# TANGO OR SIRTAKI? THE ARGENTINE AND GREEK DANCE WITH SOVEREIGNTY AND A MULTILATERAL SOVEREIGN DEBT RESTRUCTURING FRAMEWORK

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ABSTRACT

*The term 'debt crisis' is often associated with both Argentina and Greece. The massive debts incurred by each of these countries have led to internal strife, decreasing wages, and increasing inflation. Moreo-*

*ver, Argentine and Greek creditors have taken measures that infringe upon the sovereignty of each country. In wanting to protect its sovereignty, Argentina recently backed a United Nations proposal to establish a multilateral debt restructuring framework. However, Greece abstained from voting for the proposal.*

*This note begins by explaining the causes of the debt crises in Argentina and Greece. The subtle differences between the two crises, and subsequent debt restructuring efforts, have led to divergent opinions with regard to what a multilateral debt restructuring framework must comprise to fully protect sovereignty. Sovereignty, a term with many definitions, has not been sufficiently protected by past debt restructuring framework ideas. This note claims that Greece likely abstained from voting for the U.N. proposal because it believed it to be too vague and not protective enough of its own conception of sovereignty. However, as this note will argue that the U.N. proposal only represented the building blocks to what a successful system might look like. This note concludes by arguing that any successful framework must look to the sovereignty concerns of both Argentina and Greece and utilize some of the procedural innovations included in Chapter 9 of the United States Bankruptcy Code.*

## I. Introduction

On September 9, 2014, Sacha Sergio Llorenti Solíz, Permanent Representative and Ambassador of Bolivia to the United Nations ("U.N."), stood before the U.N. General Assembly and presented document A/68/L.57/Rev.1: "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes" ("U.N. Sovereign Debt Restructuring proposal").[1] In introducing this proposal on behalf of the Group of 77 and China ("G-77"), Llorenti Solíz praised the "genuine commitment to building an international financial system in which the rules are fair and favorable towards development."[2] Llorenti Solíz, in his speech, singled out Héctor Marcos Timerman, Foreign Minister of Argentina.[3] The recognition of the Foreign Minister of Argentina was not accidental. Argentina, a country once renowned for its beautiful beef, spectacular soccer, and tremendous tango, was now infamous for its default, the largest in history at the time.[4] Argentina's default and subsequent debt restructuring has since plagued its leaders, who have refused

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[1] U.N. GAOR, 68th Sess., 107th plen. mtg. at 1, U.N. Doc. A/68/PV.107 (Sept. 9, 2014).

[2] *Id.*

[3] *Id.*

[4] Tim R Samples, *Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law*, 35 Nw. J. Int'l L. & Bus. 49, 52 (2014) (citing J.F. Hornbeck, Cong. Research Serv., R41029, Argentina, Cong. Research Serv. 13-03-31 5 (2013)).

to pay certain creditors.[5] These creditors ("holdout creditors") have been singled out because they have rejected the repayment plans Argentina offered them.[6] To improve their chances on full repayment of their debts, these holdout creditors have successfully sued Argentina to prevent their exclusion from repayment.[7]

In an effort to ease its repayment obligations and avoid repaying holdout creditors in full, Argentina immediately pursued two separate avenues in response to the holdout creditor litigation. On August 7, 2014, Argentina appealed to the world's judicial stage at the International Court of Justice.[8] Argentina claimed that the United States of America, where holdout creditors filed suit against Argentina,[9] "committed violations of Argentine sovereignty and immunities and other related violations as a result of judicial decisions adopted by U.S. tribunals concerning the restructuring of the Argentine public debt."[10] Simultaneously, Argentina appealed to the world's legislative stage at the U.N. General Assembly, where Bolivia proposed the above-mentioned U.N. Sovereign Debt Restructuring proposal.[11] The proposal emphasized "the special importance of a timely, effective, comprehensive and durable solution to the debt problems of developing countries in order to promote their inclusive economic growth and development."[12]

The U.N. Sovereign Debt Restructuring proposal was adopted on September 9, 2014 by 124 votes in favor, 11 countries votes against (including

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[5] Jamison Joiner, Note, *Past Due: An Introduction to Sovereign Debt, the Ongoing Dispute Between NML Capital and Argentina, and Possible Ramifications of the Dispute's Outcome*, 21 L. & BUS. REV. AM. 85, 94 (2015) (citing Brett M. Neve, Note, NML Capital, LTD. v. Republic of Argentina: An Alternative to the Inadequate Remedies Under the Foreign Sovereign Immunities Act, 39 N.C. J. INT'L L. & COM. REG. 631, 657- 58 (2014)).

[6] Samples, *supra* note 4, at 62.

[7] *See* NML Capital, Ltd. v. Republic of Argentina, No. 08 CIV. 6978 TPG, 2011 WL 9522565, at *2 (S.D.N.Y. Dec. 7, 2011) (holding that Argentina must "rank its payment obligations pursuant to NML's Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness"); *see also* NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 265 (2d Cir. 2012) (affirming the lower court's decision).

[8] The International Court of Justice mentions that Argentina filed "[a]pplication instituting proceedings" against the United States of America, regarding a "[d]ispute concerning judicial decisions of the United States of America relating to the restructuring of the Argentine sovereign debt." Unofficial Press Release, I.C.J., *The Argentine Republic seeks to institute proceedings against the United States of America before the International Court of Justice*, No. 2014/25 (Aug. 7, 2014), http://www.icj-cij.org/presscom/files/4/18354.pdf. It requests the U.S. to accept the Court's jurisdiction.

[9] The creditors filed suit in New York. *See NML Capital, Ltd.*, 2011 WL 9522565 at *1.

[10] Unofficial Press Release, I.C.J, *supra* note 8.

[11] U.N. Doc. A/68/PV.107, *supra* note 1, at 1.

[12] G.A. Res. 68/304, ¶ 27(1), U.N. Doc. A/RES/68/304 (Sept. 17, 2014).

the United States), and 41 abstentions.[13] Greece was among the abstaining countries.[14] This abstention, at first glance, was peculiar given that Greece's issues with sovereign debt and looming creditors were similar to those of Argentina.[15] Greece's overwhelming debt forced it to accept loans on the condition that the Greek Government adopt austerity measures.[16] This imposition of the will of creditors seemingly infringed upon Greek sovereignty.

A year after the U.N. Sovereign Debt Restructuring proposal, on September 10, 2015, the "Basic Principles on Sovereign Debt Restructuring Processes" (the "Basic Principles on SDR") was presented to the General Assembly[17] and was adopted as Resolution 69/319 with 136 votes in favor, 6 against, and 41 abstentions.[18] Greece again abstained from voting, despite having been one of the only EU Member States that participated in the negotiations of this latter proposal.[19]

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[13] Meetings Coverage, General Assembly, Resolution on Sovereign Debt Restructuring Adopted By General Assembly Establishes Multilateral Framework for Countries to Emerge from Financial Commitments, U.N. Meetings Coverage GA/11542 (Sept. 9, 2014), http://www.un.org/press/en/2014/ga11542.doc.htm.

[14] Greece, and other debt-ridden countries, such as Spain, Iceland, Portugal, and Cyprus, were among the abstaining parties for the vote on U.N. draft resolution A/68/L.57/Rev.1. *See* U.N. Doc. A/68/PV.107, *supra* note 1, at 4.

[15] Robert Plummer, *Can Greece learn the economic lessons Argentina missed?*, BBC NEWS (June 28, 2011), http://www.bbc.com/news/business-13940018. In 2010, Greece and Argentina were both among the top three nations with the highest rates of inflation. Kevin P. Gallagher, *The New Vulture Culture: Sovereign Debt Restructuring and Trade and Investment Treaties* 5 (RePEc, Working Paper No. 02, 2011).

[16] Katerina Housos, Note, *Austerity and Human Rights Law: Towards A Rights-Based Approach to Austerity Policy, A Case Study of Greece*, 39 FORDHAM INT'L L.J. 425, 431 (2015).

[17] The document entitled "Basic Principles on Sovereign Debt Restructuring Processes," or U.N. draft resolution A/69/L.84, was the result of negotiations and discussions by an "Ad Hoc Committee on Sovereign Debt Restructuring Processes." *See* U.N. GAOR, 69th Sess., 102d plen. mtg. at 8, U.N. Doc. A/69/PV.102 (Sept. 10, 2015).

[18] G.A. Res. 69/319, ¶ 1, U.N. Doc. A/RES/69/319 (Sept. 10, 2015) [hereinafter Basic Principles on SDR]; *see also* U.N. GAOR, 69th Sess., 102d plen. mtg. at 9, U.N. Doc. A/69/PV.102 (Sept. 10, 2015).

[19] Greece was the first EU Member State to participate in the Ad Hoc Committee negotiations. Bodo Ellmers, *UN Committee passes first ever set of UN debt restructuring* principles, EUR. NETW'K ON DEBT AND DEVELOPMENT (Aug. 12, 2015), http://eurodad.org/Entries/view/1546468/2015/08/12/UN-Committee-passes-first-ever-set-of-UN-debt-restructuring-principles. Although Greece participated, the rest of the European Union Member States stated that they could not support a "binding multilateral legal framework for sovereign debt restructuring processes" at the U.N. because they "consider the IMF as the primary forum to discuss sovereign debt restructuring issues." European Delegation to the United Nations, EU Explanation of

Greece's abstention is not the only roadblock to a multilateral framework. On February 29, 2016, Argentina, which had vociferously backed the Basic Principles on SDR proposal since its inception, signaled a change with respect to its position on repayment of holdout creditors.[20] After taking office on December 10, 2015,[21] Argentina's new government agreed to repay holdout creditors $4.65 billion by April 14, 2016.[22] The new Argentinian government intends to place a greater emphasis on resolving creditor conflicts through negotiations and contracts, rather than through a multilateral debt restructuring system.[23] This new position, however, does not undermine Argentina's previous endorsement of a multilateral sovereign debt restructuring framework. The reasons for Argentina's previous support of an international system remain useful in analyzing whether a framework can serve to resolve the widespread issue of sovereign debt restructuring. Had such a system already been in place, Argentina's settlement with the holdout creditors after protracted and expensive litigation would have been significantly different.

Far from undermining the idea of a multilateral framework, Argentina's recent settlement with holdout creditors underscores the need for a multilateral sovereign debt restructuring framework. However, such a framework must also address the concerns that caused Greece to twice abstain from voting for a framework. Akin to Argentina, Greece likely was interested in the creation of a formal framework for debt restructuring processes that bolsters the sovereignty of countries. However, Greece abstained from voting for such a system perhaps because it believed that it would only further infringe upon the sovereignty of debt-ridden countries. Past attempts at creating sovereign debt restructuring systems demonstrate how these systems primarily focus on protecting a debtor nation's sovereignty in foreign courts.[24] However, Greece's experience with sovereignty infringement has not stemmed from foreign court judgments and creditor litigation, rather it has stemmed from its experience dealing with an external framework of debt restructuring. Greece's membership in the European Union and its dealings with the Troika during its

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Vote – United Nations General Assembly: Draft resolution: Sovereign debt restructuring (Dec. 5, 2014), http://eu-un.europa.eu/articles/en/article_15833_en.htm. Despite the Greek participation in negotiations of the Basic Principles on SDR proposal, Greece abstained from voting. U.N. Doc. A/69/PV.102, *supra* note 17, at 9.

[20] Mariano Andrade, *Argentina, 'vulture' funds end 15-year debt battle*, YAHOO! NEWS (Feb. 29, 2016), http://news.yahoo.com/argentina-reaches-deal-debt-vulture-funds-mediator-155544401.html.

[21] Hugh Bronstein & Sarah Marsh, *Argentina's Macri sworn in as president, ousting Peronists*, REUTERS (Dec. 11, 2015), http://www.reuters.com/article/us-argentina-macri-idUSKBN0TT0DA20151211.

[22] Andrade, *supra* note 20.

[23] Mauricio Macri, Argentina's new President, is described as being more "market-friendly" than his predecessor. *Id.*

[24] *See* discussion *infra* Part III.B-C.

most recent brush with default have given the country a unique perspective on how an external framework for dealing with debt restructuring infringes upon a debtor nation's sovereignty.[25] Because Greece's external framework offered a bailout and debt restructuring only in exchange for Greece's adoption of harsh austerity measures,[26] Greece has different concerns with respect to sovereignty than Argentina. Thus, in order to be viable and widely supported, the recently adopted Basic Principles of the SDR proposal must address both Greek and Argentine sovereignty concerns. These varied sovereignty concerns are best addressed by a multilateral framework that is similar to Chapter 9 of the U.S. Bankruptcy Code.[27]

In developing this argument, this note will be broken down into three main parts: Part I of the note compares Argentina and Greece's debt crises and describe their similarities and differences; Part II analyzes how the debt crises have caused different sovereignty concerns in Argentina and Greece; and Part III describes a system which would satisfy both Argentina and Greece, one that would ensure a State's sovereignty with respect to foreign judgments and right to govern while allowing it to restructure its debt obligations.

