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Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling

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Abstract

Recent rulings in the ongoing litigation over the pari passu clause in Argentinian sovereign debt instruments have generated considerable controversy. Some official-sector participants and academic articles have suggested that the rulings will disrupt or impede future sovereign debt restructurings by encouraging holdout creditors to litigate for full payment instead of participating in negotiated exchange offers. This paper critically examines this claim and argues that the incentives for holdout litigation are limited because of (1) significant constraints on creditor litigation, (2) substantial economic and reputational costs associated with such litigation, and (3) the availability of contractual provisions and negotiating strategies that mitigate the debtor’s collective action problems. It also argues that the fact-specific equitable remedy in the Argentina case was narrowly tailored to Argentina’s unprecedented disregard for court opinions and for international norms of negotiating sovereign debt restructurings and is therefore unlikely to be used in future debt restructurings.

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Introduction

On August 23, 2013, the Federal Court of Appeals for the Second Circuit affirmed a District Court award of equitable relief that barred Argentina from paying creditors who had exchanged their debt as part of a sovereign debt restructuring while it refused to pay other plaintiff-creditors that had declined the exchange offer.¹ In reaching this ruling, the court interpreted the bondholder-friendly pari passu clause that Argentina had offered in its now-defaulted debt documentation.² Argentina immediately rejected the court’s ruling and vowed to appeal to the United States Supreme Court.³ The Argentinian government also made it clear that it planned to ignore any adverse ruling.⁴ In fact, the Argentinian president stated that she would try to circumvent the ruling by changing the payment mechanism on Argentina’s international bonds to avoid the reach of US courts.⁵ This pronouncement is just the latest of Argentina’s attempts to ignore adverse court rulings.

The ruling was not only unacceptable to the Argentine government but also controversial among commentators. Official-sector participants were worried that it could set a bad precedent for future sovereign debt restructurings by creating a “free-rider” problem; creditors would now have an incentive to litigate for a better bargain instead of accepting a haircut as part of a consensual restructuring process. For instance, the International Monetary Fund (IMF) suggested that the ruling “could have pervasive implications for future sovereign debt restructurings by increasing leverage of holdout creditors.”⁶ Similarly, France filed an amicus brief supporting Argentina’s petition for certiorari on the grounds that the ruling created a

¹ NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230 (2d Cir. 2013).
² Id.
⁴ Id.
⁵ Id.
“powerful incentive…for private creditors to forgo participation in voluntary restructuring in order to enforce full payment of debt against an already distressed debtor.”\(^7\)

This paper critically examines the claim that the Second Circuit ruling will impede future sovereign debt restructurings by encouraging dissenting creditors to litigate. It argues that such incentives are, in fact, limited because there are (1) significant constraints on creditor litigation, (2) strong incentives against holding out because creditor litigation is uncertain, expensive, and risky, and (3) extensive contractual provisions and negotiating strategies available to sovereign debtors to avoid collective action problems. Furthermore, the fact-specific, narrowly tailored equitable relief in the Argentina case was predicated on Argentina’s unprecedented and widely documented bad-faith negotiations with creditors; this remedy is unlikely to be available in future sovereign debt restructurings.

This paper proceeds as follows. The first section presents an overview of the scholarship on sovereign debt, with emphasis on the economic literature. The second section outlines the guidelines suggested by international organizations for negotiations between sovereign debtors and creditors. It contrasts Argentina’s “uniquely recalcitrant” negotiating strategy\(^8\) with the consensual, good-faith negotiating process that most sovereign debtors use to restructure their debt. The third section looks at the critical role of effective creditor enforcement in sustaining the sovereign debt market, but concludes that recent cases of sovereign debt litigation, including the Argentinian experience, show that creditor enforcement is, at best, a weak remedy for creditors. The fourth section looks at the incentives for holdout creditors. Conventional wisdom holds that creditors have an incentive to “free-ride” in sovereign debt restructurings. However,

\(^8\) NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230 (2d Cir. 2013).
this view ignores the substantial costs—financial, managerial, and reputational—of litigating. The fifth section explores the various ex-ante contractual provisions and ex-post negotiating strategies available to sovereign debtors to avoid collective action problems. Argentina did not bargain to secure any ex-ante contractual provisions that would have diluted the litigation rights of its creditors. Moreover, it deliberately chose to avoid using any ex-post negotiating strategies, such as minimum participation thresholds, that would have resulted in meaningful negotiations with creditors and significantly reduced collective action problems. Lastly, a short conclusion emphasizes the equitable nature of the Second Circuit ruling and the fact that it was narrowly tailored to the unique circumstances of the Argentina case. Other courts are unlikely to grant similar relief in future sovereign debt restructurings.

Section I – Sovereign Debt: Overview of the Literature

The importance of the recurring phenomenon of debt default has prompted an enormous theoretical and empirical literature on sovereign debt.\(^9\) The distinguishing feature of sovereign debt relative to private/corporate debt is the limited mechanisms for enforcement. In contrast to private entities, sovereign nations are not subject to a legal authority. In the event of default, legal recourses are more limited than at the corporate level.\(^{10}\) There are also few sovereign commercial assets located abroad to serve as collateral or repayment.

Recognizing that few direct legal sanctions can be invoked against sovereign borrowers, initial research in economics focused mainly on why countries ever chose to pay their debts—or why private creditors ever expected them to.

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\(^{10}\) Section III looks at the role of creditor enforcement. In the United States, the 1976 Foreign Sovereign Immunities Act (FSIA) allows suing a foreign government in U.S. course for commercial contracts.
In a famous paper, economists Jonathan Eaton and Mark Gersovitz characterized the existence of a market of private loans to government along with the lack of explicit mechanisms preventing a sovereign from repudiating its external debt as a paradox. Eaton and Gersovitz argued that sovereign countries repay in order to avoid developing a reputation for defaulting and consequently losing access to international capital markets. According to the authors, countries chose to borrow from international markets in bad periods—for example, when export production was poor—and repay in good times. Countries wishing to engage in international borrowing in order to smooth income in this way were encouraged to repay their debts in order to avoid being shut off from borrowing and credit access the next time they needed it.

