy last February, when 300 people died in rioting as the result of price increases under the austerity program” (Implementation of the Brady Plan, 1990, p. 9). At the Brady conference in March 1989, participants were especially concerned that “twelve presidential elections are scheduled in Latin America over an eighteen month period... In these circumstances, negotiated debt reduction, apart from its economic value, could be useful political ammunition for leaders engaged in ongoing economic policy reform” (Fried & Trezise, 1989, p. 5). In this context, debt relief was as much a geopolitical as an economic response to growing crisis. Nevertheless, a year later, Sachs remained concerned that debt relief was not being offered quickly enough to leaders like Venezuela’s Andrés-Pérez who “not only did not back off his program, he reinforced it, stuck with it at that point” (Implementation of the Brady Plan, 1990, p. 9).

These debates illuminate the ways in which neoliberal and Cold War interests were intimately intertwined in the 1980s. Every speaker at the conference, even those who expressed sympathy for the humanitarian crisis unfolding in Latin America, expressed total confidence that the most important thing for the region in the long run was to implement the reforms espoused by the IMF and World Bank, thus implying, sometimes implicitly and sometimes explicitly, that the primary cause of the crisis had been the bad policies of debtor nations — no one suggested that excess lending was to blame. According to Conable: “Debt reduction based on unchanged debtor country policies is a waste of time” (Fried & Trezise, 1989, p. 21); according to A. W. Clausen, Chairman and CEO, BankAmerica Corporation: “First, developing countries need to

implement economic policy reforms. Help starts at home” (p. 47); and according to Yusuke Kashiwagi, Chairman, Bank of Tokyo: “resolution of the debt issue depends more than anything else on the will and efforts of the debtor countries to come to grips with the need for structural adjustments to revitalize their economies” (p. 50).

In other words, neoliberal policies were framed as necessary to regaining economic growth. Debt relief was a secondary policy framed as a way to relieve the pain of adjustment enough in the meantime to ensure that governments would retain enough legitimacy to carry out IMF-imposed reforms. As Camdessus put it, “countries prepared to embark on strong programs need to be able to count on alleviating the present drag of debt service payments on their adjustment efforts” (Fried & Trezise, 1989, p. 24). Another speaker, Enrique Iglesias of the IADB added that, “After many years of adjustment, political leaders in debtor countries require positive results to legitimize their drive toward change and modernization before public opinion. An expansion of the present menu of options, including debt reduction, is not only needed for itself but will also help politically” (p. 28). Thus, Brady restructurings, which required IMF and World Bank financial support, were only offered to those countries that were also committing to structural reforms.

The Brady Plan was aimed less at debt relief than at ensuring the neoliberal transformation of debtor economies. The trend towards high debts and the global spread of neoliberalism were closely connected to the history of a Cold War in which the United States was battling for economic and ideological sway over relatively new and newly leftist states. The neoliberalization of LDC debtors via IMF and World Bank conditionalities (temporarily) cemented neoliberal attitudes in those states, while opening their economies to transnational capital, strengthening the position of, primarily, U.S. business, while making countries dependent on continued support from the IFIs. In those economies in which commercial lending was prominent, these processes were directly tied to financialization, as well, by greatly expanding and transforming the secondary sovereign debt markets that had begun to take shape by the late 1980s.

Meanwhile, considered by its avowed goals of providing debt relief, the Brady Plan was partially successful, at best — many scholars argue that Brady relief was quantitatively inadequate (George, 1992; Implementation of the Brady Plan, 1990). I propose instead that Brady was extremely successful in offering just *enough* relief for debtors to get out of severe economic crisis without taking the banks down with them. It did so not by canceling debts, but by transforming them into new debt claims with greatly extended maturities. Shifting debts into secondary markets, where a few creditors could hold distressed assets while others escaped with relatively low losses, created a means of managing relief in cases of intense devaluation without relinquishing the control of creditors as a whole over these sovereign debtors.

The Brady Plan was developed as a desperate effort to control an economically and politically volatile situation, while offering terms good enough for bankers to accept. At the same time, it pleased the capital markets by establishing the secondary market regime that has shaped global sovereign debt dynamics ever since. In addition to extending the maturities of existing debts in new form, an explicit goal of Brady restructurings was always to allow debtor countries to access more, private financing (Fried & Trezise, 1989). Since 1989, almost all new privately financed sovereign debt has been issued in bonds, and swapping old bonds for restructured ones with longer maturities has remained the basic form of crisis management. Simultaneously, sovereign debt stocks have grown worldwide (Dobbs, Lund, Woetzel, & Mutaftchieva, 2015). Secondary markets and distressed debt trading did not cause this growth; but they have *enabled*

and *contributed to* the issuance and trading of greater volumes of riskier debt without threatening the core of the financial system.

In the process, these markets have greatly reduced the national economic sovereignty of indebted states in ways that have been largely overlooked. As noted in the introduction, rising debt burdens and structural adjustment programs have long been critiqued for restricting the sovereignty of debtor nations by critical and many mainstream commentators (*e.g.*, Buckley, 1999; Federici, 1992; George, 1992).¹⁰⁸ In this context, Brady restructurings, in which loans were simply swapped for bonds, without giving anyone direct control over other debtor assets, were widely seen as less of an infringement on economic sovereignty than either of these. My argument here, however, is that the secondary market regime produced by the debt crises and the Brady Plan has in fact restricted the national economic sovereignty of debtor states ever since, in ways that are not reducible to the explicit constraints of IMF programs or direct asset transfers to investors. The secondary market regime, furthermore, continues operating even where such constraints are absent. The regime's role in facilitating the expansion of sovereign debts to the benefit of financiers is linked to its effects on economic sovereignty. Neither can be understood without understanding precisely how these secondary markets have functioned at the level of market and trading dynamics, at the level of contractual clauses, and at the level of legal governance. It is not the volume of debt or debt service alone, but the form and governance of that debt that matters.

New Geographies of Debt and Credit

Emerging market debt trading volume grew from \$2.7 trillion in 1995 to a high of nearly \$6.8 trillion in 2010, and has remained between 4 and 7 trillion U.S. dollars annually ("EMTA Volume Survey," n.d.). The number of distressed debt traders has also risen. Altman and Kuehne (2012) estimate that over 200 U.S. institutions specialize in distressed securities of all kinds. The EMTA lists over 127 member organizations active in trading emerging market debt, but this does not include dozens of hedge funds known to have recently held Argentine, Greek and Puerto Rican bonds. The securitization of high yield sovereign debt since the 1980s and 1990s, like increasing securitization of mortgages and corporate assets in the United States and Europe (Altman & Kuehne, 2012; Gotham, 2009; Harvey, 2006), has been part of a broader search for

¹⁰⁸ In fact, the United States imposed numerous other less acknowledged and "less neoliberal," conditionalities as well. Due to its financial importance in providing aid to the rest of the world through the International Financial Institutions (IFIs) and other avenues, the United States had particular power to restrict the decision making of any country that needed U.S./IFI funds. While the IMF, the WB, U.S. policy makers and virtually all mainstream economists at the time insisted that privatization, liberalization and other free market policies should be a precondition for receiving debt relief under the Brady plan, the United States itself was protecting its own industries even in the way it funded the IFIs. Congress directed the IFIs, for instance, not to give funds "for the production or extraction of any commodity or mineral for export, if it is in surplus on world markets and if the assistance will cause substantial injury to United States producers of the same, similar, or competing commodity" (Public Law 101-167, 103 Stat. 1221, Nov. 21, 1989). Other conditions for determining whether countries could receive U.S. funds directly or through the IFIs at this time included certain environmental concerns, human rights records, level of democracy and geopolitical position in the Cold War. The budget even prohibits any U.S. funds going to programs that would support abortions. Whatever one's opinion on linking aid to energy policy or human rights, these points are interesting for expanding our understanding of how not only economic, but other social and political practices are directly influenced by the United States as a result of its overwhelming economic superiority in a situation in which aid is desperately needed by most of the Third World.

new income streams in a context of “flat yield curves and continuing abundant liquidity” (Leyshon and Thrift, 2007, p. 100). In this chronic overaccumulation crisis (Arrighi, 2010; R. Brenner, 2003; Harvey, 2003), securitization, like financialization generally, temporarily “displace[s] in time and across space, the contradictions of contemporary Anglo-American capitalism” (French et al., 2011, p. 812). These spatial-temporal fixes¹⁰⁹ are linked across sectors. Thus, the subprime crisis that led to the crash of 2008, and the European sovereign debt crisis that followed are linked not just via financial “contagion,” but by the fact that both mortgages and sovereign debt have been shaped by the dynamics of over-accumulation, securitization and the search for scarce profits. In addition, capital from one sector often flows into others, chasing higher yields, as, for example, in the way that investors fleeing the declining 1980s U.S. junk bond market were among the first to move into LDC debt (Buckley, 1997). At the same time, however, each sector has its own distinct geographical dynamics.

The shift from loans to bonds as the primary form of sovereign financing produced major transformations in transnational geographies of debt and credit, most notably through proliferation of creditors and differentiation in creditor strategies. While well known among sovereign debt actors, these changes have received almost no attention from critical political economy scholars. Under the syndicated loan model, a small number of banks — perhaps a dozen major and about a hundred smaller institutions — held any given sovereign loan. Under the bond model, a single issue may be held by thousands of creditors, who are distinct from their earlier counterparts in kind and location. With the rise of secondary markets, major investment banks, rather than commercial banks, became huge players in emerging market debt, along with hedge, mutual, pension and insurance funds. By 1993 they operated in Frankfurt, Tokyo, Mexico City, Rio de Janeiro and Buenos Aires, though most trading and all market making remained in New York and London (Buckley, 1997). Many hedge funds, furthermore, are *registered* in offshore havens like the Cayman Islands or Delaware, affecting the regulatory geographies governing sovereign debt. The low entry cost of bonds compared to loans means even individual (retail) investors, who may be anywhere, can enter these markets. After Argentina defaulted in 2001, it turned out that nearly half a million individual Italian retirees had purchased Argentine bonds in the 1990s. Participation of individual investors and pension funds radically alters the distribution of losses after a default. This is an important consequence of the securitization of risk celebrated by the industry and another example of the transformation of workers around the world into “investors.”

A country’s creditors are also temporally differentiated. Except for some retail investors, most of those holding bonds when a crisis hits are not those who originally purchased the bonds. They are “creditors” only in a very thin sense. This is not just because of constant trading, but also because bondholder differentiation has facilitated the rise of different accumulation strategies. Some investors buy and sell sovereign bonds at issuance while a country is in good economic health and bond prices are at or near face value. The shift from loans to bonds, however, bolstered an emerging subclass of investors specializing in high yield and distressed debt that buy bonds *after* signs of trouble drive prices well below face value. Since 1990, hedge and mutual funds have been frequent distressed debt traders, and pension and insurance funds are increasingly active. This differentiation in strategies has important and largely unacknowledged implications for risk calculation and crises.

¹⁰⁹ Here I follow French et al. (2011) in using the concept of a spatial-temporal fix more generically than Harvey’s spatio-temporal fix (2003).

Unlike loans that usually remain with the banks that created them, bonds are designed to be traded. This “originate to distribute” model is precisely the point of securitization. The ability to trade bonds and spread risks among large numbers of investors is seen as making the market safer in and of itself.¹¹⁰ The existence of distressed debt investors pushes this further. Investors who buy bonds while a debtor is economically stable know that, if problems arise, they can hedge their losses by selling those bonds to these specialized investors. In industry terms, such investors provide “increased liquidity,” making sovereign bonds safer. This is celebrated as good for debtors because it makes borrowing easier. Debtors can issue more debts, supposedly at lower costs than otherwise, because *creditors* are better protected — though nominal and real interest rates on emerging market bonds are still much higher than those on U.S. or European bonds (e.g., Presbitero, Ghura, Adedjei, & Njie, 2015). As with the bank loan regime, however, this bonded debt model is still based on the rollover approach, with no intention that countries ever pay off their debts entirely. In other words, sovereign risk (and financial risk generally) is calculated from the perspective of investors, not debtors. These risk mitigation practices do not reduce financial volatility overall, but enable the buildup of more, riskier sovereign debts.

The disparity between creditor and debtor risk is further exacerbated by the temporal characteristics of bonds. Syndicated bank loans typically have maturities of five to ten years (Smith & Walter, 2003). Brady Bonds, in contrast, were issued at 30-year maturities. Recent data show average maturities on new debt issuances by developing countries ranging from less than 10 to almost 50 years, with most in the 20 and 30-year range,¹¹¹ yet most traders will hold those bonds for a much shorter time. Thus, while a debtor’s risk calculations should take thirty years into account, creditors’ calculations are based only on the few years, months or even weeks for which that investor plans to hold the bonds. This temporal disparity is not a failure of the bond model; it is key to how secondary markets function. Most investors now purchase bonds not primarily for the sake of principal, but for interest payments and short term trading margins. The more discounted the bond at the time of purchase, the higher the yield those payments represent. In April 2015, for example, Bloomberg reported that Goldman Sachs Asset Management and an increasing number of distressed debt hedge funds were “piling into Venezuelan bonds” *because* the country’s impending debt crisis was driving prices to all time lows. These traders were not betting that Venezuela would recover, but “that Venezuela might just be able to cobble together enough financing to pay its debt at least in the short term.” As one investor put it, “It doesn’t mean the solvency issue isn’t there. It’s just a way to take advantage of the short-term momentum for the high-yielding spreads they’re offering” (Porzecanski, 2015). Distressed secondary markets ensure that looming crises and volatile prices provide fabulous profits for specialized investors. Each crisis, in turn, produces new pools of distressed debt and fuels the search for new strategies from which to profit off of it.

Crisis “Management” and Governance by Contract

Secondary and especially distressed debt markets directly restrict indebted states’ national economic agency. Increasing debt burdens and the need to repay interest, especially in contexts of economic austerity, have the general effect of limiting states’ fiscal options and making them

¹¹⁰ In the recent subprime crisis, for instance, the failure of several major banks to sell their mortgage backed securities contributed to the scale of the collapse.

¹¹¹ <http://data.worldbank.org/indicator/DT.MAT.DPPG>

more and more dependent on rollover loans. With the rise of the neoliberal “consensus,” these private loans implicitly carry many of the same explicit conditionalities attached to IMF and World Bank loans, with the difference that various debtor policies in this context are defined simply as making a country more or less creditworthy. This remains especially true for so-called risky states in the Third World. Furthermore, the closer these rising debt burdens and other largely unpredictable factors bring a country towards crisis, the more likely they are to eventually make a country subject (again) to IMF and World Bank loans and their explicit conditionalities.

There are also other, less obvious ways, in which the secondary market regime affects national sovereignty: through the properties of bond contracts and their legal interpretation and enforcement. One condition of any financial fix is that the legal changes to support it are there too, either in preexisting legal practice, or as new legal developments accompanying crises. Law is of particular importance for understanding the dynamics of neoliberal capitalism. The legal practices bolstering the secondary market regime have been addressed extensively and almost exclusively by legal scholars (*e.g.*, Fisch & Gentile, 2004; Gelpern & Gulati, 2009). This work is often rich in empirical and historical detail, but it tends to consider only a limited economic, social and political context and rarely gives adequate attention to power relations. A critical analysis is better positioned to understand this empirical work within the context of larger economic and political transformations. While sovereign bond contracts operate throughout the entire life of the bond, their effects are especially visible during debt crises, when many of the bond clauses come into play and most or all of a sovereign’s debts are “distressed.” Specialized distressed debt investors are increasingly dictating the outcome of these crises. In addition to short term trading and collecting temporary interest payments, two distinct strategies have emerged for profiting off defaults and restructurings. Both reflect the growing power of financiers in general, as well as legal developments favoring creditors over debtors, and the growing reach of U.S. courts over foreign states’ economic decisions. In the rest of this chapter, I discuss the restructuring strategy, before turning to the litigation strategy in the following chapter.

Many clauses in sovereign bonds benefit creditors — a trend that has become more pronounced since it received a direct boost from the 1980s crises and Brady restructurings. A recent study comparing bond contracts before and after Brady shows increased use of two kinds of clauses (Choi, Gulati, & Posner, 2012).¹¹² First, there is increasing use of “enforcement provisions” that make it easier for foreign creditors to enforce contracts judicially. This was foreshadowed in the 1970s by statutory changes regarding sovereign immunity, which has long been a cornerstone of international relations (see Chapter 3). In 1976, the U.S. Foreign Sovereign Immunities Act (FSIA) codified the commercial exception to immunity from judgment for commercial acts in the United States (Weidemaier, 2014). This shift had been designed to extend the power of U.S. courts over foreign sovereign governments by allowing private litigants to sue them at all. After the debt crises of the 1980s, all countries except “super-safe” issuers (*i.e.*, the United States, Japan, Germany, etc.) began including more clauses in their sovereign bonds to build on this statutory shift. Among the largest Brady restructurings, the percentage of contracts containing waivers of immunity from suit and asset seizure (or “execution”) rose from 13% to over 90%. For the market as a whole, minus the super-safe issuers, waivers of immunity from suit rose from 36% to 84%, and waivers of immunity from execution rose from 5% to 62% (Choi

¹¹² Though Choi et al. compare bonds to earlier bonds, rather than to the bank loans at the heart of the 80s crises, others have noted that bond contracts generally favor creditors more than do loan contracts (Fisch & Gentile, 2004).

et al., 2012). Even with such waivers, the kinds of sovereign assets eligible for seizure have remained limited in U.S. courts, but this is gradually changing. Waivers increasingly include not only commercial, but also diplomatic or military assets (Weidemaier, 2015; Weidemaier & Gulati, 2015).

The second trend identified in the above study is increasing use of “governing law clauses,” by which parties select which laws and which courts will govern their transaction. Use of governing law clauses dates to the 19th century, but they first became widespread in the 1970s, with proponents arguing that allowing commercial actors to choose their own law and forum is a key part of freedom of contract in what are quintessentially “private” transactions (Potts, 2016). New York legislated recognition of such clauses for all major commercial contracts in 1984.¹¹³ With the crisis and the Brady response, the percentage of debt contracts containing governing law clauses rose from under 50% to almost 100% for all issuers outside the super-safe category (Choi et al., 2012). New York state and, to a lesser extent, English national laws and courts are by far the most common selections for major transnational financial contracts, including sovereign bonds. The crises, therefore, resulted in a massive extension of the influence of these creditor-friendly jurisdictions over transnational sovereign debt relations (Potts, 2016). In restructurings, these clauses pre-determine the laws governing renegotiation.

As noted in the previous chapter, governing law clauses, in combination with immunity waivers, functioned to expand the jurisdictional/territorial reach of U.S. courts over distant commercial transactions after the FSIA was passed in 1976. In fueling a huge expansion in the use of these clauses in sovereign bonds, the 1980s crises greatly boosted this territorial expansion over sovereign debt relations across much of the Third World. The importance of this for national economic agency is huge. By and large, Third World states have been unable to issue bonds under their own local law since the 1980s. In contrast, the “super-safe” states are always able to issue under their own laws if desired, and even the less powerful European states have long been able to issue bonds under local law — a point that proved crucial in enabling Greece to restructure the bulk of its debts in 2010, when it used legislation to retroactively insert collective action clauses into all its local law bonds. The holdout creditors, which Greece paid off, were all holders of its foreign law bonds (Zettelmeyer et al., 2013).

Other enforcement terms, such as “cross-default,” “agent for service of process” and “*pari passu*” clauses, also became more frequent or were strengthened at this time. In addition to these enforcement clauses, post-crisis debt contracts contained numerous clauses making restructuring easier. This was spurred by the recent experience of crisis and Brady restructuring and by the proliferation of creditors caused by the shift from loans to bonds. While it was difficult to get a few dozen major banks to agree to a restructuring, it is nearly impossible to get hundreds or thousands of creditors, to participate, let alone agree to the same terms. This coordination problem is widely recognized among sovereign debt actors. The crisis increased the use of clauses meant to mitigate this problem by fostering “collective action,” primarily by allowing a majority rather than the previous 100% of creditors to approve alterations in the terms of bond contracts. As with enforcement clauses, the inclusion of clauses facilitating collective modification of non-payment terms rose from 8% to 77% of contracts for the largest Brady restructurings, and from 11% to 67% for everyone else; modification clauses for payment terms rose from 3% to 15% and 3% to 46% for each group (Choi et al., 2012).

¹¹³ New York General Obligations Laws 5-1401 and 5-1402.

Choi et al. (2012, p. 29) first suggest there is an apparent contradiction between making debt enforcement easier and making debt restructuring easier, and then propose that the answer to this puzzle is simply “that creditors sought to implement the optimal incomplete contract — one in which debtors are forced to pay in the good state but permitted to restructure in the bad state.” There are several problems with this framing. Aside from the questionable normative overtones, many states generally considered “good” have had to restructure from time to time. More importantly, Choi et al.’s phrasing suggests enforcement terms are used with some states and restructuring terms with others. In fact, these terms work together. Policy analysts at a 2015 United Nations (UN) meeting on sovereign debt restructuring concluded that the threat of enforcement tends to make debtors delay too long before restructuring, making the eventual crisis even worse. This issue was presented as resulting from misaligned incentives in the bond world. Not mentioned at the meeting was that, by delaying restructurings in this way, enforcement clauses have the effect of driving bond prices down further and giving distressed debt investors more time to profit from secondary trading and interest collection before restructuring occurs.¹¹⁴

Choi et al.’s statement further suggests that restructuring terms are worse for creditors than enforcement terms. This makes sense only if the comparison is between receiving full payment or some payment. If a crisis is bad enough to require restructuring, however, the real choice for most creditors is between receiving some payment (through restructuring) or no payment (through default or debt cancellation). Restructuring terms thus benefit most creditors by allowing the maintenance of debts and their extension through time, and “collective action” clauses protect the majority of creditors from *other*, uncooperative creditors. In other words, restructuring is crucial to the secondary market regime.

Restructuring through direct negotiations between private creditors and debtors has continued to be the primary response to sovereign debt crises since the 1980s. As we saw at the end of Chapter 2, such restructurings are now widely accepted as “private,” “voluntary” and “market-based,” in contrast to any potential international, systematized sovereign debt restructuring mechanism, which would be considered “statutory” or “mandatory.” This framing was an important accomplishment of the Brady era. Nicholas Brady and other U.S. officials constantly affirmed the voluntary, private character of the debt restructurings. Though the IMF and World Bank would provide financial support for debtors to use as collateral for the Brady bonds, Brady explained: “the negotiation of transactions will remain in the market place, encouraged and supported but not managed by the international institutions” (Fried & Trezise, 1989, p. 74). Yet at the time, many bankers strongly resisted debt relief and resented U.S. government involvement in the matter, and the Brady plan was widely understood by economists and others as being a result of “considerable arm-twisting” by the U.S. Treasury (Implementation of the Brady Plan, 1990, p. 8). The word “voluntary” frequently appears in quotation marks in analyses of the time by the plan’s supporters and detractors. So why were officials so intent on framing the Brady Plan as a voluntary affair? Most obviously this was an attempt to make the deal more appealing to the private sector. Bankers have generally eschewed unwanted government involvement in their affairs — in the late 1980s and early 1990s, when the Bretton Woods era was already fading from memory and the proponents of the Washington Consensus were celebrating the downfall of the Soviet Union, this was all the more true.

¹¹⁴ Meetings attended by author, February 3-5, 2015. Video of proceedings available at <http://webtv.un.org/watch/ad-hoc-committee-on-sovereign-debt-restructuring-processes-general-assembly-1st-meeting-69th-session/4030515815001>.

Yet there was another, subtler move involved, as well. Although there were no explicit discussions of an internationally based sovereign bankruptcy mechanism among top players of the time, Roddick (1988) explains that there were attempts at coordinated action among debtors during the 1980s, but that these were crushed by the international financial community. In the Brady Plan discussions, the emphasis on “voluntary” was closely tied to preventing any such systemic approach to the crisis to develop. Almost every single speaker at the Brady conference in 1989 reiterated that all restructurings must proceed on an “*ad hoc*” or “case by case” basis. Brady himself listed as one of four principles guiding the debt strategy moving forward that “solutions must be undertaken on a case-by-case basis” and said the goal was “to provide maximum opportunities for voluntary, market-based transactions rather than mandatory centralization of debt restructurings” (Fried & Trezise, 1989, pp. 70, 76). Iglesias listed as one point generally agreed upon by “Latin Americans” that “the case-by-case approach is the only practical way to deal with the problem” (p. 26). In the same conference, however, after first noting that, “Responsible leaders [in Latin America] have no great admiration for debt service moratoriums” and “no desire to organize a concerted default,” Rogers went on to explain that rising populist discontent driven by austerity programs had led to “a crescendo of political opposition to the case-by-case debt process” (pp. 41, 42). In Brazil, he explained, only a “small corps of embattled officials” still supported the 1988 debt agreements, while the “academic community, business groups, labor, and leading politicians including cabinet members are all clamoring to jettison the arrangement” (p. 42). Debt relief at that moment was seen as saving structural adjustment reforms as we have seen. It was also aimed at saving the “case-by-case” approach. This is because, in short, the case-by-case approach is equated with “voluntary” participation and negotiation *by the banks*.

That “voluntary” is reserved for bankers, not for debtors, is made especially clear in quotes from two bankers at the Brady conference. Clausen (BankAmerica) summed up his views: “My proposal calls for selective debt relief under the same case-by-case procedure that has been in effect these past seven years. Voluntary debt service reduction would be offered only to debtor nations working with the Bank and the Fund to implement multiyear economic adjustment programs” (Fried & Trezise, 1989, p. 48). He not only directly links “case-by-case” with “voluntary,” but then immediately lists the *mandatory* requirements for debtors hoping to participate in such a restructuring. Kashiwagi (Bank of Tokyo) was even more explicit: “across-the-board debt forgiveness is simply not a conceivable option. The advocates of debt reduction have in mind, as I understand it, market-based measures in which *creditors* take part voluntarily” (emphasis added) (p. 52). These Brady deals were sold to banks on the grounds that they could negotiate for as much as they could get from every single debtor. There was not even a requirement that they adhere to IMF recommendations for the amount of relief needed, despite the close involvement of the IMF in the entire process (Implementation of the Brady Plan, 1990; Sachs, 1989). Though not spelled out by the conference speakers, it is clear that any deviation from this “case-by-case” approach in favor of something applied to multiple countries at once would mean that some generalized rules would have been imposed on both creditors and debtors. In other words, for a banker to be able to choose to participate in a restructuring, there can be no codified imposition of terms from the IMF, the United States or anyone else. Voluntary, *ad hoc* and private are lined up on one side against coercive, systematic and public on the other.

The efforts of U.S. officials appear to have worked. Today, creditor governments and the IFIs remain closely involved with many debt restructurings. Yet investors, who have now by and large accepted that debt restructurings are the standard response to a debt crisis, fiercely defend

their “voluntary” restructurings against intervention by “public” bodies like the UN. This is another illustration of how the public/private divide is constantly being renegotiated. It is not what is seen as private or public, but the fact of framing things in this dichotomous way that remains constant under liberal capitalism. Framing the Brady plan and eventually all debt restructurings as private, market-based processes has been a crucial mechanism for obscuring the deeply (geo)political nature of debt and debt crises. Not only does it obscure the continued direct role of creditor country governments in negotiations, but also the way that, as negotiations based on debt contracts, these restructurings are always supported by the legal scaffolding of the United States or other creditor states. Both the enforcement clauses that hang over restructuring efforts, and the restructuring clauses themselves, can only function within the context of the legal systems under which those clauses were written — or, as the famous industry phrase has it, “in the shadow of the law.”