## II. Why are Argentina and Greece so indebted?

Currently, the terms 'debt crisis' and 'debt restructuring' may evoke images of Greece and the European Union. However, fifteen years ago, the terms were reserved for a nation unrelated to the European Union: Argentina. Due to this shared infamy, Argentina and Greece are often discussed together in popular media, in attempts to link the two crises, compare economic policies, and suggest lessons that Argentina could

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[25] "Troika" refers to a combination of the International Monetary Fund ("IMF"), European Commission ("EC"), and European Central Bank ("ECB"). While Argentina primarily received funding from the IMF, Greece obtained its funding from other Eurozone countries and the IMF on the condition that stricter austerity measures be implemented in Greece: "The European Commission (EC) jointly with the European Central Bank (ECB) supervise the implementation of the program's conditionality on behalf of the euro zone creditor countries, along with the IMF. The EC/ECB/IMF are often referred to as the "Troika" of creditors, even though the funding does not come directly from these institutions." Philomila Tsoukala, *Euro Zone Crisis Management and the New Social Europe*, 20 Colum. J. Eur. L. 31, 32 n.1 (2013).

[26] The austerity measures were aimed at restricting Greek workers' rights to participate in collective action, and at cutting the workers' salaries, benefits, pensions, and employment. Michelle Iodice, Note, *Solange in Athens*, 32 B.U. Int'l L.J. 539, 541 (2014). Overall, the Troika-imposed austerity measures were attempts to reform Greek labor markets and the public sector. Tsoukala, *supra* note 25, at 32 n.1.

[27] *See* discussion *infra* Part IV.

teach Greece.[28] These lessons include how Greece should emulate Argentina prior to default, during default, and in post-default debt restructuring.[29]

Some academics are wary of drawing such connections between Argentina and Greece.[30] Instead, the differences between Argentina and Greece, rather than their similarities, impart a lesson to be learned. A look into how debt restructuring has conflicted with sovereignty in both Greece and Argentina is the best way to determine what a multilateral framework for debt restructuring should look like to ensure a debtor nation's sovereignty while improving creditors' chances at repayment.

### A. *Argentine and Greek Debt Histories*

#### 1. Argentina's default and subsequent debt restructuring

Argentina's formal default on its sovereign debt on December 23, 2001 was neither unforeseen nor sudden.[31] From 1975 to 1982, during the time

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[28] Because of Greece and Argentina's notoriety in the realm of sovereign debt, journalists and academics have tied Argentina's debt crisis to that of Greece, in an effort to extrapolate Argentine lessons for future Greek debt problems. *See* Alan Cibils, *Argentina Could Show Greece a Way Out of Its Crisis*, SOCIAL EUROPE (Aug. 3, 2015), http://www.socialeurope.eu/2015/08/argentina-show-greece-way-crisis/ (stressing that the "recent agreement between Greece and the Euro Summit . . . has important parallels with the Argentine experience . . . [which] are relevant to the choices facing Greeks today"). Many argue that Argentina's successful abandonment of its dollar peg demonstrates how Greece's leaving of the Eurozone would be successful. Larry Elliot, *Could Greece emulate Argentina's success after it defaulted in 2001*, GUARDIAN (July 8, 2015), http://www.theguardian.com/world/2015/jul/08/greek-crisis-emulate-argentina-default-success. Authors advocating for Greece's leaving of the Eurozone, which would likely result in default or devaluation, argue that this event should occur as soon as possible. Michael Hendrix, *Argentina's Economic Collapse Hints at What Might Be in Store for Greece*, NAT'L REV. (July 7, 2015),http://www.nationalreview.com/article/420823/greece-debt-crisis-argentina-lessons.

[29] *See id.;* Cibils, *Argentina Could Show Greece*, *supra* note 28; Elliot, *supra* note 28.

[30] *See* Joiner, *supra* note 5, at 97 (stating that "fears that Argentina's fate could be transposed onto Greece are largely misplaced"). Some argue that even if Argentina and Greece are comparable, this comparison is imperfect. Paul Krugman, *Greek Out?*, N.Y. TIMES (May 10, 2011), http://krugman.blogs.nytimes.com/2011/05/10/greek-out/?_r=0; Kevin Gallagher, *Restructuring Greece's debt crisis*, GUARDIAN (July 5, 2011), http://www.theguardian.com/commentisfree/cifamerica/2011/jul/05/greece-debt-crisis-default (citing Paul Krugman, *Don't Cry For Argentina*, N.Y. TIMES (June 23, 2011), http://krugman.blogs.nytimes.com/2011/06/23/dont-cry-for-argentina/ (arguing that Argentina and Greece are not comparable case studies).

[31] Daniel Schilling, *NML Capital, Ltd. v. Argentina 2011 WL 524433 (S.D.N.Y. Feb. 15, 2011)*, 25 N.Y. INT'L L. REV. 159, 160 (2012). Argentina had long been considered "the single most resistant debtor in international finance." Samples, *supra* note 4, at 64 (citing ERNEST J. OLIVERI, LATIN AMERICAN DEBT AND THE POLITICS OF INTERNATIONAL FINANCE 164 (1992)).

of Argentina's military dictatorship,[32] which made public many private Argentine companies,[33] Argentina's external debt skyrocketed from $8 billion to $43 billion.[34] In an effort to combat the runaway external debt and stabilize the economy, the post-dictatorship government in the 1980s, headed by Raúl Alfonsín, "announced the Austral Plan . . . , which froze wages and prices."[35] Though initially causing a drop in inflation and growth in GDP,[36] the plan was ultimately unable to fully rectify the precarious economic situation and high external debt, and Argentina went into hyperinflation.[37]

In response to such predicaments, in 1991 Argentina adopted Ley Nº 23.928, Convertibilidad del Austral,"[38] which pegged the Austral (and later the Argentine peso) to the U.S. dollar in order to manage inflation.[39] This Argentine solution for the hyperinflation and high public debt was bolstered by International Monetary Fund ("IMF") policy:

> Argentina began to follow the IMF [International Monetary Fund] formula for economic stabilization and development . . . [which] typically consists of reducing budget and balance of payment deficits, raising interest rates, reducing inflation, privatizing state assets, and reducing trade barriers and regulation on capital flows in and out of the country.[40]

Though these policies initially slowed inflation, public debt remained high, and Argentina had to turn to loans from the IMF to pay off creditors and roll over its debts.[41]

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[32] *Argentina's "dirty war*," CBS NEWS (Feb. 14, 2015), http://www.cbsnews.com/videos/argentinas-dirty-war/ (reporting on a background of the military dictatorship and its effects).

[33] In making the companies public, the government also made public over $15 billion in private debt. Ismael Bermudez, *El derrumbe de salarios y la plata dulce*, CLARIN (Mar. 24, 2006) (Arg.), http://edant.clarin.com/suplementos/especiales/2006/03/24/l-01164108.htm.

[34] *Id.*

[35] The Austral Plan introduced a new Argentine currency, the Austral, and pegged it's value to the dollar's value. Edward C. Snyder, Note, *The Menem Revolution in Argentina: Progress Toward A Hemispheric Free Trade Area*, 29 TEX. INT'L L.J. 95, 102 (1994) (citing William C. Smith, *Hyperinflation, Macroeconomic Instability, and Neoliberal Restructuring in Democratic Argentina*, *in* THE NEW ARGENTINE DEMOCRACY: THE SEARCH FOR A SUCCESSFUL FORMULA 17, 22 (Edward C. Epstein ed., 1992)).

[36] *Id.*

[37] *Id.* at 103 (citing Smith, *supra* note 35, at 22).

[38] Law No. 23928, Mar. 27, 1991, 27104 B.O. 1 (Arg.).

[39] Joiner, *supra* note 5, at 87.

[40] John V. Paddock, Case Comment, *IMF Policy and the Argentine Crisis*, 34 U. MIAMI INTER-AM. L. REV. 155, 158 (2002).

[41] Despite the large amounts of IMF loans received by Argentina, the loans could not near the outstanding credit possessed by Argentina. Independent Evaluation

In 1995, Argentina obtained $11 billion in loans, including $2.4 billion from the IMF.[42] However, these loans were not fully gratuitous, and were conditioned upon Argentina revamping its social security system, increasing tax compliance, reducing its budget deficit, increasing the minimum age of retirement, and other similar austerity measures.[43] These restrictive conditions, coupled with the continued following of the IMF's advice, made it increasingly difficult, if not impossible, for Argentina to combat its impending recession.[44] Beginning in 1998, Argentines violently began to strike against the austerity measures, which had contributed to a rise in unemployment, reduction in spending, and increase in taxes.[45] Despite this growing dissatisfaction, the IMF continued funding Argentina, granting a $40 billion loan in 2000.[46] However, as Argentina's situation worsened and its access to other funds from international capital markets dwindled, the IMF began to take a more critical view of Argentina.[47] Citing failure by Argentina to meet budget deficit standards, the IMF refused to disburse a $1.24 billion loan in December 2001, and Argentina chose to default shortly after.[48]

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Office of the IMF Report, *The Role of the IMF in Argentina, 1991-2002*, http://www.ieo-imf.org/ieo/pages/IEOHome.aspx (click "Publications" hyperlink; then click "Issues Papers" hyperlink; then scroll down to the July 31, 2003 date and click the "The Role of the IMF in Argentina, 1991-2002" hyperlink), http://www.imf.org/External/NP/ieo/2003/arg/.

[42] Paddock, *supra* note 40, at 158 (citing Minister of Economy Announces Financing Package, BBC, Mar. 15, 1995, LEXIS, News Group File.)

[43] Memorandum, International Monetary Fund, Memorandum of Economic Policies of the government of Argentina, I.M.F. Memorandum (Feb. 14, 2000), http://www.imf.org/external/np/loi/2000/arg/01/.

[44] Paddock, *supra* note 40, at 161. Accepting loans and "kicking the can down the road" only makes it more difficult to improve the economy. Kevin P. Gallagher et al., *What Lessons Can Europe Learn From Latin America*, INTER-AMERICAN DIALOGUE'S LATIN AMERICAN ADVISOR (July 11, 2011), http://archive.thedialogue.org/page.cfm?pageID=32&pubID=2703&mode=print.

[45] Juan Carlos Linares, After the Argentine Crisis: Can the IMF Prevent Corruption in Its Lending? A Model Approach, 5 RICH. J. GLOBAL L. & BUS. 13, 20 (2005) (citing Paddock, *supra* note 40, at 169); Clifford Krauss, One-Day National Strike Freezes Much of Argentina, N.Y. TIMES (June 10, 2000), http://web.archive.org/web/20140613141320/http://www.nytimes.com/2000/06/10/world/one-day-national-strike-freezes-much-of-argentina.html.

[46] *Argentina profile – Timeline*, BBC NEWS (Dec. 1, 2015), http://www.bbc.com/news/world-latin-america-18712378.

[47] *The Role of the IMF in Argentina, 1991-2002*, *supra* note 41.

[48] Carol Graham & Paul Robert Masson, *The IMF's Dilemma in Argentina: Time for a New Approach to Lending?*, BROOKINGS (Nov. 2002), http://www.brookings.edu/research/papers/2002/11/globaleconomics-graham.

After defaulting on its $102 billion debt, Argentina felt pressured to restructure its debt by negotiating with domestic and foreign creditors.[49] This massive debt was held by almost 500 thousand creditors around the world, in 152 defaulted debt instruments, denominated "in six currencies under the laws of eight different jurisdictions."[50] Due to the overwhelming amount of debt and variety of interests, Argentina "declared a 'temporary moratorium' on principal and interest payments,"[51] which has been renewed every year since 2001.[52] This moratorium ("Padlock Law"),[53] Argentina's strong insistence that creditors agree to haircuts on their debt,[54] and the lack of an institutional partner to help in the negotiations,[55] collectively, forced a majority of creditors to accept "a disproportionate burden" during each of Argentina's two main debt exchanges.[56]

Argentina first opened a bond exchange in 2005, upon a temporary suspension of the Padlock Law,[57] when it offered certain creditors new unsecured debt at a rate of 25 to 29 cents on the dollar in exchange for creditors foregoing certain rights for recovery.[58] Given that Argentina threatened not to repay creditors that did not tender their bonds, 76% of creditors ultimately accepted the offer.[59] In order to restructure its debt with the remaining creditors, Argentina again suspended the Padlock Law and re-opened its bond exchange in 2010, offering similar payment terms to the 2005 bonds.[60] This second debt exchange brought the overall exchange participation rate to between 91.3% and 93% of creditors, depending on the source.[61]

Since Argentina began the debt restructuring, the holdout creditors have brought suit in New York "for the full amount owed on the debt,

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[49] Joiner, *supra* note 5, at 87. The $102 billion debt default was the "largest sovereign debt default in history" at that time. Samples, *supra* note 4, at 66.

