

**THE EVOLUTION OF BOILERPLATE CONTRACTS:  
EVIDENCE FROM THE SOVEREIGN DEBT MARKET**

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**ABSTRACT**

*Scholarship on the subject of innovation in financial products is sparse. And research on innovation by lawyers writing financial contracts, particularly the boilerplate contracts that dominate many markets, is sparser still. The central theoretical debate in the literature on boilerplate contracts is over whether contract language responds immediately and effectively to external changes or whether nonlinearities in the form of network effects prevent these efficient transitions. Depending on the view one takes, there is a different role for official sector involvement. This debate over the responsiveness of contract language has taken center stage in recent discussions in the sovereign debt area. Recent occurrences in the world of sovereign debt contracts provide a ripe data set for the examination of the contract responsiveness question. Prior to 2000, all the N.Y. issued sovereign bond contracts were viewed as functionally identical in terms of being restructuring proof. Then, in 2000, Ecuador used an ambiguity in the contract language to argue that its contracts are indeed susceptible to restructuring. After Ecuador's successful restructuring, contracts that earlier looked to be homogenous, now differed in significant ways. Small differences in contract language that were previously viewed as unimportant, after Ecuador's restructuring, impacted the ease with which the Ecuador style restructuring technique can be used. So, all of a sudden, Argentina might find itself with contracts that are hard to restructure and Belize might have contracts that are easy to restructure. In February 2003, following the lead of Mexico, the contracts in this market begin to move to a new (and, once again, relatively homogenous) restructuring friendly standard. Our article examines what happened in between 1996 and 2004, with respect to the heterogeneity that the Ecuador shock in 2000 created. Did the sovereign issuers converge to a single new intermediate standard? Or did they move back to the old restructuring proof standard? Or did they do nothing? The answers to these questions sheds light on the above mentioned debate over the ability of markets for boilerplate contracts to effectively respond to changes in their environment.*

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\* Professor of Law, NYU Law School. This project was originally presented at a conference on sovereign debt hosted by the Georgetown University Law Center in 2004. As part of the conference, a predecessor to this paper appeared in the Emory Law Journal. The ideas in this paper have benefited from comments at workshops at Harvard, NYU, and Columbia. The paper will be published in Jose Ocampo and Joseph Stiglitz (editors), Debt Restructuring and Sovereign Bankruptcy (Initiative for Policy Dialogue/United Nations) (forthcoming 2005).

\*\* Professor of Law, Georgetown University Law Center. The research for this Article required us to conduct a number of interviews with both market participants and policymakers familiar with what went on in the sovereign markets during the 1995-2004 period. Most of these individuals, however, requested that we not directly attribute what was said to them. To the extent possible, therefore, we cite to publicly available documents. However, there are some instances where we are unable to provide adequate citations.

• Partner, Cleary Gottlieb (New York).

*“The problem with standardized documents (from the young lawyer’s standpoint) is that they are so frustratingly standard. Not only is the substantive content of the document predictable, one quickly learns that much of the language is immutable and even the order in which the clauses appear in the document is apparently a matter of remorseless precedent.”*

Lee C. Buchheit, *The Lawyer in Negotiation*, in *How to Negotiate a Eurocurrency Loan Agreements*, 159 (2d ed. 2003).

## **I. Introduction**

Boilerplate contracts are the norm in a wide variety of financial settings, including the U.S. domestic bond market, the sovereign bond market, and the derivatives market. Our interest is in the boilerplate contracts of the sovereign bond market. As the institutional characteristics of the sovereign bond market change – such as, for example, the shift from syndicated lending in the 1980s to bonds in the 1990s – certain contract terms can become problematic in terms of presenting barriers to restructurings or making opportunistic behavior too easy. For a combination of reasons that are a function of economics, history, and politics, the official sector is often under significant pressure to allow the “market” to solve its own problems. Allowing for the market to work its magic, however, does not mean that the official sector will not engage in “education” and exhortation about the need for the private sector to adopt certain value enhancing changes in boilerplate contract terms. Indeed, in the corridors of Washington D.C. financial policy circles, “market solution” is often a synonym for official sector pressure (as contrasted with “statutory solutions” that refer to official sector mandates). The practical question though, is how to (and whether to) exert this pressure effectively on the fictional entity that is the market for boilerplate contract terms.<sup>1</sup>

### **The Two Stories**

Oversimplifying, there are two stories one can tell about the nature of these contracts. Under the first story, all contract terms are optimal. This is especially likely to be true in a market such as the sovereign bond market where the parties on both sides of the contract are highly sophisticated. If there are suboptimal terms that arise as a result of a change in institutional structures or some crazy judicial decision interpreting a particular clause, the market will immediately correct the problematic clause. Under this story, official sector exhortations about the need to change particular contract terms must be viewed with suspicion because they are (a) unlikely to be optimal, and (b) likely to further the official sector's agenda at the expense of that of the private sector.

Under the second story, by contrast, the market can get stuck at a suboptimal equilibrium as a result of network externalities.<sup>2</sup> Just as a telephone increases in value as more people have telephones, a contract terms may have value as an increasing function of the fraction of the market that uses it. As more people use the contract, there arises a greater level of familiarity and comfort with it and with that comes ease of pricing and trading. Parties may not like a particular contract term in terms of how it regulates their relationship, but may keep it because the market is familiar with it (and would be unfamiliar with some new term). Put differently, parties may not choose a term that maximizes the value of their contract, instead choosing a suboptimal but standardized term subject to network externalities. With standardized terms,

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<sup>1</sup> For more details on the sovereign market and the recent shift in contractual terms, see John Drage & Catherine Hovaguimian, *Collective Action Clauses (CACs): An Analysis of Provisions Included in Recent Sovereign Bond Issuances*, FINANCIAL STABILITY REV. November 2004.

<sup>2</sup> The hypothesis that network effects might impact contracting practices has been discussed by a number of legal scholars. See Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "the Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995) Marcel Kahan & Michael Klausner, *Antitakeover Provisions in Bonds: Bondholder Protection or Management Entrenchment?*, 40 UCLA L. REV. 931 (1993); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 286-289 (1985). More recently, see Robert Ahdieh, *Between Mandate and Market: Contract Transition in the Shadow of the International Order*, 53 EMORY L. J. 691 (2004).

uncertainty levels are lower and the resulting bond contracts are easy for the market to price, thereby reducing contracting costs. Under this second story, the official sector can play a valuable role in identifying suboptimal equilibria and encouraging and facilitating the shift to more optimal positions.

The academic literature has witnessed a heated debate over whether suboptimal terms arise as stable equilibrium solutions in highly competitive markets.<sup>3</sup> Much of the debate has occurred at the theoretical level. Recent developments in the sovereign debt market, however, provide for a case study. Our goal with this study is to assess the degree of market lock-in and, to the extent there is such lock-in, to determine the agents of change. Identifying the agents of change is crucial because if change needs to be induced, one has to know the agents who can induce it (so that one can put pressure on them).

### **The Sovereign Debt Case Study**

Recent developments in the sovereign debt market present us with what seems to be a near perfect case study to study the questions mentioned above. Subsequent to the Mexican Peso crisis in the mid 1990s, that was followed by the Asian Financial Crisis and the financial crisis in Russia, there began to be numerous calls for reform in what was referred to as the need for an “international financial architecture”. A central element of these calls for reform had to do with the problematic nature of N.Y.-law governed sovereign bonds. These bonds had clauses requiring unanimous approval from the bondholders before any restructuring of principal and interest terms could be engineered. This was in contrast to the bonds issued under English law that allowed for the modification of key payment terms with either a majority or supermajority

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<sup>3</sup> For more skeptical inquiries into the presence of these network effects, see Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT’L L. 707, 721-40 (1999); Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 570-76 (1998); Larry E. Ribstein & Bruce H. Kobayashi, *Choice*

vote of the creditors. For the N.Y. law bonds, given the large number of dispersed bondholders and the likelihood of holdouts, the result of the unanimity requirement was that restructurings were viewed as impossible (resulting in the need for costly bailouts by the official sector). For a number of years, the calls for reform of the contracts appeared to fall on deaf ears. In other words, there was perceived homogeneity in the market.

Then, in 2000, Ecuador found itself in default and under instructions from the official sector to ask its creditors, including the bondholders, to take a haircut before the official sector would consider providing additional disbursements. Ecuador, however, had N.Y.-law governed unanimity contracts and their attendant holdout problems. Its lawyers though, devised a solution to the holdout problem (the “exit consent” solution). They realized that they did not need unanimity to change the *non-payment* terms of the contracts (things such as the governing law or the listing provisions). So long as they could get a simple majority of the bondholders to agree to take new restructured bonds and also, while taking those new bonds, agree to alter some of the key non-payment provisions of the old bonds, they could, in effect, make the old bonds unattractive for those who remained. In other words, this was a method of deterring holdouts. After all, the power of being a holdout lay in the right to sue and annoy the sovereign subsequent to it having conducted an exchange. This right to sue would be significantly hurt if the governing law were changed from that of New York, for example, to that of Mongolia.

For purposes of our study, this Ecuador “shock” or “innovation”, is important because, all of a sudden, contract language on that had been assumed to be functionally identical in all N.Y. law governed contracts (in terms of barring restructurings) became heterogeneous. Small differences in contract language translated into big differences in terms of the likelihood of being

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*of Form and Network Externalities*, 43 WM. & MARY L. REV. 79 (2001).

able to use the Ecuador innovation. Put differently, the bonds were no longer restructuring proof and some countries now found themselves with bonds that were easier to restructure than others. Argentina's bonds, for example, that required a 66.66% vote to alter non-payment terms, were going to be harder to engineer a successful exit consent restructuring than were some other country's bonds that only required a 50% vote to alter non payment terms.

The reaction to the sudden heterogeneity that was created after Ecuador is the centerpiece of this study. We examine the modification terms in these contracts in minute detail to see whether the Ecuador shock to the interpretation of the terms resulted in any contractual change. Was there an immediate move to homogeneity? If so, what kind of homogeneity? Was there a move to eliminate the Ecuador innovation and bar it? Or was there a move to embrace it? Or, was there a separation in terms of risk categories with high risk countries moving to one type of contract (perhaps an easier to restructure contract) and low risk countries moving to another type (perhaps a more difficult to restructure contract)?

As we were conducting this evaluation of the contracts – a project that we began in early 2001 and that took us into early 2003 – Mexico publicly announced, in early 2003, that it was both reforming its unanimity provisions into super majority provisions (that is, payment terms could be reformed with a 75% vote) and also moving to make Ecuador type exit consents much harder to use. A cascade of other countries issuing bonds under N.Y. law subsequently followed the Mexican lead in reforming their contract language.

Using the calls for reform in 1996 as a starting point and the cascade of change that followed the Mexican adoption of the reform proposals in 2003 as an end point, we look to the patterns of shifts in the contract language in between – that is, during the period where the contracts went from being viewed as homogenous and restructuring proof to heterogeneous and

differently placed in terms of being amenable to restructuring. What were the effects of the Ecuador shock, we ask. How quickly did the unexpected heterogeneity get eliminated? The answers to the foregoing questions should help us answer some of the question in the debate over how quickly the bond market is able to adjust to suboptimal contract terms.

Using a dataset of 155 sovereign bond offerings from 1995 to early 2004, we provide evidence on the importance of standardization. We also report evidence on the related question of how, when a standardized term has been recognized as suboptimal and problematic, the move to a new equilibrium occurs (if at all).

## **II. SOVEREIGN DEBT RESTRUCTURING AND THE HYPOTHESES**

Sovereign bonds governed under New York law generally require unanimous bondholder approval for any modification of the principal and interest terms for a bond issue (referred to as unanimous action clauses, or “UACs”). In contrast, some sovereigns use English law to govern their contracts and employ collective action clauses (“CACs”) requiring less-than-unanimity for reduction to payment terms in their sovereign bonds. For countries that eventually ran into financial distress, UACs presented a large roadblock in restructuring the debt to the benefit (ex post) of both the countries and the bondholders.

To test the importance of standardization, we utilize a large exogenous shock that affected the interpretation of the standard UAC contracts. As noted, creative interpretation of exit consent provisions in late 2000 (working through non-unanimous modification terms relating to *non-payment terms* in the otherwise New York law-governed bonds) allowed Ecuador to modify its payment terms with less than unanimous support from the bondholders despite a

UAC agreement.<sup>4</sup> A lack of public discussion on the possibility of exit consents in the sovereign bond context prior to Ecuador combined with angry protests from bondholder groups post-Ecuador suggest that the use of this technique had not been previously contemplated (and thus caused an “interpretive shock” with regard to the contract terms).<sup>5</sup> [See Chart 1].

Every single bondholder has a veto over the restructuring under a UAC contract and can thereby demand a premium for her vote. The end result is that sovereigns, particularly those with New York law-governed bonds, find it extremely difficult to restructure their debt in times of distress (at least prior to the Ecuador exit consent shock in 2000). The inability to restructure quickly and painlessly can cause considerable harm to the sovereign’s economy, something that not only hurts the sovereign but also its creditors because the sovereign’s prolonged distress inevitably results in a reduced ability to repay debts.

What then explains the long-term use of UAC-type sovereign bonds? Under one theory, some sovereigns may desire UACs as a means of signaling the low probability of default to investors at the time the bonds are issued; alternatively, UACs may serve as a means to bond the

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<sup>4</sup> See Lee C. Buchheit, *How Ecuador Escaped the Brady Bond Trap*, INT’L FIN. L. REV., Dec. 2000, at 17 (describing Ecuador’s use of exit consents). For a more detailed discussion of the restructuring of Ecuador’s sovereign debt, see INT’L MONETARY FUND, INVOLVING THE PRIVATE SECTOR IN THE RESOLUTION OF FINANCIAL CRISES—RESTRUCTURING SOVEREIGN BONDS (2000), at <http://www.imf.org/external/np/psi/sstill/2000/eng/index.htm>.