However, the authors also noted that permanent exclusion from future credit would punish creditors as well as debtors and was therefore unlikely. The empirical evidence also challenged the view that exclusion from capital markets is a critical component of the enforcement of sovereign debt. As surveyed in Panizza et al., countries regain access to international capital markets following debt crises more quickly now than in previous decades.

Bulow and Rogoff further challenged Eaton and Gersovitz’s explanation, pointing out that for reputational concerns to be strong enough to enforce contracts, a sovereign would have to be excluded from international markets that permit, for example, insurance policies to be bought against low realizations of income. In addition to insurance markets, sovereigns had other ways to smooth consumption in response to bad income shocks, including self-insurance (storing output, assets/foreign reserves) and accumulating capital (investment). This would

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12 [Citation needed]


limit the effectiveness of exclusion from international markets as a mechanism to enforce contracts; that is, as a motivation for sovereigns to repay their debts. Anticipating this, creditors would not engage in lending.

Subsequently, Cole and Kehoe showed that the ability of reputation to support debt depends on the alternatives open to a country, the country’s international relationships, and assumptions made about institutions. Sovereigns may worry about spillovers in other markets and relationships for example in foreign direct investment.

Other academics identified additional incentives and punishments that could encourage countries to repay their debts, such as the debtor country’s ability to interfere with trade credits and the risk of substantial economic losses following financial crises. In fact, as shown in Alfaro and Kanczuk, these additional output costs are important in explaining the stylized fact of debt crises. Recent experiences with sovereign debt in the 1970s through the 2000s as well as earlier debt crises, such as those in the 1870s, 1890s, and 1930s, showed that debt crises are so difficult to manage that they can lead to economic uncertainty and stagnation in much of the

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developing world.\textsuperscript{19} Although these additional output losses are well documented, their microfoundations are not yet understood.\textsuperscript{20}

In sum, the sovereign debt literature has focused on the incentives to repay; in particular, loss of access to international credit markets, reputation effects, and trade and direct output costs.\textsuperscript{21} But another critical incentive is that creditors—at least those that hold bonds governed by foreign law—have access to at least some legal recourse in the country in which the debt is issued. Recent work has focused on the role of legal remedies and actions, as explored in this paper. However, as there is no supranational bankruptcy court to adjudicate disputes between sovereign debtors and international creditors, resolving sovereign debt restructuring usually involves negotiation. The next section surveys the negotiation process and the Argentinian case.

\textbf{Section II – Negotiation Process}

\textit{Guidelines for Negotiations}

Both the International Monetary Fund (IMF) and the Institute of International Finance (IIF) have developed guidelines for how this negotiation should take place. The IMF policy, known as lending into arrears (or LIA), establishes the conditions under which the IMF would be willing to lend to a sovereign debtor. The IIF Principles for Stable Capital Flows and Fair Debt

\begin{footnotesize}

\textsuperscript{20} Dooley for example argues that output loss is caused by the inability of debtors and creditors to quickly renegotiate contracts and the inability to condition the loss of output ex-ante by reasons of nonpayment. This creates a time interval during which residents of a country in default are unable to borrow from locals or foreigners due, for example, to the inability of new credits to be credible senior to existing credits. Michael Dooley, Can Output Losses Following International Financial Crises be Avoided? (NBER Working Paper no. 7531, 2000). Cambridge, United States: National Bureau of Economic Research. See also Enrique Mendoza & Vivien Yue, A General Equilibrium Model of Sovereign Default and Business Cycles, Q. 127 J. OF ECON. 889-946 (2012).

\textsuperscript{21} In this case, incentives to repay come from the concern that defaults may have adverse effects on domestic agents. Rogoff argues that in the absence of better institutions, default costs provide a punishment that in some sense substitutes for effective property rights at the international level. Keneth Rogoff, Institutions for Reducing Global Financial Instability, 13 J. ECON. PERSP. 21-42 (1999). ; “Emerging Market Debt: What is the Problem?” Speech at Sovereign Debt Restructuring Mechanism Conference, IMF, Washington D.C (2003)
\end{footnotesize}
Restructurings (the “Principles”) set forth “a voluntary approach to debtor-creditor relations, designed to promote stable capital flows to emerging-market and other debtor countries through enhanced transparency, dialogue, good-faith negotiations, and equal treatment of creditors.”

International guidelines encourage sovereign debtors and creditors to engage in a “good-faith” substantive negotiation over the terms of the restructuring. The IMF’s LIA policy requires a country to make “a ‘good faith effort’ to reach a collaborative agreement with its private creditors” as a condition for receiving IMF funds. The IIF Principles suggests that “debtor and creditors should engage in a restructuring process that is voluntary and based on good faith,” adding that “timely good faith negotiations are the preferred course of action toward these goals, potentially limiting litigation risk.” Both these policy documents discourage a unilateral and coercive process because it may lead to creditor litigation and delays.

Any good-faith negotiation also requires the full and accurate disclosure of information by the sovereign debtor to enable creditors to make informed decisions on any restructuring offer. The IMF’s LIA policy therefore requires sovereign debtors to “disclose the information needed to enable creditors to make informed decisions on the terms of a restructuring.”

Similarly, the IIF’s Principles expect “disclosure of relevant information so that creditors are in a position to make informed assessments of their economic and financial situation, including overall levels of indebtedness.” A key pillar of an effective negotiation process, thus, is the full and accurate disclosure of information by the sovereign debtor.

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Argentina’s Negotiations with International Creditors

After a prolonged period of economic crisis and political chaos, Argentina defaulted on its external sovereign debt in December 2001. The government then approached the IMF for a renewal of its financial assistance package.\(^2\) As part of those negotiations, Argentina agreed to “engage in constructive negotiations with all representative creditor groups” and make an offer that “would attain broad support from creditors.”\(^2\) The government also agreed to include a minimum participation threshold in its debt restructuring offer,\(^2\) meaning that a certain percentage of creditors would have to agree to the proposed debt exchange offer before it would go into effect. This would give the country a strong incentive to negotiate with creditors and to avoid a piecemeal approach to restructuring.