[50] *Id.*

[51] NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 251 (2d Cir. 2012).

[52] *Id.*

[53] The Padlock Law prohibited the President to open debt exchanges with creditors. The law is still in effect today, as of February 29, 2016. Law No. 26547, art. 1, Dec. 9, 2009, B.O. 31798 (Arg.).

[54] Samples, *supra* note 4, at 70 (citing J.F. HORNBECK, *supra* note 4, at 6-11).

[55] Though the IMF usually participated in sovereign debt restructuring negotiations, it was not as involved in the case of Argentine debt restructuring due to its role in Argentina's debt crisis. *Id.*

[56] *Id.* (citing HORNBECK, *supra* note 4, at 3).

[57] Argentina temporarily suspended its Padlock Law, permitting it to negotiate debt with creditors. *Id.* at 74 (referring to Law No. 26547, art. 1, Dec. 9, 2009, B.O. 31798 (Arg.)).

[58] NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 252 (2d Cir. 2012).

[59] *Id.*

[60] Samples, *supra* note 4, at 74.

[61] *Id.*; Joiner, *supra* note 5, at 88.

plus interest."[62] The holdouts, who hold Argentine 1994 Fiscal Agency Agreement bonds ("FAA bonds"),[63] are allowed to bring suit in "any state or federal court in the City of New York"[64] since the FAA bonds are governed by New York law.[65] Moreover, the United States Court of Appeals for the Second Circuit decided in 2012 that the Padlock Law signified "discriminatory treatment of plaintiffs [holdouts],"[66] and violated provisions of the FAA bonds.[67] Thus, the Second Circuit has found for creditors in the creditors' battle against Argentina and has held that the Argentine law passed in its quest for debt restructuring went against the FAA bond contracts.

2. Greece's debt restructuring and near default

Greece's recent brush with default likewise has its roots in the 1970s.[68] During that time, extensive government control over the economy, through state-owned enterprises, led to low economic growth and high debt.[69] The 1980s saw a rise in sovereign debt, from 25% to 100% of the GDP.[70] This led to macroeconomic policies, which ultimately led to high inflation and low economic growth.[71]

Despite Greece's bouts with high inflation and low economic growth, the country was somehow able to successfully reform its economic policy to become eligible to join the European Monetary Union in 2001, when it adopted the Euro as its currency.[72] Greece was able to meet the Maastricht Treaty's high standards for inclusion in the joint economic system, which included that government debt must not exceed 60% of GDP and that inflation must not exceed 1.5% more than the average inflation of

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[62] *Id.* (citing Alexcia Chambers, Moment: Implications of Argentina's Default, DIPL. COURIER (Sep. 9, 2014), http://www.diplomaticourier.com/blog/2362-moment-implications-of-argentina-s-default).

[63] NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 251 (2d Cir. 2012).

[64] *Id.* at 254.

[65] *Id.* at 253-54.

[66] *Id.* at 261.

[67] *Id.* at 260.

[68] Lauren Macias, Case Comment, *The Greek Debt Crisis: The Weaknesses of an Economic and Monetary Union*, 14 DUQ. BUS. L.J. 251, 264 (2012) (citing *Greece – Overview of economy*, Nations Encyclopedia, http:// www.nationsencyclopedia.com/economies/Europe/Greece-OVERVIEW-OF-ECONOMY.html.

[69] *Id.*

[70] George Alogoskoufis, *Greece's Sovereign Debt Crisis: Retrospect and Prospect*, HELLENIC OBSERVATORY PAPERS ON GREECE AND S.E. EUR. 1, 4 (2012).

[71] *Id.* at 16-17.

[72] Macias, *supra* note 68, at 264 (citing *Greece – Overview of economy*, *supra* note 68).

the three best performing member states of the EU,[73] were met by Greece.[74] Some scholars have argued that Greece's quick turnaround could have occurred only through fraud,[75] an allegation denied by Greece.[76]

However, entrance into the European Monetary Union, which allowed Greece access to cheaper debt, ultimately proved problematic.[77] The combination of large amounts of cheaper debt, the impending global financial crisis,[78] and Greece's exclusion from the European Central Bank's covered bond purchase program[79] forced Greece to seek new loans to pay off its amassing debt. By May 2010, Greece had signed a €110 billion (about $145 billion) loan agreement with the Troika.[80]

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[73] Treaty on European Union, Protocol on the Convergence Criteria Referred to in Article 109j of the Treaty Establishing the European Community art. 1, Feb. 7, 1992, 1759 U.N.T.S. 3 [hereinafter Maastricht Treaty].

[74] Macias, *supra* note 68, at 264.

[75] Opponents of Greek entry into the EMU stated that Greece was able to mask its actual GDP, deficit, and debt numbers through "deceptive accounting policies, in conjunction with the EMU's strict adherence to sovereignty." *Id.* at 263; *see also* Allan Little, *How 'magic' made Greek debt disappear before it joined the euro*, BBC News (Feb. 3, 2012), http://www.bbc.com/news/world-europe-16834815.

[76] Greek officials blamed a change in accounting methodology for the difference between the numbers put out for inclusion into the EMU and those claimed to be the real numbers by critics. Macias, *supra* note 68, at 266 (citing Nations Encyclopedia, *supra* note 68).

[77] Melissa Gutierrez, Case Comment, *Flying Too Close to the Sun: How an EMU Expulsion Provision Will Prevent the European Sovereign Debt Crisis from Becoming A Modern Day Greek Tragedy*, 35 HOUS. J. INT'L L. 431, 438 (2013) (citing *A Synopsis of the Greek Debt Crisis*, THE DENOUEMENT (July 5, 2011), http://knightin.typepad.com/denouement/2011/07/a-synopsis-of-the-greek-debt-crisis.html).

[78] The global financial crisis deeply affected the U.S. and Europe. Bill Thomas et al., Commentary, *What Caused the Financial Crisis?*, WALL ST. J. (Jan. 27, 2011), http://www.wsj.com/articles/SB10001424052748704698004576104500524998280

[79] The European Central Bank's covered bond purchase program was designed to "facilitate credit provision to the euro area economy, generate positive spill-overs to other markets and, as a result, ease the ECB's monetary policy stance." Press Release, EUROPEAN CENTRAL BANK, ECB announces operational details of asset-backed securities and covered bond purchase programmes (Oct. 2, 2014), https://www.ecb.europa.eu/press/pr/date/2014/html/pr141002_1.en.html. However, Greek and Cypriot bonds were excluded as they were considered too risky. *Id.* Some argue that this exclusion from the ECB's covered bond purchase program stemmed from Greece's budget falsification. *See* Macias, *supra* note 68, at 267 (citing *Eurozone crisis explained*, BBC News (Nov. 27, 2012), www.bbc.co.uk/news/business-13798000).

[80] Staff-Level Agreement, *Europe and IMF Agree €110 Billion Financing Plan With Greece*, IMF SURVEY MAGAZINE: COUNTRIES & REGIONS (May 2, 2010), http://www.imf.org/external/pubs/ft/survey/so/2010/car050210a.htm

Though the European Commission and European Central Bank did not provide funding directly,[81] they did "supervise the implementation of the program's conditionality on behalf of the Eurozone creditor countries, along with the IMF,"[82] which itself provided €30 billion of the €110 billion loan.[83] In return for this loan, Greece agreed to modify its fiscal policy in the form of cutting spending and increasing revenue, and taking pro-growth measures, such as "strengthening income and labor markets policies; better managing and investing in state enterprises[;] and improving the business environment."[84]

These reforms proved insufficient, and the private sector agreed to participate in a debt exchange program in 2011, which amounted to private financing of €135 billion.[85] In 2012, the creditor committee, made up of private and public creditors, met once more and agreed to restructure 85.5% of the total €206 billion held by the private sector.[86] These creditors agreed to exchange their debt, recognizing that they could lose 75% of their investments if they did not.[87]

This restructuring paved the way for Greece's second bailout in March 2012, of "€130 billion jointly from Eurozone countries and the IMF,"[88] which was conditioned upon reforming the Greek tax system,[89] recapitalizing and restructuring the banking sector,[90] downsizing public administration,[91] and reforming pension funds,[92] among other changes.[93] These "radical austerity measures that were imposed on Greece as loan

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[81] *Id.*

[82] Tsoukala, *supra* note 25, at 32 n.1.

[83] *Europe and IMF Agree €110 Billion Financing Plan With Greece*, *supra* note 80.

[84] Press Release, IMF, IMF Reaches Staff-Level Agreement with Greece on €30 Billion Stand-By Arrangement, Release No. 10/176 (May 2, 2010), http://www.imf.org/external/np/sec/pr/2010/pr10176.htm

[85] Jeromin Zettelmeyer et al., *The Greek Debt Restructuring: An Autopsy*, 28 ECON. POLICY 513, 520 (July 3, 2013), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5343&context=faculty_scholarship.

[86] Ben Rooney, *Greece: Historic restructuring paves way for bailout*, CNN MONEY (Mar. 9, 2012), http://money.cnn.com/2012/03/09/markets/greece-creditors-default/.

[87] *Id.*

[88] Tsoukala, *supra* note 25, at 33 n.6.

[89] European Commission on Economic and Financial Affairs Occasional Papers No. 123 of Dec. 2012, *The Second Economic Adjustment Programme for Greece – First Review*, at 1 (Dec. 2012), http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_summary_en.pdf.

[90] European Commission on Economic and Financial Affairs Occasional Papers No. 148 of May 2013, *The Second Economic Adjustment Programme for Greece – Second Review*, at 1 (May 2013), http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp148_summary_en.pdf.

[91] European Commission on Economic and Financial Affairs Occasional Papers No. 159 of July 2013, *The Second Economic Adjustment Programme for Greece – Third Review*, at 1 (July 2013), http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp159_summary_en.pdf.

counter-measures . . . had a negative impact that was larger than anticipated on Greece's economic growth and development, as well as on human rights."[94] Despite the loans, or because of them, unemployment rates in Greece reached 26.6% in June 2014,[95] and debt obligations remained high at 175% of the GDP.[96] This stark situation remained, despite the bailouts, because Greece utilized the money it received from the bailouts in order to pay back already outstanding debt.[97] Because few euros actually went into revamping its flailing economy, Greece remained in a helpless situation, defined by austerity measures and high debt obligations.[98] This bleak outlook influenced Greek voters to elect the anti-austerity, radical leftist Syriza party into power in January 2015.[99]

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[92] European Commission on Economic and Financial Affairs Report, Report on Greece's compliance with the Milestones for the disbursement to the Hellenic Republic of the third tranche of €1 billion of the EFSF instalment related to the fourth review under the second programme (Aug. 11, 2014), http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/reportcompliancedisbursement-082014_en.pdf

[93] Disbursement by disbursement milestones, as called by the European creditor community, or austerity measures, as called by the Greek people, are published by European Commission on Economic and Financial Affairs. These milestones, or austerity measures, touched upon almost every single facet of government reach. Second Economic Adjustment Programme for Greece, EUROPEAN COMMISSION, http://ec.europa.eu/index_en.htm (search "Economic and Financial Affairs" on the "Search" bar and follow the "Search" hyperlink; then follow "Economic and Financial Affairs – European Commission" hyperlink; then follow "Financial assistance in EU Member States" hyperlink; then click on the downward arrow hyperlink on the drop-down section entitled "Financial assistance in EU Member States" and click on "Greece" hyperlink; then scroll to the bottom of the page and open the "Second Economic Adjustmeent Programme for Greece" hyperlink), http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm.

[94] Housos, *supra* note 16, at 432.

[95] Danae Leivada, *Greek Unemployment Figures Show No Sign of Decline*, HUFF. POST (Sept. 10, 2015), http://www.huffingtonpost.com/entry/greece-unemployment-rate_us_55efa2fce4b03784e27714f4.

[96] George Georgiopoulos & Deepa Babington, *Greece emerged from its 'Great Depression' at start of year*, REUTERS (Nov. 14, 2014), http://uk.reuters.com/article/uk-eurozone-economy-greece-idUKKCN0IY10B20141114.

[97] Adam Shell, *Greek debt crisis: Everything you need to know*, USA TODAY (June 29, 2015), http://www.usatoday.com/story/money/markets/2015/06/25/qa-greece-debt-crisis-loan/29284181/.

[98] *Id.; see also* Gallagher, *supra* note 44 (advising Greece in 2011 to restructure its debts immediately in order to get itself out of its bleak situation).