This is not to say that there is no difference between the kind of state intervention that a statutory framework would demand and those that the *ad hoc* restructurings entail. In fact, this highlights one important aspect of government action under neoliberalism. Governments are still deeply involved in the economy, but they try to make their actions *look like* market transactions. This was true in the Brady period when the U.S. government pushed hard to create a so-called market-based mechanism, even as it advocated for specific changes in “private” debt contracts (Fried & Trezise, 1989). It was just as true in the early 2000s when many governments and the IMF pushed successfully for the inclusion of collective action clauses in sovereign bonds — a change many investors say would not have occurred without this government pressure (Gelpern & Gulati, 2006; Weidemaier, 2014). As we have seen in previous chapters, this is not a rupture from, but an intensification of, a longer trend in U.S. statecraft, which has supported the re-characterization of more and more activity previously considered public as private.

This move, similar to the shift from absolute to restrictive immunity discussed in Chapter 3, obscures the political nature of all debt restructurings and moves the decision about the amount and form of debt relief out of the sphere of state-state relations, into the “private” commercial realm. In doing so, and despite still being inextricably tied to creditor state efforts, this move succeeded in greatly expanding the power of private creditors over debtors’ economic decisions. This change did not affect all creditors equally — it was especially important for distressed debt investors. Most commentators ignore how the identity of the creditors negotiating restructurings has changed. Before and during the Brady restructurings, banks trying to offload bad loans negotiated with debtors. Since then, however, specialized distressed debt investors (whether hedge funds, or members of special trading desks at large investment banks) have been the ones at the negotiating table, and restructuring is itself an important distressed debt accumulation strategy. Such negotiations are not about absolute debt relief, but rather about rescheduling debt and interest payments across a longer period, just as the Brady Plan did.

During crises, specialized distressed debt traders buy large amounts of heavily discounted sovereign bonds in order to profit from the coming restructuring. These investors will not receive full face value, but will receive more than they paid. For instance, investors purchasing bonds for 30 cents on the dollar may agree to a restructuring at 70 cents on the dollar. They will collect not only those 40 cents per dollar of profit, but also interest on the new bonds. While the terms of an exchange may be fiercely contested, it is rare not to reach a deal, and that deal must be acceptable to most bondholders. Contrary to the supposed “riskiness” of distressed bonds, they are a safe investment — for those who have the money, connections and expertise to participate. One study calculated that average total returns for such investors are around 114%, with

annualized profits (since restructurings usually take a couple years) of 57% (Singh, 2003). These profits are much higher than for most investments, including in distressed corporate debt.

Restructurings constrain debtor sovereignty in ways that exist alongside, but are not reducible to, structural adjustment. Though they usually occur in tandem with IMF programs and approval (Marchesi, 2003), during the Brady era, Sachs criticized such restructurings for offering far less relief than the IMF was recommending (Implementation of the Brady Plan, 1990). Furthermore, the contracts produced in these negotiations enact their own forms of governance, determining which legal systems and courts apply, how debtors can use other assets, which payment intermediaries will be involved and even whether countries must maintain good standing with the IMF. Unlike structural adjustment programs, clauses last as long as the bonds containing them — often up to thirty years. Even in rare cases in which the IMF is not involved in restructurings, these clauses have all become standard. This is not to suggest that sovereign debtors have no voice in negotiations. By definition, if an agreement is reached, this means the terms were “acceptable” to all parties. But while contracts always represent formal equality between parties, they frequently embody real inequality (see Ashton, 2014 for a good discussion). Precisely how bond contracts have changed to reflect the interests and accumulation strategies of the distressed debt investors who now negotiate restructurings requires further study. All contracts are the product of the separate interests and uneven power relations of negotiating parties, and it matters very much who, exactly, is doing the negotiating.

Conclusions: Deep Finance

While many studies have focused on the United States and the United Kingdom as the most financialized economies in the world, my analysis of the secondary market regime suggests that financialization must be understood as a transnational process, in which certain aspects (the debt relations) of many otherwise non-financialized economies are highly financialized in ways that have repercussions both for creditors in New York and London, and for the national economies of indebted states. This transnational frame is doubly important for trying to understand the relationship between neoliberalization and financialization. Peck et al. (2010), Helleiner (2010), and others have argued rightly that the two processes are integrally related. Christophers (2015a) reminds us that understanding financialization requires unpacking the “black box” of finance to study not just its effects but the mechanisms by which it operates. This applies equally to understanding neoliberalization and the relationship between the two processes. I contribute to this task by exploring the market and legal dynamics of secondary sovereign debt relations. My analysis leads me to one final point about the relationship between neoliberalization and financialization, both of which pre-date the 1970s. One thing that makes the current period distinct is precisely the deep entanglement of these processes through the mechanisms of new institutional financial geographies, unique legal developments, rising indebtedness and structural adjustment. A thorough understanding of either financialization or neoliberalization since the 1970s requires taking Third World sovereign debt crises and the changes they produced into account.

It is this context that sets the stage for the debt-driven legal developments we will explore in the rest of the manuscript. The juridico-economic regime that emerged after World War II continues of course beyond this conjuncture, but in ways that are thereafter critically shaped by the intertwined forces of financialization, neoliberalization and rising indebtedness and the

uneven economic and legal geographies they have produced. As we will see in the next two chapters, although litigating holdouts constitute only a minority of creditors, they have an outsized role in pushing legal developments that enhance creditor and U.S. court power ever further.

Chapter 5 – Rise of the Vultures

“Peru would either . . . pay us in full or be sued.”
(Paul Singer, Elliott Associates)¹¹⁵

In the previous chapter, I demonstrated that U.S. support for the Brady Plan and the restructuring creditor strategy were interlinked. Both aimed to make an increasingly volatile financial system functional by offering just enough relief to debtors to prevent them from defaulting outright, and both sought to redistribute risks among creditors in such a way that the financial system would not collapse with every major debt crisis. At the same time, both the Brady Plan and successive restructurings have functioned to spread or reinforce neoliberal policies beneficial to transnational finance. What I did not yet discuss is the role of litigating creditors in these developments. In this chapter, I show that from the early 1980s through the 1990s, the U.S. executive branch actually subordinated the debt restructurings it was working so hard to orchestrate to another policy objective: upholding the contract rights of holdout creditors suing sovereigns in U.S. courts. Doing so required further expansions of U.S. juridico-economic territory.

Preparing for the Vultures

In the 2000s, the U.S. government, backed by the International Monetary Fund (IMF) and many legal scholars, criticized holdout creditors for their disruptive effects on sovereign debt restructurings. Yet just two decades earlier, the U.S. government was directly involved in establishing the legal framework that made this possible when it intervened in *Allied Bank Int'l v. Banco Credito Agricola de Cartago*,¹¹⁶ in which a private bank syndicate sued Costa Rica. Due to U.S. involvement in this case, the U.S. Court of Appeals for the Second Circuit not only upheld the enforceability of a litigating holdout creditor's contract in New York, but developed new spatial arguments to justify a significant extension of U.S. judicial reach. In *Allied Bank* (1983-1985), and in a series of later debt cases culminating in *Argentina v. Weltover*¹¹⁷ (1992), New York federal judges greatly expanded the juridico-economic territory of the United States over sovereign debt transactions involving foreign states. They did so by redefining the “location” of financial debts, by expanding the definition of “domestic” (meaning in the United States), and by enlarging the category of “commercial” activity.

These changes were first developed in relation to holdout banks who had participated in loans to Third World countries before the crises of the 1980s began, but paved the way for the rise of secondary market distressed debt investors specializing in litigation in the 1990s. By that time, the spatial framework established by *Allied Bank* and *Weltover* was so well established that most debtor countries did not try to challenge it. Instead, they focused on smaller arguments aimed at distressed debt traders, especially on the “champerty” defense, which in theory prohibited the purchase of debts with the intent of collecting through litigation. Most of these defenses were roundly rejected, further cementing the power of this new type of investor. Many

¹¹⁵ Quoted in *Elliott Assocs., L.P. v. Republic of Peru*, 12 F. Supp. 2d 328, 335 (S.D.N.Y. 1998).

¹¹⁶ *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir.1985).

¹¹⁷ *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

criticisms of vulture funds today emphasize these subsidiary legal changes occurring in the 1990s, while ignoring the more fundamental extensions of U.S. judicial reach that made the vulture fund strategy possible in the first place.

After discussing these legal developments in the context of several of the most famous holdout cases of the 1980s and 1990s, I turn to the United States' geopolitical motivations in supporting this holdout strategy. Today, most policy makers and analysts see litigating holdout creditors as having interests that run counter to those of restructuring creditors and the interests of the IMF. I argue, in contrast, that the litigation strategy and the restructuring strategy are complementary. The two strategies developed in tandem in order to narrow the options available to indebted states and, so far, have jointly supported the secondary market regime discussed in the previous chapter. This is not to say that the two strategies might not come into conflict at some point in the future. We will see in Chapter 6 that with *NML v. Argentina*, the litigation strategy has *begun* to conflict with the restructuring strategy in ways that have made both the George W. Bush and Obama administrations uncomfortable. However, it was initially developed with the full support of successive U.S. administrations from Reagan to Clinton.

Expanding U.S. Juridico-Economic Territory: 1983-1992

The first lines of what would become the map of U.S. judicial authority with respect to sovereign debt relations were laid down in 1985 with the Second Circuit's *second* ruling in *Allied Bank (Allied II)*.¹¹⁸ Their first ruling (*Allied I*), in 1984,¹¹⁹ had actually excluded the enforcement of private holdout contract claims against Costa Rica from judicial reach. After direct intervention from the U.S. executive branch, however, the judges reversed their earlier decision and ruled against Costa Rica by redefining the legal location of a sovereign debt and by enlarging the legal definition of being "in" the United States.

Allied Bank emerged directly out of the 1980s debt crises. In July 1983 Judge Thomas Griesa of the Southern District Court of New York (the same Griesa who would later hear *NML v. Argentina*), issued his first decision in *Allied Bank*. The case involved a syndicate of 39 banks from around the world, represented by the New York-based Allied Bank International. The banks brought suit in New York against three Costa Rican banks that had received loans from the syndicate in 1976, to be paid back between 1978 and 1983. In 1981, Costa Rica imposed foreign exchange restrictions in an attempt to control a worsening economic crisis. By the end of 1981, these restrictions had prevented the three Costa Rican banks from continuing payments on their loans to the Allied syndicate. Allied brought suit in order to recover the unpaid principal of \$4.486 million plus accrued interest.

The defendant banks raised arguments about whether U.S. courts had proper jurisdiction at all, whether foreign sovereign immunity protected Costa Rica from their judgments, and whether the Act of State Doctrine meant the case should be excluded from the judicial domain altogether. In 1983, Griesa rejected the sovereign immunity claims, arguing that the act upon which the suit was based was the "execution" (payment) of the loans.¹²⁰ This, he reasoned, was clearly a "commercial activity" that occurred "outside the territory of the United States," but with "a

¹¹⁸ *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir.1985) (*Allied II*).

¹¹⁹ *Allied Bank Intl v Banco Credito Agricola de Cartago*, 733 F2d 23 (2d Cir 1984) (*Allied I*).

¹²⁰ *Allied Bank Intl v Banco Credito Agricola de Cartago*, 566 F.Supp. 1440 (S.D.N.Y. 1983) (*Allied 1983*).

direct effect” in the United States, and thus fell within the commercial activity exception to the Foreign Sovereign Immunities Act (FSIA) (at 1443). In contrast, Griesa identified the relevant action for the act of state claim to be not the payment of the loans *per se*, but rather the *prevention* of payment by Costa Rica’s Central Bank and the government’s foreign exchange restrictions (at 1444, n. 3). Emphasizing the fact that the restrictions were imposed “in response to a serious national economic crisis, and that these actions were of the type which some governments undertake to try to assist in such a crisis,” Griesa concluded that, “There is no doubt that the actions of the Costa Rican government here were intended to serve a public, rather than a commercial, purpose. They were clearly an exercise of a governmental function” (at 1443). He noted that the case was distinguishable from *Dunhill* on this point (at 1444). He completed the post-*Sabbatino* analysis by reasoning that because Costa Rica’s foreign exchange restrictions were “an issue deemed by that government to be of central importance,” a judicial override of those restrictions by a U.S. court “risks embarrassment to the relations between the executive branch of the United States and the government of Costa Rica” (*id.*) He thus ruled in favor of the defendant banks and against Allied Bank International.

By the time the case was heard by the Second Circuit in April 1984 (*Allied I*), thirty-eight of the thirty-nine banks in the Allied syndicate had agreed to reschedule their loans with Costa Rica. Only one bank, the Fidelity Union Trust Company of New Jersey, refused to participate. Allied therefore brought this appeal solely on Fidelity’s behalf. The Second Circuit upheld Griesa’s decision, but on different grounds. Allied Bank had argued that the *situs* (location) of the debts was in New York, not Costa Rica, and that therefore the Act of State Doctrine did not apply. The three-judge court suggested that it disagreed with this determination, but ultimately ruled on different grounds. First, they emphasized the public, rather than commercial nature of the act, noting that in preventing payment on these loans, Costa Rica was “clearly acting as a sovereign in preventing a national fiscal disaster” (at 27). They also noted that the Costa Rican banks did not have offices or employees in New York, nor did they “conduct banking business there,” and that most of the contract negotiations had “occurred outside the U.S.” (*id.*). Payments were to be made in New York with U.S. dollars. The loans did not specify the governing law, but “did provide for concurrent jurisdiction over disputes in New York and in Costa Rica” (*id.*)

Despite offering these spatial observations, in the end, the court declined to determine the ultimate *situs* of the debt and whether or not the Act of State Doctrine applied, because they found that even if the *situs* was New York, the Costa Rican decrees should still be upheld because they were consistent with U.S. law and policy supporting cooperative debt restructurings between creditors and debtors. The court thus ruled against Allied again, but this time on “comity” rather than act of state grounds — in other words, on the grounds that political considerations and good will among nations, rather than law *per se*, dictated this outcome. Two months later, the U.S. executive submitted an *amicus* brief arguing against the court’s ruling, and in March 1985 (*Allied II*), the court reversed its own opinion on the grounds that it had been wrong about the content of U.S. policy.

In its 1984 opinion, the court had discussed Costa Rica’s ongoing debt renegotiations in detail. Costa Rica, the court explained (at 27), was in a “severe economic crisis” and in the process of renegotiating its debts. It had already entered into rescheduling agreements with 38 of the 39 banks in the Allied syndicate. Costa Rica’s foreign exchange decree was made in support of these negotiations. Indeed, the Costa Rican decrees had not actually repudiated these debts at all, the Court ruled, but simply made a “deferral of payments while it attempted in good faith to renegotiate its obligations” (*id.*). The court found that all this was clearly in line with U.S. policy,

as evidenced by the fact that both the legislative and executive branches had voiced their support for these restructurings and “reacted sympathetically” to Costa Rica’s crisis (*id.*). The U.S. had itself agreed to restructure its bilateral loans to Costa Rica.

The decision against Allied Bank, however, provoked an immediate backlash from the U.S. financial and legal communities. Two lawyers, for instance, complained at the time that the courts had too often strayed from their basic task of upholding “the expectations of the parties” and wandered into the terrain of “social engineering or the rearrangement of geopolitics” (Hoffman & Deming, 1984, pp. 494–495). Another later wrote that, “The Second Circuit’s opinion created shock waves throughout the U.S. international banking community” (Rendell, 1986, p. 823). In this context, the United States submitted an *amicus* brief¹²¹ signed by officials from the Federal Reserve, the Treasury, the State Department and the Department of Justice arguing that the Costa Rican decrees were not in fact consistent with U.S. policy, that even if they were comity should not require they be respected, and that the Act of State Doctrine should also not apply to this case.

The main point of the brief was to distinguish between the U.S. approach to handling Costa Rica’s debts to the public sector and to the private sector. While the United States did support Costa Rica’s ongoing restructuring efforts, and while it had itself participated in restructuring Costa Rica’s bilateral debts, the United States did not in any way condone *coercing* private creditors into restructuring against their will. The emphasis on so-called voluntary restructurings that would later be central to the Brady Plan was already in full force in 1984. The brief explained the U.S. commitment to the effective operation of the international financial system and repeated its support for voluntary cooperation in addressing the debt crisis. But they argued that there was already “a process in place for resolving economic adjustment problems such as Costa Rica’s. It is a process that adequately balances the interests of creditors and debtors, public and private, generally in the framework of an IMF-approved adjustment program, and which relies for solutions on the voluntary cooperation of each” (at 11).

The brief placed no blame on Fidelity for its lack of cooperation, but instead argued that, “This process is impaired not aided, by judicial recognition of a country’s unilateral suspension of external payments on debts expressly made payable in the United States... the Court’s opinion effectively sets up a new judicial framework — like that governing a corporate bankruptcy — to enforce the countrywide debt restructuring process” (at 11-12). Yet, the brief argued, what Costa Rica was doing was *not* bankruptcy, and should not be treated as such. The language in the brief emphasizes support for a case-by-case rather than a systematic approach to debt negotiations. This is completely consistent with their emphasis on *ad hoc* debt negotiations throughout the crisis. The brief dismissed as highly unlikely the possibility that overturning the decision would encourage a “rogue bank”, rather than a rogue debtor, to interfere with debt restructurings in the future (at 17 n. 12). “If the United States courts attempt to assume this role in the restructuring process, the effect could well be to encourage debtors to use the courts to establish their ‘rights’ to obtain concessions from their creditors, rather than addressing those problems through coordination, cooperation and needed economic adjustment measures” (at 15). It described Costa Rica’s actions as a one-way “cramdown” (at 13 n. 9) of an agreement against Fidelity, and clarified in multiple ways that the United States always supported upholding the enforceability of private contracts. In short, the brief explicitly subordinated IMF-mediated debt restructurings to

¹²¹ Brief for the United States as Amicus Curiae, *Allied Bank Int’l v. Banco Credito Agricola De Cartago*, 757 F.2d 516 (2d Cir. 1985) (No. 83-7714).

creditor contract rights and suggested that allowing litigation like this to proceed was actually directly in line with U.S. debt crisis policies.

The New York Clearing House Association, a major processor of payments among financial institutions, also filed an *amicus* brief on Fidelity's behalf. Clark (1984, p. 912) summed up their argument "that the decision would (1) encourage sovereign defaults on international loans; (2) reduce the bargaining power of lenders in debt restructuring negotiations by neutralizing the threat of swift judicial action in case of default; (3) force banks to reevaluate the desirability of participating in international syndicated dollar loans arranged and payable in New York City; and (4) undermine New York's role as the leading international financial center." In other words, litigation was viewed as an important disciplining tool for bringing indebted Third World governments into line and keeping New York City on top.

The Second Circuit's reversal of its former ruling is widely understood as a direct response to the interventions of the U.S. government (Bratton & Gulati, 2004; Sturzenegger & Zettelmeyer, 2006) and "in great part as a reaction to the concerns of the commercial banking community" (Lewyn, 1985, p. 669). In its second opinion by the same three-judge panel, there was a major change in tone from the year before. While *Allied II* still noted Costa Rica's "escalating national economic problems," the new opinion first asserted that, "The defaults were due solely to actions of the Costa Rican government" (at 519). Citing the U.S. brief, the court explained that it had been wrong about U.S. policy before. In fact, support for bilateral and IMF-mediated restructurings and continued U.S. aid to Costa Rica were *not inconsistent* with upholding Fidelity's contract rights in this case; "The entire strategy is grounded in the understanding that, while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and enforceable" (at 519). Without commenting on its own former statement that Costa Rica had not repudiated but merely deferred payment on these debts, the court determined that, "The Costa Rican government's unilateral attempt to repudiate private, commercial obligations is inconsistent with the orderly resolution of international debt problems. It is similarly contrary to the interests of the United States, a major source of private international credit" (at 522). Thus, the court bowed to political pressure from the executive branch to make this a "judicial" issue.

Nevertheless, the court was careful to maintain an appearance of autonomy by pointing out that, even if comity did not require deference to these decrees, if Griesa was correct in his initial ruling, the Act of State Doctrine would still bar judgment in favor of Allied Bank. In its brief, the United States had argued that the act of state would only apply to the decree if it had *affected* a debt that was located in Costa Rica's own territory. Thus the key question was where was the *situs* of the debt. In the 1960s and 1970s, the *situs* of a debt for act of state purposes had been determined to be with the *debtor*. In *Allied II*, the Second Circuit definitively altered this logic to place the legal location of a debt with the *creditor*. Here again, this spatial history was entwined with cases involving Cuban nationalizations, most importantly, *Tabacalera*.¹²²

In the context of the Cuban nationalizations, a distinct logic for establishing the *situs* of a debt for act of state purposes had been established. In *Tabacalera* and later *Dunhill*,¹²³ the *situs* of debts owed by U.S. importers to nationalized Cuban cigar companies was determined to be in the United States with the debtor. Thus, the Fifth Circuit ruled in *Tabacalera*, since the debts were outside Cuban territory at the time of the nationalization, the nationalization had no validity

¹²² *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir.).

¹²³ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

with regard to these debts. The same rule was upheld in *Dunhill*. In *Menendez*,¹²⁴ a precursor case to *Dunhill*, the District Court had noted, “It is well established that the situs of a debt is located with the debtor” (at 538). In 1985, issuing sovereign debt was still considered a public act. Thus, had the *situs* rules of *Tabacalera* and *Dunhill* been followed in the sovereign debt cases arising from the early 1980s on, a sovereign’s refusal to pay a debt would have been seen as an act occurring in that foreign state’s territory and thus as protected from U.S. courts by the Act of State Doctrine.¹²⁵

Crucially, however, the *Tabacalera* court had based its *situs* argument on a new kind of spatial reasoning. That court determined that a debt could only be said to be in a territory if the payment of that debt could be made to “come to complete fruition within the dominion of the [foreign] government” (at 715-716). In *Tabacalera*, it meant that because the Cuban government could not force the U.S. importers to pay, the debt was not located in Cuba. In *Allied II*, the Second Circuit used this logic to reach the opposite result. Citing *Tabacalera*, the Court determined that, since the debts were payable in New York, Costa Rica could not unilaterally *extinguish* the debt itself (could not bring the default to “complete fruition”), and thus the *situs* of the debt was determined to be New York (*Allied II*, at 521). Since by this reasoning debts to foreign creditors could never be fully extinguished in the debtor’s own jurisdiction, it cemented the spatial determination that sovereign debts would be located with the *creditor* rather than with the debtor from then on. Since so many international financiers operate out of New York City, this effectively extended U.S. juridico-economic territory over most Third World sovereign debt transactions.

The court argued further that even under “ordinary” *situs* rules, the result would be the same, since the banks had agreed to New York jurisdiction, Allied Bank is located in New York, some of the negotiations had taken place in New York and “The United States has an interest in maintaining New York’s status as one of the foremost commercial centers in the world... [and] in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law” (at 521-522). In doing so, the court explicitly made upholding New York’s financial power a part of its *spatial* analysis of the location of sovereign debts. Based on these *situs* analyses, the court concluded that because the debts were located in the United States, rather than Costa Rica, the Act of State Doctrine did not apply. The court ruled in favor of Fidelity.

With this decision, one law professor observed, “the international banking community breathed a noticeable sigh of relief. The ‘sanctity of contracts’ had been upheld” (Quale, 1985, p. 26). Nevertheless, over the next few years, a flurry of articles analyzing and criticizing all the *Allied* decisions appeared in U.S. law reviews and other legal journals. Only few argued that the courts should have ruled against Fidelity in order to prevent one bank from interfering with debt restructurings and IMF policy (e.g., Coyne, 1986; Finnigan, 1986). Although *Allied II* was “generally viewed as the lesser of two evils” (Quale, 1985, p. 30), many analysts remained dissatisfied. Some argued that the Act of State Doctrine should simply be abolished altogether (Bazyler, 1986; Gruson, 1988; Hoagland, 1985). Wall (1987) believed that while *Allied II* had reached the proper conclusion, it had done so through faulty logic, and that had it been applied

¹²⁴ *Menendez v. Faber, Coe & Gregg, Inc.*, 345 F. Supp. 527 (S.D.N.Y. 1972).

¹²⁵ I will elaborate on the history and politics of *situs* of debt rules in future publications.

correctly, the Act of State Doctrine would actually have barred adjudication. He therefore recommended that an explicit exception for foreign defaults should be added to the Act of State Doctrine. “The consequent strengthening of international finance,” he reasoned, “would more than justify any potential offense the defaulting nation might suffer” (p. 280).

Many were upset that *Allied II* left the “comity” defense available for future cases. The court had reversed its position on the grounds that it had been *wrong* about U.S. policy, not that U.S. policy was irrelevant. This, Rendell (1986) explained, was even worse than the Act of State Doctrine precisely because it could make the new spatial analyses irrelevant. If U.S. policy was interpreted to align with debtors in the future, “it would no longer be possible for banks to structure their loan agreements to assure that the situs of the debt would be outside the foreign country of the debtor” and thereby to maintain their right to enforce the contract (p. 823). Ebenroth and Teitz’s (1985) further comments on this point are illuminating. They condemned the comity rule for being a way “to resolder the broken link between the Executive and decisions involving foreign sovereigns, a connection deliberately dissolved by Congress in 1976 with the enactment of the FSIA” (p. 227). This is precisely right. Nearly a decade after *Dunhill* and the FSIA, both of which resulted in a substantial extension of U.S. judicial reach over activities formerly governed by the executive branch, U.S. litigation involving foreign sovereigns was still being decided in crucial ways by the U.S. executive. As we will see in the rest of this chapter, this remained true throughout the rest of the 1980s and the 1990s. Despite the significant and intentional judicialization of more and more economic actions of foreign governments, the executive branch remained directly involved, either through direct action or intentional inaction, in the outcome of these cases.

Perhaps the most common point of discussion in the legal response to *Allied* involved an argument about the legal definition of the *situs* of a debt. These reactions demonstrate clearly how reshaping the spatial order of U.S. law was understood at the time as important for U.S. financial interests. Commentators recognized with no embarrassment that defining the legal *situs* of a debt was a strategic matter. Goldthwaite (1985) suggested a formal move to a “more flexible approach,” (p. 154) noting that, in practice, “the application of the [act of state] doctrine by United States courts to cases involving a foreign sovereign’s acts with respect to a debt has been consistent only in that the American litigant, more often than not, has been the successful party. Regardless of whether the United States citizen has been the debtor or the creditor, United States courts have determined the situs of the debt to be within United States territory” (p. 152). Johnson (1986) was even more direct. He noted that while U.S. law had traditionally found the *situs* to be with the debtor, “the courts have recently expanded this test to cover situations in which jurisdiction over the debtor was based on factors other than domicile, such as the contacts the debtor had within the United States. The rationale in refusing to use solely the domicile test is that application of that test would almost always place the loan in the foreign nation and would allow the act of state doctrine to be used by foreign nations as a mechanism to avoid payment of debts” (p. 125).