<sup>5</sup> See Felix Salmon, *The Buy Side Starts to Bite Back*, EUROMONEY, Apr. 2001, at 46. For more on the negative and skeptical reactions to Ecuador’s use of exit consents, see MOODY’S INVESTORS SERVICE, WHAT HAPPENS IF A SOVEREIGN DEFAULTS? (2000); *End of the Line for Exit Consents?*, EUROMONEY, Apr. 2003 (reporting that “[i]f there is one thing that emerging-market investors hate as much as [the IMF’s proposed Sovereign Debt Restructuring Mechanism], it is exit consents”); *Troubled Sovereigns Won’t Benefit from Restructuring with Exit Consents*, MOODY’S REP., Mar. 27, 2001. The negative reaction to exit consents appeared to have largely disappeared by the time Uruguay used the technique two years later, in what looks to have been a more sophisticated and investor-friendly manner. See Felix Salmon, *Calm After the Storm*, EUROMONEY, May 2003, at 100. But then, in 2004, with the Province of Mendoza (in Argentina) attempting to use exit consents and the shadow of a the larger Argentine exchange offer in the background, there began a full scale litigation over the validity of exit consents in the sovereign context. See *Greylock v. Province of Mendoza*, 04 Civ. 7643 (S.D.N.Y. Opinion and Order issued Feb 8, 2005) (Baer, J.). Details on the filings on the Mendoza case are available at <http://www.emta.org/ndevelop/newdev2mainframe.html>. Other indications that the creditor side is still smarting from Ecuador’s use of exit consents include the attempts to have insert language in the IIF’s recently released Code of Conduct that would disapprove of Ecuador type exit consents. See Felix Salmon, *Bondholders Won’t Back New Principles*, EUROMONEY, December 2004.

country against engaging in moral hazard (e.g., using the borrowed money profligately and then seeking a restructuring). The prevalence of UAC bond terms at least until recently may simply be a reflection of the contracting preferences of sovereign bond issuers and their investors.

Others, however, argue that use of UACs on the part of sovereigns is simply a reflection of the standardized nature of such terms and the “stickiness” inherent in changing such terms. Countries in fact may have varied preferences. Particularly those calling for implementing bankruptcy-type procedures on top of contractual sovereign bond agreements argue that the UACs simply are an artifact of suboptimal standardization in the market.

Existing evidence on whether UACs are preferred by at least some countries (or are simply an artifact of standardization) is mixed. Eichengreen, Kletzer, and Mody provide evidence that countries with lower credit ratings may prefer UACs (as opposed to CACs) as a means of bonding their credibility to the market.<sup>6</sup> Gugiatti and Richards, in contrast, report evidence that the handful of N.Y. CACs that existed prior to Mexico’s sovereign debt offering in February 2003 were simply due to inadvertence.<sup>7</sup> Indeed, Gugiatti and Richards make the claim that most bond investors (and even some of their advisers) simply were unaware of the presence of CACs. We can restate the debate between preferences and standardization as the driving force behind contract terms in the following testable hypothesis:

*Hypothesis 1 (Standardization Hypothesis):* At least some sovereign issuers selected the UAC terms prior to Ecuador only because of the standardized nature of the UACs (and would have chosen another modification-related term if the UACs had not been the standard).

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<sup>6</sup> See Barry Eichengreen et al., *Crisis Resolution: Next Steps* (U.C. Santa Cruz Econ. Working Paper No. 03-11, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=445520](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=445520).

<sup>7</sup> See Mark Gugiatti & Anthony Richards, *The Use of Collective Action Clauses in New York Law Bonds of Sovereign Borrowers*, 35 GEO. J. INT’L L. (forthcoming 2005).

The Ecuador exit consent shock in how parties viewed the UAC bond terms allows for a test of the importance of standardization in contract terms. Today, because the exit consent technique is the primary method of restructuring New York law-governed UAC bonds, these differences are important to investors. But prior to four years ago, it was widely assumed that UAC sovereign bonds were restructuring-proof. Then, as sovereign financial crises occurred in the late 1990s, lawyers began to look for creative methods of interpreting the existing language of the contracts to allow for restructurings ultimately resulting in the use of exit consents.

The exit consent was a technique already in use by U.S. corporations (for whom the use of UACs in bond covenants was mandated by law). Ecuador's innovation was in adapting exit consents to the sovereign context, an area in which the technique had been assumed to be inapplicable.<sup>8</sup>

Key to the use of exit consents is the recognition that there is more to a sovereign bond contract than the requirement that unanimous approval be obtained for an alteration of the payment terms. Indeed, the vast majority of clauses (nonpayment term-related) in even the New York law-governed contracts can be modified by something less than unanimous consent. There are a few clauses covering ministerial matters that can be modified with permission from the bond's fiscal agent alone. And then there are more important clauses covering matters such as negative pledges, governing law, submissions to jurisdiction, and listing provisions. Changing

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<sup>8</sup> As we know from the outrage and surprise that was expressed after the use of the technique by Ecuador, its use in the sovereign context did come as a shock. *See supra* note 5 (citing articles). The explanation for this, Lee Buchheit tells us, may have had to do with the refusal of the old Bank Advisory Committees (on grounds of gentlemanly behavior and a fear of incurring legal liability) to use an equivalent technique (they called it a "scorched earth" amendment) to motivate holdouts in the restructurings of the 1980s. They were thus "shocked" when Ecuador used the technique in late 2000. The attorneys handling sovereign debt deals were also primarily transactional attorneys with little litigation experience (and thus unfamiliar – according to our informal survey of such attorneys – of the exit consent technique prior to Ecuador).

these clauses requires a vote of the bondholders, but importantly not a unanimous one even in UAC contracts.

Through exit consents, a subset of bondholders (typically a simple majority) exit the bond for another security and vote to modify a nonpayment term of the old bond as they exit (e.g., changing the governing law for the bond or removing the waiver of sovereign immunity on the part of the issuer). The modification to the nonpayment term of the old bond then leaves holdouts who do not exit with a reduced-value bond (e.g., removing the waiver of sovereign immunity makes it harder to sue the sovereign). Exit consents therefore deter holdouts and encourage collective action, inducing all the bondholders to exchange their old bonds for the new bonds with more favorable terms for the issuer in times of financial distress.

The sudden shift in interpretation of the modification provisions post-Ecuador toward exit consents allows for a test of the importance of these network externalities. If parties selected UACs because they were simply the best for their situation and network externalities do not matter, then we would expect that parties would react to the Ecuador interpretive shock with an immediate shift back to the old, pre-Ecuador interpretation in new offerings after the Ecuador shock (for example, through the provision of unanimity voting for even nonpayment-related terms).

On the other hand, if parties selected the UACs pre-Ecuador primarily because of network externalities (and in fact have a range of preferences), they will not all shift back immediately to the pre-Ecuador UAC regime. The post-Ecuador shift in the meaning of the exit consent-related modification terms provides a new interpretation for the old standardized terms, creating a new standard in the market (with exit consent-driven modification of payment terms). The lack of a shift back to the pre-Ecuador interpretation of the UACs would provide evidence

consistent with the Standardization Hypothesis. In the alternative, countries and investors could have shifted their preferences from UACs to more collective action-friendly terms in 2000. We could therefore view the shift to the exit consent interpretation of the UAC contracts as reflecting this new preference and therefore not supporting the Standardization Hypothesis.

Assuming countries do not all prefer the pre-Ecuador UACs (and were “stuck” on the UAC contracts due to standardization effects), how will they react after the interpretive shock post-Ecuador? We can imagine at least two possibilities. First, countries may stay with the new standard regardless of what is optimal for their particular situation simply because of network externalities. However, the new standard is unlikely to have the same level of stickiness as the old pre-Ecuador UACs. The use of exit consents, while powerful, was open to some amount of uncertainty after Ecuador, giving it less value as a standardized provision.

Second, countries may shift toward a new standard closer to the desired preference point of most countries (in the spectrum from UACs toward more collective action-oriented terms). Different paths may exist to a new standard. On the one hand, the market may quickly “flip” to a new standard without much delay. Alternatively, the shift to a new standard may occur only after an initial delay.

What may cause a delay? Over time after the Ecuador shock, countries may have developed greater experience with the benefits and costs of the exit consent procedure in the post-Ecuador period. Investors, similarly, could use the post-Ecuador experience to assess better the value of having collective action procedures in the sovereign bond context, reducing their resistance (in the form of a demand for higher interest rates) to terms closer to the CAC-end of the contract term possibility spectrum. Information also likely developed on how courts would view the use of exit consents (and more generally collective action-friendly provisions) applied

under New York law.

Other reasons exist for an initial delay in response after an interpretive shock. Issuers and their attorneys may hesitate to modify boilerplate contract terms after an interpretive shock to the extent the meaning of the shock is somewhat uncertain (at least initially). Any change the issuers and attorneys make to the contracts may indirectly provide evidence that the older contract terms (contained in the large stock of existing bond covenants) in fact do represent the meaning given them by the interpretive shock? otherwise why change the terms? So, for example, a court may interpret a shift in contracts toward prohibiting exit consents as a tacit admission that the older contracts in fact allow exit consents.<sup>9</sup> After the initial delay (once the interpretative shock is more definite), parties may then seek to change subsequent contract terms.

In the presence of network effects, reaction to an interpretive shock is also likely to be slow. Even if the old contract language is suboptimal as a result of the shock, it still brings with it the benefits of standardization. Individual lawyers will be reluctant to push for changes in their client's contracts unless they can be fairly confident that others in the market will also change. Coordinating a market move is likely to take time in most circumstances as there is debate, negotiation, and as expert committees with representatives from the various interest groups are formed.

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<sup>9</sup>The logic of this explanation (related to us by a number of market participants) was not obvious to us. The explanation for the lack of change posits that there is a significant risk that courts will interpret a change as a sign that the prior language meant something different from the new language. But the question was: Why wasn't it just as likely (if not more likely) that a court would interpret a *change* in the contract language (in response to the interpretive shock) as a sign of the market's disapproval for the interpretive shock? Lee Buchheit explained to us that the flaw in our question was in assuming that a full scale coordinated shift to the new language was possible. As a practical matter, the individual lawyer proposing that his client alter a term in her contract (in response to an interpretive shock) faces the possibility that no one else will change their terms. If so, the value in engineering the change is unclear. Indeed, if the court sees that some parties change their terms and others do not, it is going to be harder to argue to the court that the market is unambiguous in having an understanding different from that which caused the interpretive shock. Further, and perhaps more important, assuming that any change in the boilerplate language has to be explained and justified to the underwriters (who, as both Ed Bartholomew and Robert Gray – two of the most prominent bankers in the sovereign debt area -- explained at the conference, do not like deviations from

Given the necessity of time in developing experience with collective action-friendly clauses under New York law-governed bonds, we put forth the following hypothesis:

*Hypothesis 2 (Delayed Shift Hypothesis):* After a shock pushes parties out of an equilibrium around an old standard contract term, parties will delay before shifting to a new standard.

We test Hypothesis 2 against the alternative hypothesis that even with standardization, issuers are able to move quickly to a new standard after a shock to the old standard in the market.

The question then is how long it took the market to react to the Ecuador shock and produce uniformity in the modification clauses. At the outset of writing this paper, we knew that change did begin to arrive in late 2003 and early 2004, with many countries adopting the Mexican CACs (while concurrently also closing up the exit consent loophole in response to the earlier Ecuador shock). But the question we were interested in was whether in late 2000, when all of a sudden there appeared meaningful differences in modification terms as a result of the Ecuador shock, parties moved quickly to eliminate those differences (or conversely, moved to exacerbate them, by some countries moving to easier-to-restructure versions and some to harder-to-restructure versions).

Network externalities giving rise to “stickiness” in standardized terms arise precisely because contracting parties fail to internalize the impact their choice of a particular contracting term has on outside third parties. When Argentina and its underwriters, as well as attorneys for both, decide to put together a sovereign bond deal, they may fail to take into account the value to future contracting parties of devising new terms. They will, however, bear the full cost of drafting the new term, assessing the impact of the new term on other terms in the contract, and

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the standard form because deviations cause costly delays in getting deals done), it may be in the individual client’s

assessing the risk of uncertainty in how investors and courts will react to the new term. Nonetheless, some of the associated participants in the sovereign bond contracting process may internalize at least a substantial fraction of the benefits from generating new contract terms that increase the overall value. Attorney firms handling a large number of sovereign bond deals in particular act as repeat players in drafting standardized contracts for use with multiple sovereigns as we set forth in the following hypothesis:

*Hypothesis 3 (High-Volume Attorney Hypothesis):* Attorney law firms dealing in a high volume of standardized contracts are the most likely to engage in a big shift in contract terms.

We predict that those law firms that handle a large volume of sovereign bonds are most likely to lead the move toward newer bond terms representing a dramatic shift from those in use in the past (the CACs in the post-Mexico era after February 2003).<sup>10</sup>

### **III. DESCRIPTION OF THE DATASET**

Our dataset consists of 155 New York law-governed sovereign bond contracts issued from January 1995 to February 2004.

In order to obtain a random sample of contracts, we first produced lists of the possible contracts. That is, we generated lists of the contracts available on Live Edgar, Thompson Research, Perfect Information, and Global Securities Information, Inc. From those, we picked contracts using a systematic sampling method (every third contract). Our first step was to obtain

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interest to stick with the old term.

