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NOTES

1. It is also worth noting that reviews of diplomacy and negotiation have taken a broader mandate that is used here. Sharp (1999); Odell and Tingley (2016); and Butler and Boyer (2010) were more broadly focused on literature reviews of the field and much less on the large-N empirical landscape.
2. In case of the mediation work led by Wilkenfeld, most of the funding came from the U.S. National Science Foundation. GlobalEd funding came primarily from the U.S. Department of Education.
3. A detailed discussion about the validity and utility of collecting data validity from middle school and high school experimental subjects can be found in Boyer et al. (2005, pp. 201–213).
4. For details of the content validity study GlobalEd undertook to enhance validity and reliability for its negotiation styles inventory, see Boyer et al. (2009).

Mark A. Boyer and Michael J. Butler

THE DIVERGING THEORY AND PRACTICE OF INTERNATIONAL LAW

INTRODUCTION

After the September 11, 2001, terrorist attacks, many survivors and their families wanted to sue Saudi Arabia for its alleged support of the attacks. However, they faced a major obstacle: establishing the jurisdiction of a U.S. court. The United States has allowed terrorism lawsuits against foreign states since 1991, but only if the defendant was first designated by the U.S. government as an official state sponsor of terrorism.[1] Saudi Arabia was never placed on this list and hence had immunity in U.S. courts. In fall 2016, Congress bowed to political pressure and passed the Justice Against Sponsors of Terrorism Act (JASTA), which allows individuals to sue all foreign states in U.S. courts for damages "caused by . . . an act of international terrorism in the United States."[2] This was no idle threat. To avoid seizure by U.S. courts, Saudi Arabia immediately threatened to sell $750 billion in

U.S. securities and remove its other assets from the United States (Mazzetti, 2016).

President Barack Obama vocally opposed the bill and tried to block its adoption.[3] Military and national security officials highlighted three major criticisms of the bill. First, they emphasized *uncertainty*: they argued that judges lack the expertise to determine responsibility for terrorist acts, so "consequential decisions [would] be made based on incomplete information" and "different courts [could reach] different conclusions about the culpability of individual foreign governments."[4] Second, they highlighted the possibility of excessive *enforcement*. If the United States allowed trials based on the mere allegations of terrorist links, they argued, judges could order "wide-ranging discovery" that threatened national security.[5] The move also opened the door to reciprocity by other states. Foreign courts may begin to adjudicate lawsuits against the United States for its own past support of violent groups. Finally, JASTA opponents argued that the law would reduce the *flexibility* of the U.S. government in conducting diplomacy and responding to terrorism. Obama wrote: "JASTA threatens to reduce the effectiveness of our response to indications that a foreign government has…[provided] support for terrorism, by taking such matters out of the hands of national security and foreign policy professionals and placing them in the hands of private litigants and courts."[6] U.S. relationships with strategic allies, like Saudi Arabia, would presumably be threatened if the U.S. government could no longer be a gatekeeper for domestic lawsuits.

While JASTA drew intense scrutiny, it is only one example of the growing importance of non-state actors and domestic courts in challenging foreign states and enforcing international law. Here these changes are documented in empirical practice and their implications explored for our theoretical understanding of international law and cooperation.

STATE-CENTRIC ACCOUNTS OF INTERNATIONAL LAW

Scholars believe that international law facilitates cooperation through three major mechanisms. First, international rules and institutions can reduce *uncertainty* about how states should behave. By its very nature, an international agreement specifies standards of appropriate behavior. These standards create common expectations about how states should behave. When agreements are ambiguous, institutions can step in and clarify the meaning of rules, thereby allowing states to better anticipate the future behavior of others.

Second, international institutions can facilitate *enforcement* of cooperative agreements. International dispute settlement bodies (DSBs)—including courts, arbitral tribunals, and other legal institutions—cannot compel an actor to comply with a rule. But DSBs nonetheless facilitate informal enforcement of international rules by providing public information about whether a state has violated an agreement (Milgrom, North, & Weingast, 1990). This information can coordinate enforcement by outside actors, including states, interest groups, and individuals (Carrubba, 2005; Dai, 2005; Johns, 2012; Mansfield, Milner, & Rosendorff, 2002). An adverse ruling may also give governments the political cover needed to take unpopular actions, such as relinquishing territory in a border dispute or removing protectionist trade policies (Allee & Huth, 2006; Davis, 2012). Finally, domestic courts are often willing to adjudicate civil lawsuits to enforce DSB orders, creating financial and political costs for international legal violations. By implicitly raising a state's cost from breaking its promises, DSBs make compliance more likely.

Finally, theorists emphasize the role of international law in creating *flexibility* in the international system (Rosendorff, 2005). Sometimes flexibility comes from incomplete contracts that are silent on legal obligations in particular circumstances. This flexibility can ease negotiations because parties can adopt differing interpretations of a text or renegotiate their commitments in the future (Abbott & Snidal, 2000; Koremenos, 2005). Modern international law also often explicitly allows states to "appeal to exceptions" when they need to break their promises (Pelc, 2009). For example, the World Trade Organization (WTO) allows its members to restrict trade in order to balance competing social objectives (such as environmental protection and human safety) and to respond to unexpected economic shocks (such as import surges and currency crises). Even if a state has brazenly violated a legal obligation, law and DSBs can, in effect, allow efficient breach; that is, they can allow a state to violate a contract and pay compensation when the cost of compliance is excessively high. Flexibility makes cooperation more stable because it gives states an alternative to simply leaving a cooperative agreement and abandoning cooperation when compliance is cost-prohibitive (Johns, 2015; Rosendorff, 2005).

Of course, there is a fundamental tension between facilitating enforcement and creating flexibility. When legal violations are excessively costly, governments have little discretion when they face unexpected political or economic pressure to break their prior promises. Since international law is based fundamentally on consent, states can always exit cooperative agreements. For example, many African countries have announced that they would withdraw from the International Criminal Court because of jurisprudence that conflicts with their domestic laws and perceived over-enforcement of human rights violations in Africa.[7] Many countries have also been withdrawing from bilateral investment treaties (Peinhardt & Wellhausen, 2016). These are not exceptions that prove a rule: exit from treaties is both common and accepted (Helfer, 2005). Strong enforcement allows states to promote short-term cooperation, at the expense of reducing flexibility and long-term cooperation.

States can manage this trade-off between enforcement and flexibility if they create strong DSBs but use them only selectively. For example, in the aftermath of the 2008 financial crisis, many countries blatantly violated their WTO commitments in order to manage their domestic economies. While every WTO member had the right to challenge these actions through its DSB, Pascal Lamy, the director-general of the WTO, urged WTO members to overlook these temporary violations, stating: "Not only do we need the resolve to respect WTO obligations, but also *restraint in exercising WTO rights*."[8] WTO members agreed: they recognized that short-term noncompliance was better than making WTO membership so costly that the institution collapsed. Put differently, WTO members were willing to temporarily weaken the enforcement of rules so that WTO members had the flexibility to respond to exigent circumstances. This allowed the WTO to survive and continue promoting long-term trade liberalization after the immediate crisis passed. The selective use of DSBs can therefore allow states to balance the competing effects of international law and institutions.

