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A Different Kind of Restructuring: Forty Years of Debate and the Prospect of a Formal International Sovereign Debt Regime

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A Different Kind of Restructuring: Forty Years of Debate and the Prospect of a Formal International Sovereign Debt Regime

Abstract

This thesis will examine how the organization of creditors and debtors within an ad hoc sovereign debt framework affects the prospect of establishing a formal international mechanism for debt disputes. Since sovereign debtors are not bounded by the same constraints and guarantees as domestic actors, crisis-driven political battles and case-by-case compromises between creditor interests and indebted countries are the ideal building blocks for constructing a picture of the contemporary debt regime. A review of sovereign debt disputes between the 1970s and the present day – corresponding to the North-South Dialogue, the Latin American debt crisis of the 1980s, the International Monetary Fund's Sovereign Debt Restructuring Mechanism proposal, and Argentina's 2014 default – indicates that a formal sovereign debt regime is unlikely to arise in the current bond-dominated atmosphere. In particular, the dominance of retail investors and other private bondholders, combined with stagnated or waning influence among public entities such as the IMF and the Paris Club, relegates the concept of a formal, permanent debt arbiter to an aspirational status.

Keywords

sovereign debt, creditors, debtors, restructuring, Paris Club, IMF, London Club, bonds, loans, Sovereign Debt Restructuring Mechanism, North-South Dialogue, ad hoc machinery, Social Sciences, Political Science, Thomas Callaghy, Callaghy, Thomas

Disciplines

Economic Policy | Finance | International Economics | International Relations | Political Economy

**A Different Kind of Restructuring: Forty Years of Debate and the Prospect of a
Formal International Sovereign Debt Regime**

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Advisor: Dr. Thomas Callaghy
PSCI 497: Honors Thesis Seminar
University of Pennsylvania
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Abstract

This thesis will examine how the organization of creditors and debtors within an ad hoc sovereign debt framework affects the prospect of establishing a formal international mechanism for debt disputes. Since sovereign debtors are not bounded by the same constraints and guarantees as domestic actors, crisis-driven political battles and case-by-case compromises between creditor interests and indebted countries are the ideal building blocks for constructing a picture of the contemporary debt regime. A review of sovereign debt disputes between the 1970s and the present day – corresponding to the North-South Dialogue, the Latin American debt crisis of the 1980s, the International Monetary Fund’s Sovereign Debt Restructuring Mechanism proposal, and Argentina’s 2014 default – indicates that a formal sovereign debt regime is unlikely to arise in the current bond-dominated atmosphere. In particular, the dominance of retail investors and other private bondholders, combined with stagnated or waning influence among public entities such as the IMF and the Paris Club, relegates the concept of a formal, permanent debt arbiter to an aspirational status.

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I. Introduction

On September 10th, 2015, the United Nations General Assembly adopted a draft resolution on “Basic Principles on Sovereign Debt Restructuring Processes.” Capping a whirlwind year of negotiations and diplomatic scuffles over existing sovereign debt arrangements, the Principles called for the establishment of clear guidelines “for the management and resolution of financial crises” that ensure “a cooperative spirit to reach a consensual arrangement of the debt of sovereign States.”¹ In effect, the UN felt it necessary to attempt a redefinition of the underlying norms accompanying debt workouts – a step taken to challenge what Lex Rieffel calls the “ad hoc machinery” of current restructuring practices.²

While provocative, the Principles affirm the cliché that history repeats itself. In 1977 and again in 1980, the UN Conference on Trade and Development (UNCTAD) called for explicit principles for debt rescheduling; by the end of the North-South dialogue these inquiries had solidified into a proposal to create an internationally recognized sovereign debt restructuring protocol based on Chapter 11 of the United States Bankruptcy Reform Act.³ Many scholars, including A. Mechele Dickerson, attribute the failure to implement UNCTAD’s work to concerns about a loss of country sovereignty to a third-party debt mediator,⁴ while other

¹ General Assembly resolution 69/84, *Basic Principles on Sovereign Debt Restructuring Processes*, A/RES/69/84 (Limited distribution 29 July 2015), available from http://unctad.org/meetings/en/SessionalDocuments/a69L84_en.pdf.