<sup>10</sup> This prediction is in line with Kahan and Klausner's work. Kahan and Klausner both hypothesize and find that it is the high-volume underwriters and lawyers who are most likely to be associated with innovation. *See* Kahan & Klausner, *Standardization and Innovation*, *supra* note 1, at 753-60. *See also* Goetz & Scott, *supra* note 2 at 304-05. As we report later, while we find that high volume issuer's counsel is significantly correlated with contractual changes, we do not find evidence of high-volume underwriters as an important factor in contract term change, inconsistent with the findings of

lists of the available contracts from the private contract vendors. Because of our limited access to the private data bases, we requested lists from those who had access; and this meant that we received the lists that they generated for their purposes. Using the sampling method described, we began the search for post-1995 contracts in December 2001 and continued the collection process through March 2004 (we sampled lists from each of the above mentioned data bases twice during this period). Once we had selected contracts from our list, we then attempted to obtain the actual contracts. Since we had limited funds, we could afford to purchase only a handful of contracts from the private vendors (the only data base we did have access to was the SEC's Live Edgar). Instead, we obtained the contracts that our sampling technique generated from private sources (contracts at law firms and investment banks who were willing to share copies of the documents). To the extent we were unable to obtain the specific contract on our list, we went to the contract for that issuer that was closest in date to that issuance that we could obtain. For the period starting in February 2003, however, we did not sample, but instead attempted to collect every contract possible until February 2004.<sup>11</sup>

For purposes of this study, we did not attempt to separate private placements and registered offerings. This was so because our initial review of a subset of the documents suggested to us that the contracts from the two settings were essentially identical. Plus, a rough proxy for the difference between the types of deals seemed to be that the registered offerings were larger. Two factors, however, have persuaded us that a follow up study should

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Kahan and Klausner. *See id.* at 753-60 (finding evidence of large underwriters coordinating contract change, but not small underwriters or small law firms).

<sup>11</sup> The lists on which we used our sampling method were generated for us by Mary Thompson at Cleary Gottlieb, Kevin Hands at the SEC, and Édeanna Johnson-Chebbi at the Georgetown University Law Center. In addition to the individuals mentioned above, Ed Bartholomew at J.P. Morgan and Anna Gelpert at the Council of Foreign Relations and subsequently at the Institution of International Economics, were extraordinarily generous in helping us track down these contracts. The web sites for the vendors are: Perfect Information --

systematically measure the differences between the public placement contracts and registered offerings. First, as we report later, our multivariate regression results show that there is a size effect, with the larger offering contracts being more restructuring friendly. And second, to the extent theory would predict a difference in the contracts for public and private deals, and there is no difference, there is an interesting story to investigate.

There are thirty-four countries represented in the sample (we collected multiple contracts for many of the sovereigns involved). The countries with the largest numbers of sovereign debt issuances in our dataset included: Mexico, Colombia, Philippines, and Uruguay.<sup>12</sup> In addition, there were twenty-four law firms<sup>13</sup> and seventeen investment banks involved in the offerings.<sup>14</sup>

The modification clauses that we examine can be divided into three broad categories. First, we classify those offerings in the period prior to the use of exit consents to get around the UACs as in the *pre-Ecuador* period (in our sample, that is from 1995 up to October 2000). News of the Ecuador use of exit consents filtered into the market throughout much of 2000. We selected the publication date of a law review article detailing how to use exit consents to affect a restructuring of even UAC sovereign bonds in October 2000 (co-authored by Lee Buchheit, one of the architects of the Ecuador offering and the author of a response to this paper) to mark the end of the *pre-Ecuador* period.<sup>15</sup> Second, we classify the period after the news of the Ecuador restructuring hit the market in October 2000 and Mexico's issuance of a bond offering involving collective action modification clauses in February 2003 as the *post-Ecuador* period. Third, we

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[http://www.perfectinfo.com/product\\_detail.asp?productid=5](http://www.perfectinfo.com/product_detail.asp?productid=5); Global Securities Information, Inc. -- [http://www.livedgar.com/profserv/securities\\_research.html](http://www.livedgar.com/profserv/securities_research.html); and Thomson Research -- <http://research.thomsonib.com/>

<sup>12</sup> For details, see Table 1, Stephen J. Choi and G. Mitu Gulati, *Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds*, 53 EMORY L.J. 929, 949 (2004).

<sup>13</sup> We counted the London branch of a U.S. law firm as a separate law firm to track the importance of location in determining the particular types of bond terms. See *id.*

<sup>14</sup> For details on this data, see Tables 2 and 3, Choi & Gulati, *supra* note 12, at 950-51.

<sup>15</sup> See Lee C. Buchheit & G. Mitu Gulati, *Exit Consents in Sovereign Bond Exchanges*, 48 UCLA L. REV. 59, 83 (2000).

classify the period including the Mexico CAC offering in February 2003 and thereafter up to February 2004 (when we stopped collecting data for this Article) as the *post-Mexico* period. Table 1 provides a summary of the offerings by year and by designated time period. The 155 offerings breakdown as follows: 39.4% *PRE-ECUADOR*; 38.1% *POST-ECUADOR*; 22.6% *POST-MEXICO*.

Before proceeding, a caveat regarding a possible sampling problem is in order. The overwhelming majority of sovereign debt transactions occur in two markets: London and New York. Our study focuses only on the transactions and contracts in the New York market. This focus potentially produces a sampling problem because the New York market might attract particular types of debtors. For example, as Ashoka Mody and Barry Eichengreen have suggested in their series of papers, New York may be more attractive to lower rated issuer who use the tougher contracts in New York as a way of committing to not restructuring their debt, or at the least, to making any restructuring a lot more painful than it would be with an English transaction.<sup>16</sup> To the extent there was a sampling problem to the type described above, our data set would be incomplete and our results misleading because we would not capture any changes that were occurring as a result of debtors either leaving or entering the New York market because of the increased ease of restructuring New York contracts the takes place over the 1995-2004 period we examine.

The sampling issue is a valid one that we were concerned with in setting up our study. The following reason that was given to us by almost all the market participants we talked to, however, led us to restrict our sample to the New York contracts. They explained that the difference between the New York and London markets had more to do with different investor

bases and custom rather than different types of debtors.<sup>17</sup> Debtors seeking to raise money from the U.S. investor base will likely have to issue New York law governed bonds.<sup>18</sup> Further, some issuers work primarily with advisers based in New York while others work with advisers based in London. The choice of jurisdiction and law may simply follow as an ancillary consequence from the selection advisers, who tend to recommend issuances in the jurisdiction with which they are familiar.<sup>19</sup> In addition, if there had been any shift in business back and forth across the Atlantic as a result of changes in the New York market, we expect that these would have received considerable attention. Instead, there has been no mention of any such shifts of which we are aware.

As an aside, it is interesting to note that, subsequent to the move in the New York market to CACs, participants in the English market have also begun considering and coordinating a move to a new type of contract. What appears to have happened as a result of the focus on the New York contracts and the discussions about what form the new CACs should take, is that people also began taking a fresh look at the English contracts. While the New York UAC contracts were seen as too difficult to restructure, at least some observed that the English CAC

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<sup>16</sup> See Eichengreen et al., *supra* note 6. But see Anthony Richards & Mark Gugiatti, *Do Collective Action Clauses Influence Bond Yields? New Evidence from Emerging Markets*, 6 INT'L FIN. 415 (2003) (finding no meaningful pricing differences between the use of CACs in London and UACs in New York).

<sup>17</sup> See Lee C. Buchheit, *Choice of Law Clauses and Regulatory Statutes*, 15 INT'L FIN. L. REV. 12, March 1996. Buchheit explains:

The selection of New York or English law to govern a financial contract is therefore usually influenced by very mundane considerations such as the geographic location of the lead manager or the location of the borrower's assets or the geographic composition of the syndicate rather than by any perceived advantage bestowed by one law over the other.

<sup>18</sup> One indication of this is the high correlation between the issuances in U.S. dollars and the use of N.Y. law and issuances in euros or pounds and the use of English Law. This is most salient with certain big issuers like Brazil and Mexico who may need to tap investors in both markets and will therefore issue dollar bonds under N.Y. law and bonds in euros or pounds under English law. For a discussion of these correlations, see INTERNATIONAL MONETARY FUND, *COLLECTIVE ACTION CLAUSES IN SOVEREIGN BOND CONTRACTS – ENCOURAGING GREATER USE* (2002) (publication available at [www.imf.org](http://www.imf.org)). Consistent with the foregoing, Robert Gray, the President of the International Primary Markets Association, suggests in a recent article that the choice of N.Y. law (and unanimity) in the pre 2003 period was about producing a form of documentation that U.S. investors would be comfortable with. See Robert Gray, *Collective Action Clauses: The Way Forward*, 35 GEO. J. INT'L L. (forthcoming 2005).

contracts were too easy to restructure-something made even worse by their susceptibility to exit consents.<sup>20</sup> The English contracts dramatically reduce the percentage of votes required to produce a change in the payment terms when a quorum is not met at an initial meeting. For example, a typical English bond may provide that 75% of the bonds present at a meeting may change the payment-related terms. The English bond also typically imposes a quorum requirement of 75% of the outstanding bonds, dropping the quorum requirement down to 25% of the bonds outstanding if a quorum is not met at the initial meeting. Suppose quorum is not met at an initial meeting. Then, in theory, only 75% of the required 25% outstanding and present bonds for a quorum will then be needed to affect a change (that is, a mere 18.75% of the outstanding bondholders). The new CAC bond contracts in New York law bonds do not have anything close to this. They always require that 75% of the outstanding bonds vote for any change in the payment terms. So, the changes in the New York market contracts, while significant in terms of the New York market itself, look unlikely to have produced any movement in issuers from across the Atlantic because they still imposed much stricter requirements compared with the English contracts for bondholders to change payment-related terms.

At the time of the last revision of this paper, the International Primary Markets Association (one of the major creditor groups, dominated by underwriters), with the assistance of Clifford Chance in London, has put forward a proposed set of revisions to the English clauses, bringing them much more in line with the New York clauses by eliminating the quorum loophole

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<sup>19</sup> See Buchheit, Choice of Law, *supra* note 17.

<sup>20</sup> Discussion of the question of whether the English contracts would also change, as a result of a change in the N.Y. contracts came up at the G-10 meetings of the expert group that was drafting clauses for the new New York contracts. See G-10 report on Collective Action Clauses (available from the Bank of International Settlements Web Site at <http://www.bis.org/publ/gten08.htm#pgtop>).

mentioned above and also making exit consents much harder to do.<sup>21</sup> For our purposes, what this suggests is that the English market was not occupying a niche by virtue of being perceived as providing easy-to-restructure contracts. If anything, the same window of disequilibrium that allowed the New York market to move from UACs to CACs seems to have prompted the leading English advisers to suggest a move from the old easy-to-restructure English CACs to harder-to-restructure N.Y. type CACs.

#### **IV. DIFFERENCES IN MODIFICATION TERMS**

The basic UAC clause says something along the following lines:

The terms of the indenture can be changed with the written consent of more than X% of the holders, in aggregate principal amount. No such action may, however, be taken without the consent of each holder of the securities of the series that alters:

- (i) the times, dates, amounts, and currency of payments of principal or interest on the series (including in the event of an acceleration);
- (ii) any redemption payments and procedures; or
- (iii) the proportion of the principal amount that is required to authorize any action relating to this series.

In this section, we parse the modification clauses in our dataset of contracts for differences that might impact the ease of using the exit consent technique to conduct a restructuring. Small differences in the language of the modification clauses in these contracts, which we suspect were not given much importance by the market in the *pre-Ecuador* period, all of a sudden took on great importance after Ecuador's use of the exit consent technique in 2000. In what follows below, we describe the key differences in the contract modification clauses as they relate to the use of exit consents.

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<sup>21</sup> See Model Collective Action Clauses for English Law Governed Sovereign Bonds – International Primary Market Association draft dated 2004 (draft on file with authors) (available at <http://www.emta.org/ndevelop/newdev2mainframe.html> -- November 1, 2004 posting).

A. *The Pre- and Post-Ecuador Periods*

To assess the degree of variation that exists in the modification terms, we coded four dimensions for each offering along which modification terms may vary:

1. the voting percentage required for a change to the payment terms (principal and interest) and, if the voting percentage is 100% (e.g., unanimity), exactly what group of bondholders is included in this unanimity requirement (VOTEBY);<sup>22</sup>
2. the voting percentage required for a change to the terms of secondary importance—e.g., the nonpayment terms (such as the governing law, negative pledge, waiver of sovereign immunity, place of payment, and *pari passu*) (THRESHOLD);
3. whether the terms that required a higher vote threshold (generally, unanimity) for change were specifically enumerated or, alternatively, broadly prohibited unenumerated changes to something like “payment terms” (ENUMERATED);<sup>23</sup> and
4. whether there was a prohibition on modifying the “right to institute suit” for failure to comply with the terms of the contract (RIGHT TO SUE).<sup>24</sup>

These four dimensions represent the most important of the differences from the basic UAC clause that we found in our examination of sovereign bond issuances under New York law.

Given that neither one of us is a practicing lawyer in the area and were concerned about our above described coding, we first discussed our coding with a number of experts and then published our identification of the various differences in contractual language and the implications of these differences for the use of exit consents in the leading practitioner journal in the area, the *International Financial Law Review*. Our assumption was that if our coding were

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<sup>22</sup> Unanimity clauses are not all identical. Some require a unanimous vote of “each holder affected thereby”. Others require a vote of “each or all” of the bondholders. Arguably, the “affected thereby” qualifier reduces the set of bondholders who must actually unanimously agree to modify a payment term, making collective action more likely.