From a theoretical perspective, states are able to maintain this balance between enforcement and flexibility because they internalize both the costs and benefits of flexibility. When another state must violate a cooperative agreement, a compliant state bears a short-term cost from flexibility: it will contribute to

cooperation while receiving little in return. However, such a state knows that in the future, it too may need to violate its commitments. When this occurs, the state will benefit from flexibility. A state may be willing to overlook the temporary violations of others that are experiencing tough times, in order to ensure that others will overlook its own temporary violations when it goes through tough times (Johns, 2015). Joining the institution thus allows states to "trade" violations over time: tolerating the occasional defection of others in exchange for the right to sometimes defect themselves. These trades create a net benefit for everyone because a temporary violation followed by cooperation generates better long-term outcomes than no institution at all.

Note that under these theoretical arguments, it is *states* that must balance enforcement and flexibility. While most of modern international relations theory emphasizes the role of domestic politics, theories of international law rely fundamentally on actors that can balance demands both across competing domestic constituencies and across time. Accordingly, our theories of international law rely on the fundamental (if often implicit) assumption that states are the most important decision makers in the international system.

NON-STATE ACTORS AND DOMESTIC COURTS IN INTERNATIONAL LAW

These existing theories of international law are being challenged by two major empirical trends in the development and use of law to resolve international disputes. First, modern international law is no longer purely state-centric: *non-state actors* (including individuals, firms, and interest groups) often use international law to achieve their objectives. Second, the decline of sovereign immunity in the late 20th century has allowed *domestic courts* to become more important actors in the international system.

Non-State Actors. Historically, international law has created rights and responsibilities about how states treat one another and how they treat individuals. However, individuals (including firms, interest groups, etc.) have not had full legal personality because they could not make legal claims at the international level.[9] Brownlie writes: "It is states . . . which represent the . . . legal person on the international plane" (2008, p. 59). He continues: "To classify the individual as a 'subject' of law is unhelpful, since this may seem to imply the existence of capacities that do not exist" (2008, p. 65).

States have always legally been able to protect non-state actors under the doctrine of diplomatic protection, but these non-state actors rarely had direct remedies under traditional international law: non-state actors relied upon states to espouse and protect their international legal claims. For example, both customary and treaty law have long granted special protection to diplomatic and consular officials. However, the traditional interpretation of this law has been that this protection is the right of states not of the individuals themselves—diplomatic and consular officials are protected only because they represent their home state. The preamble to the Vienna Convention on Diplomatic Relations (1961) explicitly states that "the purpose of such privileges and immunities is *not to benefit individuals* but to ensure the efficient performance of the functions of diplomatic missions as representing States."[10]

This state-centric perspective is reflected in the design of international institutions created in the aftermath of World War II. The International Court of Justice (ICJ) serves as the main arbiter for questions of general international law. The ICJ can hear lawsuits between states that accept its jurisdiction, but non-state actors cannot file lawsuits. This design attribute has meant that there has

often been a disconnect between legal obligations and legal enforcement. For example, in the early 1960s, Ethiopia and Liberia sued the Union of South Africa—a country governed by white-minority rule—over its colonial administration of South West Africa.[11] Ethiopia and Liberia wanted to promote self-determination for the black natives of South West Africa and to eradicate the Union's apartheid policies. They argued that the Union had violated its 1920s Mandate, a legal document that established the Union's legal rights and responsibilities over South West Africa. Specifically, Ethiopia and Liberia argued that the Union's apartheid policies violated the Union's commitment to promote the "well-being and the social progress of the inhabitants" of South West Africa.[12] The ICJ ultimately dismissed the case by stating that Ethiopia and Liberia lacked standing. The Court argued that while the Mandate created rights for individuals living in South West Africa, it did not give Ethiopia and Liberia the "right . . . to require the due performance of the Mandate."[13] That is, Ethiopia and Liberia could not legally enforce the rights of individuals who lived outside of their territory. And, of course, individuals living within South West Africa could not enforce the Mandate because only states have standing at the ICJ. Individuals who lived within colonies had legal rights under international law, but they had no way to enforce these rights at the international level, either directly or indirectly.

To address the gap between international rights and remedies, most institutions that were created beginning in the mid-1960s have allowed non-state actors to enforce laws. Modern investment law is enforced almost solely by individual investors and firms that sue states in arbitration. Similarly, all of the UN multilateral human rights treaties that have been written since the 1960s have created dispute settlement bodies that allow individuals to file complaints if they believe that their rights have been violated by a treaty-member.[14] Additionally, states have created many new regional courts (for economics integration and human rights), most of which allow individuals to file cases (Alter, 2014).

Domestic Courts. The role of domestic courts in the international system also changed dramatically in the second half of the 20th century. Under customary international law, states were historically granted absolute sovereign immunity: they could not be sued in a foreign court, and their assets could not be taken to satisfy a foreign court order.[15] While domestic courts have a long history of regulating transnational actors, they could not be used to challenge the actions of foreign states (Falk, 1964). Since all states are sovereign, the thinking went, no state should be subject to the domestic legal system of another state. For example, Transportes Maritimos Do Estado, a steamship owner, was sued by a U.S. company in the 1920s for nonpayment of a steamship-repair bill. During the court proceedings, Transportes argued that it was a Portuguese government entity and hence entitled to immunity from U.S. courts. In its petition to the U.S. Supreme Court, Portugal wrote that it "does not intend to avoid its just obligations to citizens of the United States, but it claims that, if there is any question between it and such citizens, they are matters for adjudication by the diplomatic departments of the two governments, and it does object to the violation of its sovereignty, contrary to all rules of international law and international comity."[16] Disputes involving foreign governments, it was believed, were best addressed through diplomacy, rather than litigation.

However, sovereign immunity has slowly whittled away over the past decades, creating more and more opportunities for individuals to sue foreign states in domestic courts. The

rise of globalization and the growing involvement of governments in manufacturing, shipping, and purchasing goods led to a shift to the doctrine of limited sovereign immunity. Under this doctrine, states can lose their immunity when they engage in commercial activities.[17] The United States is not alone in this trend. Verdier and Voeten (2015) have documented the shift from absolute to limited immunity in courts around the world. They find that while only seven countries limited sovereign immunity in 1945, over 78 countries had switched to limited immunity by 2010. While this increase is partly explained by the increase in the number of states in the international system, there is nonetheless a dramatic increase in the proportion of states that limit sovereign immunity. Domestic courts can increasingly be used to challenge the actions of a foreign government, be it about a sovereign debt default, broken commercial contract, or even war crimes and human rights violations.

CHANGING LEGAL TRENDS

To illustrate the significance of the changing role of non-state actors and domestic courts in international law, changing practice in the United States is described in four different issue areas: terrorism, human rights, sovereign debt, and foreign investment. Attention is focused on U.S. courts because the relevant law scholarship focuses predominantly on U.S. practice and because many scholars believe that the United States has been the most popular choice for transnational litigants who engage in forum shopping (Whytock, 2011). In the conclusion, the generalizability of the argument is addressed by arguing that while we lack relevant cross-national data, the United States does not appear to be unique or exceptional in its growing willingness to adjudicate lawsuits against foreign states.