Although Argentina met repeatedly with creditors, it had become clear by mid-2004 that these meetings were “largely procedural” and that the government did not intend to engage in substantive negotiations with creditors regarding the terms of the potential debt exchange offer.\(^3\) Instead, the authorities presented their offer as “final” and not subject to negotiations.\(^3\) Creditors were not satisfied with the offer because they did not think it reflected the country’s ability to repay its debt.\(^3\) Furthermore, the exclusion of past-due interest from the offer was “a major departure from past sovereign restructurings.”\(^3\)

Despite these objections, Argentina proceeded with its unilateral offer, threatening not to pay creditors anything if they rejected it. Argentina also failed to keep its agreement with the

\(^3\) See id. at 71
\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
IMF “to establish a minimum participation threshold for the debt restructuring.” for example, stated that “the case of Argentina was and remains unique in its unilateral and coercive approach to the debt restructuring.” The London Club, a group representing bank creditors, categorically stated that in future sovereign debt restructurings, it did not want a “non-negotiated process and a unilateral offer as the one launched by Argentina.” The IMF concurred that “no constructive dialogue was observed and the authorities presented a non-negotiated offer,” noting also that there was “a consensus among [IMF] staff, management and major shareholders that the authorities had not lived up to their commitment … to engage in constructive negotiations with all representative creditor groups.”

It also became clear that Argentina had failed to accurately disclose information to creditors. For instance, in an assessment of the Argentinian debt restructuring process, the IMF stated that Argentina may have deliberately understated its economic forecasts in order to enhance its leverage with creditors:

The low official 2004 growth projection may, however, in part have reflected a strategic decision by the authorities to understate growth prospects to strengthen their bargaining position in debt exchange negotiations. Throughout late 2003 and 2004 there were pressures on the Fund from the authorities to underestimate growth prospects for this same reason.

In the end, 76% of the creditors accepted the offer. However, this acceptance rate was

34 IMF Staff Team from the European, Fiscal Affairs, and Policy Development and Review Departments, Ex Post Assessment of Longer-Term Program Engagement and Ex Post Evaluation of Exceptional Access, at16 (July 11, 2006).
35 Elena Duggar & Richard Cantor, The Role of Holdout Creditors and CACs, Moody’s at 2 (Apr 10, 2013).
38 IMF Staff Team from the European, Fiscal Affairs, and Policy Development and Review Departments, Ex Post Assessment of Longer-Term Program Engagement and Ex Post Evaluation of Exceptional Access, at 16 (Jul 11, 2006) (internal quotations omitted).
39 See id.at 17.
40 IMF, Argentina – Selected Issues, at 78(June 3, 2005).
driven by the acquiescence of domestic investors; the participation rate for all bonds held in
Argentina was 98%, with 100% participation among banks and pension funds. These figures
may not indicate genuine approval of the offer, given that government authorities had
considerable leverage with domestic actors, especially with regulated financial institutions like
banks and pension funds. The participation rate for bonds held by foreigners, however, was a
significantly lower 63.3%. The IMF cautions that even this participation rate should be viewed
with some skepticism, since it was likely a result of the coercive nature of Argentina’s exchange
offer:

After all, a high participation rate could be as much an indication of a debtor’s
bad faith—with creditors finding a “take-it-or-leave-it” threat credible—as of
good faith. The law passed by the [Argentinian] congress prohibiting the
executive from reopening the debt restructuring or agreeing to a settlement with
nonparticipating creditors may have enhanced the credibility of what many
creditors indeed perceived as a “take-it-or-leave it” offer.

Participation rates would likely have been even lower if creditors had not been coerced into
accepting an unfair offer.

After the exchange offer, there were still significant arrears on defaulted debt. In
contrast, other sovereign debt restructurings had “achieved participation in the range of 93%–
99% and, as a result, residual arrears were modest.”

Even after the debt exchange was over, the IMF encouraged “Argentina to formulate a

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41 Id.
42 Id.
43 IMF Staff Team from the European, Fiscal Affairs, and Policy Development and Review Departments, Ex Post
Assessment of Longer-Term Program Engagement and Ex Post Evaluation of Exceptional Access, at 43 (July 11,
2006).
44 IMF, Argentina – Selected Issues, at 78 (June 3, 2005).
45 Id. Shleifer (2003) and Roubini (2002) note that the “rouge-creditors” problem “has been vastly overstated”
pointing to restructuring experiences such as those of Ecuador, Pakistan, Russia and Ukraine. Andrei Shleifer, Will
Sovereign Debt Market Survive?, 93 AM. ECON. REV. 85-90 (2003). Nouriel Roubini, Do We Need a New
Oosterveld, US Court Ruling on Argentina’s Debt Could Have Limited Implications for Sovereign Debt
Restructurings, Moody’s at 3 (Dec. 6, 2012).
forward-looking strategy to resolve the remaining arrears outstanding to private creditors consistent with the IMF’s lending into arrears policy.\textsuperscript{46} The IMF noted that the only other country that had a significant problem with holdout creditors, Dominica, worked constructively with individual creditors to convince them to accept its exchange offer.\textsuperscript{47}

Argentina, by contrast, carried through on its threat of refusing to pay or even negotiate with holdout creditors. The Argentinian “authorities reiterated that they would not re-open the offer to accommodate non-participating creditors.”\textsuperscript{48} In fact, they even passed a law (known as the “Lock Law”) that “limited the power of the executive to effect judicial or nonjudicial settlements with nonparticipating creditors or to re-open the debt exchange.”\textsuperscript{49} Argentina was warned that the Lock Law “might increase on the margins the government’s vulnerability to legal challenge… [since the] holdouts will surely argue that the law amounts to a legal act formally subordinating the old debt to the new in violation of the \textit{pari passu} undertakings in the old bonds.”\textsuperscript{50} Argentina ignored these warning and refused to deal with holdouts. Instead, “freezing out the holdouts” had become “a domestic political strategy” for Argentina’s politicians.\textsuperscript{51}

All the same, Argentina did reopen the exchange offer in 2010 and, despite the fact that the second exchange offer was \textit{less} attractive than the 2005 exchange,\textsuperscript{52} several creditors

\textsuperscript{46} Staff Representative for the 2005 Consultation with Argentina, \textit{Argentina: 2005 Article IV Consultation}, at 32 (May 31, 2005).
\textsuperscript{47} IMF Monetary and Capital Markets Department, \textit{A Survey of Experiences with Emerging Market Sovereign Debt Restructurings}, at 13 (June 5, 2012).
\textsuperscript{48} IMF, \textit{Argentina – Selected Issues}, at 78 (June 3, 2005).
\textsuperscript{49} Staff Representative for the 2005 Consultation with Argentina, \textit{Argentina: 2005 Article IV Consultation}, at 32 (May 31, 2005).
\textsuperscript{52} See id. at 16.
exchanged their defaulted bonds, raising participation to 91%. There were two reasons why creditors chose to participate in the 2010 exchange. First, defaulted Argentinian debt was trading at very low prices, driven down by Argentina’s refusal to negotiate with dissenting creditors. Thus, it was attractive for arbitrageurs to purchase the defaulted bonds and exchange them for performing Argentinian debt instruments. Second, some of the holdout creditors had lost faith in the litigation process and no longer expected a better outcome. The relatively high cumulative participation rate—highlighted by the Argentinian authorities—should therefore not be used as a proxy for broad creditor satisfaction with the offer.