While most commentators approved of the fact that the *situs* had been decided in Fidelity’s favor in this case, many argued that it would be even better if *situs* rules were made more flexible altogether and criticized the application of “mechanical” *situs* rules that had been developed for tangible property to the far more complicated question of intangible property (e.g., Goldthwaite, 1985; Hoffman and Deming, 1984; Johnson, 1986; Miller, 1984; Tahyar, 1986). Several argued for the abolition of *situs* concerns in act of state cases, pointing out that a *situs* analysis was not necessarily compatible with the separation of powers version of the Act of State

Doctrine at all. An act that occurred in a foreign territory might conceivably still be adjudicated by U.S. courts in some circumstances without embarrassment to the U.S. executive branch. At the same time, there was no logical reason to think that because an act occurred on U.S. soil, invalidating it would necessarily not cause friction between the United States and the foreign sovereign. Some thought getting rid of the *situs* rules would be beneficial for creditors, while a couple simply argued that each case should be assessed on the merits without considering the *situs*.

These debates are interesting for a few reasons. First, they show how U.S. common law rules regarding *situs* determinations were widely understood to have important political and economic ramifications. They also show that, in general, a shift to more flexible spatial rules is understood to be good for U.S. financiers, something which resonates with the still dominant narrative today about the relationship between the relaxation of territorial rules and economic globalization. The calls to get rid of *situs* analysis altogether are also interesting for showing how lawyers and financiers have often *dreamed* of a borderless world — although in fact, even a law without *situs* rules would remain spatial and would only benefit financiers insofar as the laws of *certain* jurisdictions continued to be more extensive than others. Perhaps for this reason, there has been no real attempt by judges to get rid of *situs* rules — only to adjust them. Rising debts and the proliferation of new financial instruments since the 1970s have made legal space more complicated, but this has in no way reduced the importance of space in U.S. law; if anything, the location of intangible property being less obvious has meant that even more time and effort are spent negotiating the spatial rules that will govern financial relations.

Allied II remains the foundational case for interpreting the Act of State Doctrine in the context of sovereign debt (Lastra & Buchheit, 2014, p. 107). By 1990, *Allied II* had been cited in multiple U.S. cases in the Second Circuit involving foreign sovereign governments or their actions, including several debt cases. In cases against Jamaica and the People's Republic of the Congo (now the Republic of the Congo), for instance, secondary holdout creditors relied on *Allied II* to win their cases. In *A.I. Credit Corp. v. Government of Jamaica*,¹²⁶ Judge Sand of the Southern District of New York relied on *Allied* to determine that the Act of State Doctrine did not apply. Despite the risk to Jamaica's ongoing debt restructurings and the potentially "devastating financial impact" (at 633) this decision could have on Jamaica's economy, Sand argued, *Allied* had established that U.S. policy was that "while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and enforceable" (*id.*, citing *Allied II* at 519). Sand concluded, "it is not the function of a federal district court in an action such as this to evaluate the consequences to the debtor of its inability to pay nor the foreign policy or other repercussions of Jamaica's default" (*id.*). He noted, furthermore that he had recommended to Jamaica that it seek support from other U.S. branches, but that "no such intervention has occurred" (*id.*). In other words, the executive branch acted by declining to act in this case. A copy of a note from the IMF to the Governor of the Bank of Jamaica noting that a judgment against Jamaica "could create problems for the implementation of the international debt strategy that is supported by member governments of the International Monetary Fund" was deemed irrelevant to the decision at hand (*id.*, n. 5).

Similarly, in a December 1989 decision in favor of a holdout creditor suing the People's Republic of the Congo,¹²⁷ Judge Wood of the Southern District of New York relied on *Allied II*

¹²⁶ 666 F. Supp. 629 (S.D.N.Y. 1987).

¹²⁷ *Nat'l Union Fire Ins. Co. v. People's Republic of Congo*, 729 F. Supp. 936 (S.D.N.Y. 1989).

to reaffirm the United States' hierarchy of policy interests. Despite the Congo's concern that the judgment would interfere with its recent London Club Agreement with its commercial bank creditors, Judge Wood held that: "If this Court were to refuse to enforce this default judgment on the ground that to do so would interfere with the Congo making payments pursuant to a debt rescheduling agreement entered into with other creditors, it would have the effect of depriving a creditor of its right to choose whether to reschedule a debt or to enforce the underlying obligation to pay. Such a result would be contrary to United States policy as articulated in *Allied Bank*" (at 944). Crucially, the judge held in a footnote that, contrary to the Congo's assertions, the Brady Plan that had been officially articulated in March of that year in no way implied a realignment of U.S. interests. Wood argued that, "In fact, in Secretary Brady's address, he stated that 'we should encourage debt and debt service reduction on a voluntary basis, while recognizing the importance of continued new lending.'... The Court fails to see how such a position calls into question the continuing validity of *Allied Bank*" (*id.*, n. 5)

In short, by the time the Brady Plan was articulated, urging not only further reschedulings but outright debt relief, the policy of favoring private contract rights even when it might interfere with the United States' own debt restructuring policies was well entrenched. The Brady Plan was not seen as changing that in any way. The case against the Congo also illuminates the complicated relationship between de-politicization and judicialization. The District Court concluded by observing that it was "not the appropriate government institution to weigh the harm to the Congo of paying a valid judgment, against the harm to an insurer... that would flow from its being denied its legal right to enforcement of the judgment" (at 945). In short, the court had passed responsibility for intervening, if it wanted to, to the executive branch and declared its own actions a-political, while simultaneously basing its judicial ruling precisely on the U.S. executive's intervention in *Allied*. The judicialization of important transnational economic relations does not actually make them less political, but the power of the former depends in key ways on the *myth* of doing so.

Weltover and the further extension of U.S. judicial reach

In 1992, the second major piece of the legal map that would enable the rise of vulture funds was solidified in the *Republic of Argentina v. Weltover*. In *Weltover*, the Supreme Court determined that for the purposes of the FSIA, not only the payment, but also the issuance of sovereign debt was a *commercial activity*. This characterization relied heavily on yet another dichotomy that had been codified in the FSIA itself but not yet used in this way — nature vs. purpose. In short, the law dictated that only the *type* of activity (its nature) was legally relevant to the determination of sovereign immunity. *Why* the action was taken was irrelevant. Furthermore, the *Weltover* Court decided, even if the creditors involved were non-U.S. institutions, located abroad, if they used a U.S. bank account to collect debt payments, then the issuance of these debts could be said to have "direct effects" in the United States and to fall under U.S. jurisdiction. This case has remained important precedent.

In the early 1980s, as Argentina and private Argentine businesses faced risks of a foreign exchange shortage, the Republic of Argentina agreed to help insure private Argentine businesses by providing them with U.S. dollars at a fixed exchange rate. Essentially, Argentina guaranteed the debts of its private businesses. In 1982, when Argentina did not have enough dollar reserves to cover these agreements, it refinanced these debts by issuing bonds called "Bonods" to foreign creditors, with payment to be made in U.S. dollars, through London, Frankfurt, Zurich or New

York at the creditor's choosing. When the Bonods matured in 1986, Argentina was still in the midst of a serious debt crisis and lacked sufficient foreign exchange to pay them. Instead, "Argentina unilaterally extended the time for payment and offered bondholders substitute instruments as a means of rescheduling the debts" (*Weltover*, at 610). Two Panamanian corporations and a Swiss bank refused to accept the deal, demanding that the full amount be paid in New York, and bringing suit in the District Court for the Southern District of New York.

In a unanimous 1992 Supreme Court decision on the case (*Weltover*), Justice Antonin Scalia considered whether the FSIA allowed this suit. The holdout creditors' case rested on the third clause of the FSIA's section on the commercial exception to foreign sovereign immunity. That clause provides in relevant part that a foreign state shall not be immune "in any case...in which the action is based 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" (28 U.S.C 1605(a)(2)). The United States filed an *amicus* brief on the creditors' behalf (cited in *Weltover*). The first question was whether, under the FSIA, Argentina's issuance of the Bonods constituted a "commercial activity" and whether its rescheduling of those Bonods was an act taken "in connection with" that activity.

Scalia (at 612) noted that the FSIA itself left the definition of "commercial" quite vague. Yet, he said, previous cases, especially *Dunhill* offered some insights. That decision, he said, issued less than six months before the FSIA, could be taken to shed light on how the Act should be construed. In particular, he said, *Dunhill* defined as commercial a sovereign's "participation in the marketplace in the manner of a private citizen or corporation" (at 614). The FSIA, however, added another crucial piece of the puzzle — the distinction between nature and purpose. The Court determined that, "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" (*id.*). All that mattered was whether the acts were the "type of actions" which a private party might use in commercial activities (*id.*, emphasis in original). Thus, Scalia explained, foreign exchange controls constituted a sovereign act, because no private party can regulate currency in that way. However, "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" (at 615).

Many of the acts that had been considered public in cases before 1976 had been defined precisely in terms of their sovereign purpose or function. By codifying the use of the nature/purpose distinction in defining the "commercial," the FSIA further modified the public/private distinction, expanding the scope of the latter and thus the range of foreign actions over which U.S. courts can extend their authority. The Court rejected Argentina's arguments that the nature/purpose distinction was "formalistic" and not useful: "However difficult it may be in some cases to separate 'purpose'... from 'nature'..., the statute unmistakably commands that to be done" (at 617).

Still, the issuance and rescheduling of these debts was determined to have taken place *outside* the United States, in Argentina. The next question, therefore, was whether the rescheduling of the Bonods could be said to have a "direct effect" in the United States. In assessing this matter, the Court agreed with the Second Circuit that the FSIA did not require such "effects" to be either "foreseeable" or "substantial", only that the effect be "an immediate consequence" of the action

in question (at 617, 618). This is a weaker standard than had been adopted in many other spatial analyses before. The Court deemed it irrelevant that the plaintiffs were all non-U.S. corporations “with no other connections to the United States” aside from having received some interest payments on the Bonods in New York accounts (at 619); the Court had “little difficulty in concluding that Argentina’s unilateral rescheduling of the maturity dates on the Bonods had a ‘direct effect’ in the United States” (at 618-619). *Weltover* was another significant expansion, this time at the Supreme Court level, of U.S. judicial reach over sovereign debt relations, based only on minimal spatial ties to that activity. In this case, foreign plaintiffs were able to use U.S. courts to sue a foreign government over actions that were tied to New York only by the existence of a few U.S. bank accounts. Given the prominence of New York banks in the global economy, such a rule has massive spatial implications for New York’s juridico-economic territory.

The Court *did* reject the Second Circuit’s further argument that the rescheduling could be said to have a direct effect in the United States because of Congress’s interest in bolstering New York City’s financial status. “Although we are happy to endorse the Second Circuit’s recognition of ‘New York’s status as a world financial leader,’” Scalia wrote, “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” (at 618). Thus the court rejected the kind of spatial argument based on New York City’s financial status that had been made by the Second Circuit in *Allied II*. Nevertheless, the *reasoning* behind those claims is important. In both *Allied II* and *Weltover*, the Second Circuit clearly believed that expanding the definition of being “in” New York for the purposes of the Act of State Doctrine and the FSIA, respectively, was something that would bolster New York’s *financial* status.

Weltover provoked another flurry of articles from the legal community, but this time views on the expansion of judicial authority were more mixed. Several commentators praised the Court for offering some needed clarification and the scope and meaning of the FSIA. The decision was widely understood as significantly expanding U.S. judicial reach. Lew (1993, p. 758) wrote approvingly that, “By utilizing *Weltover*, the courts have asserted jurisdiction over non-U.S. defendants in a greater number of cases than they did prior to *Weltover*.” Sweet (1993, p. 375) noted, without apparent irony, that, “The *Weltover* decision seems to enlarge U.S. courts’ jurisdiction over foreign sovereigns in certain causes of action by introducing a ‘direct effect in the United States’ requirement which can be seen as less than ‘direct’ and not exactly ‘in’ the United States.” Other commentators were ambivalent or even critical of this fact. Ruccolo (1993, p. 520), for instance, saw the decision as disregarding the legislative history and the intentions of Congress in expanding “extraterritorial” jurisdiction under the FSIA. He noted that this ruling “could provoke foreign antipathy to American extraterritorial policing,” though he conceded that it might “encourage both American and foreign investment in developing countries.” Others, too, criticized *Weltover* for overextending U.S. jurisdiction via a too lax definition of “direct effect” and for ignoring what they understood as the legislative intent behind the FSIA (Baker, 1995; McGuire, 1992; Schano, 1994). Pizzurro complained that, “Such a sweeping interpretation would transform U.S. courts into international courts of claims” (1992, p. 824).

Leacock’s (1996) critique of the direct effect ruling and the definition of commercial was among the harshest. He argued that *Weltover* left “too much latitude in defining commercial activity” (p. 110), and that it should have retained the requirements of “substantiality” and “foreseeability” in assessing the action’s “direct effect” (p. 121). In both ways, the Court “granted unprecedented access to U.S. courts for persons seeking to file suit against a sovereign

state,” and led to “the conclusion that if a sovereign state participates in private capital markets...it cannot claim sovereign immunity” (p. 82). Moreover, Leacock points out, these decisions will most affect “developing sovereign states, because of their greater need to intervene in their domestic economies” (p. 83) and “whose governments often act as private parties engaging in commercial development to encourage foreign investment” (p. 121). It was understood at the time that these rulings, which the U.S. executive branch supported with its *amicus* brief, would especially affect Third World governments. Given the context of the debt crises in much of Latin America and Africa, we can see this even more clearly as a way to extend U.S. judicial authority over indebted governments.

The geopolitical implications of this case are blatant when one considers the adoption of the nature/purpose distinction, which was understood at the time to favor “developed” over “developing” nations. While some commentators criticized the Court’s analysis or even the very utility of the distinction (*e.g.*, Donoghue, 1992; Pizzurro, 1992), others were more approving (*e.g.*, McCarthy, 1993). Another article from 1992 on the nature/purpose distinction is useful. Greener (1992) compares the FSIA’s commitment to the nature over purpose distinction to the United Nation’s International Law Commission’s (ILC’s) Draft Articles recommending that both nature and purpose be considered in defining the commercial exception. He explains that the purpose of the ILC language “was to allow developing countries to protect themselves when they entered into contracts” (p. 198). Greener strongly recommends that the United States not sign the ILC Convention with this language intact. He acknowledges that altering the language to match the FSIA might mean that “some developing countries may refuse to sign the Convention” (p. 194). However, he notes, this is far less important than whether the United States signs or not. “Having the United States as a signatory lends credibility to the Draft Articles and is much more important than persuading some of the developing nations to become members... without the United States as a signatory, any Convention on jurisdictional immunities will likely fail” (p. 194). Having made these geopolitical inequalities clear, he justifies his recommendation by saying that not focusing on nature to the exclusion of purpose would actually hurt Third World countries by producing “a ‘chilling’ effect on the formation of contracts between sellers and sovereign buyers” (page 199). This is the familiar story in which promoting contract rights above all else is explained as being good for Third World economic development.¹²⁸

The definition of commercial in *Weltover*, based solely on the nature rather than the purpose of an act, ensures that any state participating in the international economic order, in which states have increasingly been required by economic realities and by the IMF to use market-like tools, amounts to engaging in “private” rather than “public” action. Given New York’s financial status, the simultaneous loosening of the “direct effect” definition, by which even tenuous connections to New York financial institutions enables governance of the transaction by U.S. law, means that very little transnational economic activity could *not* be considered to be within U.S. judicial reach. Between them, *Allied* and *Weltover* greatly expanded U.S. juridico-economic territory

¹²⁸ The most recent version of the ILC’s “Convention on Jurisdictional Immunities of States and Their Property” contains broad commercial exceptions to sovereign immunity and defines “commercial” in the following language: “In determining whether a contract or transaction is a ‘commercial transaction’..., reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction” —(United Nations, 2004, pp. 2—3). This version of the Convention was adopted by the General Assembly only in 2004. It is not yet in force; fewer than thirty countries have signed on or ratified the agreement. The United States is not one of them (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&clang=_en#EndDec)

over sovereign debt relations and paved the way for the rise of distressed debt traders specializing in litigation against sovereign debtors.

Rise of the Vultures: Distressed Debt Investors and the Litigation Strategy

By the early 1990s, the combination of legal developments bolstering the ability of private creditors to use New York courts to enforce debts against foreign governments with the development of a thriving secondary distressed debt market had led to the emergence of a small number of investment funds who specialized in holdout litigation. Many of the 1990s cases involved a new class of secondary debt traders who purchased discounted debts from banks and refused to participate in ongoing Brady restructurings. The cases discussed in this section have been extensively documented (Das et al., 2012; Fisch & Gentile, 2004; Schumacher et al., 2014), so I explain only those aspects that are relevant to my argument here. The most common site for these lawsuits remained New York City. The debtor countries involved fiercely resisted the lawsuits. In a common law system, built through the accretion of case precedent, that very resistance enabled holdouts to change the legal framework governing sovereign debt. “In virtually every case..., courts have rejected these [debtors’] defenses in favor of protecting the enforceability of sovereign debt obligations through litigation” (Fisch & Gentile, 2004, p. 1087).

The litigation strategy is a slow game that can only be played by investors with a lot of capital. While the strategy is often presented as highly risky, because there is no official way to enforce legal judgments against a sovereign, in practice, most holdouts do collect payment and the returns are immense. Writing well before *NML v. Argentina*, Singh (2003) found that total profits for litigating holdouts averaged from 300-2000%. Even annualized (cases can last from two years to over a decade), profits averaged 50-333%. The shift to bonds rather than loans made this strategy much easier than it had been. Bonds are easy to buy and sell, and a creditor does not need many of them in order to sue. When crises loom, holdouts purchase these bonds very cheaply from investors who would rather not undergo a protracted restructuring. Far from being an accidental byproduct, the possibility of such litigation was considered a selling point from the start. In a 1990 Brady offering announcement, Salomon Brothers listed among the qualities making these bonds appealing the fact that “bondholders could take legal enforcement action more easily than bank lenders” (cited in Buckley, 1997, p. 1852).

In the 1990s alone, thirteen different countries were sued, often by multiple creditors (Schumacher et al., 2014). By the time this strategy was becoming fully developed, *Allied* and *Weltover* had seemingly so definitively eviscerated the act of state and foreign sovereign immunity defenses for sovereign debtors, that most countries did not bother trying to pin their legal defense on either. Instead, the 1990s saw the raising and rejection of a succession of legal defenses geared specifically at secondary market holdout creditors. In other words, they tried to make certain limited inroads back into the juridico-economic territory that had just been claimed by the United States, but to no avail. In cases against Brazil (*CIBC*),¹²⁹ Panama (*Elliott v. Panama*),¹³⁰ and Peru (*Pravin*),¹³¹ for instance, each country raised the argument that these new specialized investment funds suing them were not properly “financial institutions” within the

¹²⁹ *CIBC Bank and Trust Co. (Cayman) Ltd. v. Banco Central do Brasil*, 886 F. Supp. 1105 (S.D.N.Y. 1995).

¹³⁰ *Elliott Assocs., L.P. v. Republic of Panama*, 975 F. Supp. 332 (S.D.N.Y. 1997).

¹³¹ *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850 (2d Cir. 1997) (*Pravin* 1997).

meaning of that term in the original loan contracts. Thus, they argued the sale of debts to these funds was invalid. Each court eventually dismissed this argument, on the grounds that, whether or not these funds could be considered “financial institutions,” the language in the agreements should be interpreted loosely.

Probably the most important legal struggle in 1990s vulture fund cases concerned the scope and status of New York’s “champerty” doctrine, codified in New York Judiciary Law § 489. Various champerty rules go back to at least the middle ages and prohibit the purchase of certain claims for the purpose of bringing suit on them. New York’s law reads, in relevant part, “[N]o corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, *with the intent and for the purpose of bringing an action or proceeding thereon . . .*” (emphasis added). This law was explicitly invoked as a defense in the cases just cited against Brazil and Panama, as well as in a case against Paraguay¹³² and another, famous case by Elliott Associates (parent company of NML Capital) against Peru.¹³³ The main question for legal debate was how to define “intent” and “purpose.” In all these cases, the champerty argument was dismissed.¹³⁴ In the first three, the doctrine received fairly short discussion. In the latest of the four cases *Elliott Assocs. v. Banco de la Nacion* (hereafter *Elliott v. Peru*), however, the District Court’s Judge Sweet engaged in a thorough investigation of the facts and, in a 1998 ruling, actually upheld the champerty defense to rule in favor of Peru. Elliott appealed the case, and the Second Circuit reversed the lower court’s ruling.

Elliott v. Peru is worth discussing for the way it cemented the legal foundation not only of holdout *bank* creditors, but also of secondary *bond* market traders whose strategy from the beginning involves litigation. Understanding that case requires evaluating an earlier case against Peru, also heard by Judge Sweet. Together, *Pravin* and *Elliott v. Peru* show how the litigating holdout strategy developed in relation to Third World debt crises and the IMF and Brady-led responses to them. Not only did these massive debt crises and the shift to secondary bond markets create the pools of distressed sovereign debt on which the new vulture funds relied, but the significant expertise needed to carry out this litigation was only developed over the course of dozens of cases involving distressed sovereign debts. Perhaps because Judge Sweet seems to have been more inclined towards sympathy for sovereign debtors affected by the Third World debt crises than were many of his colleagues, he probed these relations in useful ways. In part because of *Pravin*, in *Elliott v. Peru*, Sweet also allowed Peru to demand extensive documents and depositions from Elliott, which means that the case reveals important empirical details about how vulture funds operate.

Pravin was first filed in 1993¹³⁵ and finally decided in favor of Pravin Banker Associates in 1997. This case usefully illustrates the context in which IMF programs, debt restructurings and holdout litigation were intertwined.¹³⁶ By 1983, the state-owned Peruvian Banco Popular had borrowed roughly \$138 million from 48 foreign financial institutions. Due to the debt crisis, Peru

¹³² *Banque de Gestion Privee-SIB v. La Republica de Paraguay*, 787 F. Supp. 53 (S.D.N.Y.).

¹³³ *Elliott Assocs., L.P. v. Republic of Peru*, 12 F. Supp. 2d 328 (S.D.N.Y. 1998), rev’d 194 F.3d 363 (2d Cir. 1999).

¹³⁴ In *CIBC v. Brazil*, Brazil eventually won on other, contractual, grounds.

¹³⁵ *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, (No. 93 Civ. 0094 (RWS)).

¹³⁶ Empirical details compiled from 165 B.R. 379 (S.D.N.Y. 1994) (*Pravin I*); 895 F. Supp. 660 (S.D.N.Y. 1995) (*Pravin III*); 109 F.3d 850 (S.D.N.Y. 1997).

imposed foreign exchange controls by 1984, and Banco Popular paid interest but no principal on these loans from 1984-1992. In 1989, Peru's commercial lenders filed legal claims in multiple countries in order to prevent the statute of limitations running out on their claims, including those against Banco Popular. In 1990, Peru elected a new president Alberto Fujimori, who soon after implemented an IMF stabilization program and began negotiating Peru's commercially owned debts according to the United States' new Brady Plan. Most of Peru's commercial creditors agreed to stay their lawsuits. In December 1990, however, one of the banks (Mellon Bank N.A.) assigned roughly \$9.4 million of Banco Popular's debt to financial firm Pravin Banker Associates. Pravin apparently purchased the loans for 27 cents on the dollar. It sold all but \$1.425 million on the secondary market within days. Meanwhile, Peru's IMF-led economic adjustments included privatizing Peru's state-owned enterprises. After failing to find a buyer for Banco Popular, Peru began liquidation proceedings, again according to IMF policy. Pravin refused to join either the Banco Popular liquidation proceedings or Peru's Brady negotiations. Instead, Pravin demanded full repayment of principal and unpaid interest, and shortly after declared default on the debt and brought suit in New York against Banco Popular and its guarantor, the Republic of Peru.

Judge Sweet's discussion of the case in his initial 1994 opinion (referred to as *Pravin I*)¹³⁷ is interesting because it contrasts strikingly with many other similar documents. Sweet describes Peru as being affected by a "debt crisis affecting many countries in South America, Africa, and Asia" (at 381). This, he goes on, led many banks to change their "traditional lending patterns and, *as a result*, many impoverished countries, including Peru, are still trying to resolve their economic woes" (emphasis added) (*id.*). This is one of the few judicial decisions from these debt cases to describe the crises as systemic and to suggest that responsibility for the crisis rests somewhere besides with the debtor country. He goes on to explain that Peru's 1984 foreign exchange restrictions were imposed "in order to prevent the depletion of its external reserves" (*id.*).

Sweet explains that from 1984 to 1990, Peru was "generally isolated from the international financial community," as it had stopped paying its multilateral, bilateral and commercial debts (*id.*). "By 1990," Sweet continued, "Peru's economic status had deteriorated. The Peruvian debt had mounted to \$ 22 billion, much of it in arrears. Hyperinflation had accumulated at a rate of 2 million percent in the previous five years, the Gross Domestic Product had fallen by 25 percent in the previous two years; and thirty percent of the nation's population lived in poverty, of which seven million earned less than \$ 360 a year" (at 382). But in 1990, Sweet explains approvingly, Peru elected Alberto Fujimori, who introduced dramatic economic reforms known as the "Fuji Shock" and brought Peru back into compliance with "various IMF policies" (*id.*). In 1991, "Peru and the IMF entered into an agreement which fundamentally restructured the Peruvian economy, including: a Stabilization Program to reduce inflation and replenish Peru's foreign reserves; a Structural Reform Program ('SRP') to reduce the size of the public sector; a Re-Insertion Program, in effort to eliminate Peru's foreign debt arrears; a reduction in the government deficit, with the consequent firing of thousands of public sector employees; and the privatization of many of the state-owned enterprises" (*id.*). This all led to "positive economic results," new multilateral funding from the World Bank and the Inter-Development Bank, and new bilateral loans, including from the United States (*id.*). Banco's liquidation was part of these policy reforms.

¹³⁷ *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 165 B.R. 379 (S.D.N.Y. 1994).

In *Pravin I*, Sweet did not rule against Pravin, but he did stay the proceedings for six months in order to prevent Pravin's lawsuit from interfering with the ongoing negotiations. Peru's Bank Advisory Committee had expressed concern about this litigation and reminded Peru that the other creditors had only agreed to stay their own lawsuits as long as *all* the suits remained suspended.¹³⁸ He cited *Allied II*'s comity ruling in defense of his decision. While acknowledging the U.S. policies laid down in *Allied*, he distinguished this case on the grounds that a delay is different from a dismissal of Pravin's suit, and he further argued that recent developments suggested that this would be in line with U.S. policy. He notes the explicit policy shift from the Baker Plan to the Brady Plan, the United States own Chapter 21 corporate bankruptcy proceedings which he compares to Banco Popular's, and Congress' "International Debt Management Act of 1988," which had expressed Congress' deep concerns about the international debt crisis and its effects on poor countries. Sweet even notes in a footnote the "interesting" fact that the U.S. *amicus* brief in *Allied* "predicted just the sort of scenario which Pravin urges upon the court here, *i.e.*, the specter of a 'rogue' bank causing economic chaos in a foreign land" (at 387, n. 16). Based on this analysis of the relative importance of IMF programs, debt restructurings and creditor lawsuits, he stayed Pravin's lawsuit for six months.