Terrorism. Beginning in the early 1990s, individuals could sue foreign states in U.S. courts for terrorism, provided that (a) these states were designated as official state sponsors of terrorism and (b) either the plaintiff or the victim was a U.S. citizen.[18] U.S. law placed no constraints on the location of the attacks. In 2008, the relevant law was extended even further to allow lawsuits if the plaintiffs or victims were U.S. government employees.[19] For example, in *Sheikh v. Republic of Sudan*, a group of Kenyan nationals sued Sudan in U.S. courts for the 1998 bombing of the U.S. embassy in Dar es Salaam, Kenya. All of the victims in the case were foreign nationals who worked at the U.S. embassy but otherwise had no connection to the United States.[20] That is, U.S. courts adjudicated a case filed by foreign nationals against a foreign state for an attack that took place in a foreign country (albeit at a U.S. embassy).

As shown in Figure 1, these laws have led to numerous terrorism lawsuits in U.S. courts.[21] Most of these lawsuits were filed by U.S. nationals, but a substantial number included foreign plaintiffs, such as the Kenyan nationals. Almost all of the lawsuits involved attacks on foreign soil, including Colombia, Cuba, Iran, Israel, Lebanon, and other states around the globe.

Note that there is an appreciable decline in terrorism lawsuits after 2008. This is likely driven by a simple explanation: the U.S. government removed Libya and North Korea from the list of state sponsors of terrorism in 2006 and 2008, respectively. Both of these countries faced a large number of lawsuits prior to their removal. This suggests that we can expect to see a growth in litigation in future years: while the Justice Against Sponsors of Terrorism Act covers only attacks that occur on U.S. territory, it removes the requirement that the foreign state be designated as an official state sponsor of terrorism. This opens the door to lawsuits against U.S. allies like Saudi Arabia.

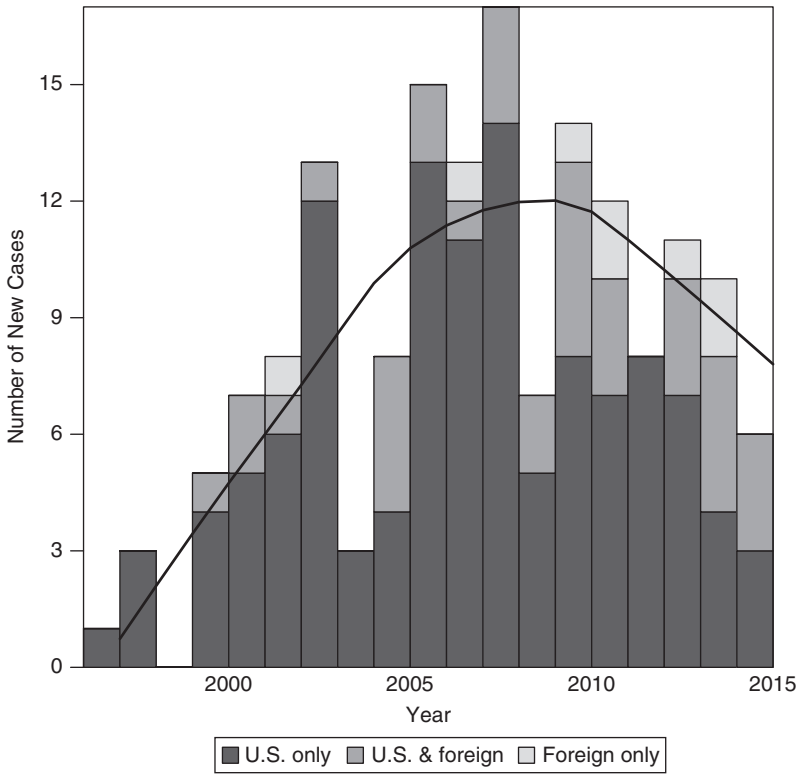

Figure 1. U.S. terrorism lawsuits, by plaintiff (1997–2015).

Note: Data collected by author from Westlaw, using the year of the first available ruling in each case. Lowess smoothing line generated by R. Of the 171 total cases, three are missing from the figure because of no information about the nationality of the plaintiff(s).

Human Rights. U.S. citizens have long been able to sue their own government for violating their human rights, but 1980–2015 saw a dramatic increase in the use of U.S. courts by foreign nationals to uphold international human rights law. The main vehicle for such lawsuits is the Alien Tort Statute (ATS). This law states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[22] That is, foreign nationals could use U.S. courts to file civil lawsuits for violations of international law. The provision entered federal law via the Judiciary Act of 1789 and lay dormant for centuries. Beginning in the late 1970s, human rights advocates began to invoke this law in an attempt to litigate human rights violations that were being ignored elsewhere. There was (and continues to be) high uncertainty about interpretation of the law because of its brevity and its obscure origin, with one judge writing that "no one seems to know whence it came."[23]

ATS lawsuits must be brought by foreign nationals, and the ATS imposes no restrictions on the nationality of the defendant, the place in which the violation occurred, or any other common bases of jurisdiction.[24] Table 1 shows information from a random sample of ATS cases, which illustrate broader trends. First, note that all of the cases involve events

Table 1. Alien Tort Statute Lawsuits

Title	Year[a]	Location	Note
Flores v. Southern Peru Copper	2002	Peru	Individuals sue a mining corporation, arguing that its pollution caused respiratory diseases
Chavez v. Carranza	2004	El Salvador	Individuals sue a government official for torture and extrajudicial killings in the early 1980s during El Salvador's civil war
El-Masri v. Tenet	2006	Afghanistan	Individual sues U.S. government official for unlawful detention, torture, and inhumane treatment while held under the CIA's extraordinary rendition program
Gutch v. Germany	2006	Germany	Individual challenges German tax assessment
Czetwertynski v. U.S.	2007	Poland	Individual sues U.S. government for leasing a property in Poland that was expropriated from the plaintiff's relative in 1954
Mastafa v. Australian Wheat Board	2008	Iraq	Widows of Iraqi men killed by the Hussein regime sue an Australian agricultural group for financially supporting the regime, in violation of the UN Oil-for-Food Program
Mamani v. Berzain	2010	Bolivia	Individuals sue for extrajudicial killings by the Bolivian military
Sikhs for Justice v. Nath	2012	India	Advocacy group sues Indian politician and political party over torture
Mezerhane v. Venezuela	2013	Venezuela	Individual sues government for expropriation and unlawful imprisonment
Rosenberg v. Lashkar-e-Taiba	2013	India and Pakistan	Victims sue terrorist group and Pakistani government agency for supporting the 2008 attacks in Mumbai

Note: Random sample of the 277 cases from the data collected by author from Westlaw.
[a] Year of the first available ruling in each case.

that occurred outside U.S. borders. Only three cases have any tangible links to the United States: *Flores v. Southern Peru Copper* was filed against an American corporation with operations in Peru, and *Czetwertynski v. U.S.* and *El-Masri v. Tenet* were both attempts to sue the U.S. government. The latter case is representative of a growing trend in ATS litigation: attempts to sue the U.S. government over the CIA's extraordinary rendition program and military prisons in Afghanistan and Guantanamo Bay. While these are not cases against foreign states, they do involve complex questions about the limits of U.S. territoriality, a broader issue with which U.S. courts have been struggling (Putnam, 2016; Raustiala, 2009).

Second, note that while human rights are not involved in all of these cases, they are the focus of almost all ATS lawsuits. Finally, note that all of these cases were litigated after 2000. This accords with the broader trend in ATS cases, shown in Figure 2. A few early cases in the 1980s and 1990s established that U.S. courts were amenable to ATS lawsuits, leading to a dramatic upsurge in the filing of new disputes.