[99] Dr. Avnita Lakhani, *David Versus Goliath and Multilateral Diplomatic Negotiations in the 21st Century: How the Greek Debt Crisis Negotiations Marked the Revenge of Goliath*, 24 CARDOZO J. INT'L & COMP. L. 97, 108 (2015) (citing Timeline: The unfolding Eurozone crisis, BBC NEWS (June 13, 2012)).

The new Greek government, which promised to "un-do the strict constraints of conditionality imposed by the EU and the International Monetary Fund,"[100] stated it would default on €1.6 billion in June 2015, claiming it did not have the funds to "satisfy creditors at the same time as paying wages and pensions."[101] This threat, coupled with strong suggestions that a Greek exit from the Eurozone, creatively dubbed "Grexit," would signal the "beginning of the end of the Eurozone,"[102] gave head of the Syriza government, Alexis Tsipras, the leverage Greece needed to present its own reform plan to the EU in June 2015.[103] Despite this leverage, Greece only obtained its third bailout, worth €86 billion over three years, in exchange for a promise that it would radically reform its economy.[104] This deal, however, allowed Greece to avoid defaulting on a €3.2 billion debt repayment to the European Central Bank.[105]

### B. *Similar Debt Crises Do Not Lead to Similar Debt Restructuring*

Normally when comparing Argentina and Greece, pundits and authors tend to imbue lessons of Argentina's default and subsequent successful debt restructuring onto Greece's current situation.[106] Since Greece likely will near default again, probably in or before 2018 once the third European bailout money runs out, this comparison is arguably warranted. After all, immediately post-default Argentina succeeded in getting its economy back on track,[107] initially lowering its debt-to-GDP ratio.[108]

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[100] René Smits, *The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments*, 38 FORDHAM INT'L L.J. 1135, 1144 (2015).

[101] Phillip Inman, *Greece warns it is set to default on debt repayment loans*, GUARDIAN (May 24, 2015), http://www.theguardian.com/world/2015/may/24/greece-warns-it-is-set-to-default-on-debt-repayment-loans.

[102] Phillip Inman, *Greek exit would trigger Eurozone collapse, says Alexis Tsipras*, GUARDIAN (June 9, 2015), http://www.theguardian.com/business/2015/jun/09/greek-exit-would-trigger-eurozone-collapse-says-alexis-tsipras.

[103] *Greece submits new reform plan to EU and IMF*, BBC NEWS (June 1, 2015), http://www.bbc.com/news/business-33062202.

[104] Ian Traynor, *Greece and lenders agree new bailout deal, finance minister says*, GUARDIAN (Aug. 11, 2015), http://www.theguardian.com/world/2015/aug/11/greece-and-lenders-agree-new-bailout-deal-says-finance-ministry-official.

[105] *Greece repays ECB after tapping fresh bailout funds*, EURO NEWS (Aug. 20, 2015), http://www.euronews.com/2015/08/20/greece-repays-ecb-after-tapping-fresh-bailout-funds/.

[106] Cibils, *Argentina Could Show Greece*, *supra* note 28; Elliot, *supra* note 28; Hendrix, *supra* note 28.

[107] Alan Cibils & Rubén Lo Vuolo, *At Debt's Door: What Can We Learn from Argentina's Recent Debt Crisis and Restructuring?*, 5 SEATTLE J. FOR SOC. JUST. 755, 773 (2007). Argentina's success stemmed from self-imposed austerity measures: Argentina "stopped servicing its bonds, domestic and international; it cut wages and raided pension funds; it foisted its bad IOUs on to one side of the banks' balance sheets, then made a grab for the deposits on the other side, putting a freeze on

Such positive numbers are posted in order to encourage Greece to default.[109]

However, encouraging a country to default is not so simple. There are many costs associated with defaulting and many benefits associated with repayment of debts.[110] Costs include loss of access to financial markets and a downward-spiraling economy.[111] Proponents of Greek default often fail to mention the difficulties Argentina faced after its short-lived post-crisis success.[112]

As if these costs were not high enough, Greece is also wary of defaulting and subsequently leaving the EU because it recognizes that certain results, such as the new favorable debt it was able to take on and the old debt it was able to restructure, could not have been accomplished without the support of the Troika.[113] The Troika was instrumental in helping

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withdrawals. It forcibly converted dollar deposits into pesos at one exchange rate; dollar loans at another." *A victory by default?*, ECONOMIST (Mar. 3, 2005), http://www.economist.com/node/3715779.

[108] Cibils, *At Debt's Door*, *supra* note 107, at 755.

[109] Authors who urge Greece to default look to Argentina for evidence that default can lead to successful results. These authors argue that Greece should abandon its Euro currency peg, which precludes it from engaging in helpful monetary policy, accept that a recession is inevitable, and take advantage of the cheaper currency, which would immediately spur Greek exports. Adam Creighton, *Greece should default on debt, take Argentina's path to recovery*, AUSTRALIAN (July 17, 2015), http://www.theaustralian.com.au/business/opinion/adam-creighton/greece-should-default-on-debt-take-argentinas-path-to-recovery/news-story/2d1c18fc4d003ac27f4a04a6fd638f09; Paul Krugman, *Argentine Lessons for Greece*, N.Y. TIMES (July 9, 2015), http://krugman.blogs.nytimes.com/2015/07/09/argentine-lessons-for-greece/.

[110] Mark L. J. Wright, *Sovereign Debt Restructuring: Problems and Prospects*, 2 HARV. BUS. L. REV. 153, 158 (2012).

[111] Apart from loss of access to financial markets, defaults may also affect a country's internal systems. *Id.* Foreign trade may be inhibited by trade sanctions, and the financial isolation may trigger a banking crisis. *Id.* at 159. The loss of access to markets affects both debtor nation and creditor, who are often forced to accept haircuts to recoup losses, rather than wait until the debtor nation regains access to capital for repayment purposes. Gallagher, *supra* note 15, at 14.

[112] The Argentine default and subsequent refusal to pay holdout creditors "has affected its stock market and given the country a reputation as an untrustworthy borrower in the international capital markets." Martin F. Schubert, Note, *When Vultures Attack: Balancing the Right to Immunity Against Reckless Sovereigns*, 78 BROOK. L. REV. 1097, 1129 n.198 (2013) (citing Steven M. Davidoff, *In Court Battle, a Game of Brinkmanship with Argentina*, N.Y. TIMES (Nov. 27, 2012), http://dealbook.nytimes.com/2012/11/27/in-court-battle-a-game-of-brinkmanship-with-argentina/).

[113] Georgakopoulos, *Lessons from Greco-Multilateralism for Creditors*, 28 CONN. J. INT'L L. 21, 27 (2012).

Greece to successfully restructure its debt in 2012.[114] The debt restructuring decreased the face value of Greek bonds and lengthened their maturity dates.[115] Moreover, institutional European pressure led to the 2012 signing of the Treaty Establishing the European Stability Mechanism,[116] which mandated that "all new euro area government securities with maturity above one year issued on or after 1 January 2013" include collective action clauses ("CACs").[117]

However, though the Troika "framework" has been impactful in aiding Greek debt restructuring efforts, such aid is not gratuitous. Greece has paid for this aid by incurring odious austerity measures,[118] which infringe upon Greece's sovereignty.[119] Greece recognizes that if it were to leave the EU, the country would be trading invaluable aid (in the form of money and help negotiating) from the Troika "framework" in favor of

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[114] Greece, unlike Argentina, worked closely with the IMF, in the form of the Troika. Rachel D. Thrasher & Kevin P. Gallagher, *Mission Creep: The Emerging Role of International Investment Agreements in Sovereign Debt Restructuring* 16 (B.U. CTR. FOR FIN., L. & POL., Working Paper No. 003, 2016). The Troika agreed to lend Greece €130 billion, contingent on "private sector involvement" ("PSI"). *Id.* (citing Alex Chambers & Christopher Spink, *Greece Bond Restructuring Set for Friday*, REUTERS (Feb. 23, 2012), http:// www.reuters.com/article/2012/02/23/greece-restructuring-idUSL2E8DN7TK20120223) (arguing that the Troika's negotiations helped increase the value to creditors and incentivize creditors to participate in debt restructuring).

[115] *Id.*

[116] Treaty Establishing the European Stability Mechanism (ESM), Feb. 2, 2012, 2011 O.J. (L 91), http://www.esm.europa.eu/pdf/esm_treaty_en.pdf.

[117] E.U. Econ. & Fin. Comm., Subcomm. on E.U. Sovereign Debt Mkts., Nov. 11, 2014, *Collective Action Clauses in Euro Area*, http://europa.eu/efc/sub_committee/cac/index_en.htm. Collective action clauses are introduced into bonds in order to combat the problem of holdouts. CACs in bonds allow for restructuring or modification of bonds as long as a majority of the bondholders agree to the restructuring proposals. Christian Hofmann, *A Legal Analysis of the Euro Zone Crisis*, 18 FORDHAM J. CORP. & FIN. L. 519, 549 (2013).

[118] Housos, *supra* note 16, at 432.

[119] Gareth Dale & Nadine El-Enany, *The Limits of Social Europe: EU Law and the Ordoliberal Agenda*, 14 GERMAN L.J. 613, 628 (2013) (arguing that the Eurozone has implemented a "regime of reduced sovereignty, most egregiously in Greece, where an elaborate supervisory mechanism has been erected, running in parallel to that of normal government"). The supervisory framework, in the form of the Troika, has effectively taken over "rewriting Greek laws but also redesigning the social fabric." *Id.* (citing Panagiotis Sotiris, *Austerity*, Limited *Sovereignty* and Social Devastation. *Greece* and the Dark Side of European Integration, LUXEMBURG: GESELLSCHAFTSANALYSE UND LINKE PRAXIS (June 28, 2012), http://www.zeitschrift-luxemburg.de/?p=2238).

increased sovereignty.[120] Greece seems willing to accept the Troika's infringement of Greek sovereignty as long as the country would not be isolated in negotiating debt, like Argentina was immediately post-crisis.

Argentina's debt restructuring perspective is different from Greece's. Although the IMF initially headed Argentina's debt restructuring efforts,[121] Argentina later decided to act on its own once it became apparent that the IMF, itself a creditor of Argentina, would present problems.[122] This lack of an institutional negotiation partner significantly reduced the leverage that Argentina had during its 2005 and 2010 bond exchanges.[123] Without the help of an International Financial Institution ("IFI"), Argentina had to depend solely on its national law to restructure its debt.[124] However, 7% of bondholders[125] did not succumb to Argentine legislative pressures because the bondholders held New York law-governed FAA bonds.[126] The FAA bonds, which did not possess collective action clauses,[127] allowed the small minority of holdouts to challenge Argentina's debt restructuring with *all* of its creditors.[128] Thus, Argentina's backing of the Basic Principles on SDR proposal signals their recognition that a multilateral framework would aid in establishing fair debt restructuring procedures.[129] Argentina seems willing to accept a multilateral debt restructuring framework that protects debtor nations' sovereignty from foreign judgments, in exchange for the likely imposition of

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[120] The Troika is willing to provide aid in exchange for austerity measures for Greece. Lakhani, *supra* note 99, at 116 (citing Seth Stevenson, Are the Greeks Sound Negotiators?, SLATE MONEYBOX (Feb. 11, 2015) (on file with the author)).

[121] Joiner, *supra* note 5, at 96 (citing Chambers, *supra* note 62).

[122] HORNBECK, *supra* note 4, at 6-11; *see also* Thrasher & Gallagher, *supra* note 113, at 16.

[123] *See* Samples, *supra* note 4, at 70 (citing HORNBECK, *supra* note 4, at 6-11).

[124] Argentina instituted the Padlock Law and other mechanisms to coerce bondholders to participate in restructuring. *See supra* note 53 and accompanying text.

[125] Joiner, *supra* note 5, at 88.

[126] *Id.* at 253-54.

[127] This treaty, the result of IFI pressures, mandates collective action clauses. Elizabeth G. Atkins, Note, *Collateral Damage: An American Judge's Innovative but Misguided Attempt to Resolve the Enforcement Problem of Sovereign Debt*, 28 GEO. J. LEGAL ETHICS 371, 375 (2015); c*f.* Treaty Establishing the European Stability Mechanism, *supra* note 116, at art. 12(3).

[128] The Second Circuit found that Argentina violated the FAA bond's Pari Passu Clause, which protects all creditors from discrimination by prohibiting Argentina's "issuance of other superior debt . . . and the giving of priority to other payment obligations." Thus, the Second Circuit blocked Argentina's ability to refuse to pay holdouts by stating that Argentina can only pay the restructured debt at the same rate as it pays holdouts. NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 259 (2d Cir. 2012).