<sup>23</sup> Unenumerated unanimity clauses are potentially broader in scope and therefore provide less room for exit consents (making collective action more difficult).

<sup>24</sup> Some of the bond contracts contained a provision prohibiting any impairment of the right to sue. Such a provision restricts the ability of bondholders to use an exit consent threatening holdout bondholders with changes that may impair the right of the holdouts to sue (such as a changes to the governing law and rescinding the waiver of sovereign immunity), thereby reducing the effectiveness of exit consents as a collective action device.

flawed in any significant fashion, we would hear from the practicing bar.<sup>25</sup> Table 2 reports the breakdown of contract terms across the time periods in our study.

### *B. Standardization Hypothesis*

In this section we test how countries with different preferences reacted initially to Ecuador's use of exit consents in 2000. If countries all chose UACs prior to Ecuador due to preference (and not because of standardization), we expect that there should have been a wholesale move to eliminate exit consents in offerings subsequent to the Ecuador restructuring in 2000. On the other hand, if standardization explains the use of UACs, then we would not expect to see such a large reversion back to the *pre-Ecuador* interpretation of the UAC terms.

Indeed, under the standardization story, we expect that a range of preferences may exist among countries for collective action-oriented modification terms. Some countries may desire UACs without possibility of modification as a means of convincing investors of the countries' low risk of default. Put another way, investors may fear (and demand a much higher interest rate from) countries with a high background risk of default that also include collective action-oriented clauses in the sovereign bond contracts. Moral hazard risks for investors (that the country may simply take the money and then demand a restructuring) may become prohibitively high. Other countries, however, may value the ability to engage in relatively low-cost restructuring and pose a relatively low moral hazard risk for investors (perhaps because of the countries' financial strength or long-term reputation for keeping their promises).

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<sup>25</sup> Those interested in more details may look at Stephen Choi & Mitu Gulati, *Why Lawyers Need to Take a Closer Look at Exit Consents*, International Financial Law Review, September 2003, p. 15-18. In brief, substantial differences existed for all four types of contract terms in our sample of contracts. These differences affected the ability of investors to use exit consents. For each type of term, we code the contracts based on a scale from 1 to 3 (0 to 3 in the case of the VOTEBY term). A lower number (e.g., 0 for the VOTEBY provision) corresponds to a more collective-action friendly provision while the opposite is the case for a higher number (e.g., 3 for the VOTEBY provision)]. Table 5 reports

As a proxy for the different preferences countries may have for collective action-oriented clauses, we group countries into three categories based on the exogenous risk of default they present investors. We focus in particular on the Moody's and Fitch ratings for each country at the time of each country's bond offerings. For each offering with a Moody's rating we assign the following number: 1=Aaa; 2=Aa1 to Aa3; 3=A1 to A3; 4=Baa1 to Baa3; 5=Ba1; 6=Ba2 to Ba3; 7=B1 to B3; 8=any C. For each offering with a Fitch rating we assign the following comparable number: 1=AAA; 2=AA+ to AA-; 3=A+ to A; 4=BBB+ to BBB-; 5=BB+; 6=BB to BB-; 7=B+ to B-; 8=any C. For each offering, we then calculate an average Moody's and Fitch rating. We then assign the offering one of three categories as reported in Table 3.

As we discussed above, even in the *pre-Ecuador* period, variations already existed across a number of different dimensions of the modification terms. To examine the shift in the use of modification terms from the *pre-Ecuador* and *post-Ecuador* periods, we construct a composite measure of the modification-related terms as follows:

$$\text{COMPOSITE} = \text{VOTE} + \text{THRESHOLD} + \text{ENUMERATED} + \text{RIGHT TO SUE}$$

Where (as defined in Table 2):

VOTE ranges from 0 (CACs) to 3 (UAC for "each or all")

THRESHOLD ranges from 1 (50% voting rule) to 3 (66.6% voting rule)

ENUMERATED is equal to 1 (if enumerated) or 3 (if not enumerated)

RIGHT TO SUE is equal to 1 (if can impair) or 3 (if unanimity for impairment)

Table 4 reports a comparison of the use of the individual modification terms and the composite modification variable for the pre and post-Ecuador periods. If the standardization

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summary statistics on the diversity of terms found in the sample in the *Pre-Ecuador*, *Post-Ecuador*, and *Post-Mexico* time periods.

hypothesis is correct, we would not expect to see countries in all three rating groups shifting post-Ecuador to eliminate (or at least make more difficult) the use of exit consents.

Note from Table 7 that while countries in all risk categories shift their use of modification terms toward slightly more easy-to-modify provisions, most of the shifts are statistically insignificant. High rating countries (investment grade) experience the only significant overall move toward the collective-action end of the contract term spectrum (significant at 5% for the VOTEBY term and at only the 20% level, however, for the COMPOSITE measure).

Two important consequences therefore flow from Table 4. First, at a summary statistic level, the countries in the three risk categories did not on average move toward eliminating the possibility of collective action through exit consents or other means after the Ecuador restructuring, consistent with the Standardization Hypothesis. If countries had viewed the pre-Ecuador UACs as optimal and contracting for new terms occurred costlessly, one would expect that post-Ecuador the countries would have shifted toward unanimity only provisions. Such a shift does not occur. Indeed, for higher rating countries, a further shift in the VOTEBY term toward the CAC end of the spectrum occurs.

Second, in the post-Ecuador period, little evidence of significant shifts in any of the risk groups of countries (aside from the VOTEBY term for high rating countries) is evident away from the new exit consent standard. Either all three sets of countries are already at their optimal set of modification-related contract terms post-Ecuador or else standardization around the new post-Ecuador interpretation of the old UACs acts as a deterrence to major change (at least initially).

The timing of Ecuador's use of exit consents in the alternative could have coincided with

a shift in preferences among sovereigns and investors from UACs to CACs. Maybe the IMF's reluctance to bail out countries like Ecuador, Pakistan, and Ukraine caused a market realization that restructuring friendly contracts needed to be put in place. Thus, the shift may not support the standardization hypothesis but instead simply reflect a change in the bargain among sophisticated contracting parties. We are skeptical of this alternative explanation for several reasons. First, Ecuador's use of exit consents did not come after a deliberative discussion among sovereigns and investors about the value of collective action-friendly clauses but came instead as a shock to the market. Moreover, many investors viewed Ecuador's shift with outrage. Second, if preferences did in fact shift to more collective action-friendly terms suddenly, we would expect a more definite move in the contract language itself. As we discuss more fully in the specific context of Mexico below in Part VI, the actual contract language changed little (and indeed, did not change at all in the case of Mexico) in the post-Ecuador period. Instead, exit consents merely changed how the parties interpreted and made use of the existing contract language. Change in the contract terms (incorporating bona fide CACs) did finally occur. However, the major change arrived only after a three-year delay, with little warning, in Mexico's sovereign bond offering.

*B. Delayed Shift Hypothesis*

For almost a decade, the official sector had been urging, even pleading, with market actors to move from UACs to CACs.<sup>26</sup> The move would be value-creating for all parties involved (except the holdouts perhaps), it was argued. Yet, the market refused to budge. Indeed, the market's unwillingness to move was perhaps one of the reasons why, in the wake of the

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<sup>26</sup>See William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L.

Argentine crisis, the IMF, in 2001, was pushed to propose a statutory bankruptcy-like restructuring solution (the Sovereign Debt Restructuring Mechanism (SDRM)).<sup>27</sup> In effect, the IMF proposed contractual change through external mandate. The private sector, though, resisted all attempts at change.

Then, in February 2003, Mexico issued a New York law-governed bond that contained CACs. As far as researchers have been able to tell, investors imposed no significant penalty (in the form of higher interest rates) on the Mexico offering. After Mexico, the floodgates opened with offerings containing CACs by, among others, Uruguay, Brazil, the Bahamas, South Korea, Guatemala, South Africa, Turkey, Poland, and Italy. The move to CACs appeared to have finally occurred. And, in that move, there also came changes to the exit consent and *pari passu* provisions of the contracts. When change finally came, it came in bunches. The move to CACs *post-Mexico*, however, was not uniform. There are countries that are still wary about the move (Israel, China, and the Philippines have all utilized the old UACs in issuances in the post-Mexico 2003 period; the Philippines though has since moved to CACs).

Table 5 provides a comparison of the modification contract provisions in the Post-Mexico period compared with both the Post-Ecuador (but Pre-Mexico) period and the Pre-Ecuador period.

The comparison of contract terms across the different time periods provides evidence consistent with the Delayed Shift Hypothesis. For medium- and low-rating countries, the only significant shift in the COMPOSITE terms does not occur immediately in the *post-Ecuador* period but only after a lag in the *post-Mexico* period. While high-rating countries do shift

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REV. 1 (2004) (describing the key developments that took place between 1995 and 2003 in the sovereign debt markets).

somewhat toward collective action-friendly clauses in the *post-Ecuador* period, the shift in the COMPOSITE term is only significant at the 20% level for such countries. After a lag, high-rating countries shift again (driven primarily by the adoption of CAC clauses in Mexico and other investment-grade countries), resulting in a significant overall change in the COMPOSITE term between the *pre-Ecuador* and *post-Mexico* periods (at the 5% level).

We, nonetheless, cannot rule out the alternative explanation that countries may have changed their underlying preference for collective action-friendly terms. We are confident that the Ecuador shift was a shock to the market devised by the lawyers at Cleary Gottlieb. But the Mexico move in 2003 was probably a function of at least some change in preferences on the part of the sovereigns. The Mexico 2003 shift occurred in the wake of the Argentine default, which was the largest sovereign default ever. Argentina's struggle, for over three years now, to get a restructuring done might have persuaded sovereigns like Mexico that it was finally time to move away from UACs. Plus, ever since the Mexican peso crisis, the Asian financial crisis, and the Russian default, there had been continual official sector pressure for a move away from UACs. So, what does this say about our delay hypothesis? We know that there was no immediate response to the Ecuador exit consent shock. The response, that began with Mexico in February 2003, took more than two years to arrive. If there was a change in preferences that helped pushed the market towards that response, that suggests that the delay without any change in preferences might have been even longer.

The importance of official-sector pressure, the Argentine default, and the Asian financial crisis in 1997 in affecting the development of sovereign bond contract terms nonetheless is unclear. If the Asian financial crisis really changed the preference of investors and issuers for

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<sup>27</sup> See Anne Krueger, A New Approach to Sovereign Debt Restructuring, Address at the National Economists' Club

collective action terms, why did it take until 2003 for the first CACs to appear? with the Mexico offering in February 2003? Likewise, the official sector initially pushed for CAC terms in the aftermath of the Asian financial crisis. Anne Krueger, First Deputy Managing Director of the IMF, however, appeared to give up publicly on CACs in 2001. Instead, Krueger and the IMF switched to pushing the SDRM bankruptcy-type regime. Importantly, the U.S. Treasury never endorsed the SDRM (instead pushing for a contractual solution) and the proposal faced a torrent of criticism from both sovereigns and bondholders. Moreover, by 2003 (again, before Mexico's shift to a CAC contract), the IMF began to consider both contractual solutions as well as making elements of the SDRM more voluntary (depending on creditor consent).

The official sector undoubtedly played some role in the move to CACs. The G-10 working group that drafted model CAC clauses prior to the Mexico offering likely played a nontrivial role coordinating the important private sector actors. Nonetheless, the role of the G-10 group should not be overstated because the clauses that Mexico, Uruguay, and Brazil eventually adopted were all significantly different from the G-10 group's proposed clauses. Further, immediately before the 2003 Mexico offering, the U.S. Treasury did indicate that it was not as hostile to the IMF's SDRM position as had previously been thought, suggesting that it might even support some version of SDRM if the private sector did not fall into line by adopting CACs. At bottom though, while we think that official-sector efforts likely played a role, there is not enough evidence to suggest that it was *the* causal factor in inducing the eventual shift. Moreover, as we discuss in the next section, the shift to collective action-friendly terms in the *post-Mexico* period took a decidedly market approach. The shifts only occurred for certain risk-rating countries (primarily medium- and low-rating countries? e.g., below investment grade)

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Annual Members' Dinner (Nov. 26, 2001); *see also* Anne Krueger, A New Approach to Sovereign Debt Restructuring,

and, at least initially, only when the attorneys associated with the bond covenants had sufficient economies of scale to make drafting new contractual language worthwhile.

*C. Multivariate Tests and the High-Volume Attorney Hypothesis*

Our summary statistical analysis above partitions countries based on the time period (*pre-Ecuador*, *post-Ecuador*, and *post-Mexico*) and the risk rating of the countries at the time of their offerings. Other factors nonetheless may affect why a country may choose particular contract terms. To control for these other factors, we construct an ordered logit model with the COMPOSITE measure of the level of collective action terms in the sovereign bond contract as the dependent variable (ranging from 3 = easiest to 12 = hardest to modify through collective action). The ordered logit assumes that the coefficient on each independent variable is independent of any particular COMPOSITE category. We include a number of explanatory variables in the model.

First, dummy variables for high- (investment grade) and medium-rating countries are included in the model to control for the effect of risk on the selection of collective action-related terms (based on the average of the Moody's and Fitch ratings as described above in Table 2 and assumed exogenous to the selection of modification bond terms).<sup>28</sup> Particularly in the late 1990s, the financial crisis facing many sovereigns may have significantly altered the risk that new offerings from such sovereigns posed for investors. We use dummy variables for different rating categories to capture any nonlinearities in the relationship between risk levels and the use of

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Address at the Indian Council for Research on International Economic Relations (Dec. 20, 2001).