One of the major innovations of ATS lawsuits has been for individuals to challenge foreign states indirectly by targeting the activities of multinational corporations (MNCs). Over 40% of ATS lawsuits involve at least one MNC as a defendant. This legal strategy allows plaintiffs to avoid legal arguments about sovereign immunity and makes it easier for plaintiffs to enforce judgments by seizing assets. Additionally, this strategy allows plaintiffs to establish firmer jurisdictional links to the United States, since most major MNCs have some financial operations that occur in the United States. In particular, many ATS plaintiffs have targeted banks that were alleged to be involved in terrorist financing and the expropriation of Jewish property during the Holocaust.

The proliferation and expansiveness of ATS lawsuits has provoked a major backlash. In 2013, the U.S. Supreme Court was asked to rule on a case filed by Nigerian citizens, who alleged that British and Dutch oil companies violated human rights in Nigeria.[25] The Court questioned whether it should be adjudicating disputes between foreign nationals and a foreign corporation over actions that occurred

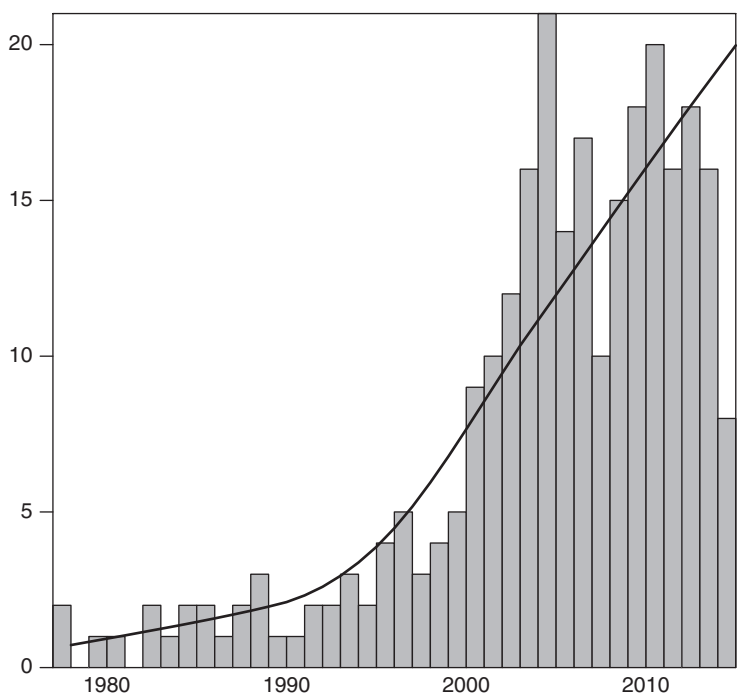

Figure 2. U.S. lawsuits under the Alien Tort Statute (1978–2015).

Note: Data collected by author from Westlaw, using the year of the first available ruling in each of the 277 cases. Lowess smoothing line generated by R.

on foreign territory. Practitioners and scholars view this ruling as a major setback in human rights litigation, but the long-term impact of this ruling is not yet clear. While it will likely stymie the volume of future ATS lawsuits, human rights victims can still invoke the ATS if they establish some jurisdictional link to the United States.

Sovereign Debt. The rise of non-state actors and domestic courts is also apparent in international economic law. Throughout history, governments have relied upon foreign credit, in the form of loans or bonds, to finance their activities. During the era of absolute sovereign immunity (i.e., prior to the mid-20th century), foreign creditors had few ways to enforce their legal claims when a government defaulted on its debt. Foreign creditors often sought diplomatic protection from their own governments, which sometimes led to gunboat diplomacy and military intervention (Maurer, 2013; Wynne, 1951). They could also seek justice within the debtor's domestic legal system or attempt to block future credit, yet defaults were regular events for most countries (Reinhart & Rogoff, 2009; Wynne, 1951).[26]

However, the decline of absolute immunity led to dramatic changes in the enforcement of sovereign debt contracts. In the late 20th century, most foreign debt was issued in the United States (Das, Papaioannou, & Trebesch, 2012), yet there was little U.S. litigation prior to the 1990s. Even though the United States shifted to restricted sovereign immunity in 1976, courts were initially divided about whether receiving loans and issuing bonds for public finance constituted a "commercial activity." This question was not definitively resolved until 1992, when the U.S. Supreme Court ruled that issuing debt constitutes a "commercial activity" under U.S. law.[27] Additionally, most sovereign debt in the 1970s and 1980s came from loans issued by commercial banks, international organizations, or other states; debtors rarely issued tradable bonds (Fisch & Gentile, 2004). Debt restructuring was common, but the limited number of creditors and their relative homogeneity ensured that orderly negotiations could occur via institutions like the Paris Club. There was accordingly little need for litigation. In 1989, the United States initiated the Brady Plan, under which existing loans were converted into publicly tradable bonds, creating a highly liquid secondary market for sovereign debt. Rather than receiving a loan from a single investor, countries had loan obligations to literally thousands of individual bond holders with diverse interests. Loan restructuring accordingly became much more difficult when debtors had economic difficulties, and litigation became an attractive option to "holdout creditors" who refused to accept revised terms.

Creditors have used U.S. courts to sue a host of states over default, including Antigua and Barbuda, Argentina, Bolivia, Brazil, China, Costa Rica, Cuba, Czechoslovakia, Democratic Republic of the Congo, Ecuador, Germany, Grenada, Guatemala, Iraq, Mexico, Nicaragua, Nauru, Palau, Panama, Paraguay, Peru, Poland, Republic of the Congo, Russia, Venezuela, and Yugoslavia.[28] Table 2 provides detailed information about ten randomly drawn lawsuits from the available U.S. rulings.[29] While some lawsuits involve debt issued prior to 1976, most lawsuits involve debt issued after the United States moved to restricted sovereign immunity. Additionally, few cases were litigated prior to the 1990s. Most of the ongoing U.S. litigation involves Argentina's 2001 default and subsequent loan restructuring, which affected approximately 600,000 individual investors (Das, Papaioannou, & Trebesch, 2012, p. 21). It is difficult to quantify the

Table 2. Sovereign Debt Lawsuits in U.S. Courts

Title	Debt Issue Date	Debt Amount (principal only)	Year[a]	Note
Carl Marks & Co. v. USSR	1916	$75 million	1986	Debt repudiated in 1918 after the Russian revolution
Bleier v. Germany	1924–1930	Over $100 million	2010	Debt repudiated by Hitler after 1933
Schmidt v. Poland	1929–1930	$4.5 million	1984	Treasury notes for the purchase of railway equipment; defaults in 1936 and 1939
Elliott Associates v. Panama	1982	$300 million	1996	Hold-out creditor after 1995 Brady Plan restructuring
FG Hemisphere v. Republic of the Congo	1982	—[b]	2002	Attempt to seize oil revenue as compensation for a defaulted loan issued by Banco do Brasil
Pravin Banker v. Banco Popular del Peru	1983	$14.2 million	1994	Loans issued by Mellon Bank to finance debt restructuring in 1983; total foreign debt in 1983 was $138 million
Connecticut Bank of Commerce v. Republic of Congo	1984	$6.5 million	2002	Loan for highway construction
Yucyco v. Slovenia	1988	$29.5 million	1997	Loans to banks that were guaranteed by the Yugoslavian government
CIBC Bank and Trust v. Banco Central do Brasil	1988	$1.4 billion[c]	1995	Debt restructuring
Peandes v. Ecuador	2000	$455,000[d]	2016	Suit for nonpayment of interest, prior to bond maturity