This respite, however, was only temporary. In March 1995, Sweet further extended the stay (*Pravin II*).¹³⁹ In August 1995, in part on the grounds that Peru's economy was recovering quite well, Sweet granted summary judgment in favor of Pravin (*Pravin III*).¹⁴⁰ In contrast to the 1994 decision, in *Pravin III*, while still talking approvingly about Peru's cooperation with the IMF, Sweet now also used all the language of *Allied II* and other cases about the United States' interest in contract rights. He reminds the reader that the Brady Plan encourages "voluntary participation by creditor banks... [It] "does not abrogate the contractual rights of creditor banks, nor does it compel creditors to forbear from enforcing those rights while debt restructuring negotiations are ongoing..." (at 666). While he acknowledges that the United States had actually submitted a brief in *CIBC*¹⁴¹ expressing some concern about the rising class of *secondary* distressed debt traders, Sweet points out that the same brief said that new secondary debt traders play "an important and useful role in the ongoing efforts to deal with sovereign debt by providing added market liquidity," and reiterated the Brady Plan's commitment to honoring the "contractual terms of debt instruments" (*id.*). Anyways, in *CIBC*, the creditor was trying to *amend* the contract terms, not simply to *enforce* them. Finally, he "takes notice of the fact that the Department of Justice has not submitted a statement of interest in the instant action" (at 667). The text is full of similarly explicit language about the importance of contract rights. The neoliberal language in this decision is striking because it comes from a judge who was apparently among the most sympathetic to Peru's plight and had, in his earlier decision, acknowledge the *systemic* conditions of the debt crisis.

Peru appealed Sweet's decision, and, in a March 25, 1997 ruling (*Pravin 1997*) issued shortly after Peru's much delayed Brady deal finally closed, the Second Circuit was even more explicit

¹³⁸ "The Defendants contend that the ensuing creditor stampede to find and attach Peru's overseas assets would both seriously disrupt Peru's foreign trade and undermine its attempts at massive economic structural reform consistent with the IMF's recommendations" (*Pravin I*, at 383).

¹³⁹ *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, No. 93 Civ. 0094 (S.D.N.Y. 1995).

¹⁴⁰ *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 895 F. Supp. 660 (S.D.N.Y. 1995).

¹⁴¹ Brief for the United States as *amicus curiae*, *CIBC Bank and Trust Co. (Cayman), v. Banco Central do Brasil*, 886 F.Supp. 1105 (S.D.N.Y.1995) (No. 94 Civ. 4733).

in its assessment of the hierarchy of U.S. interests. After discussing Peru's IMF program and Brady agreement at length, the Court turns to a discussion of U.S. policy:

First, the United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures under the Brady Plan... Second, the United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders... *This second interest limits the first* so that, although the United States advocates negotiations to effect debt reduction and continued lending to defaulting foreign sovereigns, it maintains that creditor participation in such negotiations should be on a strictly voluntary basis. It also requires that debts remain enforceable throughout the negotiations (emphasis added) (*Pravin* 1997, at 855).

While *Pravin* was being appealed in 1996, Judge Sweet took on another debt crisis case: *Elliott v. Peru*. Elliott and Pravin would be the only two creditors not to participate in Peru's Brady restructuring. In March and April 1996, this boutique investment firm had purchased over \$20 million in Peruvian debts arising out of a 1983 agreement. Shortly after purchasing these debts, Elliott declared its refusal to accept the terms of Peru's ongoing Brady negotiations, demanded full payment of face value and interest from Peru, and brought suit in New York City. Elliott even asked for an attachment order against the Brady payments that were soon expected to flow to New York *before* it had won a judgment in the case. Subsequent findings in *Elliott v. Peru* would reveal that, with this case, the litigating vulture fund strategy was brought to fruition. Despite his recent ruling in *Pravin*, Judge Sweet distinguished this case on the grounds that Elliott was asking for *pre-judgment* attachment, not summary judgment, and in December 1996 denied Elliott's motion for these attachments.¹⁴²

When the case proceeded to trial, Peru raised the champerty defense, alleging that Elliott had purchased discounted debts in order to sue for recovery. Although several other New York judges had already rejected champerty arguments in recent sovereign debt cases, Judge Sweet agreed that there was enough evidence to suggest that it was likely Elliott had purchased these debt's in order to sue Peru for full recovery. In April 1997, he thus denied Elliott's motion for summary judgment against Peru and granted Peru extensive rights to discovery against Elliott.¹⁴³ Over the next several months, Peru was allowed to demand papers and to depose key personnel working with Elliott and at the banks from which Elliott had purchased the debts in question.¹⁴⁴ In August 1998, in a lengthy decision, Judge Sweet upheld Peru's champerty defense to rule against Elliott.¹⁴⁵ His findings are worth discussing in some length because of what they reveal about how vulture funds operate, as well as what they show about the Appeals Court's reversal of his decision the following year.¹⁴⁶

"Elliott," Sweet determined in the 1998 decision, "purchased the Peruvian debt with the intent and purpose to sue" (at 332). The document describes in detail how Elliott assembled a

¹⁴² *Elliott Assocs., L.P. v. Republic of Peru*, 948 F. Supp. 1203 (S.D.N.Y. 1996).

¹⁴³ *Elliott Assocs., L.P. v. Republic of Peru*, 961 F. Supp. 83 (S.D.N.Y. 1997).

¹⁴⁴ *Elliott Assocs., L.P. v. Republic of Peru*, 176 F.R.D. 93 (S.D.N.Y. 1997) (Generally No.'s 96 Civ. 7917 (RWS), 96 Civ. 7916 (RWS)).

¹⁴⁵ *Elliott Assocs., L.P. v. Republic of Peru*, 12 F. Supp. 2d 328 (S.D.N.Y. 1998).

¹⁴⁶ *Elliott Assocs., L.P. v. Republic of Peru*, 194 F.3d 363 (2d Cir. 1999).

team already versed in suing sovereign debtors. This team most significantly included two men, Jay Newman and Michael Straus (details at 333-334). Newman was a former lawyer (as many vulture fund investors are), who began investing in “emerging market” debt soon after the debt crisis began in 1983. He pursued this work first for Lehman Brothers, then Dillon Reed, then Morgan Stanley. In 1993, he established his own offshore investment fund (The Percheron Fund), focusing on emerging market debts. In the same year, he began helping another offshore fund, Water Street Bank & Trust Limited. In that capacity, he brought lawyer Michael Straus on board as Water Street’s counsel. Straus already had a long history of suing sovereign debtors and had been involved in over a dozen suits against sovereign debtors in the United States. At the advice of Newman and Straus, Water Street purchased the debts of and brought suit in New York against the Ivory Coast, the Republic of Congo, Poland, the Polish People’s Republic, Panama and Ecuador. They also filed suit in London against Ecuador, Panama and Poland. Straus was separately involved in lawsuits against Paraguay, Ecuador, and Zaire. Judge Sweet pointed out that Straus was well aware of the champerty doctrine, since the defense had been raised against his clients in several cases. In 1995, Water Street disbanded.¹⁴⁷ In 1996, Straus and Newman formed another company in order to sue the Democratic Republic of the Congo in New York.

In late 1995, Newman was hired to assist Elliott in purchasing secondary market sovereign debt and brought Straus on as counsel in Elliott’s first suit against Panama. At the time of Elliott’s purchase of Panamanian debt, Panama was in restructuring negotiations with its private creditors. Testimony in this case showed that Paul Singer (Elliott’s president) and Newman were well aware of the status of those negotiations. Elliott purchased “\$28,750,907.05 face value of Panamanian debt obligations for \$17,579,685.56,” refused to participate in restructuring and brought suit against Panama for full repayment (at 334).¹⁴⁸ Both Elliott’s deliberate assembling of a team practiced in suing sovereign debtors and its prior suit against Panama showed, Judge Sweet concluded, that Elliott had pursued an intentional strategy of suing sovereign debtors.

While the Panama suit was ongoing, Newman advised Elliott to purchase Peruvian debt. The timing and conditions of this purchase, Sweet argued, gave further support to the champerty defense. In his deposition, Paul Singer explained that “Peru would either...pay us in full or be sued” (at 335). And, Sweet said, “Under the circumstances as they existed in January 1996, when Elliott began its assembly of Peruvian debt, the only credible way that Elliott could achieve its goal of full payment was by bringing an action” (*id.*).

Elliott only purchased Peruvian debt *after* the initial terms of the Brady agreement were announced in January 1996. Extensive discovery in this case revealed further that Elliott purchased these debts from Swiss Bank Corporation and ING Bank after Pravin won a significant victory with the District Court. It then *delayed* the closing of these agreements far longer than was normal — in short, until the Second Circuit had rejected Peru’s stay application and thus, Sweet explained, had “clarified the litigation risks” (or, more accurately, lack thereof) to Elliott (at 336). Elliott had no other good explanation for these delays.

¹⁴⁷ At least one, and likely several, of Water Street’s cases were dismissed due to the firm’s refusal to disclose the identities of its ultimate owners. Outside of the documents in *Elliott v. Peru*, there is strikingly little information available on the company, and the cases cited by Sweet do not come up on LexisNexis Academic or Bloomberg Law. A view of the case dockets on pacer.gov shows that multiple documents in these cases have been “sealed” and that several were “dismissed without prejudice” in 1994 and 1995.

¹⁴⁸ The final judgment awarded was \$26.3 million. It was paid in full, with a gross return of 60% for Elliott (Schumacher, Trebesch, & Enderlein, 2014).

Finally, contrary to their claims, Sweet concluded that Elliott did not seriously consider other ways to profit from these debts. They showed no intent to trade these debts on and admitted that they “never even investigated potential purchasers” (at 338). Although Newman suggested that using these debts to participate in Peru’s privatization programs was an option, there was no way they could have received full payment in such an exchange and, furthermore, questioning showed that Newman was completely uninformed about those programs. Singer and Newman already knew the Brady terms at the time of purchase, and testimony showed that they considered those terms to be unacceptable. Finally, Sweet determined that Elliott’s attempts to negotiate one-on-one with Peru were mere pretext, intended precisely to give the appearance of pursuing other options so as to avoid champerty charges. Elliott knew full well that Peru had economic incentives not to negotiate with individual creditors because of agreements with its Bank Advisory Committee that “all creditors be treated equally” (at 340). Newman admitted that he knew this and knew that Peru had resisted separate negotiations in Pravin and elsewhere. After a long discussion, Sweet rejected Newman’s argument that he thought Peru might settle anyways because it was an especially “opportunistic” debtor (*id.*), finding no merit in the evidence presented for this claim. After an extensive discussion of New York’s champerty law and prior case history, Judge Sweet concluded that Elliott’s intent to sue was not “contingent or incidental” (at 346), but rather that “Elliott’s sole or primary purpose was to bring the lawsuit” (at 356). Accordingly, Elliott’s claims were illegal and would not be enforced.

Peru’s victory, however, was short lived. In October 1999, the Second Circuit Court of Appeals reversed Judge Sweet’s decision, with an interpretation of champerty so narrow as to make the doctrine completely powerless.¹⁴⁹ In short, the Court ruled that the District Court’s own discovery actually led to the conclusion that Elliott’s primary purpose had not been to sue, but rather to “obtain full payment” (at 378), and that had Peru simply paid Elliott in the first place, Elliott would not have brought suit. Thus, they determined, the lawsuit was indeed merely “incidental and contingent” (at 379). Of course, since no investor would ever waste time on litigation if their opponent would simply agree to pay them instead, this ruling effectively dismantled the champerty doctrine altogether.

The Court further noted that interpreting New York’s champerty law otherwise would be inconsistent with its analyses in prior cases that the United States’ interest in enforcing debts outweighed U.S. interest in promoting debt restructurings. Upholding New York Judiciary Law § 489, they argued, “effectively forces creditors such as Elliott to participate in an involuntary ‘cram-down’ procedure and makes the debt instruments unenforceable in the courts” (at 380). This, the Court concluded, could hardly be considered consistent with U.S. policy or with “New York’s interest” (*id.*) All the more so because, as “ably pointed out by Elliott,” this would especially affect “high-risk debt purchases” and “increase the costs of trading in high-risk debt under New York law and thereby encourage potential parties to such transactions to conduct their business elsewhere” (*id.*).

None of the champerty cases in the 1990s would have been possible if *Allied* and *Weltover* had not swept aside the act of state and foreign sovereign immunity defenses earlier on — the Act of State Doctrine, for instance, was dismissed with a reference to *Allied* in Sweet’s 1998 decision, and immunity was not discussed in either Sweet’s or the Second Circuit’s opinions. By 1992, these cases had greatly extended the United States’ (specifically New York’s) juridico-

¹⁴⁹ *Elliott Assocs., L.P. v. Republic of Peru*, 194 F.3d 363 (2d Cir. 1999).

economic territory and provided the literal space in which an investment strategy explicitly aimed at litigation could be carried out.

As secondary market suits became more frequent in the 1990s, the courts had multiple opportunities to rule against these specialized distressed debt traders, without undoing their previous rulings. The champerty decisions make especially clear how easily the legal precedent could have been used to eliminate the vulture fund strategy. Any “reasonable” person, as the courts like to say, would surely agree with Judge Sweet that Elliott had purchased Peru’s debt in order to sue for full recovery, and Elliott’s behavior since has added even more evidence to this claim. Yet other district court judges before Sweet dismissed champerty claims without much consideration, and the Second Circuit overturned Sweet’s ruling in a way that essentially invalidated the law altogether by ensuring that only a litigation-crazy lawyer, who loves being in the courtroom just for the hell of it, could ever be accused of champerty.

Perhaps recognizing the tenuous nature of this reasoning, in 2004 the New York State legislature formally eliminated the champerty defense for any claim over \$500,000.¹⁵⁰ The law established the basic legality of holdout litigation in New York, cementing the expansion of U.S. judicial authority effected by Elliott. The bill jacket “indicates that the Legislature acted out of concern that distressed debt investors’ ‘ability to collect on these claims without fear of champerty litigation is essential to the fluidity of commerce in New York.’”^{151 152}

Flight of the Vultures

As successful Brady restructurings and new bond issuances cemented the transition from loans to bonds, more and more creditors pursued the holdout strategy, often winning immense profits. Schumacher et al. sum up several examples based on a variety of court documents and media reports. In 1996, *Abbotsford Investment* made a gross return of 33-40% suing Vietnam. In the 1990s, financial fund *Kensington* bought \$13.5 million in debts of the Republic of Congo for an unknown discount. In 2002, an English court awarded *Kensington* \$56 million, and in 2008 Congo paid in full. Even assuming *Kensington* had paid full value for the debt (which it clearly did not), the firm still made a gross profit of 414% on this investment. In 2000, *Cardinal Financial Investment Corporation* purchased \$8.2 million of Yemeni debts, allegedly for 12 cents on the dollar. Yemen and the firm settled out of court for a reported \$2.7 million in 2001 — a gross return of 270% for *Cardinal*. In 2001, *FG Hemisphere* sued the Republic of Congo for

¹⁵⁰ During the same case, Elliott successfully lobbied to make compound interest on debts issued before 1989 legal (Described in *Elliott Assocs., L.P. v. Republic of Peru*, 194 F.R.D. 116 (S.D.N.Y. 2000)). New York General Obligations Law § 5-527 had been amended in 1989 to allow compound interest on commercial debts over \$250,000 for the first time, but only for debts issued after that date. The updated, retroactive, version passed unanimously in 1997 — in time for Elliott to increase the amount it was awarded in the Peru litigation. The minimum monetary limits associated with these laws, as with governing law clauses, are common scalar components of legal geographies of finance. They enable New York to remain one of the states with the strongest protections for consumer debtors, while persistently rolling back protections for foreign sovereigns.

¹⁵¹ N.Y. State Assembly, Mem. in Support of Legislation, Bill No. A7244C, at 1 (July 20, 2004) (cited in (Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, 2010, p. 15)).

¹⁵² It is widely reported in academic and popular journals that Elliott was involved in lobbying the legislature to pass this bill, and that Paul Singer contributed to the sponsoring state senator John Marchi shortly before the bill was passed, although I have not been able to independently confirm the validity of these allegations (Blackman & Mukhi, 2010; M. Guzman, 2016).

face value \$35.9 million and was awarded \$151.9 million. This judgment was fully satisfied in 2007. If FG Hemisphere had paid in full, they would still have grossed 423% in profits.

In a few cases, vulture funds failed to collect, or only collected the same amount as restructuring creditors, after years of costly litigation. Data on known creditor litigation cases since 1970, however, show that most holdouts have succeeded in getting paid most of the time (Schumacher et al., 2014), and “creditor litigation and ‘runs to the courthouse’ are increasingly common” (Das et al., 2012, p. 50). Sovereign debt governing law and holdout litigation remain concentrated first and foremost in New York, with UK jurisdictions a significant second. This litigation has targeted not only so-called “emerging market” debtors like Peru and Argentina, but the world’s poorest countries, as well. By 2006, the World Bank and IMF had calculated that “the volume of claims filed against HIPC [Heavily Indebted Poor Countries] alone [had] surpassed \$2 billion, which is higher than the volume of debt relief that should have been provided by commercial creditors to these countries” and that “the volume of claims often accounts for a considerable share of GDP and the government’s annual budget” (Das et al., 2012, p. 50). Prominent examples include claims against the Republic of Congo and São Tomé and Príncipe corresponding to roughly 15% of each country’s GDP.

In their extensive analysis of sovereign debt data from 1970-2010, Schumacher et al. (2014) show that the number of lawsuits outstanding against sovereign debtors in U.S. and U.K. courts has risen from no more than a few per year in 1976-1989; between roughly 15 and 30 per year from 1990-2004; and from 30 to over 50 per year from 2005-2010. The share of restructurings accompanied by litigation has also increased, from close to none before 1983, under 20% until 1994, under 40% until 2005, and between 40 and 60% from 2006-2010. During this period, their data show that 25 different countries have been sued by commercial creditors, in 120 separate lawsuits (41 of which involve Argentina after 2001).¹⁵³ 65.8% of these suits were against Latin American countries, 22.5% against African countries, 10% against Asian countries and 1.7% against European. To the knowledge of the authors 50.8% of these creditors had been paid, 34.1% were pending and 11.7% were unknown.

It is important to remember that many of the poorest countries in the world, which have not traditionally had access to commercial credit, have not yet been sued. The recent opening of new bond markets in Sub-Saharan Africa (see Chapter 4) will likely change that. If these numbers were updated for today, the number of cases and countries sued would go up, and the regional percentages would be somewhat different. Grenada, Peru, Venezuela, Mozambique, Ghana, Zimbabwe and Zambia, for instance, are all facing or likely to soon face the threat of new lawsuits, as is the semi-sovereign territory of Puerto Rico. The European Debt Crisis has already brought vulture funds pursuing both sovereign debt and mortgages to Greece, Cyprus, Spain, Ireland and likely elsewhere.¹⁵⁴

The Geopolitics of Holdout Litigation

Under both the Reagan and the Bush administrations, the U.S. executive branch made its support for holdout creditors clear by filing briefs in *Allied* and *Weltover*, respectively. While the

¹⁵³ These estimates differ, presumably depending on how cases are counted — (Panizza, Sturzenegger, & Zettelmeyer, 2009) for instance, report that by late 2004 almost 140 lawsuits had been filed against Argentina alone.

¹⁵⁴ For general coverage, see, among other sources: <http://www.cadtm.org>, <http://jubileedebt.org.uk>, <http://www.jubileeusa.org>.

Clinton administration did raise some concerns in *CIBC* about the possible effects of secondary debt trading litigation, in the same brief it also praised those traders for the liquidity they bring to debt markets. After decades of very visible interventions in numerous cases involving foreign governments, for the rest of the 1990s the Clinton administration chose not to intervene as the full-fledged vulture fund litigation strategy emerged more fully. Even when the Second Circuit Court of Appeals asked the U.S. executive branch if they would like to submit an opinion in *Pravin*, the U.S. Attorney's office "declined to submit a statement of interest" (*Pravin* 1997, at 854).

Yet many debtor nations, as well as the IMF, criticized this litigation strategy from the beginning for interfering with U.S.-supported debt restructurings, including those mediated by the IMF. As we saw in the previous chapter, not only were IMF and World Bank-imposed policies essential to the spread of neoliberalism and the penetration of transnational capital into much of the Third World; Brady restructurings were also essential to U.S. efforts to regain control of a debt crisis that might otherwise have threatened the entire U.S. financial system, and Brady-style restructurings have sustained dollar-dominated financial power through more and more severe debt crises ever since.

From *Allied II* on, in multiple sovereign debt cases, debtors' refusal to pay holdout creditors was presented as "unilateral," suggesting a strong critique of debtor disobedience to some kind expected norms. In fact, these debtors were not disobeying much at all. In each case in this period, the debtors involved were actively participating in negotiations with creditors, in IMF programs and, after 1989, in Brady restructurings. This raises the question of what really explains such strong U.S. support for legal changes making holdout litigation possible?

A part of the answer is that the U.S. executive's actions demonstrate Washington's commitment to neoliberal ideology and the sanctity of contract. We saw this neoliberal language after all in the Brady Plan's nearly obsessive emphasis on "voluntary" participation and in the United States' own language about the enforceability of contracts in these cases. Yet, this is complicated by the fact that in participating in IMF and Brady programs, the sovereigns in question were actively subjecting themselves to neoliberal adjustments and to receiving just enough debt relief to be able to continue paying interest on their new debts — transformations that surely served the broader U.S. and capitalist interest in neoliberalization even more directly than allowing a handful of creditors to sue did.

Another important explanation for the United States' behavior in this period has to do, as some of the sources cited above suggest, with the role of these suits in bolstering the power of the U.S. dollar via bolstering New York's financial status. In other words, this was an important part about wanting to strengthen New York's reputation as the most creditor- and more broadly contract-friendly jurisdiction in the world in order to ensure its continued importance as both legal and financial center. In these cases, we can see a clear fusion of the neoliberal commitment to free contract with the explicit support for financial interests. The New York Clearing House Association brief in *Allied II*, for instance, criticized the first Second Circuit decision on the grounds that it would "force banks to reevaluate the desirability of participating in international syndicated dollar loans arranged and payable in New York City; and...undermine New York's role as the leading international financial center" (J. Clark, 1984, p. 912). Given the broad bases of U.S. dollar and New York financial power, this threat was probable exaggerated at best. Nevertheless, such concerns, voiced soon after New York had emerged from the crises of the 1970s and refashioned itself as world financial center, likely influenced many judges and U.S. officials. This was the same year that New York passed legislation mandating that all New York

choice-of-law and choice-of-forum clauses in major commercial contracts would be honored by New York courts, regardless of whether the transaction in question had any spatial ties to New York or the United States.¹⁵⁵

Finally, there is also a more specific explanation for the U.S. executive's role in these legal developments: the relationship between litigation and restructuring strategies. In short, the litigation strategy is not diametrically opposed to restructuring at all. While it has been broadly viewed as an unfortunate byproduct of an otherwise successful regime, this strategy is actually integral to the secondary market fix and a temporal geography of crisis management moving, roughly, from IMF program, to restructuring, to paying holdouts. The litigation strategy has been widely criticized by activists, U.S. policy makers, the IMF and even other financiers for being too predatory and opportunistic and for interfering with restructurings. The restructuring strategy, in contrast, is hardly ever criticized. Yet the two are necessarily linked. In fact, it is the nature of the link between them that makes creditor litigation so harmful. Schumacher et al. (2014, pages 26–27) show based on modeling extensive data sets, that sovereign debt “legal disputes are accompanied by significant economic costs, by impeding external borrowing, by disrupting international trade, and by delaying crisis resolution.” Litigation also, however, often makes the terms of debt restructurings even harsher.

First, many funds pursue both restructuring and litigation strategies, depending on the circumstances, which means that even creditors involved in one restructuring are unlikely to support strict regulations on litigation activity that they may be pursuing elsewhere. Furthermore, because litigating holdouts demand far more money than the IMF or restructuring creditors do, successful litigation always depends on restructuring creditors giving enough relief for a country to be able to afford to pay the holdouts afterwards. This means the litigation strategy is also dependent on successful IMF programs, on which “cooperative” debt restructurings are often conditioned. The debt cases discussed in this chapter ensured that the legal framework in combination with the secondary market regime would support IMF programs, which would support private bond restructurings negotiated by distressed debt investors, which, in the end, would support litigating holdout creditors.

Yet holdouts, in turn, support distressed debt markets and restructuring creditors. As supporters of the practice sometimes point out, litigating holdouts expect such high returns that they are willing to purchase even riskier debts than restructuring creditors, further increasing liquidity for markets as a whole. Just as importantly, the threat of expensive holdout litigation also increases pressure on countries to avoid restructurings, and, in the event of default, may make them more willing to compromise with negotiating creditors. Indeed, the Clearing House Association's brief also expressed fears that a ruling in favor of Costa Rica would “encourage sovereign defaults on international loans...[and] reduce the bargaining power of lenders in debt restructuring negotiations by neutralizing the threat of swift judicial action in case of default” (J. Clark, 1984, p. 912). As Fisch and Gentile (2004, p. 1084), two proponents of the litigation strategy put it, “The Clearing House's position was seemingly motivated by a desire to establish unambiguous legal precedent for enforcing the rights of commercial banks and other creditors against sovereign debtors. A judicial decision favorable to the claim, although detrimental to their general approach to restructuring plans, would provide bank advisory committees (and other commercial banks) with additional leverage in negotiating agreements with sovereign debtors and in developing restructuring plans in future crises.”

¹⁵⁵ New York General Obligations Laws 5-1401 and 5-1402; see analysis in Potts (2016).

In some cases, the threat of holdout litigation is enough to make debtors pay up without resisting at all. In Greece, the threat of litigation was enough to cause Greece to forego roughly €4.1 billion in debt relief in 2012 by paying off all its English-law bonds, rather than risk litigation (Schumacher et al., 2014). Gulati et al. (2013, p. 1) argue even more astoundingly that the fear of messy and protracted litigation has led policymakers in Europe, with the exception of the 2012 Greek restructuring, “to use its taxpayer money to repay, in full and on time, all of the private sector creditors of Eurozone countries receiving bailouts.”

More broadly, Fisch and Gentile (2004) argue that holdout creditors actually facilitate debt restructurings by imposing extra discipline on sovereign debtors that can coerce those debtors to offer better terms to its restructuring creditors (to prevent them from suing instead). As they put it, holdout litigation plays an important role in “empowering creditors relative to debtors and minority creditors relative to the majority of the creditors” (p. 1051). Schumacher et al. (2014, p. 27) likewise note that litigating creditors may have “beneficial welfare effects” by making enforcement and thus repayment more credible, and also “may act as a disciplining mechanism against over-borrowing and opportunistic default.”