<sup>28</sup> The Moody's and Fitch ratings are for the credit risk of the entire country and, as best we can tell from numerous conversations with the employees at the rating agencies and market participants, are unlikely to depend on the presence of CACs in any particular bond issue. On the influence and importance of these ratings in the sovereign market, see Alec Klein, *Credit Raters Exert International Influence*, WASHINGTON POST, November 23, 2004, A01 (available at 2004 WL 93193942).

collective action-related terms. Interaction terms are also included for *Post-Ecuador* x High-Rating, *Post-Ecuador* x Medium Rating, and *Post-Ecuador* x Low Rating, as well as *Post-Mexico* x High-Rating, *Post-Mexico* x Medium Rating, and *Post-Mexico* x Low Rating, to determine whether countries in a specific risk grouping shifted toward (or away from) collective action-oriented modification terms in the *post-Ecuador* or *post-Mexico* periods.

Second, the model includes the offering amount (in millions of U.S. dollars). The offering amount acts as a proxy for the degree of expected collective action problems. Countries offering a larger amount of securities typically will sell to more investors, leading to a larger potential collective action problem should the country later experience financial distress and need to restructure the country's obligations. We predict therefore that larger offerings should employ more collective action-friendly provisions, all other things being equal.

Third, the model includes a dummy variable for whether J.P. Morgan or Deutsche Bank, the two underwriters engaged in the largest number of sovereign debt offerings after Ecuador's use of exit consents, is involved in the offering.<sup>29</sup> We also include a crude proxy for the reputation of the underwriter associated with the offering, using Carter and Manaster's rating of underwriter quality based on initial public offerings (as updated by Professor Jay Ritter). Our use of the Carter-Manaster rating assumes that underwriters who have a high reputation in the IPO market enjoy a similar reputation for sovereign bond offerings.

Fourth, the model includes variables related to the attorneys associated with each sovereign bond offering. In particular, we are interested in testing the high-volume attorney (as change agents, that is) hypothesis. To do so, we include dummy variables for the presence of the highest volume issuer's attorney (Cleary Gottlieb) and the highest volume underwriter's attorney

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<sup>29</sup> J.P. Morgan participated in fourteen offerings and Deutsche Bank participated in twelve offerings after Ecuador's

(Sullivan & Cromwell) in the period after Ecuador's use of exit consents. We define high volume based on the total number of sovereign debt offerings in which an attorney firm participates.<sup>30</sup> We include interaction terms for *Post-Ecuador* x Top Issuer's Attorney (Cleary Gottlieb) and *Post-Ecuador* x Top Underwriter's Attorney (Sullivan & Cromwell), as well as *Post-Mexico* x Top Issuer's Attorney and *Post-Mexico* x Top Underwriter's Attorney, to test for the importance of either type of attorney firm in generating new terms different from the prevailing standard. We also include a dummy variable for the presence of a London-based branch of an attorney firm to account for the possibility that more collective action-friendly terms may enter into a sovereign bond contract simply because London-based firms may have greater familiarity with such terms.

Lastly, we include country-specific dummies for all countries with at least ten offerings in our dataset to control for the possibility that a country may pick a particular contract and then simply cut and paste that contract for all subsequent bond offerings. Dummy variables for Colombia, Uruguay, Mexico, and the Philippines are included (but not reported).

Table 6 reports the results of three variations of the ordered logit models. Model 1 is for the *pre-Ecuador* and *post-Ecuador* only periods. Model 2 is for the full sample. Model 3 is based on Model 2 with additional interaction terms (*Post-Ecuador* x Top Underwriters (J.P. Morgan and Deutsche Bank) and *Post-Mexico* x Top Underwriters) to assess the importance of underwriters in modifying contract terms.<sup>31</sup>

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use of exit consents. Combined, J.P. Morgan and Deutsche Bank participated in 28.6% of the offerings after Ecuador's use of exit consents.

<sup>30</sup> Cleary Gottlieb participated in twenty-eight offerings as issuer's counsel (30.8% of the offerings) and Sullivan & Cromwell participated in thirty-two offerings (35.2%) as underwriter's counsel in the period after Ecuador's use of exit consents.

<sup>31</sup> Although not reported, we also estimated Model 3 without interaction terms between *Post-Ecuador* x Top Underwriter's Attorney and *Post-Mexico* x Top Underwriter's Attorney. The coefficients on the *Post-Ecuador* x Top Underwriters and *Post-Mexico* x Top Underwriters are again statistically insignificant.

Note from Table 6 that the coefficient on the offering amount is both negative and significant at the 5% level in all the models. Larger offering amounts correlate with an increased likelihood of a more collective action-oriented contract (as proxied through a lower COMPOSITE score).

Turning to the country ratings, observe from Table 6 that prior to the Ecuador restructuring, no significant difference exists in the tendency of different-rating countries to use collective action-related terms (e.g., the coefficients on the High Rating and Medium Rating variables are statistically insignificant). This result is consistent with the lack of importance (at least according to Richards and Gugiatti) of nonpayment-related modification terms in the *pre-Ecuador* period.

What did the interpretive shock from Ecuador's use of exit consents do to subsequent bond offerings up until Mexico's February 2003 offering (the post-Ecuador period)? The models confirm that no statistically significant shift occurred. Only the coefficient for the *Post-Ecuador* x High Rating interaction term is significant (and only at the 20% confidence level in Models 2 and 3). The multivariate model's results are therefore supportive of the summary statistic finding that immediately *post-Ecuador*, despite the shock to how parties viewed the standardized terms, little change occurred? consistent with the Standardization Hypothesis.

Moving to the Delayed Shift Hypothesis, the regression results suggest a lack of any meaningful movement either toward or away from ease of restructuring in the wake of the Ecuador shock. It is possible that some countries (for example, the high rated ones) moved in one direction and the others (for example, the middle and low rated ones) moved in the other direction and that the shifts cancelled each other out. We attempted to correct for such a possibility in our regressions by using dummies for the different rating types and found no

significant coefficients in the post Ecuador period – consistent with the Delayed Shift Hypothesis.

What we did find, consistent with our hypothesis based on network effects (and the time that it takes to coordinate responses to interpretive shocks) is that change does not occur instantaneously. Indeed, uniformity in this market only began to appear in late 2003 and early 2004. That is, the response to the problem of UACs (that was identified as early at 1996) and the response to the Ecuador shock (2003) came together, in a big shift, in 2003, where CACs were adopted and exit consents were made more difficult.

Conversations with market participants, however, suggest that there may be an inadequacy in the theory underlying our hypothesis. Our theory for the delay in responding to the shock is that the presence of network benefits (such as learning externalities) result in a need for learning and coordination before there can be a response. A number of market participants told us, however, that while learning and coordination were important elements, the most important element in delaying any response was a signaling problem and not anything to do with network effects.<sup>32</sup> They said that we had erred by focusing only on market standardization (that is, horizontal commonality in the market). Yes, they agree, horizontal commonality was important. The market would not be happy with a clause that was non-standard. But even more important, they said, was vertical commonality. That is, the clauses need to remain the same for the same issuer from deal to deal. Any shift in the language from one deal to another for any particular issuer, other than changing dates, price information, and amounts, raises red flags for the investor side. Red flags, in turn, call for investigations by lawyers and delays. Delays are extremely costly in this market. The observation of the market participants is one that we

investigate further in the portion of the paper where we focus on specific country contracts.

Eventually change did occur, and Models 2 and 3 show this. For both medium- and low-rating countries, the interaction terms with *Post-Mexico* are negative, indicating a shift toward more collective action-friendly clauses (significant at the 5% level for *Post-Mexico* x Medium Rating and 10% level for *Post-Mexico* x Low Rating in Model 2 and significant at the 10% level for *Post-Mexico* x Medium Rating and 20% level for *Post-Mexico* x Low Rating in Model 3). Despite the fear that non-investment-grade countries (the Medium- and Low-Rating countries) may abuse collective action-friendly terms with actions leading to a higher default rate, these countries moved significantly into such terms *post-Mexico*.

Who were the agents of change? Note that the coefficient on *Post-Mexico* x Top Issuer's Attorney (Cleary Gottlieb) is negative and significant at the 5% level in Models 2 and 3. The presence of Cleary Gottlieb? the law firm handling the largest number of deals for issuers? as the issuer's attorney is significantly correlated with the overall *post-Mexico* shift toward easier CACs, consistent with the High-Volume Attorney Hypothesis. In contrast, as reported in Models 2 and 3, neither the top underwriter's attorney (Sullivan & Cromwell) nor the top underwriters (J.P. Morgan and Deutsche Bank) are significantly correlated with a shift toward more collective action-related terms. While the official sector undoubtedly played some role in the shift toward CACs in the *post-Mexico* period, the significance of the high-volume issuer's counsel as well as certain risk-rating countries (below investment grade) in the shift provides evidence on the ability of market forces to engineer changes in boilerplate terms.<sup>33</sup>

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<sup>32</sup> In his comments on this paper, Lee Buchheit makes this point eloquently. See also Lee C. Buhheit, Comments on Choi & Gulati, *infra*.

<sup>33</sup> As a robustness check, we re-estimated Model 2 with dummy variables for countries with at least five offerings (Colombia, Uruguay, Mexico, the Philippines, Italy, Chile, Costa Rica, South Africa, Turkey, and Panama). Unreported, the same qualitative relationships as in the original Model 2 remain between: (1) larger offering amounts and collective action-related terms; (2) the post-Mexico presence of Cleary Gottlieb as the issuer's attorney

The role of Cleary Gottlieb as a change agent should not, however, be overstated. It is key to remember that the heart of our study is the question of whether there was an immediate response to the heterogeneity caused by the Ecuador shock. What we saw there was that there was no meaningful response, whether Cleary was involved or not – and this is despite the fact that Cleary was the firm that produced the Ecuador shock (that is, they came up with the strategy). To reiterate, even though they came up with the exit consent strategy, they were not able to (or not willing to) push their sovereign clients to modify their contracts appropriately (either towards making the exit consent strategy more viable or more difficult, depending on the country’s preferences). Three years later, with the Mexico move to CACs, Cleary does appear to be an important player. But here it is not clear whether the fact that the coefficient of Cleary shows up as significant is indicative of causation or simple correlation. It is quite possible – indeed, perhaps likely, that the market did get “educated” by 2003 into believing that the time had come to move to CACs (particularly with the lack of any market penalty on the 2003 Mexico CAC offering). That said, we do see that Cleary is disproportionately involved in the early moves towards CACs. At bottom, it does seem that the high volume issuer’s counsel play a key role in producing change. But our results do not tell us enough from which we can tell whether they are causal.

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and collective action-related terms; and (3) Post-Mexico Medium- and Low-Rating (non-investment-grade) countries and collective action-related terms. One difference in the re-estimated model is that in the *pre-Ecuador* period (before the interpretive shock involving exit consents), high-rating countries are significantly more likely to have collective action-friendly terms compared with lower-rating countries, consistent with the work of Eichengreen, Kletzer, and Mody. *See* Eichengreen et al., *supra* note 35. Our results therefore do not provide any definitive evidence on the question (which is not the focus of this Article) of whether collective action-related terms are priced prior to the Ecuador restructuring.

As an additional test of robustness, we replace the independent dummy variables in Model 2 related to country risk rating with a variable for the range of possible ratings based on the average Moody’s-Fitch score we discuss earlier, ranging from 1 to 8 (RATING). We also include interaction terms for Post-Ecuador x RATING and Post-Mexico x RATING. *See supra* Part V.A. From this variation of Model 2, we obtain the same qualitative results as in the original Model 2.

#### D. *New Differences*

Our empirical tests are crude in the sense that we categorize all the *post-Mexico* CACs in one category (the 0 ranking in the VOTEBY category). We note, nonetheless, that among the post-Mexico sovereign bond offerings employing some form of CAC, significant differences exist. At least two possible explanations exist for the differences in *post-Mexico* contracts: (1) attorneys in competition with one another generated further innovation in contract terms post-Mexico, or (2) attorneys simply made mistakes in drafting the contracts. Our conjecture, from the limited data, is that *both* innovation and inadvertence are evident in the *post-Mexico* CAC contracts. While we perform no additional statistical test on these differences, we discuss some of these differences below.

Table 7 details the issuer's and underwriter's counsel for the high-visibility change offerings (involving Mexico, Uruguay, and Brazil) and the low-visibility change offerings (involving the Bahamas, Belize, and Guatemala).

Observe the volume of the issuer's attorneys associated with the offerings containing high-visibility first-mover changes compared with the low-visibility change offerings in Table 7. Cleary Gottlieb and Arnold & Porter? the two most active issuer's attorneys? represented Mexico, Uruguay, and Brazil. The change in contract terms in Mexico, Uruguay, and Brazil toward CACs in 2003 is consistent with the hypothesis that high-volume issuer's attorneys drive innovation in contract terms.

On the other hand, Hogan & Hartson, Hunton & Williams, and Sidley Austin? among the least active issuer's attorneys? represented the Bahamas, Belize, and Guatemala, respectively. Changes occur for such countries in the *post-Mexico* period, but the presence of low-volume attorneys supports the notion that these changes are more out of mistake. The

Bahamas did enjoy a high-volume underwriter's counsel (Shearman & Sterling). And Cleary Gottlieb acted as the underwriter's counsel for Guatemala. Nonetheless, the results from the ordered logit regression reported in Table 6 call into question the role of the underwriter's counsel in driving change in sovereign bond terms in the *post-Mexico* period. Anecdotally, evidence exists that Cleary Gottlieb, acting as issuer's counsel, preferred a 75% voting threshold for modification to payment terms in the CACs employed post-Mexico.<sup>34</sup> Significantly, Guatemala's contract employed an 85% voting threshold despite the presence of Cleary Gottlieb as the underwriter's counsel.