[129] Basic Principles on SDR, *supra* note 18. Without a sovereign debt restructuring mechanism, both Argentina and creditors would continue suffering. Thrasher & Gallagher, *supra* note 113, at 14.

austerity measures on Argentina's economy. Argentina's recent settlement with its holdout creditors does not detract from the viability of such a framework, but rather underlines the need for one.[130] While debtor nations can always resort to private debt restructuring negotiations, a multilateral framework can prove useful in litigious debt restructuring situations.

In sum, both Argentina and Greece recognize that a multilateral debt restructuring framework would be immensely helpful in aiding countries' debt restructuring efforts.[131] However, Greece's experience with the Troika framework's austerity measures and Argentina's experience with New York courts' injunction on Argentina's debt repayment strategy must inform what a multilateral framework must look like to protect sovereignty.

## III. Sovereignty Issues in Debt Restructuring

The international law system, since its Westphalian establishment,[132] has long mulled over and modified its definitions of "sovereignty."[133] Though this system initially held that it was the law of nature that determined the law of nations,[134] increased international dealings (whether through treaties, war, etc.) in the twentieth century saw the rise of a more positivist approach to sovereignty.[135] This new approach emphasized the strength of sovereign states, which shape the international system

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[130] Katia Porzecanski, Charlie Devereux & Bob Van Voris, *Paul Singer Cuts Deal With Argentina After Ugly, 15-Year Dispute*, Bloomberg Business (Feb. 29, 2016), http://www.bloomberg.com/news/articles/2016-02-29/argentina-reaches-4-65-billion-deal-with-main-holdouts.

[131] *See* discussion *supra* Part II.

[132] One of the earliest recognizable forms of an 'international law system' emerged from the Peace of Westphalia. Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 N.C. J. Int'l L. & Com. Reg. 375, 388 (2013) (citing Treaty of Westphalia (1648), avalon.law.yale.edu/17th_ century/westphal.asp (last visited Nov. 5, 2012)). The system was characterized by strong sovereign power in determining "political and legal process[es]." *Id.*

[133] Winston P. Nagan, FRSA & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 Colum. J. Transnat'l L. 141, 143 (2004) (listing the different meanings attributed to the word "sovereignty").

[134] The Naturalist perspective of international law holds that the laws of nature (i.e., a higher power) determine what an international system should look like and incentivize nations to work together toward that system. Nagan et al., *supra* note 132, at 388 (citing Hugo Grotius, The Law of War and Peace (De Jure Belli ac Pacis) (Francis Kelsey trans., Carnegie 1925) (1625)). Such a system holds that the sovereign is not supreme. *Id.*

[135] Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791, 1845 (2009).

through agreements and actions and maintain "complete discretion except as limited by their international obligations."[136] Such broad authority entitled the sovereign to be above legal reproach.[137] This absolute immunity proved extremely problematic because it allowed certain nations to benefit from otherwise illegal activity.[138] Thus, the U.S. and many other jurisdictions adopted a newer, more restrictive version of sovereign immunity.[139]

### A. *Sovereign Immunity and Debt Restructuring*

The restrictive theory offers immunity to a sovereign government, except when it acts in a commercial capacity.[140] Thus, a cloak of immunity protects a sovereign government when it acts in a public capacity, but disappears when the government acts in a private capacity.[141]

This restrictive theory is codified in the United States under the Foreign Sovereign Immunities Act ("FSIA") of 1976,[142] which sets out the circumstances under which a U.S. court will offer immunity to a foreign state.[143] Under the FSIA's "private person" test, a country does not receive immunity if "the relevant activity [the country performed] is one in which a private person can engage."[144] Under this test, the act of issuing debt instruments by a sovereign nation has been held to be the type of

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[136] Quincy Wright, *The International Status of the United Nations*, 63 COLUM. L. REV. 1350 (1963) (reviewing GUENTER WEISSBERG, THE INTERNATIONAL STATUS OF THE UNITED NATIONS (1961)) (citing S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)).

[137] Goldsmith et al., *supra* note 135, at 1843; *see, e.g.*, The Schooner Exch. v. McFaddon, 11 U.S. 116, 117 (1812).

[138] Communist nations have been the strongest proponents of absolute immunity because it shielded them from liability stemming from their commercial activities. Because Communist nations nationalized many private businesses, the Communist nations' businesses would have a comparative advantage to Western businesses because of the Communist businesses' immunity in commercial settings (i.e., immunity from torts in the workplace, contract breaches, etc.). Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 749 (2003).

[139] The U.S. formally announced its absolute to restrictive immunity policy change through the issuance of the Tate Letter, written by the acting legal advisor to the Attorney General. Michael A. Tessitore, *Immunity and the Foreign Sovereign: An Introduction to the Foreign Sovereign Immunities Act*, 73 FLA. B.J. 48, 48 n.6 (1999).

[140] M. Mofidi, The Foreign Sovereign Immunities Act and the "Commercial Activity" Exception: The Gulf Between Theory and Practice, 5 J. INT'L LEGAL STUD. 95, 99 (1999).

[141] *Id.*

[142] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602-1611 (1994)).

[143] Nagan et al., *supra* note 133, at 418.

[144] Mofidi, *supra* note 140, at 103-04.

activity a private person can partake in and therefore a "commercial activity" devoid of sovereign immunity.[145] Thus, although an official act by a sovereign government, the issuance and modification of debt has not been held to be an immunity-worthy activity in the United States (specifically New York[146]) or in England[147] if the debt is governed by New York or English law.[148]

Though sovereign nations could avoid this loss of immunity by issuing debt under their own domestic laws, potential investors would view this debt as less likely to be repaid, resulting in higher costs of capital.[149] Thus, nations are often forced to forego their domestic law in the issuance of debt in order to gain cheaper access to capital.[150] Despite this reality, Greece was successful in issuing cheap Greek law-governed debt instruments upon its joining of the Eurozone.[151] These higher risk bonds provided Greece with much needed leverage when it restructured its debt in 2012.[152]

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[145] Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 151 (2d Cir. 1991) *aff'd*, 504 U.S. 607 (1992).

[146] English and New York law are the primary governing-law choices for debt instruments when the sovereign's law is not chosen. Committee on Foreign and Comparative Law, *Governing Law in Sovereign Debt – Lessons from the Greek Crisis and Argentina Dispute of 2012*, NEW YORK CITY BAR ASSOCIATION 1, 3 (2013). Debt instruments governed by English law likewise exempt debt instruments from receiving immunity. Sean Hagan, *Designing A Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299, 311 n.30 (2005).

[147] English law does not allocate immunity for government issued debt. U.K. State Immunity Act, (1978) § 1-23, 10 Hals. Stat. (4th ed. 2001 reissue) 829-46; *see also* Hagan, *supra* note 146, at 311 n.30.

[148] These laws often govern debt instruments. Hagan, *supra* note 146, at 317 n.51.

[149] Countries considering issuing debt often ponder the trade-off between costlier debt and reduced immunity for debt issuing. Debt instruments issued under the sovereign's law will be costlier because, from an investor's point of view, the sovereign would then have the power to change the terms of the debt and frustrate the investor whenever the sovereign wishes to do so. *Governing Law in Sovereign Debt – Lessons from the Greek Crisis and Argentina Dispute of 2012*, *supra* note 146, at 2 (citing GRUSON & REISNER, SOVEREIGN LENDING: MANAGING LEGAL RISK 51 (Euromoney Pub. 1984)).

[150] If a country issues debt under its own law, then creditors "demand higher interest rates to compensate for this risk" of a country being able to modify the debt whenever they desire. Dan Rosencheck, *Argentina's Rational Default*, NEW YORKER (Aug. 7, 2014), http://www.newyorker.com/business/currency/argentinas-rational-default.

[151] Prior to 2001, Greek debt was mostly issued under New York law, without CACs (similar to Argentina's debt in the 90s). However, Greece was able to issue debt under Greek law as soon as it joined the Eurozone. STEFAN GRUNDMANN, FLORIAN MÖSLEIN & KARL RIESENHUBER, CONTRACT GOVERNANCE: DIMENSIONS IN LAW AND INTERDISCIPLINARY RESEARCH 457 (Oxford. Univ. Press ed. 2015).

[152] *See* Rooney, *supra* note 86.

Between the volatile Greek law bonds and the Troika institutional partners,[153] Greece held a lot of power in being able to convince its private creditors to upgrade from Greek law-governed to English-law governed bonds.[154] These bonds, which were negotiated to include Greek-friendly CACs,[155] have protected Greece from the holdout creditor litigation faced by Argentina and will continue to do so. Such beneficial bonds will protect Greece from being sued in foreign courts, thus insulating Greece from sovereign immunity challenges, such as those faced by Argentina.

Argentina, which had neither the benefit of an institutional partner with which to negotiate its debt restructuring[156] nor the advantage of Argentine law-governed bonds,[157] was denied sovereign immunity in U.S. courts with respect to Argentine debt.[158] The courts, in denying immunity, recognized that the FSIA has no provision that limits discovery of foreign debtors' assets, and thus did not exempt Argentina from American court rulings.[159] Because the Argentine bonds contracted away Argentina's right to jurisdictional immunity under New York law, and because Argentina was engaged in a commercial activity, the court denied Argentina immunity from suit.[160] Notably, though the ruling held that Argentina was not immune after lengthy analysis of the FSIA, even the U.S. government agreed that such a holding caused "a substantial invasion of [foreign states'] sovereignty."[161]

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153 The Troika was an invaluable partner in Greece's debt restructuring process. *See supra* note 114 and accompanying text.

154 Zettelmeyer et al., *supra* note 85, at 540.

155 The CACs have become mandatory in the issuance of European debt. *See* E.U. Econ. & Fin. Comm., Subcomm. on E.U. Sovereign Debt Mkts., *supra* note 117. *See also supra* note 117 and accompanying text.

156 HORNBECK, *supra* note 4, at 6-11.

157 NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 253-254 (2d Cir. 2012).

158 The court denied Argentina sovereign immunity due to a clause in the FAA bond that said that Argentina agreed to waive such "immunity to the fullest extent permitted by the laws of such jurisdiction." EM Ltd. v. Republic of Argentina, 695 F.3d 201, 203 n.1 (2d Cir. 2012) *aff'd sub nom*. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

159 The Supreme Court has ruled that the FSIA does not preclude discovery of a country's extraterritorial assets. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2259 (2014); *see also id.* at 2256 (Ginsburg, J., dissenting) (arguing against the majority opinion because American law and international norms limit discovery in order to protect a country's sovereign immunity).

160 *Id.*

161 *Id.* (citing Brief for United States as Amicus Curiae 18).

The theory of restrictive immunity, which arguably represents customary international law,[162] becomes significant when contemplating what a multilateral sovereign debt restructuring framework should look like. Because this theory contemplates when a sovereign may *not* avoid legal liabilities, it is natural that such a theory has been opposed in the context of sovereign debt restructuring.[163] Many nations, like Argentina and the Maldives,[164] hope for a debt restructuring framework that will preserve their "[s]overeign immunity from jurisdiction . . . before foreign domestic courts."[165] However, Greece, which likely will not face the litigation woes of Argentina, is not as concerned with its jurisdictional immunity in foreign courts.[166] Rather, Greeks likely believe that their sovereign right to government has been infringed upon due to their debt troubles.[167] Thus,

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[162] The restrictive theory of immunity has been adopted by most countries such that it has become customary international law and displaced absolute immunity. Takehiro Nobumori, *Recent Development of Sovereign Immunity Law in Japan from A Comparative Perspective of Central Banks*, 125 BANKING L.J. 885, 925 (2008). However, China remains steadfast in holding that restrictive immunity is not a rule of international law. Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 VA. J. INT'L L. 615, 681 (1994).

[163] In the U.N.'s most recent proposal the issue of sovereignty is well-represented among the nine principles put forth by the Group of 77 and China. Basic Principles on SDR, *supra* note 129.

[164] The Maldives, representing the Alliance of Small Island States (AOSIS), welcomed the Basic Principles because the Principles emphasized sovereign immunity. U.N. Doc. A/69/PV.102, *supra* note 17, at 9.

[165] The Sixth Principle of the proposal emphasizes that immunity should be broadly construed and exceptions to the immunity narrowly interpreted. Basic Principles on SDR, *supra* note 18, at 1.

[166] Greece's better debt instrument provisions, which include CACs, have given it more breathing room than Argentina in terms of restructuring holdouts. *See* E.U. Econ. & Fin. Comm., Subcomm. on E.U. Sovereign Debt Mkts., *supra* note 117; *see also An Illusory Haven: What Lessons Should Investors Learn from the Argentine and Greek Restructurings?*, ECONOMIST (Apr. 18, 2013), http://www.economist.com/news/finance-and-economics/21576391-what-lessons-should-investors-learn-argentine-and-greek-restructurings (describing how CACs forced Greek holdout investors to restructure their debt while Argentine holdout were able to take successfully to the American courts).