Private-sector creditors are not alone in dealing with Argentina’s bad-faith negotiating style. The IMF’s acting managing director, Anne Krueger, felt that the institution was “blackmailed” during its negotiations with the Argentinian government over the terms of its IMF loan package. Similarly, the Paris Club, an informal group of sovereign creditors, believes that Argentina’s settlement with official-sector creditors is “dependent on Argentina’s political agenda” rather than on its ability to pay.

**Section III – Creditor Enforcement**

In some cases, a country may face circumstances, such as wars and revolutions that make it genuinely difficult to service sovereign debt. However, there is also a strong economic incentive for sovereign debtors to renege “whenever the expectation of further loans no longer

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55 Id.
56 Id.
58 Paris Club Presentation, Meeting with Private Sector Representatives (September 11, 2012)
exceeds in amount the interest payable on old ones.” Even when a sovereign debtor has the capacity and ability to pay its debts, “domestic political opposition” can force political actors to renege on external commitments. Thus, some sovereign debtors have chosen to “default with some regularity, and when they do, often pay back a fraction of what they have borrowed.”

Argentina is a prominent example, having defaulted seven times on its external debt—in 1827, 1890, 1951, 1956, 1982, 1989, and 2001. It has spent a remarkable 32.5% of the years between 1816 and 2009 in default on its external debt. Argentina has also defaulted on its domestic debt four times.

Given such a strong economic incentive to renege, why do countries ever negotiate in good faith with their creditors? One reason, already mentioned, may be that a country values its reputation for keeping promises. This need not just be a moral commitment. The economic value of a good reputation in the sovereign debt markets can have important spillover effects in other areas, such as attracting foreign investment. A sovereign debtor that keeps its word in one arena is likely to do so in others. Conversely, a sovereign debtor that regularly breaks its promises to external creditors seems likely to violate the rights of other international investors.

The nationalization of YPF, an Argentinian energy company, should therefore come as no surprise, this is a country with a history of violating investor rights.

An incentive for a sovereign to repay debt governed by foreign law is that creditors have

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60 Id.
61 See id. at 49.
64 Id.
65 Id.
some legal recourse. International-law-bond creditors have the power to “litigate,” which creates an incentive for sovereign debtors to negotiate.\(^\text{69}\) The IMF has also recognized that the threat of litigation is an important underpinning of the sovereign debt market:

Effective creditor enforcement supports a credit culture and increases the availability of credit to sovereigns. Litigation may also cause a recalcitrant sovereign debtor to acknowledge the extent of its financial difficulties and bring it to the negotiating table.\(^\text{70}\)

When bonds are issued under foreign law, creditors can sue a defaulting debtor in a foreign court and typically obtain a favorable judgment, since the sovereign debtor is in breach of contractual obligations. However, the value of this judgment can be limited for two reasons. First, the creditors generally cannot recover a sovereign debtor’s local assets since these are typically protected by domestic law.\(^\text{71}\) Second, sovereign debtors benefit from foreign governments’ sovereign immunity laws, limiting creditors’ ability to seize sovereign assets held abroad. Although sovereign debtors typically irrevocably waive sovereign immunity in their bond documents,\(^\text{72}\) however, this still constitutes a partial waiver of sovereign immunity. The United States Foreign Sovereign Immunities Act (FSIA), for instance, allows sovereign governments to waive sovereign immunity only with respect to commercial assets.\(^\text{73}\) Assets held in a sovereign capacity continue to be immune from attachment by sovereign debt creditors. For example, foreign assets held in a diplomatic capacity, such as military assets or an ambassador’s residence, are always protected in the United States.\(^\text{74}\)

These significant restrictions on creditor litigation have meant that the “experience with


\(^{70}\) IMF Legal Department, *Recent Developments in Sovereign Debt Litigation and Implications for Debt Restructuring and Debt Relief Processes*, at 2 (March 22, 2004).

\(^{71}\) IMF Staff Note, *Legal Aspects of Standstills and Moratoria on Sovereign Debt Payments and Their Effect on Actions by Creditors* at 21 (Feb 20, 1996).

\(^{72}\) See *id.* at 17.

\(^{73}\) See *id.* at 22.

\(^{74}\) *Id.*
holdout creditors in bond restructurings has been very limited so far." As a result, the IMF acknowledged in 2012 that “creditor coordination and holdouts have not generally been a major problem.” IMF directors have emphasized that the impact of anecdotal successes in creditor litigation, such as the favorable Brussels ruling in the Peru case, should not be “overstated.”

These obstacles and restrictions were highlighted by the Argentinian default in 2001. Argentina’s non-exchanging creditors have failed to recover any meaningful assets through litigation in foreign courts, despite the fact that Argentina failed to negotiate with them in good faith prior to its unilateral and coercive exchange offer. In fact, as recently as 2012, the IMF stated that the case of the Argentinian holdouts was a cautionary tale for creditors litigating against sovereigns: “The long-running quest for assets by Argentina’s ‘vulture’ creditors demonstrates the practical limits on litigating against sovereigns even where one has an enforceable judgment in hand.” Similarly, Lee Buchheit of Cleary Gottlieb Steen & Hamilton has stated that in light of the Argentinian experience, “the markets now seem to believe that legal remedies alone are unlikely to be a satisfactory recourse for private sector debt holders, at least if the sovereign default is large enough or persists long enough.”