Note: Random sample of cases from the data collected by author from Westlaw.
[a] Year of the first available ruling in each case.
[b] Court granted judgment in 2002 for $151 million in damages.
[c] Value of plaintiff-held debt as of 1994.
[d] Value of plaintiff-held debt as of 2015.

litigation against Argentina because of the immense complexity of the cases, but Argentina's regulatory filings with the Securities and Exchange Commission provide a snapshot of the ongoing litigation. In September 2016, Argentina reported that it faced unpaid judgments made by U.S. courts totaling $1.2 billion, with an additional 15 class action lawsuits pending in U.S. district courts.[30]

Of course, restricting our focus to litigation is problematic because we can observe only those cases that were actually filed. An alternative way to examine changing trends is to consider the terms of bond contracts. Because of the initial uncertainty about whether issuing bonds was a "commercial activity" under U.S. law, creditors demanded that foreign governments explicitly waive their immunity in debt contracts. Table 3 shows changing patterns in debt contracts issued in New York using data from Weidemaier (2014).[31] Prior to 1965, no bond that was publicly issued by a foreign state in New York included any kind of immunity waiver. Beginning in 1965, states began to waive their immunity from the jurisdiction, meaning that investors could use U.S. courts to sue debtor states. States then progressively began to also waive their immunity from execution, meaning that investors could execute U.S. court orders by seizing foreign state assets that were located in the United States, such as money deposited in U.S. bank accounts. By the 2000s, all bonds issued in New York included a waiver of jurisdiction, and 78% also included a waiver from execution. These changing patterns in bond contracts demonstrate that foreign states became increasingly vulnerable to litigation in U.S. courts. While we do not have complete quantitative data on bonds issued in London and other markets (or privately issued debt), the broader sovereign debt literature does not provide any suggestion that the terms of bonds issued in New York were systematically different from those issued in other markets.

These immunity waivers generated litigation that quickly spilled across borders. For

Table 3. Sovereign Debt Contracts Issued in New York (1950–2009)

Years	Type of Waiver						Total Number of Bonds
	None		Jurisdiction Only		Jurisdiction and Execution		
	Count	*Percentage*	Count	*Percentage*	Count	*Percentage*	
1950–1959	38	*100.0%*	0	*0.0%*	0	*0.0%*	38
1960–1969	57	*91.9%*	5	*8.1%*	0	*0.0%*	62
1970–1979	42	*61.8%*	22	*32.4%*	4	*5.9%*	68
1980–1989	17	*15.2%*	30	*26.8%*	65	*58.0%*	112
1990–1999	8	*2.5%*	64	*20.0%*	248	*77.5%*	320
2000–2009	0	*0.0%*	115	*21.8%*	413	*78.2%*	528

Note: Compiled using data from Weidemaier (2014).

example, when Argentina issued a bond in 1994, it waived its immunity from U.S. courts. Seven years later, it defaulted on its debt and attempted a major restructuring with its creditors. However, not all of its creditors accepted the revised terms. One of Argentina's most aggressive creditors was NML, a hedge fund that specializes in purchasing and then litigating defaulted bonds.[32] NML first sued Argentina in U.S. courts and secured a judgment that ordered Argentina to pay its creditors. In addition to attempting to seize Argentinian assets located in the United States, NML asked foreign courts (including courts in the United Kingdom and Ghana, for example) to recognize and enforce the U.S. order so that NML could seize Argentinian assets located outside the United States. NML targeted government aircraft, art exhibits, and even a warship docked in Ghana (Fontevecchia, 2012). At a high point in the Argentina–NML dispute, one hedge fund employee noted: "We will continue to seize assets, enforce judgments. Argentina can't isolate themselves from the United States or in places where our claims are enforceable forever. That would be amazing in today's world" (Goodman, 2016). Yet this is precisely what Argentina tried to do. To protect its assets from seizure by the United States and other foreign courts, Argentina kept its government-owned assets, including its airplanes and art, within its own borders. Additionally, Argentina rerouted its international bond payments through its domestic banks to keep NML from seizing funds that otherwise would have flowed through U.S. banks (Stevenson, 2014). The NML litigation yielded few outright successes, but it gave NML a sufficiently strong bargaining position that Argentina agreed in spring 2016 to pay NML $2.4 billion to end the litigation—a nearly 400% return on NML's initial investment (Stevenson, 2016).

Foreign Investment. In addition to sovereign debt, capital often flows across borders through direct investments in economic activities. In 2015 alone, an estimated $1.76 billion flowed across borders in foreign direct investment.[33] As of December 2016, states had signed over 3,000 international investment agreements. Most of these treaties allow foreign investors to sue their host country via arbitration if they believe that their treaty rights have been violated.[34] It is difficult to get a precise count of arbitrations since investors and host countries often keep their disputes private (Hafner-Burton, Steinert-Threlkeld, & Victor, 2016). However, in her exhaustive study of investment arbitration, Wellhausen (2016b) found that 676 foreign investment disputes were heard by an international arbitral body in 1990–2014. This is a conservative estimate of international arbitration, since Wellhausen includes only disputes that are filed against states and not commercial disputes that are filed against state-owned enterprises.

While new scholarship has begun to look systematically at investment arbitration, political science has neglected to examine what occurs after arbitration.[35] After all, if a country is willing to mistreat a foreign investor in the first place, why should we believe that they will comply with an international arbitral award? States recognized this problem long ago and made arbitration awards enforceable in domestic courts. For example, most modern investment disputes are heard at the International Center for the Settlement of Investment Disputes (ICSID). As part of its membership in ICSID, each state must "recognize an award rendered [by ICSID] as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[36] Additionally, many states are

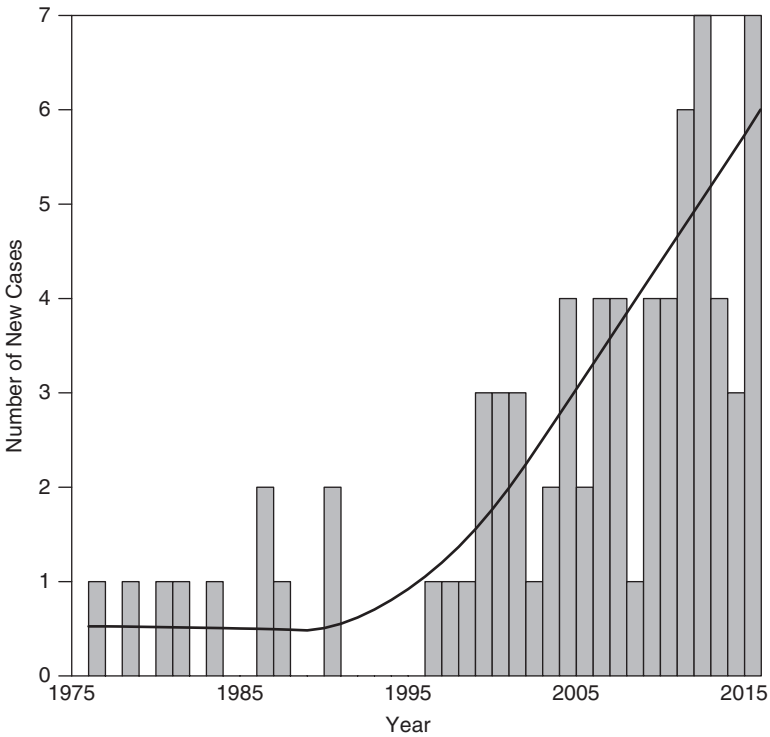

Figure 3. Enforcing international arbitration awards and foreign judgments in the United States (1975–2015).