[167] The term sovereignty has many definitions. Greece likely believes that its infringed upon sovereignty is that of "sovereignty as basic governance competencies," which involves a Sovereign's right to decide what best constitutes "appropriate process and how to most effectively control certain behavior[s]." Nagan et al., *supra* note 133, at 142-145 n.18 (citing Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made*, *in* INTERNATIONAL LAW ESSAYS 355, 360-62 (Myres S. McDougal & W. Michael Reisman eds., 1981)). Many argue that such intrusion into the sovereign's right, through externally imposed austerity measures, violate Greek sovereignty and is thereby illegal. Michael Nevradakis, *Are Greece's Loan Agreements and Austerity Measures Illegal? Greek Constitutional Law Scholar Says 'Yes,'* THE HUFF. POST (Oct.

Greeks hope for a framework that would provide them with the debt restructuring benefits they received as members of the Eurozone, with none of the externally imposed austerity measures. Greece's experience in the Eurozone framework, however, has allowed Greece to recognize that this quid pro quo would be asymmetrical in favor of debtor nations, and thus not viable. Greece is likely wary of backing the Basic Principles on SDR proposal because it would not adequately address its own sovereignty concerns, while causing the cost of its debt to soar.[168] Thus, in abstaining from voting for the recent U.N. proposal despite its role in the negotiations,[169] Greece sent a clear message to debtor nations around the world: The issue of sovereignty cannot be remedied in a debt restructuring framework.

Whether the concept of State sovereignty will be strengthened, as Argentina holds, or unchanged or weakened, as Greece's experience has taught it, is difficult to determine given the limited information posited by the most recent Basic Principles on SDR.[170] Although the proposal lists nine basic principles that should guide sovereign debt restructuring processes, these are too limited to evince what a U.N.-led framework might look like.[171] The Basic Principles on SDR mentions sovereignty as a "right . . . [of a country] to design its macroeconomic policy."[172] The proposal also mentions sovereignty as sovereign immunity from jurisdiction in front of "foreign domestic courts."[173] Thus, while the Basic Principles on SDR seemingly addresses both Greek and Argentine concerns about debt restructuring, it is necessary to analyze past attempts at international debt restructuring mechanisms to see why they have not taken hold. Analyzing past frameworks for their successes and failures with respect to sovereignty will enlighten why Argentina believes the new U.N. proposal will succeed, while Greece trusts that it will not.

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31, 2012), http://www.huffingtonpost.com/michael-nevradakis/are-greeces-loan-agreemen_b_2046978.html; *see also* Tsoukala, *supra* note 25, at 42-43 (noting that many of the extreme austerity measures involved structural reforms implemented by and modeled after programs stemming from IFIs).

168 From Greece's point of view, new debt issued governed by the law of a third-party debt restructuring framework would be extremely pro debtor country. Since creditors would be disfavored, creditors would demand higher interest rates and better terms on their debt, raising costs for borrower nations. *See supra* note 149 and accompanying text.

169 *See* Ellmers, *supra* note 19; U.N. Doc. A/69/PV.102, *supra* note 17, at 9.

170 Basic Principles on SDR, *supra* note 129.

171 *See id.*

172 *Id.* at 1 ¶ 1.

173 *Id.* at 2 ¶ 6.

## B. *The IMF's Sovereign Debt Restructuring Mechanism*

In 2001, as the Argentine debt crisis was reaching its climax and default loomed,[174] the IMF began to contemplate a sovereign debt restructuring system.[175] The resulting statutory framework was the Sovereign Debt Restructuring Mechanism ("SDRM"), which was formally proposed in 2003.[176] The SDRM was designed to protect debtor countries from litigation in order to allow for debt restructuring efforts to take place.[177] Thus, once a debtor country judged its own debt to be unsustainable,[178] the debtor country could activate the SDRM.[179] This activation would not suspend creditor rights, would not invalidate contractual provisions, and would not result in an automatic stay.[180] Instead, creditors would form into representative committees in order to address debtor-creditor and inter-creditor issues.[181]

The debtor would then propose terms of restructurings to these committees, and the committees could approve a restructuring plan as long as "75 percent of the outstanding principal of those registered and verified claims that are subject to the restructuring" voted in favor.[182] The Sovereign Debt Dispute Resolution Forum ("SDDRF") would resolve disputes that arose during the restructuring efforts.[183] Thus, the SDRM aimed to provide an orderly resolution to debt conflicts between sovereign nations and creditors.

Although 70% of IMF member states supported the SDRM,[184] the proposal likely failed for a number of reasons. First, it lacked the support

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[174] Graham et al., *supra* note 48.

[175] Address by I.M.F. First Deputy Managing Director, *International Financial Architecture for 2002: A New Approach to Sovereign Debt* Restructuring (Nov. 26, 2001), https://www.imf.org/external/np/speeches/2001/112601.htm.

[176] I.M.F. Factsheet, *Proposals for a Sovereign Debt Restructuring Mechanism (SDRM)* (Jan. 2003), https://www.imf.org/external/np/exr/facts/sdrm.htm.

[177] Molly Ryan, Note, *Sovereign Bankruptcy: Why Now and Why Not in the IMF*, 82 FORDHAM L. REV. 2473, 2509-2510 (2014).

[178] The IMF carefully delineated what it considered eligible claims to be brought under the SDRM, and what it considered excluded from eligible claims. Legal and Policy Development and Review Departments, *The Design of the Sovereign Debt Restructuring Mechanism – Further Considerations* 1, 8-9 ¶¶ 15-16 (Nov. 27, 2002), http://www.imf.org/external/np/pdr/sdrm/2002/112702.pdf.

[179] The SDRM could only be activated by the debtor nation, a nod to retention of a nation's sovereignty in its debt restructuring. *Id.* at 9 ¶ 18.

[180] *Id.* at 9-10 ¶ 20. In comparison, the U.S. Bankruptcy Code, which extends to certain Municipalities, includes an automatic stay provision to serve as protection for the debtor from any subsequent and prior litigation against it. 11 U.S.C. § 922 (2012).

[181] The Design of the Sovereign Debt Restructuring Mechanism – Further Considerations, *supra* note 178, at 10 ¶ 21.

[182] *Id.* at 10 ¶ 22.

[183] *Id.* at 10 ¶ 29.

[184] Ryan, *supra* note 177, at 2512.

of the world's largest financial systems, such as the United States.[185] Creditor countries (and those with many private creditors within them) worried that the SDRM would undercut investors' claims, which were written into contracts.[186] Although the creditors' rights would not be suspended, creditors' claims could be altered by a large majority of other creditors even if no CACs were present in their contracts and even if the contracts were governed by the law of the creditor nation. Second, the perceived easiness of restructuring under the SDRM, and the pro-debtor mentality it espoused, ultimately would raise the cost of capital for debtors.[187] Third, and most importantly, the SDRM gave the IMF too much power at the cost of infringement on the sovereignty of both creditor and debtor nations. Under the SDRM, creditors could not rely on their own courts for remedy, as the SDDRF would supersede the powers of their courts and have jurisdiction over disputes arising throughout the restructuring process.[188] Debtor nations' sovereignty would likewise suffer, as the debtor nation would have to make many of the decisions throughout the debt restructuring process at the whim of the IMF.[189] For example, the debtor nation would have to be in constant communication with the IMF and the decision about whether the debtor nation should activate the SDRM would "be influenced by judgments made by the [IMF] about the scale of the financing it would be willing to provide in the absence of a debt restructuring and the magnitude and feasibility of domestic policy adjustment."[190]

Thus, the SDRM would allow the IMF to retain great influence over how debtor nations should restructure their debt and what policy adjustments they should undertake in order to make their future debt more sustainable. Greece, currently the recipient of such external influence on internal programs, believes such a framework belittles the sovereign right of a State to govern.[191] Greece likely abstained from voting for the recent U.N. debt restructuring framework because Greece feared it would take the shape of the SDRM, with the U.N. imposing the undue influence.

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185 Hagan, *supra* note 146, at 301.

186 Ryan, *supra* note 177, at 2512.

187 Disfavoring creditors increases creditor risk, which results in higher interest rates charged to debtors in exchange for debt. Hal S. Scott, Symposium, *A Bankruptcy Procedure for Sovereign Debtors?*, 37 INT'L LAW. 103, 125 (2003). *See also* Rosencheck, *supra* note 150.

188 Ryan, *supra* note 177, at 2512.

189 The IMF, which would likely be one of the debtor nation's largest creditors, would surely have a conflict of interest in ensuring that its own debt was repa*id.* The IMF could not fairly oversee a system meant to ensure that debtors could lessen their own debt obligations to creditors when the IMF itself would be a creditor. *Id.* at 2513.

190 The Design of the Sovereign Debt Restructuring Mechanism – Further Considerations, *supra* note 178, at 25 ¶ 85.

191 *See* Nagan et al., *supra* note 167 and accompanying text; *see also* Nevradakis, *supra* note 167.

Argentina, the "victim" of holdout litigation, would likely support an SDRM. Argentina would be able to activate the SDRM, thereby forcing the holdouts to accept the terms voted for by the majority of the creditor committee, even in the absence of CACs. Thus, because the SDRM focused on Argentina's concerns about sovereignty in debt repayment, and not Greece's concerns about sovereignty in government, the SDRM failed to fully protect debtor nations' sovereignty.

### C. *Academia's Sovereign Debt Restructuring Convention*

Academics have likewise been intrigued by the question of the viability of an institutional debt restructuring system. A predecessor to the SDRM, the Sovereign Debt Restructuring Convention ("SDRC")[192] proposed similar solutions to debt restructuring problems.[193] The SDRC differed from the SDRM only in that the SDRC allows for more creditor claims to be restructured.[194]

Thus, the SDRC, like the SDRM, focused on resolving the issue of sovereignty from the point of view of litigation. While both proposed frameworks successfully address the holdouts litigation problem and the issue of debtor nations being subjected to foreign court judgments, the frameworks do not address Greece's concern about infringement into the sovereign right of government. However, proponents of the SDRC argue that such a framework would lessen the imposition of measures upon which loans or bailouts are conditioned[195] because the SDRC would allow a debtor nation to function with less amounts of funding than if the debtor nation were seeking a bailout to keep from defaulting.[196]

Though the reduced amounts of financing required to resolve debt crises is no doubt beneficial to a debtor nation, even a small amount of

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[192] The SDRC was originally proposed by Steven L. Schwarcz in 2000, under the name "Proposed Model Convention." Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 1032 (2000). *See also* Steven L. Schwarcz, *"Idiot's Guide" to Sovereign Debt Restructuring*, 53 EMORY L.J. 1189, 1215 (2004).

[193] The solutions posited by the SDRC include neutralizing holdouts through supermajority creditor voting and allowing only the debtor nation to activate the SDRC. Steven L. Schwarcz, *Sovereign Debt Restructuring Options: An Analytical Comparison*, 2 HARV. BUS. L. REV. 95, 103 (2012).

[194] The SDRC allows for both private creditor and foreign government creditor claims to be restructured. *Id.*

[195] *Id.* at 108.

[196] The SDRC, which would facilitate the negotiations between debtors and creditors, aims to quickly restructure debt. Such systemic efficiency will prevent a country from protracted solitary negotiations with creditors during which the debtor country may have to borrow money to keep from defaulting on debt owed to creditors not willing to partake in the negotiations. Thus, the SDRC would allow for lesser amount of financing, which would reduce the amount of measures the financier may impose upon the debtor nation. *Id.* at 108 n.96.

financing can carry with it the heavy burden of extreme austerity conditions.[197] Greece's experience with Troika-imposed austerity measures likely proved to Greece that even favorably restructured debt can come with many conditions that would infringe upon the nation's sovereign right to government.[198] Without specific limitations upon the conditions that can be imposed in exchange for funding, the Greek government's abstention in the vote for a U.N. framework modeled after the SDRM and the SDRC likely signifies the belief that a framework cannot fully protect the sovereign rights of debtor nations. Thus, while the SDRC is well tailored to tackle Argentina's concerns with regard to jurisdictional sovereignty, the SDRC does not adequately touch upon Greece's concerns about legislative sovereignty.

### D. *The U.N.'s Sovereign Debt Restructuring Process*

Unlike the SDRM and SDRC, which did not sufficiently address how a debt restructuring framework would protect the rights of a Sovereign State to govern and design its own internal policies,[199] the U.N.'s Basic Principles on SDR proposal endeavored to address this issue.[200] With the passing of U.N. Sovereign Debt Restructuring proposal,[201] the U.N. set out to negotiate a sovereign debt restructuring framework ("SDR") that would mutually benefit creditors and debtors, and would not affect the well-being of countries and their people.[202] These negotiations, which occurred over the course of three sessions of the Ad Hoc Committee on Sovereign Debt Restructuring Processes, themselves headed by the United Nations Conference on Trade and Development ("UNCTAD"), raised concerns about how such a "[f]ramework [would] affect sovereignty."[203] There were also concerns about merely relying on contract law

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[197] *Id.* at 108 n.95 (arguing that "[n]onetheless, conditionality sometimes can be inappropriate or excessive") (citing Morris Goldstein, IMF Structural Conditionality: How Much is Too Much? Pg. 66 (Peterson Inst. For Int'l Econ., Working Paper No. 01-04, 2000), http://ideas.repec.org/p/iie/wpaper/wp01-4.html.