Fisch and Gentile expand further on this view that litigating creditors can prevent “opportunistic” debtors who *can* pay but simply don’t *want* to pay from defaulting in the first place.¹⁵⁶ Or, as sovereign debt policy makers have frequently noted, the threat of litigation and other fears can make the debtor delay too long before restructuring, making the eventual resolution even more painful than it would have been (*e.g.*, UNCTAD, 2015, p. 4). What both these versions overlook is the way that, since the emergence of significant secondary debt markets, delaying a restructuring actually allows time for the crisis to escalate and the price of that sovereign’s bonds to drop even further, while still being actively traded by investors gambling on the timing of default (as in the case of Venezuela discussed in Chapter 4). The lower these prices get, the higher the profits made by restructuring and litigating creditors will eventually be.

In their discussion, Fisch and Gentile make the move, common among sovereign debt analysts, of framing the lack of “legislative standards or secure judicial review” governing the restructuring process as something that promotes the power of *debtors* over creditors: “the absence of a formal proceeding for evaluating the debtor’s financial condition creates a risk of unreasonable restructuring terms...[that] may discriminate against minority creditors” (p. 1048). Yet such statements are either ignorant or, more likely, cynical. As discussed in Chapters 1 and 3, from the very start of the Third World debt crises in the early 1980s, to the development of the Brady Plan in 1989, to the failed IMF Sovereign Debt Restructuring Mechanism efforts in the early 2000s, to the recent stonewalled United Nations General Assembly attempts to develop a binding international framework for restructuring sovereign debts, the vast majority of financiers and the U.S. government have been staunchly and vociferously opposed to anything that would codify or systematize debt restructurings in any way.

Finally, insofar as they strengthen holdouts, who increase the amount restructuring creditors can demand, the legal changes effected by vulture fund litigation enhance all these dynamics. They also often help all secondary debt traders directly by creating new legal standards. For example, Elliott’s lobbying to make New York’s 1989 compound interest law apply retroactively helped other creditors pursuing debts from the 1980s or before. By litigating the “financial

¹⁵⁶ For instance, they point out (p. 1053) that often a debtor defaults in order to be able to use funds to “alleviate discontent within the sovereign debtor’s borders” when it could perfectly well pay that money to a foreign creditor instead.

institution” question, these holdout creditors ensured that hedge funds and other boutique investors would definitively be considered proper assignees in secondary debt markets. And by eliminating the champerty defense, first in court, and then in the New York state legislature, Elliott ensured that any financier could sue or threaten to sue a sovereign debtor if and when he so desires.

In short, the official elevation of the sanctity of contract above the United States own explicit support for IMF programs and debt restructurings did not undermine the latter at all. Rather, it allowed for the creation of a new juridico-economic geography, in which the expansion of New York judicial power over transnational sovereign debt contracts bolstered the power of both holdout and restructuring financiers. These restructurings not only tended to offer less debt relief than the IMF and the World Bank recommended (see previous chapter), but also required that countries be engaged in the systemic neoliberalization of their economies implied by IMF and World Bank policy conditionalities. At the same time, the worse the terms of debt restructurings for the debtor, the more dependent on IMF and World Bank aid Third World countries would remain — bringing the links between neoliberalization, financialization, and more neoliberalization full circle, via the mechanism of sovereign debt crises governed by U.S. law.

The reconfiguration of the legal framework for governing sovereign debt relations was an important step in the United States’ longer project of strengthening U.S. hegemony and leveraging the power of U.S. courts to impose discipline on Third World states, while disguising U.S. geopolitical interests behind supposedly a-political, technical legal processes. The legal developments of the 1980s and 1990s that bolstered the secondary market regime were made possible by extensions of U.S. juridico-economic territory in response to the Cuban Revolution, and increased as a result of the Third World debt crises of the 1980s. While these explicit spatial claims were less central to many of the vulture fund cases in the 1990s, however, the spatial question has been far from settled. For one thing, the question of the geographies of jurisdiction and justiciability remains distinct from that of enforcement and attachments. In some of these cases, the ability to at least harass debtors by seizing some assets was key to convincing them to obey the U.S. judgments. In most sovereign debt cases, the lack of an official enforcement mechanism does not prevent ultimate payment. Nevertheless, the relative lack of legal ability to attach (seize) sovereign property was and remains a serious bar that holdout creditors have not yet fully dismantled.

They did make one stride in that direction in *Elliott v. Peru*. Even after Elliott won its judgment against Peru in 1999, Peru at first refused to pay. Shortly after, Elliott obtained attachment orders against Peru in Belgium, Luxembourg, the United States, the United Kingdom, Germany and Canada. As it happened, many of Peru’s newly restructured creditors received their interest payments through the Belgian-based payments-processor Euroclear. In a now famous episode, a Belgian court accepted Elliott’s interpretation of a *pari passu* clause in its Peruvian debt and ruled that any member of Euroclear who accepted payments from Peru through that system would be fined.¹⁵⁷ Many of Peru’s creditors were thus reluctant to accept payment. Afraid of facing another default, within months, Peru agreed to pay Elliott in full — a payment that brought Elliott a gross return of 400% (Fisch and Gentile, 2004; Schumacher et al., 2014; Singh, 2003). The ruling caused great consternation in the sovereign debt community (Gulati and Scott, 2012). In Belgium, it was soon addressed by passing legislation protecting Euroclear from

¹⁵⁷ *Elliott Assocs., L.P.*, General Docket No. 2000/QR/92, Cour d'Appel [CA] [Court of Appeal] Bruxelles, 8ème ch., Sept. 26, 2000 (Belg.).

such rulings in the future (Weidemaier & Gelpern, 2014). The *pari passu* interpretation, however, would later prove central in Elliott subsidiary NML Capital's case against Argentina.

Chapter 6 – Sovereign Debt, Default, and Discipline

Having documented and analyzed the history of U.S. judicial expansion in the past three chapters, it is now possible to return to the case of *NML Capital v. Argentina*, in order to re-interpret this litigation in territorial terms. In this chapter, I explore the detailed spatial arguments at the heart of the case, examining why different actors involved pushed for different legal borders. This litigation has produced tensions and contradictions among financiers, between the U.S. judiciary and the U.S. executive, and more broadly for the global, debt-driven financial order as a whole.

NML Capital v. Argentina

After Argentina defaulted on over \$80 billion in sovereign bonds in December 2001, a flood of creditors brought suit. Panizza et al. (2009) report that by late 2004, almost 140 distinct lawsuits, including 15 class action suits were filed. NML Capital was one of those creditors. Most of these suits ended in summary judgment for the litigating creditor, but as usual in the case of sovereign debt, collecting on those judgments was not easy. NML and other creditors sought to attach numerous Argentine assets. The vast majority of these attempts were unsuccessful. In 2005, at least one was blocked by the district court in order to allow Argentina's 2005 restructuring to go through unhindered (Panizza et al., 2009). While most of Argentina's creditors accepted that 2005 offer, and most of the rest accepted the 2010 offer, some did not.

Unable to collect on its money judgments, NML tried a different strategy. In 2008-2009, they initiated suit on another set of more than \$220 million in Argentine bonds.¹⁵⁸ This time, NML and a handful of other hedge funds (NML et al.) declined to have their win reduced to a money judgment. Instead, they asked Judge Griesa for injunctive relief or "specific performance." That is, instead of asking for money damages, they sought a court order forbidding Argentina from a particular act: paying the exchange bonds. In addition, they raised the *pari passu* — or "equal footing" — clause that NML's parent company Elliott had used against Peru in 2000. They got their wish.

This chapter focuses on the period between the issuance of Griesa's *pari passu* order and corresponding injunction in 2011-2012 and Argentina's settlement with NML et al. and other holdout creditors in 2016. In late 2011, Griesa issued the *pari passu* order declaring it illegal for Argentina to continue to pay the exchange bondholders without paying the litigating holdout creditors (see Chapter 2).¹⁵⁹ In February and November 2012, he backed up this order with the ratable payment injunction declaring that it was illegal for Argentina to pay the exchange bondholders if it did not pay the holdouts a "ratable" amount first — and that anyone who helped Argentina process these payments would be breaking the law, too.¹⁶⁰ (I will refer to these three orders collectively as the Orders). All the Orders were stayed while Argentina appealed the case.

¹⁵⁸ See amounts listed in: Opinion, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG) (S.D.N.Y. Sep. 28, 2011).

¹⁵⁹ Order, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG) (S.D.N.Y. Dec. 7, 2011).

¹⁶⁰ Order, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG) (S.D.N.Y. Feb. 23, 2012); Amended February 23, 2012 Order, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG), 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012).

The Orders dramatically altered not only the terrain of this case, but of sovereign debt dynamics in general. They did so because they changed the spatial rules on which sovereign debt law had operated for the previous twenty years. The Orders greatly expanded New York's juridico-economic territory in sovereign debt cases, both over far more places outside the United States and over more parts of the debt payment stream. Because of this, the Orders provoked a flurry of legal responses from many third parties, most arguing about the propriety of these spatial claims. In August 2013, the Second Circuit Court of Appeals upheld Griesa's rulings, but again stayed the Orders pending review by the U.S. Supreme Court. In June 2014, the Supreme Court declined to hear the case and the stays were lifted, thereby affirming, at least for now, this new legal geography.

As the *pari passu* case was climbing up the legal ladder, NML et al. were pursuing a related case as well, pushing for the right to demand information about Argentina's assets located anywhere in the world. On the same day that it declined to hear the *pari passu* case, the Supreme Court issued an opinion in this discovery case siding with NML et al. and extending U.S. judicial territory in discovery claims far wider than it ever had been before (hereafter the Discovery Opinion).¹⁶¹ While the Discovery Opinion has received far less attention than the *pari passu* Orders, they should in fact be understood as linked parts of the same sovereign debt strategy, and together they greatly expanded New York judicial and private creditor power at the expense of the territorial sovereignty of indebted states and even many Western European states where debt payments are processed. While the scope of these decisions may still be challenged by foreign courts in the future, insofar as they hold, they will have implications for transnational commercial relations with sovereigns beyond the debt context.

In this chapter, I analyze the spatial struggles unfolding in the *pari passu* and discovery cases to argue that while both are part of explicit attempts to discipline Argentina for its "bad" behavior, the *terrain* on which these cases are fought is deeply territorial. The borders produced in these struggles are highly irregular and varied, but the *pari passu* and discovery orders have in common that they not only further extend the category of what is considered "in the United States" but actually invert the previous territorial logic governing relations with foreign sovereigns. Whereas the logics explored in the context of nationalizations in the 1960s and 1970s and sovereign debt in the 1980s and 1990s often functioned by expanding the legal borders of the United States, here the logic is inverted so that U.S. courts claim to have injunctive and discovery powers over anything *not located in Argentina*. This is a major new extension of U.S. judicial power. It has also brought the U.S. judiciary into direct conflict with the U.S. executive branch and illuminates the fact that the U.S. judiciary now shows little or no deference to the executive in cases involving commercial relations with foreign governments. This judicial independence or insouciance, depending on your viewpoint, is justified by the courts on the grounds that these sovereign debt cases are purely private and commercial. This was only made possible, however, by the systematic enlargement of the legal category of the private since the 1950s. That category has been expanded far further in these cases. In short, the legal terrain the U.S. executive worked so hard to promote has now been turned on the executive itself, in ways that may yet have far-reaching implications for the United States' position in the world.

The *Pari Passu* Orders and Injunctions

¹⁶¹ *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. ____ (2014).

The language of contracts literally writes material financial geographies into being (Appel, 2011). But it does not do so in isolation. It is never the text of contracts alone that determines the form of the transaction and how it unfolds across the years. Rather it is the text in the *context* of an entire political, economic and legal framework that determines how that text gets interpreted and applied, how it is understood in relation to other legal rules and contracts, and, when logical or legal conflicts arise, whether this contract or other legal rules are given precedence. Griesa's Orders were based on the contract language in NML's bonds. Those bonds were originally issued in 1994, as Argentina emerged from the debt crises of the 1980s. The Fiscal Agency Agreement behind the bonds contains, like almost all sovereign bonds, a *pari passu* clause. That clause reads:

The Securities [*i.e.*, the bonds] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.¹⁶²

As discussed in Chapter 2, the *pari passu* clause has long been a “boilerplate” clause in sovereign bonds, yet its meaning has always been considered unclear. It has usually been taken to mean that one series of bonds cannot be legally ranked below that of another. The important point is that, until the Belgian court's 2000 ruling in the Elliott attachment case (see Chapter 5), no court had ever interpreted the clause to mean that a debtor could not pay one creditor without paying another. Years later, Elliott's subsidiary NML Capital raised that argument again. In December 2011, in a ruling made directly from the bench, Griesa changed his mind (Weidemaier, Scott, & Gulati, 2013). He noted that Argentina had issued new “unsecured and unsubordinated External Indebtedness” in 2005 and 2010 (S.D.N.Y. 2011 at 2). Furthermore, Argentina had passed Law 26,017 in 2005. Known as the “Lock Law,” it provides that the “national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to bonds” that were held back from the 2005 exchange offer (*id.* at 3). Making payments on those exchange bonds, but not on NML's bonds, Griesa ruled, constituted a lowering of the rank of NML's bonds below Argentina's other bonds and therefore violated the *pari passu* clause in the FAA. Crucially, Griesa did not limit his ruling to this particular case by saying that it was the Lock Law alone that violated the *pari passu* clause as the United States¹⁶³ and other third parties immediately urged him to do (see also Allen & Overy, 2012). Rather, he listed both paying the exchange bondholders *and* the Lock Law as violations.

In and of itself, this order simply declared that Argentina was in breach of contract, but did not lay out any particular punishments or means of enforcing them. On February 23, 2012, however, Griesa addressed this with a corresponding injunction. Because otherwise NML would never be paid, Griesa argued, he would use his “equitable powers” to order that:

Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any

¹⁶² As cited in the S.D.N.Y. Dec. 7, 2011 Order.

¹⁶³ Brief for the United States of America as Amicus Curiae in Support of Reversal, *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. Apr. 4, 2012) (No. 12-105-cv(L)).

subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the “Exchange Bonds”), the Republic shall concurrently or in advance make a “Ratable Payment” (as defined below) to NML (S.D.N.Y. Feb. 2012 Order at 3-4).

Griesa furthermore enjoined Argentina from making any payments on the exchange bonds without paying NML, and ordered that “all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds (collectively, “Agents and Participants”)...shall be...prohibited from aiding and abetting any violating of this ORDER” (*id.* at 4-5). He also ruled that NML was entitled to discovery about all payments on the exchange bonds and prohibited Argentina “from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court’s ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments...” (*id.* at 5). The seeds of the legal arguments that would ensue were all contained in this order. What exactly did “ratable payment” mean? Which third parties precisely could be bound by this injunction? How far did NML’s right to discovery extend? And how much authority did Griesa have to prevent Argentina from making or rerouting its payments?

It is significant that Griesa did not explicitly limit the spatial reach of his injunction at all. He did not say that Argentina was prohibited from making payments on the exchange bonds that were paid in the United States or even with direct effects in the United States. He likewise did not limit the third parties prohibited from helping Argentina make payments to those agents and participants located in the United States. Nor did he say that Argentina could not reroute its payments through other routes that would pass through the United States in any way. Whether intentional from the beginning or not, Griesa and the higher courts would eventually affirm the broadest possible spatial readings of these Orders, despite heated disagreements from third party financiers, the U.S. government and others.

As explained in Chapter 2, injunctive relief is not exactly part of the common law, but rather an *ad hoc* judge-based rule designed to facilitate compliance in a particular case. In other words, Griesa neither could nor needed to show that previous judges had ever issued an injunction like this before. Injunctive remedies are based not directly on existing law, but rather on the judge’s assessment of “the equities.” In this case, Griesa justified these extraordinary measures, without naming it as such, precisely by reference to the legal gap between judgment and enforcement that had always existed in sovereign debt law. In other words, he argued that because there was no “adequate remedy at law” for forcing Argentina to pay, NML would suffer “irreparable harm” if he did not find another way to do so (*id.* at 2). He justified this in terms of the “public interest of enforcing contracts and upholding the rule of law” (*id.* at 3). Ironically, he based the need for this relief in part on the *lack* of a sovereign debt bankruptcy regime, which he reasoned meant that “creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises” (*id.*) In other words, he made the common move of framing the lack of this regime as hurting *creditors* when in fact we’ve seen how private creditors and the U.S. government have worked very hard to prevent the establishment of such a regime.

In the process, Griesa rhetorically invoked the public/private distinction, by arguing that this whole case should be placed in the domain of the private: “No less than any other entity entering into a commercial transaction,” he wrote, “there is a strong public interest in holding the

Republic to its contractual obligations” (*id.*). While explicit legal debates about how to define the private and commercial are less present (though not absent) in the ensuing *pari passu* debates, that distinction is still crucial to the underlying justification for these Orders. Over the next few years, NML et al. and the courts continued to cast Argentina as simply a normal, private debtor like any other, while Argentina, the U.S. government, France, Mexico, and many third party financiers emphasized the importance of Argentina’s sovereign status. Although in the end, the importance of Argentina’s public, sovereign status was not completely denied by the courts, this case and the related discovery case have been significant steps forward in expanding the legal domain of the private and commercial and restricting that of the public and sovereign.

Finally, while the injunction was designed to work via expanding Griesa’s spatial authority, it was intended quite explicitly to discipline Argentina. For example, in the injunction Griesa justified his *ad hoc* approach on the grounds that “the Republic has made clear...its intention to defy any money judgment issued by this Court” (*id.* at 2). The fact that the legal distinction between jurisdiction to issue judgments against sovereigns and to enforce them is codified in the Foreign Sovereign Immunities Act (FSIA) did not in any way mitigate Griesa’s anger at being disobeyed. Griesa made these Orders knowing full well that he was breaking new legal ground. During the hearing before the injunction was issued, he admitted as much:

I am going to sign this order. *It’s not the first time that a court has signed an order that may have problems. But to me the bigger overriding problem is the lawlessness of the Republic.* When I say lawlessness I mean the deliberate, continued failure to honor the most clear-cut obligations in the debt instruments, the most clear-cut assurances in the debt instruments. Those have been turned into a dead letter by the Republic (emphasis added).¹⁶⁴

The Second Circuit would later echo these sentiments.¹⁶⁵

At first, however, that Court was unsure about some of the details of Griesa’s Orders. In October 2012, they affirmed the Orders in principle, but remanded the case back to Griesa to clarify the exact interpretation of “ratable payment” and precisely which third parties should be considered subject to the injunction.

Considerable debate about how much the holdouts should be paid ensued. These arguments were covered extensively in the financial and legal press. In short, Argentina and others argued that equal payment should mean the holdouts should get the same amount as the exchange bondholders — otherwise, Argentina argued, the holdouts would be the ones receiving preferential treatment and the problem would simply be reversed. Barring that, Argentina and others argued that ratable payment should mean that if, say, a payment due on December 31 was equal to 1% of the total amount due over the life of the exchange bonds, then NML et al. should get 1% of the \$1.3 billion they claimed to be owed at the same time.¹⁶⁶ NML in contrast argued that if the exchange bondholders were paid 100% of what they expected to receive on December 31 (say \$200 million), then NML et al. should receive 100% of what they were owed as of that

¹⁶⁴ Transcript of Oral Argument at 48-49, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. Feb. 23, 2012) (No. 03 Civ. 8845 (TPG)).

¹⁶⁵ Transcript of Oral Argument, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d. Cir Feb. 27, 2013) (No. 12-105-CV(L)); *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d. Cir 2013).

¹⁶⁶ *E.g.*, Memorandum of Law of the Republic of Argentina in Response to Plaintiff’s Brief on Remand, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 16, 2012).

day — the whole \$1.3 billion.¹⁶⁷ In his November 2012 order, Griesa accepted NML’s reasoning in full. The logic of each argument has been debated at length in and out of the case. The only point I will make here is that none of these interpretations *necessarily* follows from the text of the FAA bonds or from Griesa’s initial injunction. As is almost always the case, multiple plausible interpretations are possible. The point is that Griesa chose the interpretation that most favored the vulture funds, and in August 2013 the Second Circuit affirmed this reading.¹⁶⁸

In this chapter I focus not on the proper interpretation of *pari passu* or ratable payment, but instead on the spatial logic of the injunction. Griesa also followed NML’s exact suggestions in construing the scope of third parties bound by the injunction as broadly as possible. At a hearing on the matter in February 2012, Griesa himself had expressed doubts about the legal validity of doing so:

Now, look, [the proposed injunction] would indeed be a mechanism for enforcement but it also presents a very serious problem. So let me ask you this. *Is there any legal authority, is there any legal basis for me to use the pari passu clause to interfere with the payment to the exchangers?* ... Now, if I entered this order, this would impose an obligation on the banks and it might impose an impediment upon the banks with respect to the exchange offer people which does not exist now. They get the money and presumably they pay the exchangers. There is no condition, no impediment. This would obviously present an impediment, a condition. *Is there any legal basis for doing that?* (emphasis added) (S.D.N.Y. Transcript, Feb. 23, 2012 at 7-8).

Yet, nine months later he accepted NML’s arguments word for word. While Griesa and NML agreed that the injunction could not, for legal reasons, apply to the exchange bondholders themselves, nor to “intermediary banks,” they argued that it could apply to every other third party financier in the payment chain *and* that no bank involved was technically an intermediary bank. Included in the Amended Injunctions was a detailed list of third parties to be prohibited from aiding Argentina in processing payments, including:

(1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York); (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London))); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds (S.D.N.Y. Nov. 2012 Order at 5-6).

¹⁶⁷ E.g., Brief of Plaintiffs in Response to the Remand from the Court of Appeals, *NML Capital v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 13, 2012).

¹⁶⁸ *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d. Cir 2013).

As you can see, multiple European payment institutions were explicitly included in this list. It was this massive and, many argued, “extraterritorial” reach that made the injunctions potentially effective. It also brought a flood of third parties into the case in 2012.

Crucially, the exchange bondholders and the payments processors argued that Griesa’s Orders violated their own contract rights in the name of upholding the contractual rights of the plaintiffs. In short, the Order’s worked by preventing the exchange bondholders from getting paid. This shows clearly that the *pari passu* case is not about upholding contracts or not upholding contracts. At most it is about determining *which* among *conflicting* contracts to uphold.¹⁶⁹ As Weidemaier and Gelpert (2014, pp. 216–217) put it in a critique of Griesa’s unprecedented injunction, “Cursory references to ‘the public interest of enforcing contracts and upholding the rule of law,’ cannot explain how these interests are served by an injunction that allows the sovereign to comply by breaching its contracts *en masse*.”

As the case unfolded, Argentina, the U.S. executive branch and many of the third parties also argued in their briefs that the injunctions violated the exchange bondholders’ due process rights, and that they would hurt the “public interest” by harming future sovereign debt restructurings and New York City’s financial status. The vulture funds and some of their supporting amici argued, in contrast, that the systemic implications of the case would be limited by Argentina’s supposedly unique recalcitrance, and that showing the courts’ commitment to contract rights in this way would help New York’s financial status. But throughout the case, hundreds of pages of briefs and decisions focused not on these big questions, but rather on the spatial details of the injunctions and their validity. It is these spatial arguments that I address in the following section.

The *Pari Passu* Case: Geographies of Payment, Ownership and Agency

The arguments about the proper scope of the injunctions in this case revolved around two interrelated questions: *how far* did Griesa’s authority, and thus the injunction, properly extend, and to *whom*. The legal arguments about both questions revolve around three interlinked spatial debates surrounding, respectively, geographies of payment, geographies of ownership and geographies of agency. International payment streams today, including those used to pay the exchange bonds, commonly pass through multiple payment processors. The first key geographical question relating to the propriety of the injunction refers to where along the multi-party payment stream does a payment go from being in Argentina, to being outside Argentina, to being in the United States. The second refers to where along that same stream, the payment passes from *belonging* to Argentina to belonging to the exchange bondholders. The third refers to where, along that stream, the payment *processors* go from acting *on behalf of* Argentina, to acting on behalf of the exchange bondholders. These arguments all rest, in turn, on a terminological question about whether the payments in question were being “attached,” “enjoined” or something else by the injunction. Although the briefs are full of detailed legal arguments about these matters, the key spatial arguments can be boiled down according to party and the type of bond in question.

In the next few subsections, I first analyze the spatial arguments of Argentina, the exchange bondholders and third party financiers with regard to the U.S. dollar denominated, New York

¹⁶⁹ For a good discussion of this point, see generally Opposition Brief of Interested Non-Party Fintech Advisory Inc., *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 16, 2012).

law bonds and the euro-denominated English law bonds at issue. I then explain NML et al.’s counter-arguments, followed by the courts’ decisions. In the last subsection, I turn to the position of the U.S. executive to look at the changing relationship between the U.S. judiciary and the executive branch, and what the implications are for understanding the U.S. executive’s position on sovereign debt restructuring today.

The U.S. Dollar Exchange Bondholders

After Griesa issued the initial Orders, over fifty exchange bondholders entered the case. The bulk of these funds are hedge and other specialized investment funds, most specializing at least partially in distressed debt trading. Most of the U.S.-dollar, New York law bondholders joined together as the Exchange Bondholder Group (EBG), headed by Gramercy Funds Management.¹⁷⁰ Fintech Advisory, another hedge fund, filed separately. In multiple briefs and hearings at the District Court, Second Circuit and Supreme Court levels, Argentina, the EBG, Fintech, and third party payment processors like the Depository Trust Company, the Clearing House Association and the Bank of New York Mellon, as well as the U.S. executive branch, argued that Griesa’s injunctions improperly tried to seize funds that were, at the start, immune, and that, after that, belonged to the exchange bondholders, not to Argentina.

This argument is based on a further legal claim that the injunction is a *de facto* attachment attempt. That is, although the injunction claims not to be “seizing” assets belonging to Argentina or anyone else, Argentina and other parties argued that telling Argentina what to do or what not to do with those assets is just an attachment in disguise. This is important for two reasons. First, the FSIA provides that only sovereign assets that are used for a commercial activity in the United States are not immune from attachment. Thus, as long as a sovereign’s money is outside the United States, it cannot be attached by order of a U.S. judge. Second, New York law forbids attaching the money of one of a debtor’s creditors for the sake of paying another of that debtor’s creditors (Arg. Memo of Law Nov. 16, 2012 at 25, citing N.Y. U.C.C. § 4-A-502, 503). This is the basis for the argument that, once the money in question *belongs to* the exchange bondholders, it cannot legally be attached in order to pay the plaintiffs.

All parties involved, including Griesa and NML, agreed that the violation in question was Argentina’s. They also agreed that the court only had legal standing to enjoin Argentina and Argentina’s property, not the exchange bondholders or their property (which is why the exchange bondholders were carefully excluded from the injunction). The rest of the argument made by Argentina and the exchange bondholders depends on geographies of payment and of ownership.