If investors cannot collect against a uniquely intransigent and problematic debtor such as Argentina, then it suggests that “the troubles afflicting sovereign-debt markets result from creditor rights being too weak, not too strong.” Creditor litigation, by itself, has clearly not

76 IMF Monetary and Capital Markets Department, A Survey of Experiences with Emerging Market Sovereign Debt Restructurings, at 1 (June 5, 2012).
“created a credible debt-enforcement regime.”81

Bilateral sovereign creditors have generally fared better in sovereign debt restructurings. They have additional leverage in negotiations with sovereign debtors because they can draw upon “political rights which enable them to threaten the debtor’s interests outside the borrowing relationships.”82 The IMF agreed with this assessment:

Official creditors through the Paris Club are in the strongest bargaining position because they are able to bring to bear, in a bilateral or multilateral context, political and diplomatic approaches to the resolution of sovereign liquidity problems. Their negotiations have also been facilitated by the [International Monetary] Fund's policy not to extend financial assistance to any member country that remains in arrears to official creditors. Private creditors, on the other hand, do not have as much clout with sovereign borrowers who negotiate with them as adversaries, and the satisfactory conclusion of their negotiations is not a pre-condition for [International Monetary] Fund assistance.83

In theory, the Paris Club requires a “comparability of treatment” whereby private sector creditors are expected to agree to “comparable” treatment to Paris Club creditors in any sovereign debt restructuring.84 In practice, this clause has only limited the ability of private creditors to negotiate a better deal than the Paris Club, not the other way around.85 Thus, comparability of treatment has proven to be a “highly discretionary, one-way street.”86

Section IV – Holdout Incentives

Conventional wisdom holds that investors have the incentive to “free-ride” in sovereign debt restructurings. The argument is that a holdout creditor has the incentive to wait for the

81 Laura Alfaro, Noel Maurer & Faisal Ahmed, Gunboats and Vultures: Market Reaction to the “Enforcement” of Sovereign Debt, at 7 (2010).
83 IMF Staff Note, Legal Aspects of Standstills and Moratoria on Sovereign Debt Payments and Their Effect on Actions by Creditors, at 39 (Feb. 20, 1996).
85 Arturo C. Porzecanski, Debt Relief by Private and Official Creditors: The Record Speaks, 10 INT’L FIN. 201-04 (2007).
86 See id. at 204.
successful conclusion of a restructuring agreement. After the restructuring is completed, the holdout creditor either waits for the sovereign debtor to spontaneously continue servicing the old debt or else litigates to pressure the sovereign debtor to settle. By doing so, the holdout creditor receives a higher recovery and bears none of the costs of the sovereign debt restructuring. Framed this way, it is a wonder that anyone voluntarily accepts a painful debt write-down instead of holding out and enjoying a free lunch at the expense of other creditors. Yet, restructurings have been successfully completed and the problem of holdout creditors has been “limited.”

The first reason for this is that investors that buy defaulted debt in the secondary market may have greater flexibility to agree to a sovereign debt exchange offer since it may be set at or above the price that they paid for their debt in the market. This is especially true for investors that value their investments at market price; a speedy and successful debt exchange offer is likely to boost the value of their claims. Thus, secondary market buyers are, if anything, strongly motivated to agree to an exchange offer and to pocket the short-term price appreciation from a successful debt restructuring.

The second reason is that litigation is expensive, risky, and difficult to execute. Although the success of previous sovereign debt litigation can set a favorable judicial precedent, the value of such a precedent is quickly eroded by the fact that sovereign debtors can avoid a given precedent by changing the contractual language that gave rise to that particular court ruling.

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88 *Id.*
Furthermore, as Section IV will outline, sovereign debtors have other tools to limit the litigation rights of creditors. The decision to litigate is therefore accurately characterized as a “high-risk high-return” strategy with no guarantee that the investor will receive any recovery at the end of a long and expensive process.92

**Litigation Expense and Specialized Knowledge**

It is expensive and time-consuming to convert a favorable court judgment into an actual cash recovery because of the considerable restrictions on sovereign debt enforcement. Investors must weigh the considerable upfront costs of litigation against an uncertain future recovery.93 Furthermore, such litigation requires specialized knowledge which few investors have.94 This is especially true of small bondholders, who will “generally not have the resources or the sophistication to pursue the litigation option.”95 Lastly, even for creditors that would otherwise be able to litigate, there are strong reasons not to do so because such litigation inevitably diverts “time and attention from the investment fund manager’s primary task of managing the fund’s assets.”96 For all of these reasons, the “number of successful litigations by creditors remains very small” and it is not a strategy likely to be widely adopted.97

**Investor Mandate and Illiquidity**

Most sovereign debt investors have a limited mandate to invest in performing sovereign

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93 IMF Policy Development and Review and Legal Departments, *Fund Policy on Sovereign Arrears to Private Creditors,* at 23 (Jan. 9, 1998). See also Felix Salmon, *Stop Selling Bonds to Retail Investors,* 35 GEO. J. INT’L L., 838 (lawyers in sovereign debt litigation “can be extremely expensive.”)
94 IMF Legal Department, *The Restructuring of Sovereign Debt-Assessing the Benefits, Risks, and Feasibility of Aggregating Claims,* at 6 (No. 5 Sept. 3, 2003). See also Anna Gelpern, *Sovereign Damage Control,* Peterson Institute for International Economics, Policy Brief Number PB13-12 at 2 (May 2013) (“enforcement requires skill, commitment, and resources beyond the reach of all but a few specialists”).
96 IMF Legal Department, *Recent Developments in Sovereign Debt Litigation and Implications for Debt Restructuring and Debt Relief Processes,* at 25 (March 22, 2004).
debt. The performance of these investors is usually measured against emerging market bond
indices; holding defaulted debt is likely to lower their performance relative to the benchmark.98
Most sovereign debt investors are therefore anxious to sell defaulted bonds at the earliest sign of
distress; they are in no position to hold “a depreciating and illiquid asset.”99 Such investors are
also eager to participate in an exchange offer because, after the exchange is complete, the
defaulted bonds are likely to be illiquid and infrequently traded.100 Sovereign debtors also
threaten to delist the defaulted bonds, further raising the costs of holding and trading them.101
Lastly, funding litigation expenses inevitably sets up a conflict between current investors, who
will have to pay the costs of litigation, and future investors, who will benefit from any
recovery.102 For all these reasons, the vast majority of investors are unable or unwilling to hold
defaulted, illiquid sovereign debt in their portfolios.