[198] The Eurozone has implemented a "regime of reduced sovereignty, most egregiously in Greece, where an elaborate supervisory mechanism has been erected, running in parallel to that of normal government." Dale & El-Enany, *supra* note 119, at 628.

[199] *Id*; *see also* Part III.B-C.

[200] *See* Basic Principles on SDR, *supra* note 18, at ¶ 1.

[201] *See* U.N. Sovereign Debt Restructuring proposal, *supra* note 1, at 1.

[202] Webcast: 11th Meeting of the Ad Hoc Committee on Sovereign Debt Restructuring Processes - General Assembly, 3rd Working Session (U.N. Web TV 2015), http://webtv.un.org/watch/11th-meeting-ad-hoc-committee-on-sovereign-debt-restructuring-processes-general-assembly-3rd-working-session/4378286017001#full-text.

[203] Powerpoint Presentation from Richard A. Conn, Jr., Guest Speaker, Ad Hoc Committee on Sovereign Debt Restructuring Processes – United Nations, to Member

and the free-market approach[204] to resolve sovereignty issues.[205] Thus, the resulting SDR framework set forth in the Basic Principles on SDR[206] tackled the issue of sovereignty straight on and declared that a U.N. SDR framework would recognize "that [the] Sovereign State has the right, in the exercise of its discretion, to design its macroeconomic policy, including restructuring its sovereign debt, which should not be frustrated or impeded by any abusive measures."[207] This recognition of a sovereign right to design governmental policy was bolstered by the U.N.'s recognition of the principle of impartiality, which "requires that all institutions and actors involved in sovereign debt restructuring workouts, including at the regional level . . . [should] enjoy independence and refrain from exercising any undue influence over the [SDR] process . . . that would give rise to conflicts of interest or corruption or both."[208]

The U.N. negotiations resulted in the passing of nine basic principles for an SDR framework, which were ultimately adopted by the General Assembly.[209] However, Greece abstained from voting for the proposal while Argentina voted strongly in favor.[210] Argentina's affirmative vote makes sense given their experiences with debt restructuring. Argentina, which since 2001 has not had extensive access to world capital markets,[211] should be a strong proponent of a multilateral SDR framework because, in the perspective of its government, the benefits outweigh the costs. Having attempted restructuring its debt without the help of international institutions,[212] Argentina suffered at the hands of holdouts,[213] which

States (Apr. 28, 2015), http://unctad.org/meetings/en/Presentation/gds_sd_2015-04-28-30_ConnJr_en.pdf.

[204] The free-market approach refers to resolving the problem of holdout creditors solely through better debt contracts. An example of such an approach would be to uniformly include CACs in all debt instruments, and allowing most decisions and terms to be altered by a supermajority of creditors. Schwarcz, *supra* note 193, at 104.

[205] According to the First Working Session Summary Report, the session moderator, Rodrigo Olivares Caminal, mentioned that the current situation demanded "too much from contract law to solve legal issues, where we cannot address social or political issues." Memorandum, UNCTAD, Legal Framework for Debt Restructuring Processes: Options and Elements, UNCTAD Office Report (Mar. 31, 2015), http://unctad.org/meetings/en/SessionalDocuments/gds_sd_2015-02-03-05_summary_en.pdf.

[206] *See* Basic Principles on SDR, *supra* note 18.

[207] *Id.* at ¶ 1.

[208] *Id.* at ¶ 4.

[209] Basic Principles on SDR, *supra* note 18.

[210] *Id.* at 9.

[211] H.C., *Argentina and the capital markets: At least they have Paris*, ECONOMIST (May 30, 2014), http://www.economist.com/blogs/americasview/2014/05/argentina-and-capital-markets. *See* Gallagher, *supra* note 15, at 14.

[212] HORNBECK, *supra* note 4, at 6-11.

[213] Joiner, s*upra* note 5, at 88 (citing Chambers, *supra* note 62).

refused to accept haircuts on their returns and sued Argentina to enjoin the state from making payments to other creditors with whom Argentina had successfully negotiated.[214] Though Argentina's recent settlement with holdout creditors seemingly points to the success of a free-market, or contractual, approach to sovereign debt restructuring, this settlement only came about after fifteen years of expensive litigation, the costs of which Argentina agreed to cover.[215] While a free-market approach works effectively with domestic law-governed debt,[216] such an approach is inefficient and expensive if the debt is foreign law-governed. Argentina's litigation was an expensive and protracted process due to the fact that New York law governed the FAA bonds that Argentina had originally issued.[217]

The New York debt, which undercut Argentina's repayment capabilities, ultimately leveraged the recent settlement. The litigation behind the settlement greatly underscores the need for a speedy, effective multilateral debt restructuring system. Such a framework brings with it an enormous benefit, namely the ability to retain sovereign immunity from foreign jurisdictions in the process of restructuring a nation's debt.[218] This benefit, which would provide Argentina and other debtor nations with much leverage in restructuring old debt and issuing new debt, and thus lead to speedy debt restructuring, vastly outweighs the costs of such a system. Costs, which include austerity measures and infringements on domestic policy by other Sovereign Members or creditor members of a framework, are not something with which Argentina has had much experience.[219]

For Greece, however, the costs associated with an SDR framework vastly outweigh the benefits of such a framework. Having restructured

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[214] NML Capital, Ltd. v. Republic of Argentina, No. 08 CIV. 6978 TPG, 2011 WL 9522565, at *1 ¶ 8 (S.D.N.Y. Dec. 7, 2011).

[215] Andrade, *supra* note 20.

[216] Greek law-governed debt gave Greece much leverage in its debt restructuring. *See supra* note 151 and accompanying text.

[217] NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 253-254 (2d Cir. 2012).

[218] Basic Principles on SDR, *supra* note 18, at ¶ 6.

[219] Argentina is no stranger to self-imposed austerity measures. *See* Cibils et al., *At Debt's Door*, *supra* note 107, at 773 and accompanying text. Argentina also accepted IMF proposed austerity measures from 1999-2000, but these measures brought about rampant and widespread national strikes. Krauss, *supra* note 45. Due to such national disdain for austerity measures, Argentina slowed its austerity measure implementation, which led the IMF to stop disbursing its austerity conditioned loans. Graham & Masson, *supra* note 48. This lack of capital forced Argentina to default, from which it rebounded nicely without having creditor-imposed austerity measures. Dean Baker, *For Greece there is an alternative to austerity – as Argentina proved*, GUARDIAN (July 30, 2012), http://www.theguardian.com/commentisfree/2012/jul/30/greece-alternative-austerity-argentina-imf-germany.

most of its debt with the help of the Troika and the rest of the EU,[220] Greek debt now includes many CACs and other anti-holdout measures.[221] For Greece, a Troika-backed, contract-based approach has proven sufficient, as Greece has retained favorable debt restructuring terms and has not experienced foreign court judgments impeding debt restructuring processes.[222] Thus, for Greece, a statutory approach does not bring about additional benefits. Instead, a statutory approach only incurs additional costs, in the form of creditor-imposed austerity measures, which such a framework would bring about.[223] Although the Basic Principles on SDR proposal addressed the need to limit the influence of creditors upon debtor nations,[224] Greece likely abstained from voting for such a system because of the precedents set by the SDRM and SDRC.[225] Thus, the vague Basic Principles on SDR proposal set forth by the U.N. were likely insufficient to convince Greece that the system differed from previous attempts at SDRs.[226]

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[220] Georgakopoulos, *supra* note 113, at 27.

[221] Treaty Establishing the European Stability Mechanism, *supra* note 116, at 6 ¶ 11; *see also* E.U. Econ. & Fin. Comm., Subcomm. on E.U. Sovereign Debt Mkts., *supra* note 117 and accompanying text.

[222] The majority of the private debt restructured under the 2012 Greek debt restructuring included beneficial provisions which aid Greece in the event of holdout litigation. Georgakopoulos, *supra* note 113, at 27 (citing Chambers et al., *supra* note 114) and accompanying text; *see also* John Geddie & Marius Zaharia, *Greek debt better shielded from vultures than Argentina's*, REUTERS (July 3, 2015), http://www.reuters.com/article/euro-zone-greece-vultures-idUSL8N0ZI23B20150703 (arguing that Greece was successful in structuring its debt contracts, which will likely protect them from holdout litigation).

[223] Though the Troika certainly helped Greece negotiate and restructure its debt, it was also responsible for imposing several austerity measures on Greece. Dale & El-Enany, *supra* note 119, at 628. Thus, Greece likely fears that a potential U.N. framework, in conjunction with an already existing regional European "framework" (like the Troika), would impose great austerity measures in return for diminishing returns on benefits. Such costs would infringe upon Greece's sovereignty. Nevradakis, *supra* note 167.

[224] Basic Principles on SDR, *supra* note 18, at ¶ 4 (emphasizing the need for impartiality to "refrain [creditors] from exercising any undue influence over the process and other stakeholders or engaging in actions that would give rise to conflicts of interest."

[225] *See supra* Part III.B-C.

[226] According to Richard Kozul-Wright, Director of the Division on Globalization and Development Strategies at UNCTAD, who was present at the Ad hoc Committee negotiations, "the issue of sovereignty was one that was central to any discussion on rules and regulations on international level, which was why it was not explicitly addressed in the roadmap." Memorandum, UNCTAD, Ad hoc Committee on a multilateral legal framework for sovereign debt restructuring processes – Second working session, Draft minutes of the first day (Apr. 28, 2015), 11, http://unctad.org/meetings/en/SessionalDocuments/gds_sd_2015-04-28-30_summary_en.pdf. Mr. Kozul-

Although Argentina and Greece share a common debtor history, the two countries have had very different experiences throughout their respective debt restructuring processes. Though both countries have felt their sovereignty being infringed upon, the differences in their restructuring processes resulted in different concerns with respect to how to best protect their right as Sovereign nations. Though the most recent U.N. SDR proposal attempted to address all issues of sovereignty, Greece did not think that such a proposal was explicit enough to protect Greece's sovereignty to govern. Whether or not this distrust of the most recent proposal stemmed from unfair comparison to the SDRM and SDRC, a more specific proposal is required if the U.N. desires Greece's backing. This framework, ideally, would balance the debtor country's sovereignty against creditors' rights.

## IV. What Should the U.N. Proposal Have Looked Like to Secure the Backing of Both Argentina and Greece?

In order to be viable, an SDR framework needs to be as fair to creditors as it is to debtors.[227] First, fairness with respect to creditors entails the inclusion of all creditors in debt restructuring negotiations.[228] Whether the framework can "cramdown"[229] certain reorganization plans over objecting classes of creditors, or whether majority creditors can bind minority creditors in the decision-making process requires consideration.[230] Second, fairness with respect to debtor nations entails maintaining a state's sovereignty.[231] In Argentina's case, sovereignty might include protection from holdout creditors.[232] In Greece's case, sovereignty might include a limitation on how involved creditors may become in rewriting Greek laws and programs.[233] Thus, an Argentine and Greek-backed SDR framework would need to balance creditors' rights against the countries' respective sovereignty concerns. After all, a system which blatantly favors

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Wright also emphasized how an SDR framework must address the problem of international investment superseding the power of national legislation. *Id.*

[227] 11th Meeting of the Ad Hoc Committee on Sovereign Debt Restructuring Processes, *supra* note 202.

[228] Scott, *supra* note 187, at 126.

[229] *Id.* at 125.

[230] A system that allows majority creditors to bind minority creditors might be fair to debtors, who could avoid holdouts, but it might be unfair to minority creditors, unless such creditors contracted for such terms in the debt instruments (such as a CAC). Ryan, *supra* note 177, at 2512.