## VI. ADDITIONAL TESTS

In this section, we use a test of the standardization hypothesis that was suggested to us by lawyers working in the area. Their suggestion was that we look at contracts in greater detail for a single country, instead of aggregating the data across the different countries. While there were reasons for market-wide standardization (that would show up in the aggregate data), the lawyers contended that even stronger forces may push for standardization within a single country's contract. In particular, the market may take a suspicious view of countries that attempt to vary the contract terms in their sovereign bond deals. The data on Mexico bears out this single-country standardization hypothesis.

The reason we chose Mexico was that it was the country for which we were able to obtain the largest number of contracts for the time period examined by this Article. As we discuss later, however, the Mexican experience may not be representative and a fuller test would need to look at the data for a larger number of countries. Caveats aside, however, this case study produces interesting results.

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<sup>34</sup> Our conversations with a number of market participants suggest that Cleary Gottlieb (or at least some of its

Table 8 reports the data for twenty debt issuances by Mexico primarily during the time period of our main dataset. A couple of things are striking about the results. The first has to do with the degree of lock-in and the second has to do with the reasons for standardization.

First, prior to the big shift in February 2003, the key contract terms stay identical, regardless of fluctuations in the country's risk ratings, fluctuations in the size of the offering, and Ecuador's exit consent interpretive shock in late 2000. These contract terms stay identical not only in terms of the primary provisions on which we ran the econometric tests? that is, the VOTEBY, THRESHOLD, ENUMERATED, and RIGHT TO SUE provisions discussed earlier that would have an obvious impact on any attempt to use the exit consent technique? but also on three less important provisions that Mexico included, as reported in the "Extra Provisions" column in Table 8. The single country data reveals lock-in effects that are much stronger than what was revealed in the aggregate data discussed in the prior sections. Regardless of what happens externally, there is no fluctuation *at all* in the language of the modification term, at least until the big shift to CACs occurs in February 2003.

Second, is the relationship between the issuers and underwriter's counsel. From deal to deal, the lead underwriters change. But the issuer's and underwriter's counsels remain the same. It makes sense that the issuer's counsel (Cleary Gottlieb, in Mexico's case) remains the same because the issuer is the same for every deal. But we also see that the underwriter's counsel remains the same even though the lead underwriter changes. So, even though the lead underwriter for one deal may be Goldman Sachs and the lead for another deal may be Credit Suisse and the lead for a third deal may be Barclays, the underwriter's counsel remains the same (Sullivan & Cromwell, in Mexico's case). Put differently, the primary relationship of the

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attorneys) was active in promoting the 75% threshold.

underwriter's counsel seems to be with the issuer (or the transaction) rather than with their purported clients, the underwriters. This pattern raises at least two questions. First, can it really be true that underwriter's counsel is determined by the issuer and not the underwriter? (This pattern does not suggest the kind of adversarial relationship where the underwriter's counsel is looking out for the interests of the ultimate purchasers of the bonds, the investors). Second, does this unusual correlation help explain the strong lock-in effects that we were seeing?

The lawyers and investment bankers to whom we spoke did not find the patterns we describe to be unusual or problematic in the least. They explained that the reason for the correlation between the issuer and the underwriter's counsel that we found had to do with the speed with which these deals tended to be done. These bond issuances tended, inevitably, to be shelf offerings. Because of the need for speed in what everyone viewed as a routine transaction, there was a need to have counsel on both sides who were familiar and comfortable with the deal documents. To hire a new set of lawyers on either side would mean that these lawyers would necessarily have to take time to get comfortable with the documentation. The choice of lead underwriter faces no such constraint, and typically different underwriters bid to take the lead position for any particular offering.

The foregoing story bears directly on the question of why there appear to be unusually strong lock-in effects when one looks at country-specific data. If the lawyers for the deal are chosen because they are comfortable with the deal documents then little incentive will exist on the part of the lawyers to change the documentation? that is, unless something major happens. Shifts in the country's risk ratings do not seem to qualify as a large enough change to merit altering documentation, nor did the exogenous shock of Ecuador's use of exit consents. To articulate the point differently, the importance of getting these transactions done quickly seems

paramount, and that goal trumps concerns with contract language.<sup>35</sup>

This concern with speed is related to the reasons for contractual lock-in discussed at the outset of the paper, such as learning externalities. So, for example, market familiarity with standardized contract terms reduces the delay and cost to investors of pricing a sovereign bond offering. Conversely, bond offerings with new terms, particularly if not widely adopted in the market, may signal to investors opportunistic behavior on the part of the issuer. In addition to network externality-related effects, the importance of deal-to-deal continuity for a single issuer may also drive standardization. The willingness of a sovereign issuer to stick to the same documents provides the market with some assurance that the issuer is not trying to act opportunistically to take advantage of the investors.

## **VII. CONCLUSION: UNANSWERED QUESTIONS**

The process of conducting this study has left us with many more questions unanswered than answered. In this final section, we note some of the ones that strike us as ripe for further research. In two papers that we are in the process of collecting data for, we attempt answers to at least some of these questions.

### *i. Signaling Problems versus Network Effects*

We began this study with the hypothesis that the stickiness in bond contracts terms, to the extent it was present, was likely driven by networks effects such as learning externalities, ease of pricing and such. Our sense at the end of this study is that while network effects do play a significant role, deal-to-deal stickiness and the fear of sending negative signals by changing

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<sup>35</sup> One might not ordinarily think that speed of deal completion would be an important driving force for lawyers because they are generally paid on hourly billing rates. Investment bankers, on the other hand, who are paid by commission, are more likely to care about the speed of deal completion (with non completion being an extremely bad outcome). In

standard terms plays an even bigger role. Unpacking the relationship between the two causal factors and determining their relative influence on the stickiness is important because it can help determine what strategies will be more likely to produce change. For example, if it is the problem of negative signaling that is the primary causal factor, the official sector can do things to assure creditors that the driving force for the change is not opportunistic behavior by the debtor (or some hidden change in the debtor's circumstances). If instead, it is network effects that are the driving force, the official sector can focus on setting up coordinating committees that will help assure that large numbers of market participants will move at the same time.

*ii. Law Firms versus Lawyers*

In our regressions, we use firms as the unit of analysis. And we also treat the different investment banking firms and law firms as independent entities. We think that our regression results do capture an insight in terms of showing the importance of the issuer's counsel with the biggest market share in driving changes in contract terms. Numerous conversations with market participants about our results, however, suggest that additional unpacking would be beneficial. Specifically, in many cases it might have been individual lawyers who were driving the changes (sometimes despite the resistance of their firms, as opposed to because of those firms). Further, these particular lawyers likely worked in conjunction with certain key lawyers and bankers on the other side, who also saw the benefits of engineering change. And at bottom, there was undoubtedly official sector involvement, especially in the form of key officials at the U.S. Treasury applying pressure at crucial moments. We think it likely that an in-depth study of why countries moved to CACs at the times that they did might reveal that the proper unit of analysis

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theory, the different pay structure for the lawyers might be seen as a means by which lawyerly diligence in examining the deal documents can be ensured. We see, however, that deal completion seems to be important to the lawyers as well.

was the specific individuals (and their networks of connections across firms) rather than the firms themselves.

*iii. The Hidden Role of the Official Sector*

Our analysis cannot capture the background role of official sector institutions in driving changes in contract terms. Yet, we know that the official sector did play a key role in terms of funding and encouraging research, setting up committees both to study the matter and to draft clauses, and finally, in exerting pressure both by offering alternatives that the private sector definitely did not want (like the IMF's SDRM) and by exhorting individual finance ministries to acquiesce in the changes (exhortation that suspect was done via phone calls made by high ranking U.S. Treasury officials to key individuals at various ministries of finance). This is not to say that private sector actors did not play key roles. But the causal pathways through which the private sector actors worked were more complicated than the data capture and the official sector was very active in the background. For example, we would not be surprised if qualitative studies revealed that the U.S. Treasury, the various G-7 countries, the IMF all had key private sector individuals who they communicated to and exerted pressure through. So, in a sense those particular individuals were the instruments of both their firms and the particular official sector agency that had tapped them.

*iv. Cascades and Tipping Points*

Our study does not even scratch the surface of the question of why certain countries moved earlier towards CACs and others later. We are in the process of collecting both qualitative and quantitative data on the different issuances in the post-February 2003 period. Among the interesting questions that this study could potentially answer are why it is that Mexico moved first, Brazil second, and Uruguay third (and so on)? Or, alternatively, if one

focuses on the pre-Mexico N.Y. law uses of CACs by countries like Lebanon, Egypt, and Qatar, why the rest of the market did not follow them, but instead waited for Mexico to issue its bonds with CACs? And then there is the question of why Mexico chose to move to CACs when it did. One anecdote we heard about the Mexican issuance in February 2003 -- only one month after a high ranking Ministry of Finance official for the Mexican government had announced in Washington, D.C. that Mexico was not planning to shift to CACs anytime soon -- was that Mexico was afraid that some smaller sovereign might give into the pressure to use CACs and might use the "wrong" types of CACs, such as some of the highly restrictive kinds that were being proposed by various creditor groups. This anecdote, if believed, suggests that Mexico and its advisers perceived that the market had reached some kind of tipping or boiling point and that it was imperative for them to be the first mover so as to dictate the terms of the cascade of change that was likely to follow. Hindsight suggests that Mexico was correct in its perceptions. But how did the Mexicans and their advisers make the calculation that Feb 2003 was the right time to make the move?

*v. Counsel for the Client versus Counsel for the Transaction*

One of the more surprising results of this project was the perfect correlation in the case of Mexico between the identity of issuer and the identity of the underwriter's counsel. Obviously, we expect the identity of the issuer and the identity of the issuer's counsel to be correlated. After all, the issuer's counsel works for the issuer. But, when we see that the lead underwriter changes from deal to deal (for example, from J.P. Morgan to Credit Suisse to Banker's Trust) and the underwriter's counsel remains the same (Sullivan & Cromwell, in the case we looked at), it begins to look like it is the issuer who is selecting the underwriter's counsel and not the underwriter. When we asked industry participants about these bizarre results, they responded

that this was simply the practice of having a “designated underwriter’s counsel.” That is, where there was a routine deal that had to be done repeatedly – such as a sovereign doing shelf takedowns – it was far more efficient to have a designated underwriter’s counsel for the deal, who was already familiar with the documents and would not feel the need to renegotiate every provision of the deal.

To us, the designated underwriter phenomenon raises potential agency problems. What if some junior lawyer at the underwriter’s counsel discovers some problem in the deal documentation in the nth iteration of the deal that no one had noticed before? If the underwriter’s counsel is being chosen because of her comfort and familiarity with the deal documents (in other words, he willing to pass on the documents quickly), she has a disincentive to point out the flawed language and ask for a change. Plus, pointing out the error would in effect be conceding that one had committed error on a prior deal; something that might lead directly to the hiring of a replacement law firm. The end result then might be that although the deal gets done quickly, the bondholder clients are not being provided full disclosure about the contract terms they are agreeing to.

## **Some Observations on Choi and Gulati's "The Evolution of Boilerplate Contracts"**

Lee C. Buchheit

1. In this paper, Choi and Gulati use methods of empirical analysis to track the behavior of drafters of a boilerplate provision in sovereign bonds governed by New York law (the "amendment" clause) in response to an unexpected tactical use of the clause in Ecuador's bond exchange in 2000.
2. Let me begin with two preliminary comments on boilerplate clauses in standardized financial instruments. First, there is a reason why the clauses are called boilerplate. They are rarely questioned, negotiated or even read (at least by investors). It pleases everyone in these deals to treat the boilerplate provisions as the product of divine revelation. But it is because they are so rarely the object of scrutiny that the substantive coverage of boilerplate clauses can, as the decades roll sweetly on, become obscure to succeeding generations of lawyers and their clients. Want to test this theory? Ask a group of corporate transactional lawyers to describe in detail the differences between a representation and a warranty. The words are conjoined thousands of times in their contracts, but can they confidently explain the difference? Some, I suspect, would say that certain terms just go together, like peanut butter and jelly, or Seigfried and Roy.
3. Second, there is a strong institutional prejudice against innovation in the drafting of boilerplate clauses. If someone tinkers with boilerplate text, investors and rating agencies will be forced to think about the change. If investors have to think about bond documentation, they are less likely to buy it. If they are reluctant to buy, the issuer must increase the coupon to sell the paper.

Issuers do not like to increase coupons.

An irrepressible talent for creative, innovative drafting in the boilerplate provisions of financial instruments is a lethal genetic trait for the young lawyer.

4. The specific boilerplate clause Choi and Gulati study -- what they call a "UAC" or unanimous amendment clause -- has two relevant features:
  - (i) it forbids changes to the payment terms of the bond without the consent of all holders of the instrument, but
  - (ii) it permits amendment of any other term of the bond with only a bare majority (sometimes 66-<sup>2</sup>/<sub>3</sub>%) of the holders.