Business Relationships

Many sovereign debt investors are anxious not to undermine their longstanding business
relationships with the sovereign debtor and domestic residents.103 Furthermore, institutional
creditors may be promised future business with the sovereign government in exchange for
agreeing to a restructuring.104 Such business can include “fees and commission from ongoing and
future underwriting of the country’s bonds and the franchise value of their commercial banking

98 IMF International Capital Markets and Legal Departments, Involving the Private Sector in the Resolution of
Financial Crises-Complementing the Catalytic Approach, at 8 (Jan. 8, 2002).
99 IMF Legal Department, Recent Developments in Sovereign Debt Litigation and Implications for Debt
Restructuring and Debt Relief Processes, at 24 (March 22, 2004).
100 IMF International Capital Markets and Legal Departments, Involving the Private Sector in the Resolution of
Financial Crises-Complementing the Catalytic Approach, at 8 (Jan. 8, 2002).
101 See e.g., Argentina threatened to delist its bonds following the 2005 exchange offer. IMF, Argentina – Selected
Issues, at 73 (No. 10 June 3, 2005).
102 IMF Legal Department, Recent Developments in Sovereign Debt Litigation and Implications for Debt
Restructuring and Debt Relief Processes, at 25 (March 22, 2004).
103 See id. at 4.
104 IMF Legal and Policy Development and Review Departments, Involving the Private Sector in Forestalling and
Resolving Financial Crises: The Role of Creditors’ Committees-Preliminary Considerations, at 6-7 (Aug. 11, 1999).
operations in the debtor country.”

Thus, the motives and incentives of large financial institutions are not necessarily aligned with those of minority investors and such institutions may have good reason to agree to a restructuring even when the sovereign debtor is not offering a fair deal.

**Reputation and Regulatory Pressure**

Institutional investors can be subject to substantial regulatory pressure from the “official sector” and national regulators in their own country to agree to a deal with a sovereign debtor. This pressure is particularly acute when the investor is a financial institution of the defaulting sovereign or has substantial commercial presence in that country. Even in the absence of regulatory pressure, investors are concerned about the reputational consequences of holding out. For instance, creditors that choose to pursue litigation are subject to considerable demagoguery in the media and amongst political actors. They are often referred to as “vulture investors.” Most investors are unable to stomach such strong public reactions and are unlikely to seek unwanted attention. Only a small percentage of investors are able to hold out against such strong regulatory and reputational pressures.

**Conclusion**

Between 1976 and 2010, only 30 of the 180 cases of sovereign debt restructuring with

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106 IMF Legal Department, *The Design and Effectiveness of Collective Action Clauses*, at 6 (June 6, 2002).
109 IMF Legal Department, *Recent Developments in Sovereign Debt Litigation and Implications for Debt Restructuring and Debt Relief Processes*, at 25(March 22, 2004).
private creditors resulted in litigation. The IMF agrees that “[c]reditor litigation in the context of bond restructurings has been rare, with the exception of Argentina (2005)—with more than 50 litigation cases filed in the U.S. and the U.K.—as well as Greece.” Most sovereign debt restructurings were, instead, characterized by “high participation rates and speedy completion” because “the underlying offers were seen by participating creditors as reasonable, in that they reflected governments’ capacity to pay and offered adequate burden sharing.” Creditor litigation has primarily been pursued in cases where the sovereign debtor did not offer a fair deal.

This should come as no surprise, since litigation is not a realistic option for most retail or institutional investors. But it does raise the question of why most investors are sanguine about the presence of those investors that are willing to litigate. There are three reasons for this. First, demand from such investors for “distressed debt supports the functioning of the secondary market, with some benefits to creditors and the debtor.” Without such investors, the market for distressed debt might cease to function, especially when faced with a debtor that is intent on offering a nonnegotiated, coercive offer. Thus, post-default, the “threat of litigation only serves to increase the value of the bonds.” Second, holdout litigation can aid intercreditor equity by offering “a mechanism by which minority shareholders can challenge restructurings designed principally for the benefit of the majority of the creditors.” Third, investors participating in the exchange may see “payments to the holdouts as a modest tax on the restructuring that

113 IMF Legal Department, Recent Developments in Sovereign Debt Litigation and Implications for Debt Restructuring and Debt Relief Processes, at 6 (March 22, 2004).
114 Felix Salmon, Collective Indecision, EUROMONEY (Nov. 1, 2002).
the threat of enforcement real, perhaps deterring the debtor from defaulting on the margins.”

Holdouts creditors, thus, “serve as a check on opportunistic defaults and onerous restructuring terms.” Without the presence of such investors, the threat of creditor enforcement ceases to be credible and bond prices would likely collapse after a sovereign default.

**Section V – Dealing with Holdout Creditors**

Even if creditors have individual incentives to hold out, sovereign debtors can overcome collective action problems in restructurings by (1) including ex-ante contractual provisions in the bond documentation that make it more difficult for dissenting creditors to hold out and litigate their claims and (2) using ex-post negotiating strategies that encourage collective action amongst creditors.

**Ex-ante Contractual Provisions**

Several types of ex-ante contractual provision can minimize the risk of holdout creditors in sovereign debt restructurings. Some of these provisions have been championed by international organizations, including the IMF, as effective mechanisms for dealing with holdout creditors.

**Collective Action Clauses (CACs)**

The most widespread contractual mechanism for dealing with collective action problems is the collective action clause (CAC). Typically, these clauses empower a qualified majority of creditors to bind dissenting creditors and thereby “limit the potential threat of litigation from ‘holdout’ creditors.” The official sector has long “encouraged the use of collective action

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clauses in international sovereign bond issues,“119 strongly believing that CACs can make a “significant contribution to the restructuring process.”120

Collective action clauses come in several flavors. The first type, the **majority restructuring clause**, allows a supermajority of creditors within a bond issue to bind all remaining creditors to the financial terms of a debt restructuring.121 Once this supermajority threshold, typically set at 75%, is met, dissenting creditors have no recourse and must accept the financial terms on offer.122 This type of CAC has gained widespread acceptance in the New York-law bond market. “99% of the aggregate value of New York-law” sovereign debt bonds that have been issued since 2005 have included majority restructuring clauses.123 Only one issuer, Jamaica, has chosen not to include such a clause in its bond offerings.124