[231] David A. Skeel, Jr., *When Should Bankruptcy Be an Option (for People, Places, or Things)?*, 55 Wm. & Mary L. Rev. 2217, 2238 (2014)

[232] *Id.*

[233] *See infra* Part IV.B.2

debtors would increase costs of debt to debtor countries, as creditors would demand higher interest rates to allay their risks.[234]

A. *Fairness to creditors*

1. Inter-creditor issues and the inclusion of majority voting.

Under the SDRM, creditors would be at the mercy of other creditors even if no CACs were written into the debt contracts.[235] Though such a framework seems incredibly unfair to minority creditors, one can observe the impact of not including such a system in the litigation saga in Argentina. Minority creditors have legally managed to prevent Argentina from paying 93% of the creditors with whom it had agreed to restructure its debt.[236] Thus, while a mandatory CAC framework is unfair to minority shareholders, such a framework allows for the efficient and widespread resolution of indebtedness with most countries.[237] Though this system certainly undercuts the free-market approach and the sanctity of contracts, it does not preclude minority creditors from repayment.[238] While minority creditors might not realize their ideal returns on investment, such majority-led restructuring more widely benefits the international system.[239] Moreover, minority holdouts' returns on investments and even principal repayments have been foiled even in the absence of majority-led restructuring frameworks, since certain nations have refused to repay holdouts due the holdouts' high demands.[240] Thus, because the benefits to the system as a whole outweigh costs to minority creditors, majority voting is popular in many bankruptcy proceedings, notably in the United States' Chapter 9 Bankruptcy Proceedings for Municipalities.[241]

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[234] *Cf.* Schwarcz, *supra* note 193, at 121 (explaining how systems which favor creditor participation result in lower loan terms for restructuring debtors).

[235] *Id.*

[236] Joiner, *supra* note 5, at 88.

[237] Schwarcz, *supra* note 193, at 109 (explaining how a statutory option that addresses the holdout problem through majority voting makes debt restructuring more efficient and predictable, thus making the cost of bailouts cheaper because investors are more certain as to what will happen during debt restructuring procedures).

[238] The minority creditors will still be repaid, but the repayment terms will be dictated by the majority creditors. Sean Hagan, *Sovereign Debtors, Private Creditors, and the IMF*, 8 L. & BUS. REV. AM. 49, 62 (2002).

[239] Majority voting frameworks allow a Sovereign to restructure debt in a more orderly and quick manner. This more quickly decreases the Sovereign's debt, reduces the need to depend on IFI bailouts, and stabilizes credit rates around the world. Scott, *supra* note 187, at 103.

[240] Argentina is a prime example of a nation that has refused to repay holdout creditors. Skeel, *supra* note 231, at 2229; *see also* NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 251 (2d Cir. 2012).

[241] Though municipalities are defined as "political subdivision[s] or public agenc[ies] or instrumentalit[ies] of a State[,]"11 U.S.C. § 101(40), and are not States

2. Creditor-debtor issues and the benefits of a cramdown provision.

The SDRM's shortcomings with respect to inter-creditor issues also exist with creditor-debtor issues. Under the SDRM, once the restructuring proceedings begin, creditors would organize into different representative committees.[242] However, under the SDRM, a majority vote in all committees would be the only way to approve a debtor's reorganization plan.[243] One obvious shortcoming of this design is that if there happen to be multiple creditor classes,[244] and if all but one provide a majority vote towards a reorganization plan, the plan will not pass. This high bar has led the U.S. to install a cramdown provision under its Chapter 9 Bankruptcy laws.[245] This provision allows a reorganization plan to be confirmed by the bankruptcy court if at least one creditor class has accepted the plan, even if the rest of the classes object to the plan's passage.[246] Thus, a viable system requires a cramdown provision to ensure that a specific class of creditors (like holdouts) does not unnecessarily halt the restructuring proceedings. Though this is certainly a cost to some creditors, it can also be a benefit to majority creditors or affirming creditor committees.[247] Moreover, the debtor nation will surely benefit from such a provision, as it will also permit more rapid and effective debt restructuring.

B. *Fairness to Debtors*

1. Protection from foreign court judgments and the automatic stay

Both the SDRM and SDRC, while facilitating creditor organization and voting on reorganization plans,[248] did not allow for an automatic stay

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themselves, Chapter 9 of the U.S. Bankruptcy Code maintains many provisions aimed at ensuring the sovereignty of the municipalities. Thus, Chapter 9 is a good benchmark for what an international SDR framework may look like. Notably, to file for Chapter 9 Bankruptcy and thus avail itself of the process, a municipality needs to meet eligibility requirements by obtaining consent from a majority of creditors to be impaired by bankruptcy proceedings. 11 U.S.C. § 109(c) (2010).

[242] The Design of the Sovereign Debt Restructuring Mechanism – Further Considerations, *supra* note 178, at 10 ¶ 21.

[243] Scott, *supra* note 187, at 125.

[244] Some argue that multiple creditor classes are impossible in the sovereign context because there is no system that provides the basis for determining relative priorities of claims (ex. secured, unsecured, or subordinated creditors). Hagan, *supra* note 146, at 348 n.125.

[245] 11 U.S.C. § 1129(b) (2010).

[246] Scott, *supra* note 187, at 125.

[247] Majority creditors, or affirming creditor committees will not be denied repayment due to a small number of holdouts or dissenting creditor classes. Schwarcz, *supra* note 193, at 109.

[248] Hagan, *supra* note 146, at 363.

on litigation.[249] This automatic stay, as codified by U.S. Bankruptcy law,[250] prevents creditors from collecting from debtors through litigation in courts.[251] Particularly in cases resembling Argentina's scenario, such a provision is extremely attractive to a debtor nation, as it limits the threat of litigation posed by holdouts: when sovereign immunity is not enough to protect a country from foreign judgments, an automatic stay would provide the debtor with the necessary breathing space to restructure its debt.[252] While such a system seemingly favors debtors, it likewise protects creditors from other creditors.[253] Instead of one creditor emerging victorious after litigation, which may impede the success of other creditors,[254] an automatic stay forces all creditors onto a level playing field. Thus, the benefits of an automatic stay for debtors extend to creditors, again with the costs being imposed upon litigious creditors. Though the automatic stay affects all creditors vying for repayment, the highest costs would be imposed upon the litigious holdout creditors. Thus, though the automatic stay may be beneficial to debtors, it would likely also raise the cost of debt for debtor nations.[255]

2. Limitations on creditor-imposed domestic reforms.

No SDR Framework proposed thus far has focused on limiting how much creditors can condition their restructuring on the imposition of domestic austerity measures on the debtor nation. While the Basic Principles on SDR proposal seemingly touched upon the subject,[256] it remained vague in delineating the limitations.[257] In comparison, Chapter 9 of the U.S. Bankruptcy Code specifically limits a Bankruptcy Court from infringing upon states' 10th Amendment right to sovereignty over inter-

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[249] Patrick Bolton & David A. Skeel, Jr., *Inside the Black Box: How Should A Sovereign Bankruptcy Framework Be Structured?*, 53 EMORY L.J. 763, 776 (2004).

[250] 11 U.S.C. § 362(a) (2000).

[251] Bolton et al., *supra* note 249, at 781.

[252] *Cf.* EM Ltd. v. Republic of Argentina, 695 F.3d 201, 203 n.1 (2d Cir. 2012) *aff'd sub nom*. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) (granting holdout creditors the right to overcome Argentina's sovereign immunity).

[253] Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888, 935 (2012).

[254] *See, e.g.*, NML Capital, Ltd. v. Republic of Argentina, No. 08 CIV. 6978 TPG, 2011 WL 9522565, at *2 (S.D.N.Y. Dec. 7, 2011).

[255] Schwarcz, *supra* note 193, at 121.

[256] The U.N. proposal, in its fourth Basic Principle – Impartiality – mentioned the need to restrict creditors "from exercising any undue influence over the process and other stakeholders or engaging in actions that would give rise to conflicts of interest." Basic Principles on SDR, *supra* note 18, at ¶ 4. The Basic Principles also mentioned the right of Sovereign State[s] . . . to design its macroeconomic policy[.]" *Id.* at ¶ 1.

[257] Ad hoc Committee on a multilateral legal framework for sovereign debt restructuring processes – Second working session Memorandum, *supra* note 226, at 11 and accompanying text.

nal affairs.[258] Though this limitation on how active a court (and thus creditors) may be in managing the bankruptcy case stems from the U.S. Constitution, a similar "internal affairs" doctrine in international law[259] should limit an SDR Framework Court from thrusting too many reforms upon a sovereign, in exchange for restructuring aid.[260] A Chapter 9-like system that limits an SDR framework's reach would likely quell Greece's concerns about the overreaching influences of a framework.[261] Thus, an SDR Framework, like a Chapter 9 Bankruptcy Court, should only be focused on implementing the procedural aspects of debt restructuring.[262]

### C. *Chapter 9 of the U.S. Bankruptcy Code as a Model for an SDR Framework*

Whatever form the U.N. SDR framework ultimately takes, an SDR Framework should include majority voting, cramdown provisions, automatic stays, and a limitation on creditor imposition. These features, present in Chapter 9 of the U.S. Bankruptcy Court, will ensure a system that is fair to both creditors and debtors and increases the chances at an efficient and rapid debt restructuring system. Such a system is likely to address the concerns of both Argentina and Greece, and thus represents what a viable SDR Framework might look like.

Again, such an SDR Framework, which is likely to anger many creditors, especially holdout creditors, will likely cause an increase in the cost of debt for debtor nations. However, if debtor nations want to avail themselves of a system that more efficiently reorganizes and restructures existing debt, certain sacrifices will have to be made. If the debtor nation is not willing to sacrifice its sovereignty, it will have to accept increased costs of capital.

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[258] UNITED STATES COURTS: CHAPTER 9 – BANKRUPTCY BASICS, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-9-bankruptcy-basics (last visited Feb. 28, 2016).

[259] Under the current positivist international law system, a Sovereign is the ultimate discretion holder, and may act unless specifically prohibited from so acting. Wright, *supra* note 136, at 1350.

[260] John H. Chun, Note, *"Post-Modern" Sovereign Debt Crisis: Did Mexico Need an International Bankruptcy Forum?*, 64 FORDHAM L. REV. 2647, 2678 (1996).

[261] Though the Troika framework helped Greece restructure its debt, it conditioned such aid in exchange for framework-imposed domestic reforms. Dale & El-Enany, *supra* note 119, at 628.

[262] UNITED STATES COURTS: CHAPTER 9 – BANKRUPTCY BASICS, *supra* note 258 (explaining how the "functions of the bankruptcy court in chapter 9 cases are generally limited to approving the petition (if the debtor is eligible), confirming a plan of debt adjustment, and ensuring implementation of the plan").

## V. Conclusion

On December 10, 2015, more than one year and three months after the original U.N. Sovereign Debt Restructuring proposal was presented to the General Assembly, Argentina experienced a regime change.[263] Mauricio Macri, the current president of Argentina, as opposed to his predecessors, ran on a platform of economic reform and vowed to repay holdout creditors: "We don't want to remain listed as a defaulter. Even though things haven't been done well in the past, there's now a change."[264] On February 29, 2016, Macri's Argentina succeeded in doing exactly what it had promised to do when it agreed to repay holdout creditors.[265] Thus, Argentina's previously staunch backing of the U.N. proposal looks to have been a political gamble that has since shifted with the most recent elections.

Politics aside, the world can learn much from the respective Argentine and Greek debt crises. Although they appear similar at first blush, they look dramatically different upon further inquiry. Structural and situational differences, arising primarily from Greece's membership in the European Union as opposed to Argentina's lone debtor status, account for divergences in the way the two countries perceive debt restructuring. Although both countries have experienced creditors infringing upon their sovereignty, their experiences have been unique. Argentina believed their sovereignty in foreign courts to have been infringed upon, while Greece felt it had lost its sovereignty to govern. Though both countries could benefit from a formal debt restructuring framework, these differences lead to different opinions regarding what each framework should include.

Although Argentina's recent settlement with holdout creditors, after expensive and protracted litigation, appears to be a triumph of the free-market approach to debt restructuring, it only further underlines the need for a formal debt restructuring framework. While freedom of contract serves to resolve debt restructuring dilemmas in many situations, an SDR framework would allow debtor nations to resolve their debt issues quickly and efficiently when such private negotiations fail.

An international debt restructuring framework that approximates the United States' Chapter 9 Bankruptcy proceedings for municipalities is likely to appease countries concerned with sovereignty infringement, whether they have experienced debt crises like Argentina or Greece. The majority voting, cramdown provisions, automatic stay, and limitation on creditor and court imposition provisions of Chapter 9 would increase the sovereignty of nations in debt restructuring processes while ensuring that

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263 Bronstein et al., *supra* note 21.

264 Linette Lopez, *Argentina says it's finally coming to the table*, Business Insider (Jan. 13, 2016), http://www.businessinsider.com/argentina-to-negotiate-with-hedge-funds-2016-1.

265 Andrade, *supra* note 20.

creditors have a fair opportunity of repayment of their investments. Though an international bankruptcy code is likely to increase the cost of capital for debtors, due to the increased interest rates that creditors will charge in order to allay their increased risks, the benefits to be gained outweigh these costs. Moreover, an international debt restructuring framework is likely to make debt restructuring proceedings more efficient and less time-consuming for countries. This streamlining would reduce the amount of capital necessary to run the country and repay creditors during proceedings.