Note: Data collected by author from Westlaw, using the year of the first available ruling in each of the 83 cases. Lowess smoothing line generated by R.

members of the New York Convention (1958), a separate treaty in which states pledge to "recognize arbitral awards as binding and enforce them in accordance with [their] rules of procedure."[37] Similar treatment is granted to the judgments of foreign courts, which often hear international investment disputes. As of December 2016, over 150 states are members of the ICSID Convention and/or the New York Convention, meaning that an international arbitration award can be formally recognized as legally binding in most countries in the world.

Foreign investors regularly use domestic legal systems to enforce these awards. Figure 3 shows attempts to enforce arbitral awards and foreign judgments in U.S. courts during the years 1975–2015. While the absolute number of cases each year is relatively small, there is a steep upward trend since about 1995. These data suggest that over 10% of arbitration awards turn into lawsuits in U.S. federal courts, and these awards are worth an average of $713 million in baseline damages.[38] Table 4 includes ten randomly selected disputes from the full dataset, showing the diversity of states that are involved in investment arbitration. Additionally, Table 5 shows the distribution of cases across industries. Roughly a quarter of disputes involve oil, gas, and minerals. The other most common types of disputes involve the sale of goods across borders, public

Table 4. Arbitration Awards and Foreign Judgments with Enforcement Proceedings in U.S. Courts

Title	Year[a]	Industry	Claimant Nationality	Respondent Nationality	Award Amount in U.S.$ Millions[b]
Ethiopia v. Baruch-Foster Corp.[c]	1976	Oil, gas, and minerals	Ethiopia	United States	0.70
Ipitrade Intern. v. Nigeria	1978	Sale of goods (cement)	France	Nigeria	9.12
Maritime Intern. Nominees Establishment v. Guinea	1981	Oil, gas, and minerals	Liechtenstein	Guinea	25.00
International Ins. Co. v. Caja Nacional de Ahorro y Seguro	2001	Insurance	United States	Argentina	4.70
Monegasque de Reassurances v. Nak Naftogaz of Ukraine	2002	Insurance	Monaco	Ukraine	88.36
Telcordia Tech v. Telkom	2004	Telecommunications	United States	South Africa	—
Strategic Technologies v. Taiwan	2007	—[d]	Singapore	Taiwan	1.58
Servaas v. Iraq	2010	Services	United States	Iraq	14.15
Enron Nigeria Power Holding v. Nigeria	2014	Utilities	Cayman Islands	Nigeria	11.20
Newco Limited v. Belize	2015	Infrastructure	Belize	Belize	4.26

Note: Random sample of the 83 cases from the data collected by author from Westlaw.

[a] Year of the first available ruling in each case.

[b] To ensure better comparability across cases, the award amount does not include interest charges or arbitration costs/fees.

[c] Arbitration was initiated by Baruch-Foster, but Ethiopia won (and attempted to enforce) a counterclaim.

[d] Ruling states that the case involved a "commercial dispute" but provides no further information

Table 5. Industry Breakdown of Arbitration Awards and Foreign Judgments With Enforcement Proceedings in U.S. Courts

Industry	Number	Percentage
Agriculture	3	3.6%
Banking and finance	4	4.8%
Construction[a]	6	7.2%
Infrastructure	9	10.8%
Insurance	6	7.2%
Oil, gas, and minerals	20	24.1%
Real estate	2	2.4%
Sale of goods	11	13.3%
Services	6	7.2%
Telecommunications	3	3.6%
Utilities	10	12.0%
Other/Unknown	3	3.6%
Total	83	100.0%

Note: Data collected by author from Westlaw.
[a] Excluding infrastructure.

utilities (such as electricity provision), and infrastructure contracts.[39]

Of course, executing these awards—by seizing state-owned assets in the United States or elsewhere—continues to be a challenge for many investors. Just because an award is recognized by a domestic court as legally binding does not mean that states completely lose their immunity from execution. Just as Argentina sought to avoid its creditors by removing its assets from the jurisdiction of U.S. courts, other foreign states have tried to protect their assets when investors enforce their arbitration awards or foreign judgments in U.S. courts. For example, in April 2016, Crystallex, a Canadian mining company, won a $1.2 billion arbitration award against Venezuela for violating an investment treaty.[40] Shortly before the award was issued, Crystallex notified U.S. courts that "Venezuela, knowing that it would be held liable to Crystallex in the pending arbitration, took affirmative steps to hinder and delay any enforcement action in the United States by removing $2.8 billion in stockholder equity from two Delaware corporations that it owns and controls and transferring that money out of the country."[41] Crystallex has also been attempting to seize Venezuelan assets that are located in Canada.[42] Even if these legal maneuvers are not successful, the NML sovereign debt dispute demonstrates that persistent litigation can be effective in forcing states to the negotiating table.

THE GROWING GAP BETWEEN THEORY AND PRACTICE

The issue areas noted here—terrorism, human rights, sovereign debt, and foreign investment—all illustrate the changing role of non-

state actors and domestic courts in enforcing international law. These trends within U.S. courts are documented here partly to keep the analysis feasible and partly because many scholars believe that the United States is a popular forum for transnational litigants. Is the United States unique as an arbiter of disputes against foreign states? Cross-national data on lawsuits against foreign states do not exist. Indeed, the data here are a novel contribution to our understanding of U.S. litigation. However, research suggests that transnational litigation has become less U.S.-centric. Quintanilla and Whytock (2011) document a general decline in transnational torts and contract claims from the mid-1990s. At the same time, Whytock (2008) finds an increase in U.S. cases that involve foreign judgments and arbitral awards, suggesting that transnational litigants are initiating legal actions in other countries or through international arbitration, then using U.S. courts to seize assets.

Qualitatively, U.S. courts are often more conservative in adjudicating international disputes than other developed countries. As discussed, a 2013 ruling by the U.S. Supreme Court placed stricter limits on lawsuits under the Alien Tort Statute, to ensure that future cases have stronger jurisdictional links to the United States.[43] And even though U.S. courts have clear jurisdiction over a variety of sovereign debt contracts, the dramatic surge in litigation against Argentina has caused many U.S. judges to ask whether U.S. courts have become too involved in enforcing international law (Cabranes, 2015). Sovereign debt and foreign investment lawsuits are routinely heard in the domestic courts of other countries, including France, Japan, and the United Kingdom. Civil lawsuits for human rights violations by Germany during World War II have been heard in Greece and Italy.[44] And many countries—including Argentina, Belgium, and Spain—have moved well beyond the United States in protecting human rights by allowing criminal prosecutions of foreign leaders under the doctrine of universal jurisdiction (Langer, 2011, 2015). Clearly, international law is no longer purely state-centric.