One potential problem with majority restructuring clauses is that they only apply to the bond issue at hand.125 A second type of CAC, the **aggregation clause**, is modeled along the lines of a majority restructuring clause, but applies across a predefined set of debt instruments.126 However, there is significant concern that this type of CAC could be abused if the instruments covered by the clause have different contractual claims or maturities and the debtor tries to manipulate the voting process by offering terms that are attractive for some debt instruments but not for others.127

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121 IMF Legal Department, *The Design and Effectiveness of Collective Action Clauses*, at 2 (June 6, 2002).
124 *Id*.
126 IMF Legal Department, *The Design and Effectiveness of Collective Action Clauses*, at 17 (June 6, 2002).
The third type of CAC, the **majority enforcement clause**, limits the ability of dissenting creditors to accelerate their debt claims.\(^{128}\) For instance, the clause allows a qualified majority of creditors to limit the ability of minority creditors to accelerate their claims following a default.\(^{129}\) Alternatively, if the acceleration of debt claims has already happened, the clause allows a majority or supermajority of creditors to reverse the acceleration.\(^{130}\)

The fourth type, bonds issued through **trust deeds**, vests the right to litigate in the hands of a bond trustee,\(^{131}\) which usually can litigate only if a minimum percentage of bondholders—typically 20% to 25%—request it to.\(^{132}\) In many cases, the trustee will also require indemnification.\(^{133}\) Any proceeds received from the litigation are typically shared amongst all bondholders and not just the creditors that chose to litigate.\(^{134}\) The combination of these provisions makes it very difficult for dissenting creditors to litigate against the sovereign debtor.

**Pari Passu Clauses**

**Pari passu** clauses limit the ability of debtors to privilege one group of creditors over another. Although **pari passu** clauses are sometimes seen as a single category, there are actually three different types.\(^{135}\) The narrowest version simply provides that “the bonds rank *paripassu* with all indebtedness.”\(^{136}\) This provides for only equal rank and makes no mention of debt service payments by the debtor. Almost half of all sovereign bonds issued in the 2000s contain

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\(^{130}\) Id.

\(^{131}\) Id.

\(^{132}\) Id.


\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) Id.
this narrow version of the *pari passu* clause. A more bondholder-friendly version states that the “bonds will rank *pari passu* in priority of payment and [emphasis added] in rank of security.” Finally, the broadest, most bondholder-friendly version provides separately for both equal priority and equal payment of similarly situated creditors. For instance, Argentina’s bond offering featured the strongest version of the *pari passu* clause:

> The Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank paripassu without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.

The scope of the broader versions of the *pari passu* clause has, however, been “subject to various interpretations.” Under a narrow interpretation, the clause is only violated if the sovereign debtor legislatively subordinates the claims of one group of creditors relative to another group of similarly situated creditors. Under a more expansive interpretation, “the covenant would preclude the borrower from making payment to one class of creditors in circumstances where other creditors that are also owed payment have received nothing.” In 2012, the US Court of Appeals for the Second Circuit clarified the meaning of the *pari passu* clause in Argentina’s bond offerings, holding that clauses that separately provided for both equal priority and equal payment prohibited debtors from paying one class of creditors while other creditors that are owed payment receive nothing.

In future bond offerings, sovereign debtors can avoid this now-settled interpretation by

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137 Id.
138 Id.
139 Id.
140 *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012).
142 Id.
143 Id.
145 Id.
changing the wording of the clause or by adopting a less bondholder-friendly version of the clause; for instance, by deleting language that provides for equal payment. Italy has already changed the *pari passu* clauses in its most recent bond offerings to accomplish this.146

In 2000, a Brussels court adopted a similar interpretation when faced with a clause that provided that the debt “will rank at least *pari passu* in priority of payment” with other external debt.147 Several commentators bemoaned the “nightmarish situation” that the ruling would create, saying that it “put a large hammer in the hands of holdout creditors, thereby enabling them to cause even more disruption in restructurings.”148 These predictions have not come true and sovereign restructurings have proceeded largely unimpeded since the Brussels rulings. The Second Circuit ruling, which only interprets the strongest version of the *pari passu* clause, is also unlikely to have a significant impact on future restructurings, especially because sovereign debt issuers can change the wording of the clause in their future bond offerings.

**Sharing Clauses**

Loan agreements typically include sharing clauses, which require a creditor to share with all remaining creditors the proceeds of any recovery through litigation against the debtor.149 The inclusion of sharing clauses would make bond instruments significantly less attractive for creditors that would have otherwise chosen to litigate against a sovereign debtor.150 This is because sharing clauses distribute any potential gains from litigation across all creditors, while the costs of such litigation are borne exclusively by the litigating creditors.

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146 IMF, *Sovereign Debt Restructuring-Recent Developments and Implications for the Fund’s Legal and Policy Framework*, at 31 (No. 35 Apr 26, 2013).
147 The *pari passu* clause in that case said that “[t]he obligations...will rank at least *paripassu* in priority of payment with all other” external debt of the issuer. G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 636 (2001).
Choice of Law

Sovereign debtors have the option of issuing bonds under their own law. In such cases, creditors have little litigation recourse because sovereigns can retroactively amend their laws to insert additional contractual provisions into the bond documents or otherwise limit the rights of creditors to pursue litigation. Furthermore, bonds issued under local law typically limit the ability of creditors to litigate in foreign courts. Thus, “in the absence of legal remedies, creditors would have little choice other than to accept the terms of a restructuring.” For instance, in 2012, the Greek authorities retroactively inserted aggregation clauses into their local-law debt, allowing a majority of creditors to bind minority creditors to the terms of the financial exchange.