5. The clause had a colorful history in the restructurings of the hundreds of billions of dollars of commercial bank loans to sovereign borrowers throughout the 1980s and early 1990s,<sup>36</sup> but the context there (syndicated bank loans) was materially different from sovereign bonds.
6. Ecuador in 1999 was the first country to default on Brady bonds and then, in 2000, successfully to restructure the instruments. In the minds of some investors, therefore, Ecuador sinned twice: first by restructuring instruments (sovereign bonds) that had previously been seen as inviolable, and second by tactically using the UAC in those bonds to encourage (the euphemism is Ecuador's) holders to accept the violation.
7. Choi and Gulati first ask whether subsequent drafters of UACs responded to this unexpected use of the clause and, if not, why not? Based upon the empirical evidence of what they did, Choi and Gulati attempt to crack open the skulls of the subsequent bond drafters to determine why they did it. In the process, Choi and Gulati offer several fascinating insights into how the practicing bar (in the relatively small universe of sovereign bond lawyers) responds to changes in the marketplace.
8. Their conclusions? A widespread change in the drafting of UACs did not follow Ecuador's controversial use of the clause to encourage participation in its restructuring of 2000. What did happen, however (and it happened within four years of the Ecuador deal), was a dramatic shift away from the use of UACs in New York law-governed sovereign bonds in favor of a modified version of the competing English-style amendment clause, dubbed a collective action clause or "CAC".<sup>37</sup>
9. Back to the nagging whys. Why the initial reluctance to adapt the clause if indeed the sovereign bond investor community viewed Ecuador's tactical move as beyond the bounds of fair play? Inertia? Ignorance? And then why the great leap forward (actually backward, if you view the matter in historical terms<sup>38</sup>) to CACs?
10. Answering these questions shows the limits of a purely empirical study of contractual clauses. An empirical study of this kind will tell us what happened and when it happened and perhaps even the way it happened, but not why it happened. The answer to that question requires the researcher to look at the contemporaneous developments in the market.<sup>39</sup>
11. The clause that Choi and Gulati have chosen to study, and the period in which they have chosen to study its evolution (1995-2003), demonstrate how difficult it can sometimes be to disentangle the various forces at work on a contract drafter.

Unlike, say, a cross-default clause where the drafting preferences of the lender and the borrower can confidently be predicted in advance and the visible evidence of which side

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<sup>36</sup> See Lee C. Buchheit, *Making Amends for Amendments*, INT'L. FIN. L. REV. , Feb. 1991 at 11.

<sup>37</sup> CACs permit changes to payment terms of a debt instrument with the approval of only a qualified supermajority.

<sup>38</sup> See Buchheit & Gulati, *Sovereign Bonds and the Collective Will*, 51 EMORY L.J. 1320, 1326-30 (2002).

<sup>39</sup> See Lee C. Buchheit, *Contract Paleontology* (unpublished draft on file with authors, 2004).

won the debate in any particular clause can be plotted on a graph, the motivations in an amendment clause are not so clear.

It is wrong to assume that all bondholders will favor UACs (because they make restructurings more difficult) and all borrowers will favor more liberal amendment clauses. Neither generalization is true.

Once a bondholder decides that it will accept a sovereign debtor's restructuring program, that holder has a powerful interest in seeing that all the other bondholders accept it as well. Although some investors professed themselves to be outraged by Ecuadorian perfidy in using the clause to force bondholders to abuse each other,<sup>40</sup> not all investors shared this view.

For their part, many sovereign bond issuers were fiercely hostile to the introduction of the more liberal CACs because they worried (needlessly, as things turned out) that investors would interpret this as what the Pentagon calls "prepositioning" for a later default.

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<sup>40</sup> Uruguay tested this hypothesis three years later. In Uruguay's bond restructuring, the package of exit consents was arranged in a "check the box" format. A bondholder could accept Uruguay's offer without agreeing to apply pressure on his fellow bondholders by voting to amend any bonds left behind. When the results were tallied, the brotherhood of bondholders theory turned out to be something of a romantic myth -- more than 90% of the bondholders accepting Uruguay's offer voluntarily agreed to amend the non-payment terms of the old instruments. See Buchheit and Pam, *Uruguay's Innovations*, 19 J. INT'L BANKING L. & REG. 28, 29 (2004).

12. Even if sovereign bond buyers in 2000 felt that a contractual cram down of a debt restructuring on a reluctant group of fellow bondholders was unseemly, that view may well have been changing over the very period for which Choi and Gulati have collected data.

The choices facing a sovereign debtor are not (i) pay the bond in full if a restructuring is too difficult to implement or (ii) restructure the bond if the amendment clauses can be used to reduce or eliminate hold-outs. The third choice is not to pay and not to restructure. This is the absolute worst outcome for the bondholder. Argentina's decision to leave its bonds in default for more than three years starting in 2001 -- ostensibly because it was too difficult to restructure UAC instruments -- may have altered the market's view of the desirability of contractual cram downs and Ecuadorian-style exit consents. This may explain why the market criticisms of Ecuador have muted over the intervening years and perhaps even why CACs have recently prospered in New York law sovereign debt instruments.

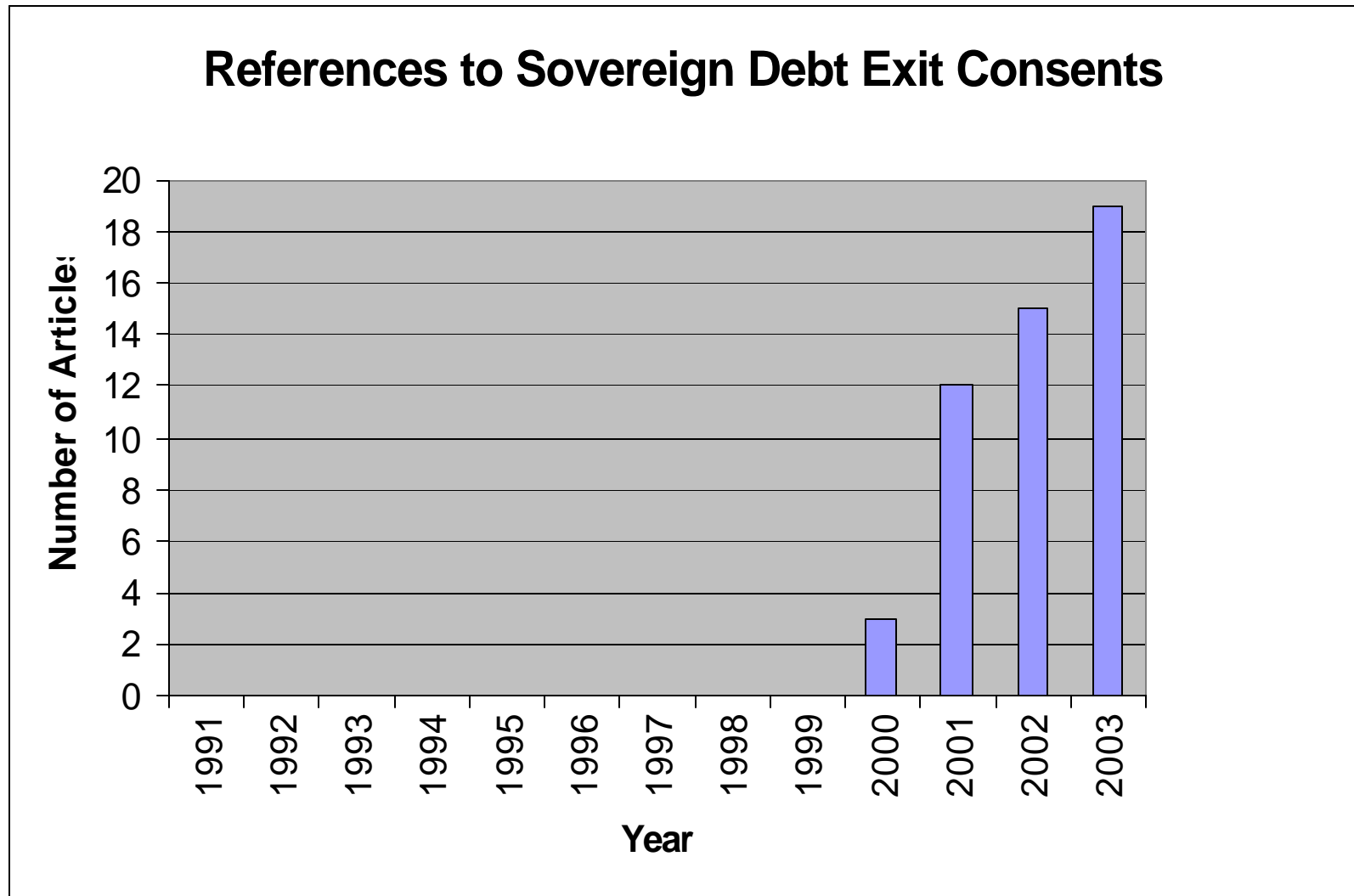
13. The Choi/Gulati research also highlights some interesting features of sovereign bond documents and the lawyers that draft them.

Their research shows, for example, an extraordinary congruence in the drafting of at least this particular boilerplate clause. Does this reflect an intellectual consensus among the practicing bar as to how it should be drafted? Probably not. As they demonstrate, the standard form documents produced by a few of what they call "high volume" law firms contribute disproportionately to the contractual gene pool. It is therefore sometimes difficult to know whether the prevalence of a particular drafting convention in the historical data reflects the legal soundness of that approach, or whether the same law firm or small group of law firms is just relentlessly churning out the clause -- sound or not -- in large quantities. By way of analogy, scientists have recently discovered that 8% of the entire population of Asia have a genetic link to Genghis Khan.<sup>41</sup> This, I suspect, says less about the quality of the Great Khan's DNA than it does about his views concerning the benefits of monogamy.

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<sup>41</sup> See Lois Rogers, "Genghis Super-Y -- The Gene for a True Alpha Male", The Sunday Times, June 13, 2004.

**Chart 1**  
(Obtained from searches on Nexis, Westlaw (TP-ALL), and the Wall Street Journal)



**Table 1: Sovereign Bond Offerings By Year****Panel A**

Year	Frequency	Percentage
1995	2	1.3%
1996	10	6.5%
1997	6	3.9%
1998	9	5.8%
1999	18	11.6%
2000	17	11.0%
2001	22	14.2%
2002	31	20.0%
2003	36	23.2%
2004	4	2.6%
Total	155	100.0%

**Panel B**

Pre-Ecuador is defined as including all offerings in the sample up to and including October 2000. Post-Ecuador is defined as including all offerings after October, 2000 until January 31, 2003. Post-Mexico is defined as including the Mexico offering on February 1, 2003 and all offerings thereafter up to February 2004.

Time Period	Frequency	Percentage
Pre-Ecuador	61	39.4%
Post-Ecuador	59	38.1%
Post-Mexico	35	22.6%
Total	155	100.0%

**Table 2: Contract Provisions**

*Pre-Ecuador* is defined as including all offerings in the sample up to and including October 2000. *Post-Ecuador* is defined as including all offerings after October, 2000 until January 31, 2003. *Post-Mexico* is defined as including the Mexico offering on February 1, 2003 and all offerings thereafter.

[NOTE: The description of the variation in the provisions is omitted from the abridged version of the paper. A lower number (e.g., 0 for the VOTEBY provision) corresponds to a more collective-action friendly provision while the opposite is the case for a higher number (e.g., 3 for the VOTEBY provision)]

<i>Type of Provision</i>	<i>Rankings</i>	<i>Pre-Ecuador Frequency</i>	<i>Percentage</i>	<i>Post-Ecuador Frequency</i>	<i>Percentage</i>	<i>Post-Mexico</i>	<i>Percentage</i>
Voteby	0 = Less than unanimity voting (CAC)	1	1.8%	5	8.9%	20	62.5%
	1 = Each holder affected thereby (Unanimity)	13	22.8%	13	23.2%	2	6.3%
	2 = Each of the affected series (Unanimity)	6	10.5%	10	17.9%	3	9.4%
	3 = Each or All (Unanimity)	37	64.9%	28	50.0%	7	21.9%
	Total	57	100.0%	56	100.0%	32	100.0%
Threshold	1 = 50% voting rule	17	28.8%	18	32.7%	10	29.4%
	2 = 50% of outstanding or 66.6% of votes cast	1	1.7%	0	0.0%	0	0.0%
	3 = 66.6% voting rule	41	69.5%	37	67.3%	24	70.6%
	Total	59	100.0%	55	100.0%	34	100.0%
Enumerated	1 = Enumerated	52	89.7%	56	96.6%	33	100.0%
	3 = Not Enumerated	6	10.3%	2	3.4%	0	0.0%
	Total	58	100.0%	58	100.0%	33	100.0%
Right to Sue	1 = No "Impairment" provision	58	95.1%	54	91.5%	35	100.0%
	3 = Impairment of right to sue provision	3	4.9%	5	8.5%	0	0.0%
	Total	61	100.0%	59	100.0%	35	100.0%

**Table 3: Breakdown of Offerings by Exogenous Bond Rating**

<i>Category</i>	<i>Definition</i>	<i>Number of Offerings</i>	<i>Percentage</i>
High Rating	Moody's -Fitch rating of < 5 (Investment Grade)	73	48.7%
Medium Rating	Moody's -Fitch rating of 5 (Non Investment Grade)	59	39.3%
Low Rating	Moody's -Fitch rating of < 5 (Speculative/Substantial Risk)	18	12.0%
<b>Total</b>		150	100.0%

**Table 4: Contract Provision Comparisons**

*Pre-Ecuador* is defined as including all offerings in the sample up to and including October 2000. *Post-Ecuador* is defined as including all offerings after October, 2000 until January 31, 2003. *Post-Mexico* is defined as including the Mexico offering on February 1, 2003 and all offerings thereafter. Composite ranking is equal to the sum of the Voteby, Threshold, Right to Sue, and Enumerated term rankings as given in Table 5 (ranging from 3=easiest to modify to 12=hardest to modify). The High, Medium, and Low Ratings are based on the average Moody's and Fitch ratings (see Table 6 for definition).