Why do these changing trends matter? The primary theoretical puzzle that underlies international law pertains to consent: Why do sovereign states voluntarily constrain their own actions using international laws and institutions? As described earlier, existing theory relies upon the claim that states balance the costs and benefits of these constraints over time: states constrain themselves, given the belief that others will be constrained as well. Yet for cooperation to hold over time, states must have the flexibility to sometimes violate their commitments when the short-term cost of compliance is so high that it outweighs the long-term benefit of cooperation. That is, states must balance the competing goals of both enforcing law and giving states the flexibility to sometimes violate it. This flexibility can come in many forms, including appeals to exception, temporary efficient breach, or the common understanding that sometimes the law will not be enforced. This flexibility is possible because of reciprocity: by forgiving a violation today, a state can expect that it will be forgiven when it must violate. The rise of non-state actors and domestic courts disrupts this delicate balance.

To understand this disruption, let us return to our motivating example: attempts to broaden access to U.S. courts for antiterrorism lawsuits. Under international law, terrorism is clearly illegal, and states must not support terrorism. Yet national security concerns often compel states to support violent groups that may be considered terrorists in either the short term or the long term. It is understood within the international community that while states should not support terrorists, sometimes they make decisions that (could arguably) violate this rule because of competing concerns.

In the past, the U.S. government has been willing to overlook the actions of Saudi Arabia,

partly to maintain its strategic alliance and partly to preserve its own flexibility in conducting foreign policy. If individuals can use U.S. courts to sue foreign states for supporting terrorism, then the U.S. government will likely receive reciprocal treatment. Other states may begin to allow their citizens to sue the United States for supporting violent groups in other parts of the world. From the perspective of the Assad regime, the United States is supporting terrorism when it provides military support for Syrian rebels. Similarly, the United States supported the Taliban in its war against the Soviet Union in the 1980s, only to have the Taliban later facilitate terrorism elsewhere. When the U.S. government internalizes all of the various factors at work, it is willing to provide less enforcement in exchange for preserving more flexibility.

However, the costs of overlooking state support for terrorism are not spread evenly across society. The victims of terrorist attacks and their families bear the cost of violations. By providing victims with a venue for lawsuits, domestic courts provide a remedy for violations of international law and make future state support for terrorism more costly. That is, they privilege the enforcement of antiterrorism rules at the expense of making the international legal system less flexible. The argument here is not that it was a mistake for Congress to expand the jurisdiction of U.S. courts over terrorism lawsuits in 2016 and that the United States should ignore state-sponsored terrorism. Rather, allowing individuals to sue foreign states in domestic courts has tangible consequences for the operation of international law: it changes the balance between enforcement and flexibility that existed before individuals had access to a legal remedy.

Consider another timely issue in international economic law: the regulation of cigarettes. When Tabaré Vázquez, a former oncologist, became the president of Uruguay in 2005, one of his domestic priorities was to strengthen Uruguay's antismoking regulations. After these new regulations were implemented, Philip Morris International (PMI) sued Uruguay, arguing that it violated a bilateral investment treaty. Two months later, the Australian government announced that it, too, would be adopting stricter antismoking regulations. PMI decided to once again take its legal battle to the international level by suing Australia in international arbitration.

The growth of international anti-tobacco treaties and regulations suggests that most states believe that the need to promote public health should outweigh the lost profits of cigarette manufacturers. While states generally recognize that foreign investors should be protected from discriminatory regulation, they often "appeal to exception" when the protection of foreign investment harms public health. It is unlikely that the United States, the corporate home of PMI, would ever espouse PMI's claims by filing lawsuits against Uruguay and Australia.[45] The United States wants to preserve its own flexibility to promote public health through domestic regulation. But states no longer decide whether to enforce international investment law; investors do. When PMI sued Uruguay and Australia, it derived the benefit of enforcement without internalizing the accompanying political cost of reduced regulatory flexibility.[46] By giving foreign investors access to legal remedies, states have changed the balance between enforcement and flexibility.

This mismatch—between who benefits from enforcement and who benefits from flexibility—poses a challenge for our existing theories of international law. When states are removed from enforcement decisions, they lose the ability to balance the competing objectives of compliance and flexibility. Of course, states can attempt to readjust by writing agree-

ments that impose fewer constraints on states or allow more appeals to exception. But the strategic interactions that underlie international law have changed.

The changing practice of international law presents both a challenge and an opportunity for international relations theory. Outcomes are no longer determined solely (or even primarily) by state interactions; rather they are the results of individual decision making that can lead to complex and unanticipated outcomes. Early theoretical accounts of international law invoked the Prisoner's Dilemma as a model of strategic interactions. But changing trends suggest that a more apt metaphor may be the open market economy, in which a large number of actors with diverse preferences interact across borders, seeking the most profitable conditions for enforcement. Just as closed markets function differently from open markets, so too may state-centric accounts of international law operate differently from theories that incorporate non-state actors and domestic courts.

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NOTES

1. See 28 U.S.C.A. § 1605(a).
2. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 3(b), 130 Stat. 852 (2016).
3. Obama vetoed the bill in September 2016. However, subsequent votes in the U.S. Senate and House of Representatives overrode his veto.
4. See President Obama's letter to the Senate, at 162 Cong. Rec. H6023 (daily ed. September 28, 2016) (Justice against Sponsors of Terrorism Act—Veto Message from the President of the United States)
5. Ibid. at H6024.
6. Ibid. at H6023.
7. Withdrawals in October 2016 included Burundi, Gambia, and South Africa. South Africa's withdrawal from the International Criminal Court was partially motivated by the criticism it faced for not extraditing Omar al-Bashir to The Hague the previous year. South Africa argued that the extradition requirement in the Rome Statute violated domestic diplomatic immunity laws. See Chan and Simons (2016).
8. Emphasis added. Quoted in Davis and Pelc (2015).
9. McCorquodale also emphasizes that individuals cannot "participate in the creation [and] development" of international law (2006, p. 308). See also Cassese (2005, pp. 142–150) and Shaw (2014, pp. 188–189) on the limited role of nonstate actors within international law.
10. Vienna Convention on Diplomatic Relations, April 18, 1961, [1972] 23 U.S.T. 3227. (Emphasis added.)
11. South West Africa was the territory that makes up modern-day Namibia.
12. See Articles 2 and 4 of Mandate for German South West Africa, Geneva, December 17, 1920, Council of the League of Nations Doc. 20-31-96D (1920). Available in 2 League of Nations Off. J. pt. 1 (1921).
13. South West Africa (*Eth. v. S. Afr.*; *Liber. v. S. Afr.*), Second Phase, 1966 I.C.J. Rep. 6, at 29 (July 18).
14. The most famous of these bodies is the Human Rights Committee, which hears alleged violations of the International Covenant on Civil and Political Rights.
15. In technical terms, states were both immune from jurisdiction as well as immune from the execution or attachment of foreign court orders. See Shaw (2014, pp. 506–565) for an overview of the law of sovereign immunity.
16. See *The Sao Vicente*, 260 U.S. 151, 153 (1922) (quoting writ of certiorari submitted by Portugal).
17. Under U.S. law, a foreign state can also lose its immunity for some kinds of property and personal injury lawsuits. See 28 U.S.C. § 1605.
18. See, e.g., Antiterrorism Act of 1990, Pub. L. No. 101-519, 104 Stat. 2250 (1990) (codified at 18 U.S.C. §§ 2331, 2333-2338 (Supp. 1991)) and Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 194-132, 110 Stat 1214 (1996) (codified at 8 U.S.C. §1189 (Supp. 2002)).
19. See the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008).
20. See *Sheikh v. Republic of Sudan*, 172 F.Supp.3d 124 (D.D.C. 28 March 2016)
21. All of the original data here were collected using searches of the Westlaw database. The data and coding documents are all available from the author. Since it was usually not possible to code the date on which each lawsuit was filed, the data are coded based upon the date of the first available ruling. Because not all U.S. court rulings are publicly available, the data here are a conservative estimate of the amount of litigation.
22. Judiciary Act of 1789, ch. 20, §9, 1 Stat. 73, 77 (1789) (amended 28 U.S.C. §1350, 1982); also known as the Alien Tort Claims Act.

23. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).
24. In practice, federal courts have limited jurisdiction over nonresident defendants by the U.S. doctrine of minimum contacts. This doctrine, originating in U.S. common law, requires that courts exert jurisdiction over a prospective defendant only if that defendant has at least the kind of "minimal contacts" (e.g., presence, commercial interests, etc.) that would allow the defendant to "reasonably expect to be haled into court" in that forum jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). However, there is tremendous variation in how strictly judges apply and interpret this standard.
25. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 569 U.S. 12, 185 L. Ed. 2d 671 (2013).
26. There are a few examples in which foreign creditors attempted legal action through foreign courts. For example, following Peru's default in 1875, its foreign creditors sued Dreyfus Brothers, a French intermediary for Peruvian exports, in Belgium, France, and the United Kingdom (Wynne, 1951, pp. 129–134). However, such attempts were unsuccessful.
27. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992).
28. The data here contains debt from both loans and bonds. Creditors include governments as well as their agencies and instrumentalities (such as central banks) that are covered by U.S. sovereign immunity laws. Not included are lawsuits over export–import financing (such as letters of credit from state-owned banks). The complete list of cases is included in the Online Appendix.
29. These data exclude cases filed in response to Argentina's 2001 default. Not provided here is data about the number of new debt lawsuits over time, because the complexity of this litigation makes it extremely difficult to choose the unit of analysis. Judges routinely bundle together cases brought by multiple plaintiffs when deciding individual legal questions, and it is often not possible to get a complete list of plaintiffs from publicly available rulings.
30. See Republic of Argentina, Annual Report (Form 18-K) (September 23, 2016), Exhibit 99.D, page D-159. Available from the author.
31. Weidemaier (2014) collects the attributes of 1,800 bond contracts over 1823–2011, using the records of the Thomson OneBanker database, major investment firms, and the New York and London Stock Exchanges. See Choi, Gulati, and Posner (2012) for descriptive data on changing patterns in other bond contract terms.
32. NML is a subsidiary of Elliott Management Corporations, which has been the primary innovator enforcing sovereign debt in U.S. court. Its other subsidiaries (Elliott Associates and Kensington International) have challenged bond defaults by Peru and the Republic of the Congo.
33. See United Nations Conference on Trade and Development (2016) "World Investment Report: 2016" U.N. Doc. E.16.II.D.4, at p. 3.
34. Different treaties allow for disputes at different arbitral bodies (Allee & Peinhardt, 2010).
35. A rare exception is Wellhausen (2016a).
36. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Art. 54(1), March 18, 1965, [1966] 17 U.S.T. 1291, T.I.A.S. No. 6090.
37. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, September 30, 1970, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (effective December 29, 1970), also known as the "New York Convention," Article III.
38. Investment disputes differ tremendously in their duration, meaning that much of the variation in total award amounts comes from interest charges and arbitration fees/costs. To ensure comparability across awards, only the baseline damages in an award are included. Excluded are the other supplemental charges.
39. Note that attention is not restricted here to foreign direct investment—which requires investment in production facilities—since disputes over the sale of goods and insurance are included. A more permissive view of foreign investment is adopted, since the political and legal challenges faced in these industries are equivalent to those faced by foreign direct investors.
40. See *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 961 (April 4, 2016).

41. *Crystallex International Corp. v. Petroleos de Venezuela*, Civil Action No. 15-cv-1082-LPS, Plaintiff Crystallex International Corp.'s Opposition to Defendants PDV Holding, Inc. and Citgo Holding, Inc.'s Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(B)(6), 2016 WL 1242617 (D. Del. R. March 18, 2016).
42. See *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (July 20, 2016), Case No. CV-16-11340-00CL, 2016 ONSC 4693 (Can. Ont. Sup. Ct. J.).
43. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 569 U.S. 12, 185 L. Ed. 2d 671 (2013).
44. See *Ferrini v. Federal Republic of Germany*, Cass. (Sezioni Unite), 6 Novembre 2003, n. 5044; and *Prefecture of Voiotia v. Federal Republic of Germany (Distomo massacre case)*, Areios Pagos [A.P.] [Supreme Court] 11/2000 (288933) (May 4, 2000), 129 ILR 513.
45. Indeed, in recent investment treaty negotiations with Australia, the United States agreed to exempt tobacco companies from investment protection.
46. PMI ultimately lost both arbitration cases. However, the cases caused many countries to delay and adjust new antismoking regulations and introduced some new jurisprudence that was favorable to tobacco companies See *Philip Morris Brands Sàrl, Abal Hermanos S.A. v. Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion of Arbitrator Gary Born (July 8, 2016).

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THE DIVERSIFICATION OF DETERRENCE: NEW DATA AND NOVEL REALITIES

INTRODUCTION: NEW WORLD, NEW USES FOR DETERRENCE

The world has changed considerably since the Cold War. Rather than conducting duck-and-cover drills to prepare for a nuclear attack, schools now implement lockdown procedures, reflecting concerns about shootings or bomb threats. The same populations that once faced incineration in a general nuclear exchange now fret over terrorist incidents perpetrated by radicalized youths or cyberattacks initiated by murky figures located in Russia, China, or North Korea. The relative transparency of the major international threats during the Cold War era contrasts with the complexity and ambiguity of hazards of the contemporary international arena. How many of the basic insights about deterrence inspired by Cold War events remain relevant today? How has deterrence changed in the interim? The study of deterrence has been, and can continue to be, updated to address evolving international realities.

The circumstances characterizing deterrence in the modern world are less elemental than total nuclear annihilation, but they are also more varied and complex. The supposed success of classical deterrence theory and the stability that it (may have) produced, set the scene for today's multifaceted deterrence environment. U.S. hegemony after the Cold War forced its near-competitors to pursue new modes of conflict that skirt the constraints imposed by the classical model. The United States, the North Atlantic Treaty Organization (NATO), Japan, South Korea, and other stable states now face adversaries whose actions are more difficult to detect and control.

An increasing number of countries also possess nuclear capabilities, latent or overt,[1] even as Western governments are forced to confront a more diverse set of antagonists exercising a wider range of strategies involving terrorism, insurgency, and cyberattacks. Practitioners have taken up the language of deterrence to define their own and others' behavior in these new contexts. For example, President Barack Obama's Comprehensive National Cybersecurity Initiative requires the United States to define and develop deterrence strategies and programs (Executive Office of the President,