Conclusion

Sovereign debtors have the contractual technology to severely limit the ability of creditors to dissent from any sovereign debt restructuring. This, in turn, can increase the risk of opportunistic default by sovereign debtors. One recent example is Ecuador. The combination of two defaults (1995 and 2000) and record oil prices had left Ecuador with “an enviably manageable external debt profile.” Nevertheless, the country defaulted on its international bonds in late 2008. The motivation for the default was “domestic politics, not financial necessity.” The bonds were governed by a trust indenture that vested the right of pursuing any enforcement action in the hands of the trustee. Furthermore, any enforcement action required

151 IMF Legal Department, The Design and Effectiveness of Collective Action Clauses at, 18 (June 6, 2002).
155 Id.
156 See id at 24.
both the consent of 25% of the bondholders and the indemnification of the trustee for expenses and liabilities arising out of such enforcement.157 The trustee failed to safeguard the interests of the bondholders and 91% of them were forced to accept Ecuador’s highly coercive and inadequate offer.158 Lee Buchheit and Mitu Galati complained that “the system designed to protect bondholders against such [an opportunistic] default [had] failed.”159

This section raises the question of why a sovereign debtor would ever choose not to insert such contractual provisions into its bond documents. One hypothesis is that sovereign debtors have an ex-ante incentive to credibly commit to greater creditor enforcement rights in order to attract more favorable financing terms.160 Less creditworthy countries must therefore decide whether the premium for including contractual terms that limit creditor litigation rights is worth paying.161 The important point, however, is that this is an ex-ante bargain between the sovereign debtor and the creditor and is priced into the financial terms of the transaction. Once the bargain is set, the sovereign debtor has an incentive to dilute the provisions to which it had originally committed.162

**Ex-post Negotiating Strategies**

Sovereign debtors retain several tools to aid a restructuring process even in the absence of the contractual terms discussed above.

**Minimum Participation Thresholds**

A sovereign debtor can reduce collective action problems by conditioning any debt

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157 Id.
158 See id at 25.
159 See id at 22.
exchange offer on the participation of a minimum percentage of creditors (typically set at 75% to 90%). \textsuperscript{163} High participation thresholds reduce the incentive to hold out because if enough creditors choose not to participate in the exchange offer, then the sovereign debt restructuring could fail and holdout creditors would not benefit from the concessions of other creditors. \textsuperscript{164} Thus, conditioning any restructuring on a high participation threshold minimizes the pool of dissenting minority creditors and thereby reduces the risk of creditor litigation. \textsuperscript{165} Several countries, including Jamaica and Uruguay, have used the “explicit announcement of minimum participation thresholds” as a “mechanism to resolve coordination problems.”\textsuperscript{166}

\textit{Exit Consents}

Exit consents are another way to encourage creditor participation in sovereign bonds issued under New York law.\textsuperscript{167} Creditors participating in the exchange are asked, as part of the offer, to agree to change the nonpayment contractual provisions of all bonds under the same issue. The goal is to make the bonds held by the dissenting, non-exchanging, creditors less attractive through the deletion or modification of contractual provisions that provide for robust creditor protection.\textsuperscript{168} The IMF has recognized that the exit consents, “when appropriately designed, may play a useful role in facilitating a debt restructuring in circumstances where the bonds do not contain majority restructuring provisions.”\textsuperscript{169}

\textsuperscript{163} IMF, \textit{Sovereign Debt Restructuring-Recent Developments and Implications for the Fund’s Legal and Policy Framework}, at 28 (April 26, 2013).
\textsuperscript{164} See id at 41.
\textsuperscript{166} See \textsuperscript{165} id. at 14.
Full Payout

Sovereign debtors can always choose to pay out the non-exchanging creditors in full. There are holdouts in almost any restructuring, yet the sovereign debtor can go ahead with it and pay the holdouts in full to “avoid legal challenges.” Holdouts have generally been “paid in full after a preemptive restructuring” without jeopardizing the debt restructuring or increasing the incentive to hold out.

Conclusion

The judicious use of these ex-post mechanisms has allowed debtors to restructure their sovereign debt without significant holdout problems, even in the absence of ex-ante contractual terms. Argentina, however, chose not to use exit consents or minimum participation thresholds. Such mechanisms—even somewhat coercive techniques such as exit consents—still require an “element of consent” by the creditors and Argentina was not interested in obtaining such consent through a negotiated outcome.

Conclusion

In *NML Capital v Republic of Argentina*, the Second Circuit faced a unique set of facts. The case involved a bondholder-friendly debt contract that included an unconditional waiver of sovereign immunity and the most creditor-friendly version of the *pari passu* clause. The contract excluded collective action clauses that can facilitate sovereign debt restructurings and eliminate the right of dissenting creditors to pursue litigation remedies. The sovereign debtor adopted a “uniquely recalcitrant” negotiating strategy and failed to abide by international norms.

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171 *Id.*
173 *Id.*
175 *Id.*
governing negotiations between sovereign debtors and creditors.\textsuperscript{176} It legislatively subordinated the claims of dissenting creditors by passing a law prohibiting any payment or settlement with non-exchanging creditors.\textsuperscript{177} In short, the Argentina case presented a uniquely unsympathetic debtor. If anything, the case highlighted “the potential dangers of uncooperative debtors to the international financial system” and the limited leverage that creditors have for dealing with them.\textsuperscript{178} Given this unprecedented set of facts, the Second Circuit affirmed the district court’s narrowly tailored, fact-specific equitable remedy. In ruling for the plaintiff-creditors, the Second Circuit emphasized that “New York’s status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts.”\textsuperscript{179}

But that ruling is too narrow to set a broad precedent. In a recent case in the Southern District of New York, \textit{Export-Import Bank of the Republic of China v. Grenada}, the creditor—Taiwan’s export-import bank—alleged that Grenada had violated the \textit{pari passu} clause in its debt agreement by continuing to pay some creditors while making no payments on the debt held by the plaintiff. The creditor sought summary judgment rewarding it equitable relief similar to that affirmed by the Second Circuit in the Argentina case.\textsuperscript{180} The district court denied the creditor’s motion on the grounds that the \textit{pari passu} clause in the Grenada case was different from the clause in the Argentina case.\textsuperscript{181} It further stated that the inquiry is fact-specific and that the Second Circuit ruling was predicated on the conduct of Argentina’s legislative and executive branches in dealing with dissenting creditors.\textsuperscript{182} What we can see in the Grenada case is that

\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} IIF Staff Note on Argentina, Meeting with Paris Club Creditors at 3 (June 15, 2005).
\textsuperscript{179} \textit{NML Capital, Ltd. v. Republic of Argentina}, 727 F.3d 230, (2d Cir. 2013).
\textsuperscript{181} Id.
\textsuperscript{182} Id.
courts are not going to automatically apply the Argentina precedent to future sovereign debt restructurings.