While the bonds are in Argentina, they reasoned, they are sovereign property within the territory of a foreign sovereign state and thus cannot be seized by Griesa, because it would constitute an unwarranted extra-territorial extension of U.S. judicial reach, and, specifically, because that would be a violation of the FSIA. The initial payment on the exchange bonds is always made to the Bank of New York Mellon’s (BNYM’s) branch *in Argentina*. Significant time in many of the briefs and the oral arguments was spent on establishing this point, with

¹⁷⁰ The constitution of this group changed over the next few years, but in December 2012, the EBG was comprised of fifty-three funds, including multiple subsidiaries of the same parent funds — for instance, thirteen separate Gramercy entities were listed.

Griesa himself asking for many details of the payment transfer process.¹⁷¹ The basic process, which even NML did not question after some initial wrangling, was agreed to move from Argentina to the Bank of New York Mellon in Argentina, to the “registered owners” of the bonds in New York (either the Depository Trust Company or its nominee Cede & Co.), to financial institutions like JP Morgan or Citibank, and eventually to the “beneficial interest holders” — the exchange bondholders.

Thus, Argentina, for example, argued in its November 13, 2012 petition for a Second Circuit re-hearing,¹⁷² that:

The [Court of Appeals’] Decision affirmed the district court’s unprecedented orders restraining the Republic from making payments *outside the United States* to the holders of over 91% of its defaulted debt...unless the Republic makes an undefined ‘Ratable’ payment to plaintiffs on their defaulted debt with funds also *located outside the United States* that are *categorically immune from attachment* and restraint under the Foreign Sovereign Immunities Act (at iv).

In the same brief, the Republic argued further that: “The Court effectively commandeered immune Republic assets to pay plaintiffs, and ordered the Republic not to use equally immune assets to pay other legitimate debts unless it submitted to this commandeering. A greater affront to sovereignty and sovereign immunity is harder to imagine” (emphasis added) (*id.* at 7).

In April and December 2012,¹⁷³ the U.S. executive branch made these arguments just as forcefully. It critiqued Griesa’s Orders for violating the FSIA by telling Argentina what to do with assets that are immune from execution, and even for telling Argentina not to reroute its debt payments to avoid U.S. jurisdiction. This, the U.S. executive branch wrote, was a “breathtaking assertion of extraterritorial jurisdiction” (April 2012 at 22). Its briefs discussed at length the longstanding and intentional distinction codified in the FSIA between U.S. powers to claim jurisdiction and issue *judgments* against foreign sovereigns, and the much more limited scope given to U.S. powers of attachment and enforcement. Their first brief stated that, “Sovereign property located outside of the United States plainly falls outside the court’s enforcement authority” (*id.* at 23). They even go so far as to say that the injunction would likely be improperly extraterritorial even if it were aimed at a private party.

The second half of the argument about the U.S. dollar denominated exchange bonds depends on a further argument about the geography of legal ownership. As soon as that first payment is made in Argentina, this argument goes, the money in question no longer belongs to Argentina at all, but rather to the exchange bondholders, and thus can no longer be seized under New York law. As the EBG said in a characteristic quote in its December 2012 brief¹⁷⁴: “those payments,

¹⁷¹ E.g. Transcript of Oral Argument, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. Nov. 9, 2012) (No. 08 Civ. 6978 (TPG)).

¹⁷² Petition for Panel Rehearing and Rehearing En Banc of Defendant-Appellant the Republic of Argentina, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Nov. 13, 2012).

¹⁷³ Brief for the United States of America as Amicus Curiae in Support of Reversal, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Apr. 4, 2012); Brief for the United States of America as Amicus Curiae in Support of the Republic of Argentina’s Petition for Panel Rehearing and Rehearing En Banc, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 28, 2012).

¹⁷⁴ Brief for Non-Party Appellants Exchange Bondholder Group, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 28, 2012).

once transferred from the Republic to BNYM *in Argentina*, are the legal and exclusive property of the Exchange Bondholders” (emphasis added) (at 20).¹⁷⁵ The EBG actually argued that even if the initial transfer were to go from Buenos Aires to New York (which, they were clear, it did not), the court still would not have a right to those funds because “irrespective of the location, the payments belong to the Exchange Bondholders the instant they are received by BNYM” (*id.* at 20). Nevertheless, in each of their many briefs over the years, they were careful to emphasize that the payment did occur *in Argentina* and thus that, any way you cut it, by the time the money left Argentine territory, it belonged exclusively to the exchange bondholders.

In making this argument, its proponents explained the rules established in the “trust indenture” governing the 2005 and 2010 exchange bonds:

Under the terms of the governing Indenture, the Republic pays the holders of that debt in Argentina when it pays the Trustee [BNYM], which receives, holds, and transfers the funds in trust for the beneficial owners of the restructured debt... Once that transfer takes place, the Republic has no right to the funds, and they are no longer the property of the Republic (Arg. Memo of Law Nov. 16, 2012 at 16-17).¹⁷⁶

By the same token, it was argued, once the initial transfer was made to BNYM, that bank, and all the succeeding payment institutions were not “agents” of Argentina at all, as NML claimed; rather, they were acting only on behalf of the exchange bondholders. BNYM itself made this point, arguing strenuously that it was legally and in practice completely independent of Argentina, labeling one subsection of the brief: “The Amended Injunctions Constitute Far-Reaching Judicial Intrusion Into Indenture Trustee Relationships And Threaten Upheaval In The Capital Markets” (at 19).¹⁷⁷

Having argued that the initial payment occurs entirely within Argentina, and that once it gets to BNYM in Buenos Aires it is the sole property of the exchange bondholders and that BNYM and all the other third parties listed in the injunction are operating only on behalf of those bondholders, Argentina summed up the implications for the case: “Once the third parties are properly excluded from the Amended Injunctions, the only enjoined act remaining is the Republic’s payment to BNYM outside the United States. In addition to the fact that such an injunction violates the FSIA, to the extent they only restrain acts that take place beyond the jurisdiction and control of the district court, the Amended Injunctions must be vacated as impracticable” (Arg. Brief Dec. 2012 at 44).

The EuroBondholders

¹⁷⁵ See also, among others, Brief for Non-Party Appellant Fintech Advisory Inc., *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 28, 2012); Brief of Defendant-Appellant the Republic of Argentina, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 28, 2012).

¹⁷⁶ This kind of legal specificity about ownership and agency is standard in financial contracts of all kinds today, and is intended precisely to erect legal barriers to liability, taxes and so on. NML’s challenge to established rules about the geography of ownership in this case, if picked up by other judges, could extend significantly beyond the context of sovereign debt.

¹⁷⁷ Motion by Non-Party the Bank of New York Mellon, as Indenture Trustee, for Leave to Appear and to Submit Briefs as an Appellant on the Merits of the District Court’s November 21, 2012 Injunctive Order and Opinion, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 3, 2012).

Not all the exchange bonds were denominated in U.S. dollars or governed by New York law. After Griesa issued the injunctions, a group of Euro Bondholders¹⁷⁸ and, separately, the investment firm ICE Canyon,¹⁷⁹ all holding euro-denominated, English law bonds entered the fray in order to argue that even if the injunction was held to apply to the U.S. dollar New York law bonds, it surely could not be claimed to apply to their own. These parties agreed with the geographies of ownership and agency above, but spent much more time on the geographies of payment because the payments on their bonds *never* flowed through the United States at all. Their arguments thus focused on the extraterritorial nature of the injunctions' application to payments and parties located in Europe. Euroclear, a major payments processor located in Brussels, also submitted multiple briefs in this case.

First, these parties argued, the fact that these bonds are governed by the law of England and Wales means that it is doubtful that Griesa has any jurisdiction over Argentina with respect to *these* bonds at all. Furthermore, the Euro Bondholders argued, payments are at all points outside the United States: "Payments on the Euro Bonds are made by the Republic to a bank in Argentina, transferred to a bank in Germany, and then distributed by European clearinghouses to the ultimate beneficiaries... At no point in the payment chain do funds enter the U.S. or flow through U.S. entities" (2012 at 2-3).¹⁸⁰ Contrary to the plaintiffs' claims, moreover, the Euro Bondholders informed the court, the indenture for their bonds did not even require the Euro-bond trustee to maintain an office in NY, but only in London. In its own briefs, Euroclear, one of the "clearinghouses" referred to in this quote, insisted that it was a non-U.S. entity, with no significant operations in the United States. By enjoining it and other European settlement systems, Euroclear argued "the District Court purports to regulate and control the conduct of institutions and activities with little or no connection to the United States" (2014 at 8).¹⁸¹

These orders thus violate the presumption in U.S. law against extraterritoriality, a presumption, ICE Canyon argued, "based on the respect that should be accorded the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons inside its borders" (2013 at 31). Like the U.S. bondholders, these parties argued that trying to attach or otherwise enjoin these European institutions and payment streams was a direct violation of the FSIA. As the Euro Bondholders put it in their brief before the Supreme Court:

¹⁷⁸ Consisting of Knighthead Capital Management, LLC, Redwood Capital Management, LLC, and Perry Capital LLC, "each on behalf of one or more investment funds or accounts managed or advised by it" (Motion of the Euro Bondholders for Leave to Intervene as Interested Non-Parties at 1, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 4, 2012).

¹⁷⁹ ICE Canyon actually held Euro-denominated "GDP-linked securities, a distinct financial instrument that only pays out in proportion to Argentina's GDP each year. For the sake of this case, the courts decided to treat these as the same as the exchange bonds.

¹⁸⁰ See also Emergency Motion of ICE Canyon LLC for Leave to Intervene in Appeal as an Interested Nonparty, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 21, 2012), arguing (at 3) that payments are made entirely in Europe, and lack any "nexus" to the United States; and Brief of Intervenor Ice Canyon LLC, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Jan. 1, 2013), explaining (at 3) that the GDP-linked securities are "paid through a process occurring entirely outside the United States and involving only foreign entities."

¹⁸¹ Brief of *Amicus Curiae* Euroclear Bank SA/NV in Support of Petitioner, *Republic of Argentina v. NML Capital, Ltd.*, No. 13-990 (U.S. Mar. 24, 2014).

The Second Circuit’s decision is particularly troubling in regard to the payments that Argentina makes on its euro-denominated exchange bonds (‘Euro Bonds’), which flow from Argentina to Germany and then either to Belgium or Luxembourg, and thus are entirely immune from attachment under the FSIA. The lower courts nonetheless affirmed unprecedented extraterritorial injunctions that upend the FSIA’s carefully constructed immunity scheme (at 1).¹⁸²

As the Euro Bondholders, Argentina, Fintech, BNYM and other parties affected by the injunctions all protested in their briefs, citing a famous quote from Judge Learned Hand, a court “cannot lawfully enjoin the world at large, no matter how broadly it words its decree.”¹⁸³

The Vulture Funds

NML et al. and a few *amici* filing on their behalf got around these spatial arguments by having a different debate entirely. In one early brief (Nov. 13, 2012) in the post-injunction litigation, NML did try to argue that Argentina’s first transfer of funds to BNYM ended in New York City, not Argentina. However, once both BNYM itself and Argentina directly refuted this,¹⁸⁴ NML dropped this line of argument. Rather they focused on the argument that they are not enjoining anyone but Argentina, and not attaching anything at all — rather they are simply directing Argentina not to use their funds in a particular way (to pay the exchange bondholders), without also paying the holdout plaintiffs. This, they argued explicitly, meant that there is no violation of the FSIA.¹⁸⁵ Instead, they were enjoining Argentina, which had submitted to the jurisdiction of New York Courts. And, under Federal Rules of Civil Procedure 65(d)(2), all parties in “active concert or participation” with the enjoined party and its pursuit of the enjoined activity can be held liable under that (domestic) U.S. law. The U.S. executive (April 2012 at 26) and Argentina (Dec. 28 2012 at 21) objected that this was a mere ruse to circumvent the limitations on attachments codified in the FSIA, citing a 1983 case ruling that courts “may not grant, by injunction, relief which they may not provide by attachment” (2012 4 4 U.S. brief; 2012 12 28 Arg brief).¹⁸⁶ Argentina pointed out that the fact that the “Orders function as an improper execution device is why NML itself has characterized the *pari passu* clause as an ‘enhanced judgment enforcement mechanism’” (*id.* at 22).

Whatever the technical legal merits of their argument, what NML et al. have done in this case is to argue that U.S. *injunctive* power has a different, and more extended, spatiality than either jurisdiction or enforcement. They in effect argue that there are *no* spatial limits to the injunctive reach of a New York judge. This spatial strategy rests not on geographies of payment or of ownership, but rather of agency. Because the exchange bondholders are not covered in the injunction, the key to NML’s argument is to show that BNYM, the Depository Trust & Clearing

¹⁸² Brief of Respondents Euro Bondholders in Support of Petition for Writ of Certiorari, *Republic of Argentina v. NML Capital, Ltd.*, No. 13-990 (U.S. Mar. 24, 2014).

¹⁸³ *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930)

¹⁸⁴ Brief of Non-Party Bank of New York Mellon, as Indenture Trustee, Addressing the Issues Raised on Remand from the Court of Appeals, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 16, 2012); (Arg. Brief Dec. 28, 2012).

¹⁸⁵ *E.g.*, Joint Response Brief of Plaintiffs-Appellees NML Capital, Ltd. and Olifant Fund, Ltd., *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Jan. 25, 2013).

¹⁸⁶ Citing *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983).

Corporation, Euroclear and all the other third party financial institutions named in the injunction are acting as “agents” of Argentina whenever they process a payment on the exchange bonds. The defendants and their *amici* raised various legal arguments about how agency is typically defined in commercial law, but to no avail. In a clear example of the opportunistic switching back and forth in U.S. common law between complicated legal histories of the *actual* use of legal rules and what is presented as a common sense commitment to the so-called “plain text” of a rule, NML et al. and the judges repeated like a mantra throughout these briefs Rule 65(d)(2)’s phrase about “active concert or participation.” Does BNYM know that it is processing a payment for Argentina? Yes. Does BNYM “participate” in that process? Clearly it does. Then, they conclude, BNYM is in “active concert or participation” with Argentina and can be held in contempt of court under the injunction.

The plaintiffs’ briefs actually spend very little time addressing the Euro-Bondholders or the European institutions’ arguments at all. Though they repeat frequently that Griesa has jurisdiction over Argentina (and thus over its “aiders and abettors”) because the bonds in question contain waivers of immunity and New York governing law clauses, they do not, as far as I was able to ascertain, ever address the fact that the Euro bonds are governed by English law. In one brief,¹⁸⁷ they simply noted that Euroclear and Clearstream are subject to the injunction in precisely the same way as the U.S. clearing systems are, with no mention of the fact that the former operate entirely outside the United States.

The Courts

Griesa and the Second Circuit judges sided with NML et al. on nearly every point. They dismissed the arguments of Argentina and the United States that NML is intentionally circumventing the FSIA, including the U.S. government’s critique of the Courts’ “formalistic” distinctions between attaching and enjoining.¹⁸⁸ They repeated NML’s arguments that the injunction only targets Argentina directly and that nothing is “attached” at all. They fully accepted NML’s agency arguments about third party payments processors. They were unconcerned about the complaints of BNYM and other financial institutions that this injunction interfered with their mundane payment processes and forced them either to violate a court judgment or their own contractual obligations to the exchange bondholders.

The courts’ adoption of a new, injunction-specific legal spatiality was explicit. “Since the amended injunctions do not directly enjoin payment system participants,” the Second Circuit argued in its August 2013 decision,¹⁸⁹ “it is irrelevant whether the district court has personal jurisdiction over them” (at 16). They, at times, seemed to wish for a more traditional way of asserting authority over the exchange bondholders, as when they cited a 1985 case to the effect

¹⁸⁷ Reply Brief of Plaintiffs in Response to the Remand from the Court of Appeals, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 19, 2012).

¹⁸⁸ In its December 28, 2012 brief, the United States wrote: “That Argentina’s dominion over its property was constrained is demonstrated by the panel’s own logic. The Court stated that Argentina could comply with the injunction by paying ‘all amounts owed to its exchange bondholders’ and all to the holdouts, or by making partial payments to both...; but in each case Argentina would be compelled to use sovereign funds in a particular way. Similarly, if Argentina decides not to pay the holdouts, it is constrained in its use of funds with which it would pay the exchange bondholders. Either way, Argentina is compelled to do something in particular with its immune property” (at 7).

¹⁸⁹ *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d. Cir 2013).

that “federal courts can enjoin conduct that ‘has or is intended to have a substantial effect within the United States’” (*id.*).¹⁹⁰ In this quote they seemed to be searching for the “direct effect” rule in the FSIA. In the end, however, they did not base their argument about the scope of the injunctions on this. Rather, the Second Circuit summed up the irrelevance of the spatial arguments here:

If ICE Canyon and the Euro Bondholders are correct in stating that the payment process for their securities takes place entirely outside the United States, then the district court misstated that, with the possible exception of Argentina’s initial transfer of funds to BNY, the Exchange Bond payment “process, without question takes place in the United States.” ... But this possible misstatement is of no moment because, again, the amended injunctions enjoin no one but Argentina, a party that has voluntarily submitted to the jurisdiction of the district court (*id.* at 17-18).

If these European systems want to complain later, the Court said, they can, but for now we will assume our injunction applies to them.

In June 2014, the Supreme Court allowed all these Orders to stand by declining to review the case. The stay was finally lifted. Within days, Argentina made the next payments on the exchange bonds anyways, sending roughly \$230 million to BNY in New York and €225 million to the Bank of New York Luxembourg.¹⁹¹ Not wanting to violate the injunctions, BNY kept the money and refused to pass it on. When Argentina still refused to pay NML and the other holdouts, it was forced into technical default on the exchange bonds, sparking the massive outpouring of criticism from governments, policy makers, scholars and activists around the world discussed in Chapter 2.

The assertion by a U.S. court of massive authority to control payments and payment institutions anywhere in the world by arguing in terms of injunctive power rather than jurisdiction or enforcement powers was new. In fact, as recently as 2008, in another holdout case against Argentina, Griesa himself had rejected such a strategy, saying that: “I have a document on its face which has requests for injunctive relief about trust bonds held in Belgium and Germany. I can’t do that.”¹⁹² Why, just a few years later, were the Courts willing to take this step?

The instrumentalist nature of the Courts’ reasoning is clear even in their own documents. In its August 2013 opinion, the Second Circuit wrote that, “The district court put forward sufficient reasons for binding Argentina’s conduct, regardless of whether that conduct occurs here or abroad” (at 17). The reasons they go on to list are: “if Argentina is able to pay Exchange Bondholders while avoiding its obligations to plaintiffs, the Injunctions will be entirely for naught” and that, “to prevent Argentina from avoiding its obligations to plaintiffs, it is necessary that the process for making payments on the Exchange Bonds be covered” (citations omitted) (*id.*). In a particularly astute paragraph in its March 2014 Supreme Court brief, Euroclear captured this unusual legal logic perfectly:

¹⁹⁰ Citing *United States v. Davis*, 767 F.2d 1025, 1036 (2d Cir. 1985).

¹⁹¹ See, Transcript of Oral Argument, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. June 27, 2014) (No. 08 Civ. 6978 (TPG)).

¹⁹² Transcript of Oral Argument at 52, *Seijas v. Republic of Argentina*, No. 04 Civ. 400 (TPG) (S.D.N.Y. April 30, 2008), cited in Arg. Brief (Dec. 28, 2012).

The circular nature of the Court's reasoning is self-evident. The Court posits that it has jurisdiction over activities in foreign countries because otherwise the Court's order concerning those activities would be 'for naught.' The Court further holds that it can reach steps in the payment process that take place overseas because it is 'necessary' to do so if the Order is to be enforced (at 4).

The Executive Branch

In upholding the *pari passu* order and injunctions, the courts not only ruled in favor of holdout creditors over Argentina, the exchange bondholders and a host of third party financiers, but also explicitly against the wishes of the U.S. executive branch. The courts defied the U.S. executive *not only* by rejecting the latter's arguments about the FSIA, but in relation to executive concerns about what has always been considered their domain: foreign policy. The courts' explicit rejection of U.S. *political* concerns in the *pari passu* case and the discovery case discussed in the next section reveals important changes in the relation between the branches since the 1990s.

In both its briefs in the *pari passu* case, the U.S. executive argued that Griesa's Orders could endanger New York City's financial status: "The decision could encourage issuers to issue debt in non-U.S. currencies in order to avoid the U.S. payments system, causing a detrimental effect on the systemic role of the U.S. dollar" (Dec. 2012 at 5). This is not merely a commercial concern, but a deeply political concern about U.S. dollar seignorage and its importance for U.S. hegemony (see discussion in Chapter 4). More directly, the U.S. executive argued strenuously that these decisions would have a "significant, detrimental impact on our foreign relations," and on "reciprocal treatment of the United States and its extensive property holdings" (April 2012 at 6). They pointed out that attachments of property have often been considered more offensive to sovereign governments than court judgments alone, and reminded the courts that, "The United States' views regarding the foreign policy implications of particular exercises of a court's jurisdiction under the FSIA are accorded deference by the courts" (Dec. 2012 at 8).

In stark contrast to the cases examined in previous chapters, in *NML Capital v. Argentina*, the U.S. government argued vehemently that the courts should respect the *limits* of U.S. judicial reach. Their argument was framed in terms of territory and sovereignty. For instance, the United States explained that:

The potential for affront is particularly heightened where, as here, the U.S. court purports to control the foreign state's conduct *within its own borders*. The breadth of the injunctions at issue here, which not only purport to exercise jurisdiction over foreign state property, but also have the effect of *dictating to a sovereign state* the implementation of its sovereign debt policy *within its own territory*, is particularly likely to raise foreign relations tensions (emphasis added) (April 2012 at 29).

Although this is a foreign sovereign immunity, not an act of state case, and the briefs are thus not citing *Sabbatino*, a similar logic about the proper separation of powers among branches can be seen operating here. The U.S. executive even felt the need to point out to the court that "It is important to recognize in this regard the strongly held view of many foreign states that they are not subject to coercive orders of U.S. courts" (*id.*).

Yet this does not represent any significant reversal of the United States' position on sovereign debt restructurings. Rather, the United States wants to *preserve* the rules that were established in the 1980s and 1990s without extending them further. They made this quite clear: "While holdouts retain the right to assert legal claims in court and enforce resultant judgments in appropriate circumstances and in a manner consistent with the FSIA, the creation of new rights and new vehicles for enforcement alters and destabilizes the landscape of sovereign debt restructuring" (Dec. 2012 at 4). Their briefs discuss the U.S. position on sovereign debt at length, reaffirming their support for International Monetary Fund (IMF) conditionalities in conjunction with "voluntary" and "consensual" debt restructurings. The problem, they admit, is that in "the past decade," the shift from loans to bonds and the proliferation of creditors of different kinds this has produced have increased "uncertainty" in debt restructurings, "adversely affecting even low-income countries such as Liberia and Zambia" (*id.* at 3).

Their briefs do not mention the fact that in *Allied* and *Weltover*, the United States intentionally supported holdout creditor litigation above either consensual debt restructurings or IMF policies. But, in keeping with their commitment to a purely non-statutory framework based on upholding contract rights, they criticize Griesa's interpretation of the *pari passu* clause as *mistaken* and not merely unfortunate, and therefore as not properly upholding contract rights at all. Furthermore, they argue, the *pari passu* ruling and the injunction together will actually impede voluntary sovereign debt restructurings by making it less likely that other creditors will agree to negotiate rather than hold out for full repayment. In its own briefs, Argentina espoused a similar view, affirming the United States-backed approach to "voluntary debt restructurings" in a legal context in which judgment debts can be collected "through execution on non-immune property, but not through extraterritorial coercion" (Arg. Dec. 2012 at 26). In other words, despite the courts' intense anger, neither the United States nor Argentina has expressed any real disobedience to the sovereign debt system that had been created in the 1980s and 1990s — they have only resisted its expansion.

In *NML v. Argentina*, however, the courts brushed aside all these concerns. In addition to rejecting U.S. arguments about attachment and the FSIA, in its October 26, 2012 decision,¹⁹³ the Second Circuit dismissed the executive's concerns about future sovereign debt restructurings with hardly any discussion. *If* these rulings have that effect, the judges observed, it will not be the fault of the holdout creditors, but rather of the sovereign debtor who refuses to pay them. In its August 2013 decision, the Second Circuit reaffirmed this point. As further defenses against the charge of interfering with future debt restructurings, they revived the arguments that collective action clauses would make the holdout issue go away in the future (see Chapter 2 for critiques of this view), and that Argentina's supposed uniqueness would prevent this case from setting bad precedent. Basically, they argued that, since no other debtor is ever likely to behave as badly as Argentina, this kind of injunction will not be needed again. Of course, that is not how precedent, which can easily leap from one sort of case to another, works.¹⁹⁴ If this case does not end up being used to bolster creditor power in the future, it will only be because the courts have

¹⁹³ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d. Cir 2012).

¹⁹⁴ Anna Gelpern (2014) has a useful critique of this "uniqueness" argument: "It is naive at best, manipulative at worst. Consider that there are over 2000 companies listed on the New York Stock Exchange, and fewer than 200 countries in the entire world, of which only a few dozen issue foreign bonds. What is a typical country in a sample of 30? Brazil? Cyprus? Greece? Grenada? Ecuador? Turkey? Uruguay? Zambia? For better or worse, every country and every debt crisis is 'unique,' and every one is precedent for the next. And yet, every other article about the case seems to go on the uniqueness detour..."

successfully imposed new transnational rules restricting the behavior of foreign sovereigns and deterring those sovereigns from trying their luck.

Although the U.S. executive expressed displeasure with the fact that the court had not accorded its views on foreign policy proper deference in its first brief, neither of the Second Circuit's decisions addressed these foreign relations concerns at all. Given the longstanding practices of associating the judicial modality of governance with "non-political" "private" issues, and the executive modality of governance with "political" and "public" issues, the court's blatant refusal to even acknowledge these political concerns constitutes, in practice, an assertion that *NML v. Argentina* is a purely private matter.

The Geopolitics of Pari passu

It is not surprising that Argentina would resist the expansion of U.S. court-backed creditor power, but why would the U.S. government do so? In it has done so precisely for the reasons it claims. The U.S. government, the IMF, International Capital Markets Association and many financial and legal experts are concerned that the *pari passu* Orders will allow holdout creditors to seriously interfere with the current sovereign debt restructuring regime. As I argued in Chapter 4, this restructuring regime is crucial to the operation of the secondary market fix. In other words, a blow to sovereign debt restructuring is not merely a blow to sovereign debtors, but to the ability of the global financial system to emerge from each successive and increasingly serious debt crisis *relatively* unscathed. Insofar as they might threaten this system, litigating holdout creditors have put themselves at odds with the financial system as a whole in a way that had never been the case before. If judges allow holdouts to pursue these kinds of injunctions in future cases (an important "if"), or even if the possibility of such injunctions is enough to weaken the leverage of negotiating debtors in future restructurings, there may come a point when the United States and other powerful countries have to choose between allowing major financial crises to implode, or capitulating to demands from Third World states for binding sovereign debt relief rules. Neither option is appealing to the U.S. government.

The U.S. government's concerns about its own property abroad are surely sincere. With the most powerful courts in the world, the United States is in no danger from a system allowing judgments against foreign sovereigns that almost always compel *de facto* enforcement, because the United States would likely not feel compelled to obey a similar foreign court order. Seizing U.S. *property* that is already located within a foreign state's borders, however, is not that difficult once the legal/normative barriers are removed. Especially as the United States' own hegemonic position has been increasingly questioned in the past decade or so, it is not hard to imagine that some states might be willing to make this gambit.