***Pre-Ecuador versus Post-Ecuador***

<i>Type of Contract Term</i>	Pre-Ecuador <i>High Rating</i>	Post-Ecuador <i>High Rating</i>	<i>p-value</i>	Pre-Ecuador <i>Medium Rating</i>	Post-Ecuador <i>Medium Rating</i>	<i>p-value</i>	Pre-Ecuador <i>Low Rating</i>	Post-Ecuador <i>Low Rating</i>	<i>p-value</i>
VOTEBY	2.21	1.65	0.050**	2.70	2.59	0.627	2.50	2.29	0.758
THRESHOLD	2.07	1.77	0.274	2.78	2.82	0.842	2.50	3.00	0.242
ENUMERATED	1.28	1.15	0.449	1.17	1.00	0.155	1.00	1.00	.
RIGHT TO SUE	1.19	1.36	0.368	1.00	1.00	.	1.00	1.00	.
COMPOSITE	6.67	5.89	0.108	7.65	7.43	0.465	7.00	7.67	0.447

\*\*\* significant at the 1% level, \*\* significant at the 5% level, \* significant at the 10% level.

**Table 5**

*Pre-Ecuador* is defined as including all offerings in the sample up to and including October 2000. *Post-Ecuador* is defined as including all offerings after October, 2000 until January 31, 2003. *Post-Mexico* is defined as including the Mexico offering on February 1, 2003 and all offerings thereafter. Composite ranking is equal to the sum of the Voteby, Threshold, Right to Sue, and Enumerated term rankings as given in Table 5 (ranging from 3=easiest to modify to 12=hardest to modify). The High, Medium, and Low Ratings are based on the average Moody's and Fitch ratings (see Table 6 for definition).

***Post-Ecuador versus Post-Mexico***

<i>Type of Contract Term</i>	Post-Ecuador	Post-Mexico	<i>p-value</i>	Post-Ecuador	Post-Mexico	<i>p-value</i>	Post-Ecuador	Post-Mexico	<i>p-value</i>
	<i>High Rating</i>	<i>High Rating</i>		<i>Medium Rating</i>	<i>Medium Rating</i>		<i>Low Rating</i>	<i>Low Rating</i>	
VOTEBY	1.65	0.75	0.022**	2.59	1.67	0.021**	2.29	0.00	0.000***
THRESHOLD	1.77	2.43	0.043**	2.82	2.08	0.011**	3.00	3.00	.
ENUMERATED	1.15	1.00	0.308	1.00	1.00	.	1.00	1.00	.
RIGHT TO SUE	1.36	1.00	.	1.00	1.00	.	1.00	1.00	.
COMPOSITE	5.89	5.25	0.239	7.43	5.67	0.000***	7.67	5.00	0.000***

\*\*\* significant at the 1% level, \*\* significant at the 5% level, \* significant at the 10% level.

***Pre-Ecuador versus Post-Mexico***

<i>Type of Contract Term</i>	Pre-Ecuador	Post-Mexico	<i>p-value</i>	Pre-Ecuador	Post-Mexico	<i>p-value</i>	Pre-Ecuador	Post-Mexico	<i>p-value</i>
	<i>High Rating</i>	<i>High Rating</i>		<i>Medium Rating</i>	<i>Medium Rating</i>		<i>Low Rating</i>	<i>Low Rating</i>	
VOTEBY	2.21	0.75	0.001***	2.70	1.67	0.009**	2.50	0.00	0.000***
THRESHOLD	2.07	2.43	0.266	2.78	2.08	0.014**	2.50	3.00	0.292
ENUMERATED	1.28	1.00	0.152	1.17	1.00	0.287	1.00	1.00	.
RIGHT TO SUE	1.19	1.00	0.238	1.00	1.00	.	1.00	1.00	.
COMPOSITE	6.67	5.25	0.007**	7.65	5.67	0.000***	7.00	5.00	0.092*

\*\*\* significant at the 1% level, \*\* significant at the 5% level, \* significant at the 10% level.

**Table 6: Ordered Logit Model of Collective Action-Related Modification Provisions**

Dependent variable is the COMPOSITE collective-action contract term ranking equal to the sum of the VOTEBY, THRESHOLD, ENUMERATED, and RIGHT TO SUE rankings (ranging from 3=easiest to modify to 12=hardest to modify). *Pre-Ecuador* is defined as including all offerings in the sample up to and including October 2000. *Post-Ecuador* is defined as including all offerings after October, 2000 until January 31, 2003. *Post-Mexico* is defined as including the Mexico offering on February 1, 2003 and all offerings thereafter. Model 1 is for the *Pre-Ecuador* and *Post-Ecuador* only periods. Model 2 is for the full sample. Model 3 is a variation on Model 2 with interaction terms for *Post-Ecuador* x Top Underwriters and *Post-Mexico* x Top Underwriters. Dummy variables for countries with at least 10 offerings in the dataset are included in the models (for Colombia, Uruguay, Mexico, and Philippines) but are not reported. The High, Medium, and Low Ratings are based on the average Moody's and Fitch ratings (see Table 6 for definition).

<i>Independent Variables</i>	<i>Model 1</i>	<i>Model 2</i>	<i>Model 3</i>
Offering Amount (U.S Mill).	-0.001** (-2.520)	-0.001** (-2.270)	-0.001** (-2.210)
Top Issuer Attorney Dummy (Cleary Gottlieb)	0.976 (0.980)	0.764 (0.830)	0.789 (0.840)
Top Underwriter Attorney Dummy (Sullivan & Cromwell)	1.782* (1.870)	1.808** (2.030)	1.837** (2.050)
London-Based Attorney Dummy	-2.461** (-2.140)	-2.847*** (-2.740)	-2.823*** (-2.720)
Top Underwriter Dummy (Deutsche Bank and J.P. Morgan)	0.297 (0.450)	0.253 (0.420)	-0.268 (-0.220)
Carter-Manaster	-1.573** (-2.440)	-1.394*** (-2.630)	-1.402** (-2.530)
High Rating	-1.496 (-0.920)	-1.230 (-0.770)	-1.218 (-0.760)
Medium Rating	-0.207 (-0.130)	-0.136 (-0.090)	-0.129 (-0.080)
<i>Post-Ecuador</i> x High Rating	-1.075 (-1.090)	-1.501 (-1.490)	-1.545 (-1.530)
<i>Post-Ecuador</i> x Medium Rating	-0.657 (-0.540)	-0.835 (-0.710)	-0.884 (-0.750)
<i>Post-Ecuador</i> x Low Rating	0.662 (0.330)	0.922 (0.470)	0.750 (0.380)
<i>Post-Mexico</i> x High Rating		-1.624 (-1.430)	-1.620 (-1.420)
<i>Post-Mexico</i> x Medium Rating		-2.936** (-2.120)	-2.894* (-1.890)
<i>Post-Mexico</i> x Low Rating		-5.019* (-1.810)	-4.934 (-1.610)

<i>Post-Ecuador</i> x Top Issuer Attorney (Cleary Gottlieb)	1.006 (0.940)	1.424 (1.360)	1.283 (1.170)
<i>Post-Mexico</i> x Top Issuer Attorney (Cleary Gottlieb)		-3.665** (-2.520)	-3.713** (-2.550)
<i>Post-Ecuador</i> x Top Underwriter Attorney (Sullivan & Cromwell)	0.229 (0.200)	0.390 (0.340)	0.367 (0.320)
<i>Post-Mexico</i> x Top Underwriter Attorney (Sullivan & Cromwell)		-0.951 (-0.630)	-1.002 (-0.670)
<i>Post-Ecuador</i> x Top Underwriters (Deutsche Bank & J.P. Morgan)			0.759 (0.530)
<i>Post-Mexico</i> x Top Underwriters (Deutsche Bank & J.P. Morgan)			0.466 (0.260)
N	96	117	117
Pseudo Adj R2	0.316	0.338	0.339
Log Likelihood	-99.342	-123.254	-123.111

z-statistics in parentheses.

\*\*\* significant at the 1% level, \*\* significant at the 5% level, \* significant at the 10% level.

**Table 7: Attorneys Associated with Select *Post-Mexico* Offerings**

Volume of the issuer attorney corresponds to the fraction of the offerings in the dataset in which the particular attorney acts as the issuer attorney. Volume of underwriter counsel corresponds to the fraction of the offerings in the dataset in which the particular attorney acts as the underwriter counsel. (See Table 2).

<i>Sovereign</i>	<i>Issue Date</i>	<i>Issuer Attorney</i>	<i>Volume of Issuer Attorney</i>	<i>Underwriter Counsel</i>	<i>Volume of Underwriter Counsel</i>
Mexico	2/1/2003	Cleary Gottlieb	44.50%	Sullivan & Cromwell	40.60%
Uruguay	4/10/2003	Cleary Gottlieb	44.50%	Shearman & Sterling	18.10%
Brazil	6/19/2003	Arnold & Porter	14.20%	Sullivan & Cromwell	40.60%
Bahamas	7/24/2003	Hogan & Hartson	0.60%	Shearman & Sterling	18.10%
Belize	6/1/2003	Hunton & Williams	0.60%	Allen & Overy	1.90%
Guatemala	7/29/2003	Sidley & Austin	3.90%	Cleary Gottlieb	9.70%

**Table 8: Sovereign Contracts for Mexico From 1995 to 2003 (up to the “Delayed Shift” to CACs)**

Issue Date	Amount	Interest Rate	Due	Moody's Rating	Fitch's Ratings	Issuer Counsel	Inv. Bank Counsel	Inv. Bank	VOTEBY	THRES - HOLD	ENUMERATED	Extra Provisions – at Higher Vote level (No Impairment of RIGHT TO SUIT for all contracts)	Pari Passu
2/1/2003 (the “Delayed Shift”)	\$1 Billion	N/A	N/A	Baa2	BBB-	Cleary	Sullivan & Cromwell	Goldman Sachs	75%	66.667%	Yes	*governing law *submission to jurisdiction *waiver of immunities *place of payment *change the meaning of "outstanding" *agent for service of process *redemption procedures *event of default *STATUS or <i>Pari Passu</i>	Will rank equally
12/4/2002	\$2 Billion	6.375%	1/16/2013	Baa2	BBB-	Cleary	Sullivan & Cromwell	J.P. Morgan	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
11/28/2001	\$1 Billion	8.30%	8/15/2031	Baa3	BB+	Cleary	Sullivan & Cromwell	J.P. Morgan	Each	66.667%	Yes	*Place of payment *Redemption *Portion of principal payable on acceleration	Will rank equally
8/9/2001	\$1.5 Billion	8.30%	8/15/2031	Baa3	BB+	Cleary	Sullivan & Cromwell	Goldman	Each	66.667%	Yes	*Place of payment *Redemption *Portion of principal payable on acceleration	Will rank equally
3/23/2001	\$3.3 Billion	8.125%	12/30/2019	Baa3	BB+	Cleary	Sullivan & Cromwell	Credit Suisse	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
3/29/2000	\$500 Million	8.625%	3/12/2008	Baa3	BB	Cleary	Sullivan & Cromwell	Chase	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
3/29/2000	\$500 Million	8.625%	2008	Baa3	BB	Cleary	Sullivan & Cromwell	Chase	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
3/23/2000	\$500 Million	9.875%	2010	Baa3	BB	Cleary	Sullivan & Cromwell	J.P. Morgan	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
10/6/1999	\$425 Million	10.375%	2/17/2009	Ba1	BB	Cleary	Sullivan & Cromwell	Goldman Sachs	Each	66.667%	yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally

Issue Date	Amount	Interest Rate	Due	Moody's Rating	Fitch's Ratings	Issuer Counsel	Inv. Bank Counsel	Inv. Bank	VOTEBY	THRES - HOLD	ENUM-ERATED	Extra Provisions--at Higher Vote level (No Impairment of RIGHT TO SUIT for all contracts)	Pari Passu
10/4/1999	\$425 Million	10.375%	2/17/2004	Ba1	BB	Cleary	Sullivan & Cromwell	Goldman Sachs	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
8/2/1999	\$400 million	11.375%	9/15/2016	Ba2	BB	Cleary	Sullivan & Cromwell	Solomon Smith Barney	Each	66.667%	yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
8/2/1999	\$400 Million	11.375%	9/15/2016	Ba2	BB	Cleary	Sullivan & Cromwell	Solomon Smith Barney	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
8/2/1999	\$425 Million	10.375%	2009	Ba2	BB	Cleary	Sullivan & Cromwell	Goldman Sachs	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
8/2/1999	\$400 Million	11.375%	2016	Ba2	BB	Cleary	Sullivan & Cromwell	J.P. Morgan	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
4/16/1999	\$500 million	10.375%	2/17/2009	Ba2	BB	Cleary	Sullivan & Cromwell	J.P. Morgan	Each	66.667%	yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
3/25/1999	\$1 Billion	9.750%	4/6/2005	Ba2	BB	Cleary	Sullivan & Cromwell	Morgan Stanley	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
4/1/1998	\$400 Million	11.375%	2016	Ba2	BB	Cleary	Sullivan & Cromwell	Solomon Smith Barney	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
3/5/1998	\$1 Million	8.625%	2008	Ba2	BB	Cleary	Sullivan & Cromwell	Morgan Stanley	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
9/24/1996	\$1 Billion	11.375%	9/15/2016	Ba2	BB	Cleary	Sullivan & Cromwell	Goldman Sachs	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally
[Pre 1995]	\$1 Billion	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Each	66.667%	Yes	*Portion payable on acceleration *Place of payment *Redemption procedures	Will rank equally