That the vulture funds would pursue these strategies, despite their possible effects on the U.S. government or on the international financial system, does not require much explaining. The contradictions between the personal interests of capitalists and those of the capitalist system as a whole are well known. But what about the decisions of the U.S. courts? Is their displeasure with Argentina enough to explain their flouting of decades of legal practice and a longstanding relationship between the U.S. judiciary and the executive? Before I proffer a hypothesis, I turn to the discovery arm of the NML litigation, in which the U.S. courts' attitudes on these matters are even clearer.

The Discovery Case

As the *pari passu* litigation was moving through the courts, another much less discussed, but arguably just as significant, arm of the NML litigation was progressing as well. “Discovery” refers to the legal right of litigating parties to demand relevant information in the form of documents, depositions and so on from their opponents or third parties. In debt cases like this, discovery is granted in order to help a creditor locate assets for attachment in order to enforce a judgment. The usual practice has long been to apply the same legal limits to discovery as have been applied to enforcement under the FSIA — in other words, to limit discovery to assets that are used for a commercial activity in the United States. Starting in 2010, however, NML sought the right to demand discovery from third party financiers about Argentina’s assets of any kind located anywhere in the world. Just as with the injunctions, NML sought to evade the usual limits on extraterritorial attachment by arguing that the FSIA’s limits only applied to attachment itself, not to discovery.

On June 16, 2014, the same day it declined to review the *pari passu* case, the Supreme Court issued its decision in the discovery case, agreeing with every one of NML’s arguments.¹⁹⁵ In the process, the Court not only greatly extended U.S. judicial reach over foreign sovereign property and institutions abroad, but explicitly dismissed the U.S. executive’s concerns about this case and denied the relevance of that branch’s opinions on the matter. In this section, I focus only on the two U.S. briefs filed in this case,¹⁹⁶ the Supreme Court hearing on April 21, 2014,¹⁹⁷ and the Supreme Court’s June decision

Evading the FSIA

In its briefs, the U.S. government, like Argentina, argued that the lower courts’ granting of such extensive discovery rights to NML constituted improper extraterritorial overreach, and that courts only have authority to issue discovery with respect to assets over which they *could* legally order attachment. The FSIA, the United States argued, is unambiguous in distinguishing immunity from suit and immunity from execution, and exceptions to the former (via waiver, involving commercial activity in the United States, etc.) in no way constitute exceptions to the latter. Since U.S. courts have no authority to attach property outside the United States, whether commercial or not, they certainly have no authority to order discovery about that property.

The fact that such assets might be attachable under Belgian or French law, for instance, makes no difference — pursuing those assets requires pursuing discovery and attachment in *those* jurisdictions, as has long been the usual practice. In fact, in its 2014 brief, the executive observed that discovery is much more limited in many countries than in the United States; “Respondent’s effort to compel the disclosure in the United States of information about a foreign state’s worldwide assets would thus circumvent the limitations imposed and protections afforded not only by the FSIA but also by foreign law, thus heightening the possibility of friction between Nations” (at 26). The executive also saw clearly how NML et al. were inverting the spatial logic of the FSIA, and U.S. law more generally, on this point. The plaintiffs argued that the FSIA is

¹⁹⁵ *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. ____ (2014).

¹⁹⁶ Brief for the United States as Amicus Curiae, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842 (U.S. Dec. 4, 2013); Brief for the United States as Amicus Curiae in Support of Petitioner, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842 (U.S. Mar. 3, 2014).

¹⁹⁷ Transcript of Oral Argument, *Republic of Argentina v. NML Capital, Ltd.*, (U.S. Apr. 21, 2014) (No. 12-842).

only explicit about attachment and does not say anything about discovery. Furthermore, they argued that the FSIA only says that non-commercial assets of a foreign sovereign *within* the United States are immune from enforcement — it doesn't say anything about assets *outside* the United States. The U.S. executive branch harshly critiqued this inversion of the FSIA's logic. It reminded the Court that, in 1976 when the FSIA was passed, the presumption was that the United States had *no* authority of any kind outside its own borders: "[T]he statute's exclusive focus on property located within the United States simply confirms the fundamental proposition that it would be unthinkable for a U.S. court, acting pursuant to carefully crafted exceptions to immunity under the FSIA, to presume to order the attachment of or execution against property of a foreign sovereign abroad" (U.S. Brief 2014 at 25).

Nevertheless, in its June 2014 decision, the Supreme Court upheld this astounding inversion of the rules of U.S. juridico-economic territory. In the majority opinion, Justice Scalia argued that the text of the FSIA is "comprehensive" in controlling the rules of sovereign immunity (at 6). The context of the legislation and Congress's intentions in passing it (as well, apparently, as past judicial interpretations) are irrelevant: "the text of that provision immunizes only foreign-state property '*in the United States.*' So even if Argentina were correct that §1609 execution immunity implies coextensive discovery in-aid-of-execution immunity, the latter would not shield from discovery a foreign sovereign's extraterritorial assets" (emphasis in original) (at 9). In the 1940s, renowned legal scholar Edward Levi (2013[1949]) observed that, counter-intuitively, constitutional law has actually been even more flexible than statutory or common law, precisely *because* judges can always go back to the original text without concern for other judges' interpretations. This discovery case demonstrates how the same textualism can be applied to statutes as well in order to give the Justices maximum discretion in re-interpreting their meaning as desired.

In making this ruling, the Court was actually not even certain about whether U.S. courts could order extraterritorial discovery in cases *not* involving foreign sovereigns. They wrote that in this decision they simply "assume without deciding" that it does (at 5). This case, they said, only asked them to evaluate whether such extensive discovery violates the FSIA, and they determined that it does not. This decision marks a significant extension of U.S. juridico-economic territory in the form of discovery powers.

Expanding the Private and the Judicial

The U.S. executive and Argentina's lawyers found it especially egregious that NML sought discovery not only about commercial assets — the only kind of assets in the United States that a creditor could ever demand information about — but about *public* assets. During the Supreme Court hearing on April 21, 2014, several Justices seemed to push back on this point, too, suggesting that perhaps it was fine to seek discovery about commercial assets abroad but not such clearly sovereign assets. Argentina's lawyer Jonathan Blackman agreed that *if* the Court were to allow discovery abroad, at all, it should not extend this "under any circumstances to diplomatic property, to military property, to national security assets, to property of a sitting or former head of state of a country, to state officials..." (at 13).

Yet NML's lawyer Theodore Olson¹⁹⁸ responded that NML needed discovery to be able to tell whether or not something was actually being used for a public purpose. Even "if it's an

¹⁹⁸ The same Theodore Olson who represented George W. Bush in the Supreme Court case that determined the outcome of the 2000 election and represented Citizens United in the infamous case of the same name.

airline that says Argentine Air Force on the side of it, it still could be commercial property,” he argued (*id.* at 33). This answer seemed to perturb some of the Justices (*id.* at 34):

Justice Sotomayor: So I was right. This is doing exactly what the Solicitor General is saying, it is asking for an accounting of everything that Argentina owns regardless of what its purpose is.

Mr. Olson: It is well, we don’t know what its purpose is until we find out what the assets are.

Justice Sotomayor: So just answer yes.

Mr. Olson: Yes, the answer is yes.

Even Scalia expressed some skepticism about this¹⁹⁹, and Chief Justice Roberts observed, “That’s pretty intrusive at a sovereign level to say you can find out how many jet fighters Argentina happens to have” (at 34). Yet, despite these reservations, less than two months later, the Court granted NML et al. full rights to discovery of “information about Argentina’s worldwide assets generally” (June 2014 Decision, at 10). Justice Sotomayor took no part in the decision. Only Justice Ginsburg dissented, precisely on this point; she wanted to retain the limit on discovery to property used in connection with commercial activities, whether “here or abroad” (*id.* Dissenting opinion, at 2).

In addition to this explicit rejection of the importance of the public/private distinction with respect to discovery, the transcript of the Supreme Court hearing shows a strong rhetorical push for expanding the category of the private and commercial, perhaps even to the extent of doing away with the importance of a sovereign category altogether. Justice Scalia repeatedly asked the Argentine lawyers why the idea of a U.S. court allowing discovery outside the United States was any different from a New York court allowing discovery about assets in Florida. Justice Breyer made this more explicit: “Now, you agree that we can go do that in respect to property in California, Florida, and New Mexico. Well, in today’s world we want the same information about France, Italy, and Turkey” (at 11).

At another point, Justice Alito took a different tack: “What if Argentina...were a private, a foreign company? Could you... have discovery of assets in other countries...[?]” (*id.* at 14). As Argentina’s lawyer reminded her, “That’s a question this Court has never actually addressed” (*id.*). And Justice Kagan asked, in relation to the discovery rules governing relations between two private parties: “What in the text would put a foreign government in a different position than... when the suit involved only private parties?” (*id.* at 25). In the end, the Justices were apparently unconcerned about U.S. Deputy Solicitor General Kneeder’s point that, “What is wrong with that is a foreign sovereign is not the same as a foreign private person” (*id.* at 21).

In other words, the Justices were all pushing towards the idea that the category of “public” should be eradicated altogether, suggesting that a sovereign nation need not be treated any differently from a private entity. Although these rhetorical moves are not explicitly cited in the decision, they still surely have power in justifying these new rules in the minds of the courts.

The Justices’ conviction that all this should really be considered a private matter aligns with their corresponding insistence on seeing this as a legal and not a political matter. In both briefs in

¹⁹⁹ “Justice Scalia: Well, that makes it a lot harder for me because I thought you [NML] just looked to the Foreign Sovereign Immunities Act. And anything that is executable in this country under that, you can get information on to try to execute abroad. But you are saying, oh, no, it’s more than that, it’s stuff that you couldn’t execute on in this country, but that some foreign countries will let you execute on” (*id.* at 38-39).

the discovery case, the U.S. executive raised serious concerns about the foreign policy implications of the ruling, arguing that it would raise both comity and reciprocity concerns. The 2013 brief noted that the case had already raised “significant foreign relations concerns for the United States” (at 19). Both briefs explained that immunity from execution was intended precisely to prevent such foreign relations problems, and that upholding such broad discovery rights “would invade substantially a foreign state’s sovereignty in an especially sensitive area and would be inconsistent with the comity principles the FSIA embodies. It would risk reciprocal adverse treatment of the United States in foreign courts. And it would more generally threaten harm to the United States’ foreign relations on a variety of fronts” (2014 at 10). Furthermore, this decision would “strongly increase the possibility that U.S. courts would issue orders that constitute an affront to foreign states’ coequal sovereignty” (*id.* at 20).

In the April 21 hearing, Deputy Solicitor General Mr. Kneedler had made the United States’ interest in the case explicit, explaining (at 19) that “the United States would be gravely concerned about an order of a trial court in a foreign country, entered at the behest of a private person, seeking to establish a clearinghouse in that country of the United States’ assets for its many diplomatic, military, intelligence — .” Justice Sotomayor interrupted Mr. Kneedler to ask “How often do you think the U.S. is going to default on paying a judgment and have people chase it all around the world?” Mr. Kneedler immediately replied that, in fact, “There are a number of circumstances in which the United States would and some in which it has [defaulted on a judgment]” (*id.*). This exchange is interesting both for Mr. Kneedler’s unusual candor in admitting that the United States is, in fact, not always totally law abiding in the way the Court seems to expect. It is even more interesting for the way Justice Sotomayor blatantly presents U.S. power or American exceptionalism as a justification for applying laws to foreign countries that the United States would not want to have applied to itself.

Justice Scalia’s utter lack of legal deference and civility with respect to the opinions of the U.S. government in this case are telling. In the hearing Scalia comes close to accusing Mr. Kneedler of lying about the concerns of other countries regarding the discovery rulings, interrupting the latter mid-sentence to demand, “Why haven’t they told us? They have to ask you to pass it along?” (at 22). Even clearer is the moment when Mr. Kneedler explained his concerns about international comity and reciprocity if the FSIA were to be interpreted to allow such wide-ranging discovery. Scalia again interrupted him mid-sentence, butting in with, “Wait, wait, wait, wait, wait, wait, wait. I thought that the whole purpose of the Foreign Sovereign Immunities Act was to protect us from you, from the State Department and the government coming in and saying, Oh, you know, in this case, grant this one, deny that one” (at 17). Scalia concludes the Court’s published decision on a similarly scornful note:

Nonetheless, Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause “a substantial invasion of [foreign states’] sovereignty,”... and will “[u]ndermin[e] international comity”... Worse, such orders might provoke “reciprocal adverse treatment of the United States in foreign courts,”... and will “threaten harm to the United States’ foreign relations more generally,”... These apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by factor-balancing business nearly 40 years ago [*i.e.*, with the passage of the FSIA] (at 11).

This is the extent of the discussion of the United States’ political concerns in that decision. In other words, the Supreme Court has definitively declared a case involving debt collection against a foreign sovereign to be absolutely *non*-political — unless Congress decides to get involved. This is a major shift from the 1980s and 1990s when courts continued to cite U.S. policy on debt restructurings years after the FSIA was passed.

In short, in the *pari passu* and discovery cases, it is clear that the Courts are now blatantly ignoring the United States’ own concerns about extraterritorial overreach, even in a decision such as the discovery ruling that could sooner or later put U.S. assets in harm’s way. U.S. intervention in the discovery case is even more clear-cut than its intervention in the *pari passu* case. Here, there is no concern about balancing the contract rights of holdout creditors with the desire to impose just enough discipline on sovereign debtors. This is a more direct concern, on the part of the U.S. administration, that, if or when U.S. power slips, some foreign government will likely flip the United States’ own legal rules around on it. This case demonstrates that by 2014 the Courts were willing and able to extend their authority, whether or not it suited the U.S. executive branch. Although judicial power is still ultimately *state* power, this reveals important splits within the state — splits that are playing out through struggles over the shape and form of U.S. juridico-economic territory.

A Spatial Postscript

The June 2014 *pari passu* and discovery decisions did not quite mark the end of the spatial battles taking place through the NML litigation. Over the next few months, as Argentina was stuck in technical default, struggles over the margins of the injunction’s scope went on. The Euro Bondholders, for instance, pushed their case further,²⁰⁰ but were definitively shut down in March 2015 when Griesa issued an order affirming that the injunction forbade Euroclear from processing any exchange bond payments and ordering Euroclear to turn over information (discovery) to the holdouts about any and all such payments it was asked to make.²⁰¹

A thornier issue arose immediately after the June decisions, when Citibank Argentina, located in Buenos Aires, asked for clarification on whether the injunction applied to *Argentine law* bonds, payable in Argentina, some in U.S. dollars and some in Argentine pesos. On June 27, less than two weeks after the Supreme Court decisions, Griesa issued an order declaring these bonds *exempt* from the injunction.²⁰² A month later, however, after appeals from NML et al., he changed his mind, ruling that while the peso-denominated Argentine law bonds were exempt, the U.S. dollar bonds were not.²⁰³ Argentina, Citibank and the plaintiffs fought out this arm of the case over the next several months, with the key spatial argument revolving around whether or not the U.S. dollar Argentine law bonds constituted “domestic foreign currency indebtedness” (and were thus not enjoined), or “external indebtedness.” Citibank and Argentina argued that these

²⁰⁰ Corrected Memorandum of Law in Support of Non-Parties Euro Bondholders’ Emergency Motion for Clarification, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. July 14, 2014).

²⁰¹ Order, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG) (S.D.N.Y. Mar. 25, 2015).

²⁰² Order Clarifying Amended February 23, 2012 Orders, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG) (S.D.N.Y. June 27, 2014).

²⁰³ Order, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG) (S.D.N.Y. July 28, 2014).

bonds were payable entirely in Argentina and subject to Argentine law and thus constituted the former.²⁰⁴ Citibank raised both the FSIA and act of state defenses.

On March 12, 2015, Griesa ruled against Citibank and in favor of the plaintiffs once again.²⁰⁵ First, he determined, although the *pari passu* clause in the original bonds was phrased in terms of “external indebtedness,” his own injunctions were not. Thus, it did not matter whether the Argentine law bonds were external or not (although why this would not also extend to the *peso* denominated Argentine law bonds is not clear). Nevertheless, he took the time to affirm extended judicial reach anyway, ruling that the U.S. dollar Argentine-law bonds *did* constitute external indebtedness, because although they were registered in Argentina and payable in Argentina, they were *advertised* outside Argentina: “The evidence produced is overwhelming: the exchange bonds governed by Argentine law were, like all the other exchange bonds, offered in many countries, not exclusively in Argentina” (at 8). By this reasoning of course, almost any sovereign bond offering anywhere in the world is “international” and subject to U.S. injunctive power. In order to avoid being stuck between its host country’s domestic laws and Griesa’s orders, Citibank shortly after exited the custody business in Argentina altogether.

Finally, Argentina did partially flout Griesa and the U.S. courts by successfully issuing \$1.4 billion in new bonds (the Bonar 2024s) in an extremely quick sale in April 2015. Since the injunction was first issued, Griesa had repeatedly warned Argentina not to try to evade the injunction by rerouting the payments of the exchange bonds outside U.S. reach. In nearly every brief, NML et al. cited media reports and public statements by Argentine officials to show that Argentina was trying to do just that — something Argentina’s lawyers consistently denied. Whether Argentina had attempted to evade the orders earlier or not, they were apparently never able to do so. It is very difficult to rout payments around U.S. reach when that reach extends to any place in the world outside Argentina. Yet while still in default on the exchange bonds, they *were* able to issue new ones.

NML et al, this time led by Aurelius, immediately petitioned Griesa to rule this a violation of the injunctions and to declare payments on these new bonds vulnerable to attachment and all information about them open to discovery. Argentina’s lawyers argued that the injunction actually said nothing about prohibiting issuing *new* debt unrelated to the exchange bonds, and Argentina’s lawyers and its officials argued that these bonds were offered exclusively within Argentina and thus could not be subject to the injunction. In a rush hearing on the day before the bond sales closed, Griesa seemed unsure about whether his injunctions applied to the Bonar 2024s, clarifying that there were no New York governing law clauses and no waivers of immunity in the new bonds and asking the holdouts whether he really had any jurisdiction over the matter.²⁰⁶ He concluded the hearing by saying, “I don’t have anything before me with any factual indication that The Republic is trying to evade prior orders” (at 21). Nevertheless, he granted the plaintiff’s discovery to see whether this would produce any attachable assets: “you are entitled to know the information about the transaction, the proceeds, the geography, etc., etc.” (at 23).

²⁰⁴ Brief of Movant-Interested Party-Appellant Citibank, N.A., *NML Capital, Ltd. v. Republic of Argentina*, No. 14-2689(L) (2d Cir. Aug. 15, 2014); Brief of Defendant-Appellant the Republic of Argentina, *NML Capital, Ltd. v. Republic of Argentina*, No. 14-2689(L) (2d Cir. Aug. 15, 2014).

²⁰⁵ Opinion, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG) (S.D.N.Y. Mar. 12, 2015).

²⁰⁶ Transcript of Oral Argument, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. April 22, 2015) (No. 08 Civ. 6978 (TPG)).

Over the next few months, Argentina argued that the bonds were negotiated entirely in Argentina and that Argentina itself had nothing to do with the part of the transaction in which the bonds were transferred to foreign investors.²⁰⁷ The plaintiffs argued, as with the Argentine law bonds, that these were, in fact, international offerings because they were marketed abroad and sold to investors around the world: “Argentina cannot conceal the fact that the bonds were both offered and sold outside of Argentina by the mere expediency of *laundering* the international offering through local ‘agents’” (emphasis added) (at 9).²⁰⁸ This legal scenario, in which a bond offering was designed intentionally to avoid U.S. legal space while still raising money from around the world raises interesting questions about the extent and limits of New York’s financial reach, and about how transnational financial transactions get spatially coded in legal terms. These questions remain unanswered for now, because in October 2015 Argentina elected a new president, who would soon put an end to all the holdout litigation.

Sovereign Discipline

Collapsing international demand for exports, rising inflation, decreasing real wages, and increasing class tensions, combined with the technical default caused by the US court rulings, strained the Argentine economy enough to affect the November 2015 presidential elections, in which Cristina Kirchner’s populist party lost to the center-right Mauricio Macri. Vulture funds were a key topic in both campaigns. Within months of Macri’s win, the country settled with the holdouts — for far more than the original \$1.6 billion originally sought by NML et al. As predicted, as soon as those funds had succeeded when the Supreme Court declined to hear the *pari passu* case, a host of “me too” plaintiffs piled into the courts to sue Argentina. NML et al. themselves sought and were granted additional relief on bonds for which they had received money judgments prior to switching to the injunctive relief strategy. Over 500 new plaintiffs who had been waiting in the wings to see what would happen in this case brought suit as well in a total of 49 new legal actions. By October 2015, the amount Argentina owed under the *pari passu* orders had risen from \$1.6 billion to nearly \$8 billion, and rising.²⁰⁹

Macri took office in December 2015. In February, the Macri administration offered all the holdouts, including the “me too” plaintiffs, a deal of 150 cents on the dollar — that is, the full face value of their bonds, plus 50% to cover missed interest payments. This amount represented about 72% of what many of the plaintiffs claimed they were owed — a far better deal than the 30% the Kirchner administration had offered. The deal was immediately accepted by two major hedge funds, Montreux Partners and EM Ltd. (the latter is an affiliate of the Dart family, who had sued Brazil in the early 1990s). Argentina paid \$1.35 billion to a group of Italian retail investors (Levine, 2016; Stevenson, 2016).

²⁰⁷ E.g., Memorandum of Law of the Republic of Argentina in Opposition to Plaintiffs’ Motions for Leave to Amend and Supplement Their Complaints, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. June 1, 2015).

²⁰⁸ Memorandum of Law in Support of Plaintiffs’ Motion to Compel Deutsche Bank, JP Morgan and BBVA to Produce Documents Concerning the Bonar 2024 Bonds, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. October 5, 2015).

²⁰⁹ Memorandum of Law of the Republic of Argentina in Opposition to Motions by 526 Plaintiffs in 37 Actions Seeking Partial Summary Judgment, *NML Capital, Ltd. v. Republic of Argentina*, No. 14 Civ. 8630 (TPG) (S.D.N.Y. Mar. 18, 2015); (Van Voris & Porzecanski, 2015).

NML Capital and Aurelius, among others, at first rejected the settlement as too little. By this point, however, public sentiment and, more importantly, the courts were against them. On February 19, Griesa announced at Argentina's request that he would lift the injunction once Argentina repealed the Lock Laws and made its first payments to all holdouts who settled by February 29.²¹⁰ NML and Aurelius immediately appealed the decision, arguing that the injunction should not be lifted until they, too, had settled with Argentina.²¹¹ In ongoing negotiations with the Macri government, they demanded more than the 150% already offered. Griesa's attitude, however, was now less favorable to the holdouts. He repeatedly praised the Macri government's turnaround and cooperative attitude in the negotiations, suddenly speaking about the injunction as if its sole goal had been to encourage *settlement* (by definition implying less than 100%), rather than to ensure that the holdouts were paid in full. He pointedly reminded the plaintiffs that he did not *have* to do anything:

It is important to recall that the plaintiffs had no absolute legal right to the injunctions. An injunction is an extraordinary measure that is not normally available for breach of contract. The *pari passu* clause never *required* the equitable relief that the plaintiffs requested and the court granted. Rather, the court exercised its inherent equitable power to fashion a remedy for the Republic's breach of the plaintiffs' contractual rights... In short, the injunctions were a discretionary remedy, not a legal entitlement (Feb. 2016 Ruling, at 21).

The U.S. government too weighed in on the matter,²¹² urging the courts to lift the injunctions right away, praising Macri's administration and noting that the United States "has a significant foreign policy interest in supporting Argentina's new administration's efforts to reverse prior economic policies, to normalize Argentina's relations with its creditors, and to strengthen the Argentine economy" (at 4).²¹³

With the tide of the court's good will turning against them, hedge funds Elliott (including NML), Aurelius, Davidson Kempner and Bracebridge Capital agreed to a deal on February 28 for \$4.4 billion, or roughly 75% of their total claims, plus \$235 million in legal fees and other claims. Argentina's finance ministry reported that, in total, they paid \$9.3 billion to the holdouts. It was reported that Elliott "received \$2.4 billion, a 392 percent return on the original value of the bonds" (Porzecanski, Devereux, & Van Voris, 2016). Given that Elliott/NML purchased those bonds for far *less* than face value, they made a much higher return than that.

In order to pay these debts, in April 2016 Argentina issued \$16.5 billion in *new* bonds to investors around the world. This amount was *more than double* what any developing country had ever raised in one issue up to that point (Wernau & Cui, 2016b). It had received offers for \$68.8 billion (Bronstein & Marsh, 2016). The willingness of investors to immediately flood back into

²¹⁰ Rule 62.1 Indicative Ruling, *NML Capital, Ltd. v. Republic of Argentina*, No. 14-cv-8601 (S.D.N.Y. Feb. 19, 2016).

²¹¹ Appellees' Opposition to Appellant's Emergency Motion for Voluntary Dismissal, *Aurelius Opportunities Fund II, LLC, et al., v. Republic of Argentina*, No. 15-1060(L) (2d Cir. Feb. 22, 2016).

²¹² Brief for the United States of America as Amicus Curiae, *Aurelius Capital Master, Ltd., et al., v. Republic of Argentina*, No. 16-628 (2d Cir. Mar. 23, 2016).

²¹³ Despite the fact that it had ended up deciding not to file at the Supreme Court level in the *pari passu* cases, in this brief, the US also reminded the court for the record that it disagreed with the *pari passu* Orders altogether and still believed they were mistaken, bad for US foreign policy, and violated the FSIA.

Argentine debt markets after 15 years of its “rogue” behavior is telling. The return to capital markets was loudly celebrated by Argentine officials and the financial press as a sign that Argentina was back on track, and that investors were pleased with Macri’s pro-business policies. Yet this version of the story is deceptive and/or naive. As with most bond offers, this one was divided between 3-year, 5-year, 10-year and 30-year bonds. In a country with Argentina’s political history, there is no reason to think Argentina could not swing to the left again. And throughout the 15-year debt saga, the plaintiffs and financial commentators loved to point out that Argentina has defaulted *many* times over the past couple of centuries. What really draws investors to this kind of offering are high yields and finding an outlet for their own surplus capital. The interest on the new bonds ranges from 6.25% to 7.62% — significantly higher than U.S. or European bond issues. The point, as the Wall Street Journal itself admitted, is that investors are “looking for higher yields in a period of low interest rates” (Wernau & Cui, 2016a). Just as importantly, none of these investors will need to hold onto these bonds for a full 5 or 10 or 30 years. If they have not already traded them, then when things start going south, they can always sell them off to NML Capital, Aurelius or another distressed debt investor.

It took four years from the moment Griesa first issued the *pari passu* Orders, including almost two in technical default, for NML and the courts to force Argentina to pay the holdout creditors. More importantly, Macri immediately began liberalizing the Argentine economy and, after a 15-year lag, Argentina is back in the secondary market game. Economic difficulties imposed by the legally created default, as well as the inability to access credit markets on any significant scale, contributed to a political shift to the right in Argentina and brought the country back in line with the values of the U.S. hegemonic system. Although the United States had opposed the *pari passu* Orders, it was quite pleased with these end results. In its March 2016 brief urging that the injunctions be vacated, the United States concluded “the United States has a significant, and more general, policy interest in promoting open, market-based economies and sound macroeconomic policy in Latin America. Argentina’s bold macroeconomic reforms set a positive example for other countries in the region” (at 17).

Although the discovery decision has rarely been discussed in relation to the new enforcement provisions produced by the *pari passu* litigation, the two work together. One allows U.S. courts to control payment flows outside the U.S.’s own borders; the other allows U.S. courts to identify the flows that can then be controlled in this way. The interplay of legal and extra-legal mechanisms in *enforcing* these decisions is important. The significant expansion of U.S. juridico-economic reach in the *pari passu* and the discovery cases worked — but only in combination with New York City’s position as the most powerful and most extensive financial space in the world. Insofar as European nations, for instance, allow extraterritorial discovery and injunction orders by U.S. courts to stand, this will also be due to the need of all their financiers to continue doing business in and through New York City.

The effect of all this, in the end, was to shift Argentina from its “post-neoliberal” or *neodesarollismo* approach back to blatant neoliberalism (Cantamutto & Ozarow, 2016; Wylde, 2016). The implications are theoretical as well as political. Attention to the geographical and legal properties of debts helps us avoid the trap of thinking simplistically about market *versus* state power in the age of globalization, neoliberalization and financialization. Growing creditor power must be seen as deeply embedded within a juridico-economic order in which different states stand in very different geo-economic and geopolitical positions to one another and to private investors. The Argentine example demonstrates this well. Argentina remained highly indebted even after the restructurings, and much of its debt ended up with specialized investors.

Holdout creditors used this restructured debt as leverage. They built on longstanding pro-creditor legal developments and pushed through further legal changes to make enforcement easier. The results — multi-billion dollar debt payments to holdouts and the reinstatement of neoliberal national economic policies in Argentina — show how distressed debt strategies function to (re)impose neoliberalization even where IMF programs no longer exist. Peck (2010) has shown that both the “roll out” and “roll back” of neoliberal policies have strengthened neoliberalization in the long term. Yet, as the Argentina example shows, the roll back phases — so important for assuaging political discontent — have not altered the deep debt chains binding countries to international financial discipline, nor the legal practices that strengthen them. Indeed, the attempt to reverse austerity and increase social spending in the context of an underlying crisis of overaccumulation, economic stagnation and constant interest payments often requires *more*, not less, debt financing. This further subjects countries to the interests of private creditors, making the next debt crisis and roll out of neoliberal policies more likely.

While the 2008 global financial crisis seemed to call neoliberalism’s legitimacy into question, free market ideologies and austerity policies are growing stronger everywhere from Ireland and Greece to Brazil and Argentina (Peck, Theodore, & Brenner, 2012). This analysis of the Argentina case sheds light on the institutional reasons why. The “roll back” phase of neoliberalism in most countries has focused on increasing regulations on trade and capital flows, reversing austerity programs and other specifically *economic* policies. Nowhere, to my knowledge, has it involved a direct removal or refusal of the neoliberal *legal* structures underpinning ever-expanding contract and creditor rights, or, more specifically, of the secondary distressed debt regime built upon that legal power. The stickiness of laws and legal practices and the deep financial structures on which neoliberal capitalism is built are mutually interdependent.

Another argument of this dissertation has been that these “neoliberal” legal structures did not begin with neoliberalism as usually understood. The Supreme Court’s rhetorical reduction of everything to “the private” and “non-political” today clearly fits within the broader neoliberal obsession with private markets and private property that has been growing, in fits and starts, since the 1970s. But this is not merely a *reflection*. In an economic system in which law plays an integral role in enabling and structuring economic processes, redistributing more and more power towards certain private entities often depends on the legal production of new rules and categories. This expansion of the private also goes back well before neoliberal ideologies gained widespread prominence in the 1970s. It is part and parcel with the U.S. executive-led push beginning after World War II to reclassify more and more foreign government activity as private and commercial.

The most recent expansions of this category, to the point even of suggesting that sovereign status should not matter at all, are a sign of the changing relationship between the judiciary and the executive branch. Before the 1950s, U.S. courts drew a strong line between their own and the executive’s domain in transnational economic matters. In the 1960s, some even resisted the expansion of the judicial domain. In the 1980s and 1990s, judges were sometimes hesitant to rule on issues involving foreign sovereign governments without explicitly considering the U.S. executive’s policies and political vulnerabilities. At each stage, the U.S. executive branch pushed the courts towards taking “commercial” matters into their own hands, while simultaneously expanding the definition of that category. If the courts today show *no* deference to the executive branch in a “mere contract case” involving a foreign government, it is only because the U.S. executive’s strategic construction of U.S. legal power over the past half century worked so well. It took a great deal of energy and effort over many years to carve out such an expansive category

of commercial activities out of the formerly sovereign sphere. Now, that category appears to many judges, lawyers, financiers and non-specialists to be a completely natural category, disobedience to which demands scorn and punishment.

Now we can return to the question, raised in Chapter 2, of what precisely Griesa and the higher court judges were so angry at. Argentina's "crimes" were twofold. First, it unilaterally defaulted on and restructured its debts, rather than waiting for permission from the IMF — something the U.S. government, as much as courts and financiers, wanted to punish it for. Unilateral action offends creditors and their host countries and threatens U.S. hegemony. Argentina's second "crime" was actually more complicated. It refused to pay the holdout creditors, even after court judgments demanded it. On the one hand this was unique in the sense that most poor countries in the past have eventually caved in and paid litigating creditors. In another sense, Argentina was actually not breaking the rules at all — rather it was playing precisely by the *de jure* rules; rules that included an intentional gap between judgments and enforcements. At no point in the *NML* litigation did Argentina try to argue for rolling *back* any of the territorial advances made by the U.S. judiciary in the past few decades. It only tried to assert its right to obey those rules as they were actually written, and to resist *extra*-legal coercion. It was the combination of Argentina's economic ability and political willingness to resist, on the one hand, with the growing volume and normalization of distressed debt trading, on the other, that brought things to a legal head. This clash provided the legal terrain on which U.S. juridico-economic territory could be expanded even further, and the national economic sovereignty of indebted states further displaced.

The judges' anger with Argentina was not a natural reaction to Argentina's insouciance — it was the holdout creditors, not Argentina, who were trying to alter the existing system. Argentina's behavior was actually not much of a threat to the existing debt restructuring regime, at all; its 2005 and 2010 exchange bonds contain all the same pro-creditor terms as other "negotiated" bond contracts. But once the vulture funds, who often operate precisely by trying to push new legal boundaries, drove the law in this way, Argentina's unwillingness to fold became an insult to the U.S. courts on whose power holdout litigation is based. Due, in large part, to the fact of Argentina's long-term resistance, the courts have instantiated new legal precedent in this case that will almost certainly create problems for future debt restructurings. It is not yet clear whether it will obstruct restructurings altogether, as many commentators have feared, or whether it will just give even more disciplining leverage to the creditors in those restructurings. Either way, whether by preventing any debt relief or by reducing the real relief entailed in restructurings, these changes will surely bring us closer to the moment in which the secondary market regime will no longer be able to maintain the balance between enabling expanding creditor power and preventing the financial system from *too much* collapse.

To date, the secondary market regime has enabled a long succession of sovereign debt crises to play out without bringing down the international financial system, even while each crisis brings more countries into distressed secondary markets. As long as restructurings grant just enough relief for countries to resume servicing their debts, while *extending* the reach of creditors over indebted countries, the question remains: how far can the search for high yields go before the volatility it generates becomes too much even for this securitized financial system to handle? What happens then will depend a lot on the status of U.S. law, and whether governments (indebted or otherwise) are willing to resist that power with direct political action.

Making the existing debt system more humane, however, means more than greater diligence at the moment of issuance and greater relief once a crisis occurs, though both are desirable. The

dynamics of sovereign debt buildup and crisis are driven by the ability to profit from high yield, high-risk bonds. Changing this requires, at the very least, recognizing that so-called private debt contracts are in fact thoroughly political and should be tightly regulated by, for instance, restoring champerty laws, outlawing holdout litigation, and sharply limiting interest rates. More dramatic change would require altering the nitty-gritty rules of sovereign debt so that private creditors and foreign courts have less power over sovereign governments, and it would require radically altering debt restructurings so that debt relief includes significant debt cancellation. Not doing so may have repercussions not only for indebted states, but also, eventually, for the global economy as a whole.

The spatial changes to U.S. juridico-economic territory produced in the courts of the NML litigation may have been geared at sovereign debt, but its implications potentially go far beyond that to transnational economic relations involving foreign governments in general, and perhaps to private-private transnational transactions more broadly. The discovery decision, for instance, appears to have broadened the scope of U.S. discovery even further than has been the case for contracts between two private parties. If the *pari passu* and discovery decisions, and, probably even more importantly, this *kind* of injunctive design are picked up by U.S. judges down the road, the implications for the geography of U.S. legal power will be huge. Although the judges in this case suggested that such an impact would be limited because Argentina's misbehavior was so extreme, this is not how precedent works. So what kind of legal terrain has been produced in these cases?

In both the *pari passu* and discovery cases there has been a significant expansion of U.S. juridico-economic territory. More specifically, in both there has been a kind of inversion of the foreign/domestic logic that had been in operation so far. Until now, the strategy had relied primarily on expanding the category of the domestic (meaning "in the United States"), because the *general* rule was that U.S. courts only had power over things that occurred within U.S. territory. Now, in contrast, the courts are claiming to have *certain kinds* of legal power (injunctive and discovery) over anything that *doesn't* happen in the territory of the sovereign in question. In other words, the most important meaning of "domestic" is now anything that is confined to Argentina, while U.S. courts claim authority over anything "foreign," meaning "outside" Argentina. This radically alters the existing legal map. It will remain to be seen whether other countries in Europe and elsewhere accept this reformulation, or whether this produces direct legal clashes of a kind that could actually force U.S. courts to back down.

All this is not to say that *every* spatial barrier to U.S. judicial reach has now been torn down — far from it. For instance, in yet another arm of the NML litigation, the plaintiffs tried for years to attach Argentine Central Bank funds being held at the Federal Reserve Bank of New York. Central Banks, however, have traditionally been considered state instrumentalities, and their funds to be sovereign, not commercial assets, and thus immune from attachment. At the same time, they have been considered to be legally distinct entities from the host sovereign itself — thus, a sovereign's waiver of immunity in a debt contract is *not* considered to apply to its central bank assets. In September 2013, Griesa tried to change this, accepting NML's arguments that the Argentine government exercises such unusual control over its Central Bank that the latter can be seen as identical with the former (in technical terms, that the Central Bank is an "*alter ego*" of Argentina).²¹⁴ He ruled further that the Central Bank's use of its reserves in New York

²¹⁴ Discussed in Opinion, *EM Ltd., NML Capital, Ltd., v. Banco Central de la Republic Argentina, Republic of Argentina*, No. 13-3819(L) (2d Cir. Aug. 31, 2015).

constituted commercial activity and that, therefore, the immunity waiver in Argentina's bonds applied to these assets.

In a decision strikingly different from those in the *pari passu* and discovery cases, however, the Second Circuit rejected Griesa's decision on both counts, upholding the standard legal distinction between governments and their central banks, and arguing that, whether or not the use of the reserves was commercial activity in the United States, it was only incidentally connected to the issue being litigated and thus could not be attached for those purposes.²¹⁵ They also directly cited the U.S. executive's political concerns about this issue in their opinion:

[A]dopting plaintiffs' theory for jurisdiction here would dramatically expand the scope of the commercial-activity exception to sovereign immunity. Any allegation of the wrongful use of dollars outside the United States would conceivably lead to a sovereign immunity waiver, so long as the plaintiff could show that these dollars were acquired in U.S.-based transactions. Given New York's role as a financial center, every country and every central bank would be at risk of losing their sovereign immunity on this basis. As the United States argued as amicus in BCRA II, weakening the immunity from suit or attachment traditionally enjoyed by the instrumentalities of foreign states could lead foreign central banks, in particular, to 'withdraw their reserves from the United States and place them in other countries. Any significant withdrawal of these reserves could have an immediate and adverse impact on the U.S. economy and the global financial system'" (at 41).

This quote shows clearly that the courts themselves still see certain limits on their own judicial reach as important, and that they are still committed to preserving *some* aspects of U.S. economic dominance. As litigating creditors push for ever new legal changes that challenge these interests, legal struggles over remaining boundaries like these will continue.

²¹⁵ Opinion, *EM Ltd., NML Capital, Ltd., v. Banco Central de la Republic Argentina, Republic of Argentina*, No. 13-3819(L) (2d Cir. Aug. 31, 2015).

Conclusion

Until we are able to transcend the American fixation with sharply separating law from politics, we will continue to fluctuate between the traditional polarities of American legal discourse, as each generation continues frantically to hide behind unhistorical and abstract universalisms in order to deny, even to itself, its own political and moral choices.

- Morton Horwitz (1992, p. 272)

After World War II, the United States made a concerted effort to bolster its newfound hegemony with expanded legal power based in the transnational extension of U.S. common law and judicial authority. The 1960s was a period of widespread de-colonization, Third Worldist movements, and nationalizations of former imperial property, as well as of U.S. regime change and other covert Cold War interventions. In that context, the U.S. executive branch pushed the judiciary to systematically expand its power further beyond the United States' political borders than it had before, in order to maintain the geo-economic *status quo*, ensure the continued extraction of resources to the United States, and expand the scope of the capitalist world order, while obscuring the imperialist character of these moves. The judiciary at first resisted, on grounds that this violated the proper separation of powers and sullied the law itself by calling on courts to adjudicate properly "political" matters. Yet, over the course of several decades and dozens of legal cases involving foreign governments or their actions, all three branches of the U.S. government learned to use U.S. law to gradually extend U.S. judicial power over foreign governments. The mechanics of this involved the continual re-drawing of the dividing lines between the legal categories of foreign and domestic, public and private, and political and legal.

As U.S. finance became definitively more important than U.S. manufacturing in the wake of the political and economic crises of the 1970s, and as debt levels began to rise around the world, New York courts became central to the construction of U.S. dollar hegemony and creditor power. In the 1980s and 1990s, the scope of U.S. judicial reach was determined by considering whether a foreign state's actions were commercial and whether they had occurred "in" the United States, and definitions of both were further expanded in this period. At the same time, courts continued to cite U.S. policy preferences, and even to invite opinions from the executive branch, to lend extra support to their spatial analyses, and affirm that they were not improperly interfering in foreign relations. The new legal geographies established in this period increased the power of U.S. creditors to extract maximum interest from indebted states during the Third World debt crises, and worked in tandem with debt restructurings and IMF programs to impose even harsher discipline on those countries. The U.S. executive branch remained directly involved in shaping these legal structures through the 1990s, as secondary sovereign bond markets developed and distressed debt trading became a more and more popular accumulation strategy.

In the 2000s, when the U.S. executive began to grow uncomfortable with some of the excesses of that strategy it was too late. By then, federal New York courts and the Supreme Court had stopped caring what the executive branch wanted in purely "commercial" cases, and had staunchly aligned themselves with the interests of capital even over the geopolitical interests of the United States' political elites. The executive's commitment to *ad hoc* debt restructurings and upholding the sanctity of contract in order to perpetuate the extraction of payments from indebted states have not changed. But the secondary market regime established in the previous

decades was designed precisely to ensure just *enough* debt relief so that the system would not collapse. Creditors themselves share no such concern, and the vulture funds' concerted strategy of changing the law to expand their power, and the willingness of the U.S. judiciary to agree to these changes, brings into question the future of a precarious debt system that has enabled the financial order to remain relatively unscathed thus far. This explains the U.S. executive's strenuous objections to the Argentina decisions. These changes have already had important effects on sovereign debt restructurings, giving private creditors, whether litigating or restructuring, more leverage in negotiating the extent of write-downs and the terms of new contracts during debt crises. The *NML* rulings have pushed this even further and it remains to be seen how their precise effects develop.

Surely adding to the executive's concern is the fact that the United States itself has become increasingly indebted, with growing fears about the rising power of China, which holds much of that debt. It is now possible to imagine a day when a Chinese judge might order the United States to pay back its debts, using the same legal arguments developed by U.S. courts. Still, the United States is not likely to lose its significant economic advantage, including access to the most important financial space in the world, any time soon, not least because it still retains unchallenged military authority. U.S. politicians are only beginning to apprehend how this judicial power might eventually become detached from U.S. national power, and, despite its unhappiness with the courts' decisions in this case, the executive branch is still wedded to the legal framework it helped produce; for now at least, it remains staunchly against any kind of binding international debt framework that might rein in this rising judicial power.

Of more immediate concern may be the Supreme Court's decision to allow creditors to demand information from anyone about Argentina's assets anywhere in the world. As the U.S. Deputy Attorney General made explicit in the Supreme Court hearing on the matter, the U.S. has assets all over the world. Once the political will is there, it will not be difficult for a court in another country to order their seizure. And while the United States may be powerful enough to refuse to accept such a ruling, having to do so would put it in an awkward position. A major purpose of transferring agency over transnational decisions from the executive to the judicial sphere has been to de-politicize and naturalize what would otherwise appear as the blatantly imperialist moves of the United States. If the United States itself were to refuse to obey courts that have simply adopted U.S. style legal practices, it could put another serious dent in the United States' already threadbare international legitimacy. Conversely, if U.S. power or legitimacy declines enough, other courts around the world will become more and more willing to make such rulings against the United States.

U.S. courts are not simply pro-finance. As they have expanded their judicial reach over the past fifty years, judges have become increasingly accustomed to having extensive judicial power over foreign nations in their own right. In the process, New York federal courts and the U.S. Supreme Court have increasingly aligned themselves with the power of New York's transnational financial space — even when their decisions might go against the foreign policy interests of the executive branch. In this context, there are increasing questions about how far the power of the U.S. judiciary can be separated from that of the United States as a whole — in other words, can “judicial imperialism” be divorced from, or even undermine, broader U.S. power in any significant way, even as it remains dependent on the production of national legal borders? What is certain is that U.S. judicial power *is* dependent on New York City's financial space. A major change in the position of the U.S. economy and the related power of the U.S. dollar in the global economic order would indeed greatly reduce the power of New York courts and the U.S.

Supreme Court along with it.

In short, since World War II, (re-)writing the law has become a more and more important strategy for bolstering the power of private capital and of U.S. hegemony. The point here has not been to determine whether particular legal changes are “wrong,” “mistaken” or contrary to “settled market understandings” as many analysts of the *pari passu* decisions have done. Rather, the point has been to show *that* new legal decisions are constantly re-mapping U.S. juridico-economic territories, and to understand *how* and with *what effects* they are doing so. Whatever their legal flaws or merits, the Cuban nationalization cases of the 1960s and 1970s, the debt cases of the 1980s and 1990s, and, most recently, *NML v. Argentina* have each produced new legal geographies and extended U.S. judicial reach over more transnational economic relations involving sovereign governments than had been the case before.

In addition to examining this legal history and its implications for sovereign debt dynamics and U.S. hegemony, one goal of this dissertation has been to offer a more general analysis of the legal spatiality of contemporary capitalism. All three branches of the U.S. government have played active roles in fashioning this expansion. Through litigation, capitalists and their lawyers have long participated just as actively, if perhaps with less longterm vision. With the rise of hedge funds and an increasing crossover between investors and lawyers, this participation has become even more strategic — re-fashioning the law has become central to specialized accumulation strategies in many cases. In fact, these investors are known in the industry as “activist investors.” As some legal scholars explain approvingly, “Unlike traditional investors, activist hedge funds look for bonds where companies have violated, have arguably violated, or are about to violate some contractual provisions; buy up a large quantity of the issue; and then aggressively enforce their rights” (Kahan & Rock, 2009, p. 283). As this quote suggests, what these hedge funds do is often portrayed in terms of the morality of contract — they are seen as “finding” the legal details or loopholes in a contract and then “enforcing” the law. It is more accurately understood as *making* the law. Or as Foucault writes in *The Punitive Society* (2016, p. 148), the privileged classes are able to get around the law “by giving themselves the power to make and dismantle the law.”

A primary goal of this dissertation has been to show that the law that gets produced in the process has not become de-spatialized or even de-territorialized as capitalism has become more and more “global.” It is true that the sources on which legal jurisdiction is founded have become more complicated and more diverse. This “flexibilization,” however, continues to be deeply territorial not only in its *effects*, but in its framing; the more complicated these questions have become, the more time, effort and text have gone into arguing about precisely how to define the borders of X and the route of Y. Globalization has not meant the end of legal borders, but rather their proliferation.

These lessons extend far beyond the field of sovereign debt and even of state-private transactions to help us understand contemporary capitalism more generally. This dissertation has not attempted to lay out a comprehensive map of U.S. juridico-economic territory today. Nor could it. What I have done is much more modest. I have identified and illustrated some important lines on that map with respect to commercial relations between private actors and foreign sovereign governments.

Enumerating all the contours of U.S. juridico-economic space would likely be impossible. For one thing, this space varies according to the precise modality of judicial power in question — for instance, according to whether powers of judgment, discovery, injunction, or attachment are involved. It also differs according to the kind of economic activity in question. To take the

key examples from this dissertation, the spatial logic applied to sovereign bonds builds on, but is not identical with that applied to nationalizations. Both of these differ in some important ways from the spatial logic applying to transnational contracts between two private parties, where the Foreign Sovereign Immunities Act (FSIA) and the Act of State Doctrine are of no relevance.

In short, U.S. legal space today, like all space, is actively produced, including through many of the legal practices explored in this dissertation. It is undeniably *capitalist* space, fundamental to the reproduction of the relations of production (Lefebvre, 1976). Yet it does not fit comfortably within the framework of increasing homogenization often identified with capitalist space and “globalization.” U.S. juridico-economic territory is delimited by state borders, but it is simultaneously transnational. It involves territorial struggles for control over space, but the borders being fought over are *ad hoc*, irregular and convoluted. They are legible only to a small number of highly trained experts in law, business and policy circles, and even then, only in relatively small pieces. A sovereign debt lawyer, most likely does not know the details of derivatives or real estate law.

While not attempting to provide a comprehensive map of U.S. legal space, this dissertation has aimed to provide some theoretical and methodological tools for pursuing similar spatio-legal investigations of other processes. I have provided a historical framework for situating U.S. legal power in relation to post-World War II geopolitical dynamics and U.S. hegemony that is relevant to understanding many economic processes. I have also demonstrated the importance of “reasoning by dichotomy” as a key *spatial* method of the production of legal geographies in U.S. law. As part of this, I have shown how it is not only explicit spatial categories like foreign and domestic that are relevant to producing legal space. Other categories like private/public, law/politics and nature/purpose also often serve spatial functions, separately and, most importantly, in their links and interactions with one another. These dichotomies operate explicitly within legal arguments, but also, less directly, in the minds of judges and politicians in ways that shape legal outcomes. In short, I hope to have provided some new tools for reading the spatial in legal documents and practices that may be helpful to geographers, legal scholars, and political economists.

I hope this framework can and will be usefully applied to exploring a host of important questions about the legal spaces of contemporary capitalism that I was unable to address here. This dissertation has not done justice to the importance of various Third World actors, especially elites, in both participating in and, in some cases, resisting the production of these transnational legal spaces dominated by the United States. Likewise, although I allude to the importance of English legal space at points, the history of English juridico-economic geographies and their imbrication with those of the United States requires much deeper analysis. Transnational payment geographies, in addition, deserve a dissertation of their own, as do the legal spaces shaping derivatives transactions, currency exchanges and land grabs. Another pressing question is how the increasing inclusion of “investor state dispute settlement” clauses in bi- and multi-lateral trade treaties are reshaping legal territories, and perhaps even subordinating the United States’ own legal power to that of transnational corporations. Finally, a fundamental question for political economists and economic geographers is how all of these “elite” legal spaces of transnational finance relate to *other* capitalist spaces, often ones that are highly visible and homogenizing. How do the convolutions of transnational payment geographies intersect with the growing power of industrial agriculture, massive Apple factories in China, or the expansion of mega-cities?

However, the most important question I have tried to raise, if not fully answer in this

dissertation is the following: what are the ethical and political stakes of establishing one kind of juridico-economic territory and not another? Throughout, I have critiqued the systematic expansion of U.S. juridico-economic territory for correspondingly reducing the space over which other countries, especially in the Third World, have authority. I have argued that this displaces national economic sovereignty from many other countries to the United States. Yet this is not necessarily to suggest that we need a return to so-called “Westphalian” legal borders, in which legal territory is exactly matched to official political borders — which it never was in any case. The more basic point is to re-politicize and re-democratize legal border-making by challenging the view that legal rules are simply technical and apolitical, and by suggesting that we should not leave these crucial political decisions up to litigants, judges, and lawyers.

A contract is never just a contract, and there is no such thing as “the” rule of law. There are only particular laws and legal practices, which are shaped by particular interests and that benefit some, while harming others. In short, this brings us back to the judicialization debates discussed Chapter 1. I agree with those that have criticized as anti-democratic the judicialization of significant political activities in the last several decades. I hope to have shown, however, that the scope of judicialization is far greater than it is usually considered to be. It is not only the judicial review of contested elections, or definitions of citizenship that remove important political questions from the realm of popular debate. It is also the far more extensive and far less noticed expansion of judicial power over transnational economic relations that seriously undermines democracy in the United States and abroad.

The answer may not be to try to turn back the legal clock to a more “positivist” territorial frame. Sovereignty is not something that a country either does or does not have, and national power and national political borders are never directly aligned. The degree and kind of choice a state is able to exercise with respect to its own national economic decisions is a far looser and more variable thing, shaped by internal political dynamics and economic pressures as much as by legal rules. Yet the fact remains that, at a moment when even potential democratic action remains confined to the national and sub-national scales, the increasingly *trans*-national reach of U.S. common law escapes democratic oversight from either the United States or other nations. Correcting this mismatch would require at the least reversing some of the past half-century’s extensions of U.S. judicial reach over the sovereignty of other states, and reigning in the power of U.S. courts. A more substantive change would require radically rethinking the nature of both legal and economic inter-state relations, and using the law to curb the power of private capital, rather than to produce it.

U.S. judicial power is of course not the only way in which U.S. hegemony displaces the sovereignty of foreign nations. In addition to direct U.S. military incursions in Iraq, Afghanistan and elsewhere, drastic economic imbalances in and of themselves reduce the options available to many states. U.S. legal power contributes to these more obvious inequalities. It is distinct, however, in being less visible and, in that way, more insidious. As U.S. judicial power increasingly reaches around the globe, reshaping domestic legal systems in its wake even as it overrides them, exposing these underlying legal structures becomes all the more urgent. Once established, these deep legal structures, on which so much financial power is based, are almost never directly criticized by policy makers, activists or scholars. They simply fade into the rule of law to which all countries that wish to participate in the international economic order today must profess obedience.

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