² Rieffel, Lex. *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery*. Washington: Brookings Institutions Press, 2005. Print. pp. 1-3.

³ “United Nations General Assembly to vote on debt restructuring principles.” United Nations Conference on Trade and Development, 9 Sept. 2015. Web. 24 Sept. 2015. <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1072>.

⁴ Dickerson, A. Mechele. “A Politically Viable Approach to Sovereign Debt Restructuring.” *Faculty Publications*. The College of William and Mary Law School Scholarship Repository, 2004. Print.

observers note that risk-averse creditors fear the uncertainty of placing debt workouts under the agency of a formal institution.⁵ Whatever the reason for past failures, contemporary scholarship and policy actors agree that resistance to a formal regime is strong and multifaceted.

Given the odds, it is striking that the concept of a global sovereign debt system has surfaced repeatedly in policy debates. The history of sovereign debt in the postwar era can be described as a state-centric governance network intended to minimize creditor risks through coordination and orderly, but case-specific, restructurings.⁶ This “ad hoc” approach offers little room for international statute, since it advocates for an evolution of creditor-debtor relationships supported by national agreement, constraint, and finance mechanisms. Even multilateral forums for debt restructuring, such as the Paris Club, are ad hoc solutions – the Club was founded in 1956 by major European creditor countries looking to clear payment imbalances with Brazil and Argentina, and its monopoly over the process for restructuring developing country debt owed to bilateral donor agencies was not established until a decade later!⁷ Nor is the preference for case-by-case architecture specific to official creditors: on the private sector side, the London Club of commercial bank creditors is another characteristic ad hoc solution, formed in the 1970s as a convenient mechanism for loan management but solidified by a series of trials and crises in the 1980s.

⁵ “Revisiting Sovereign Bankruptcy.” Committee on International Economic Policy and Reform (CIEPR). The Brookings Institution, Oct. 2013. Web. 23 Oct. 2015. <http://www.brookings.edu/research/reports/2013/10/sovereign-debt>.

⁶ Callaghy, Thomas. “Innovation in the Sovereign Debt Regime: From the Paris Club to Enhanced HIPC and Beyond.” The World Bank Operations Evaluation Department, 9 July 2002. Print. pp. 12.

⁷ Rieffel, L. *Restructuring Sovereign Debt*. pp. 55-58.

It follows that the “treaty” approach, as embodied by the UN’s efforts, continues to have support due to lingering dissatisfaction with the established ad hoc model. In 2015, Weidemaier noted that the ad hoc system empowers bond owners to use contracts to maximize their own interests in ways that may not enhance social welfare.⁸ Another criticism, voiced by Joseph Stiglitz and Martin Guzman, is that the ad hoc system for sovereign debt loans is controlled by a creditor-dominated framework consisting of the Paris Club, the International Monetary Fund, and, most broadly, the close ties and policy preferences of OECD nations.⁹ As the UN efforts demonstrate, the treaty approach thus retains some appeal as a system that promises greater leverage to debtors by reducing creditor influence in the restructuring process.

The academic and policy treatments of these two systems reveal both common ground and an important distinction between proponents of ad hoc machinery or treaty-based governance. On one level, the debate is predominantly about institutions – how norms, rules, and governing bodies should be arranged to optimize sovereign debt workouts – and whether there is a need for international law to facilitate new configurations of organizations, debtors, and creditors. On another plane, supporters of each approach distinguish themselves in their orientation toward the future of sovereign debt management. Ad hoc advocates such as Anna Gelpern, for example, depict existing sovereign debt workout

⁸ Weidemaier, Mark. “Remarks made before the United Nations General Assembly Ad-Hoc Committee on Sovereign Debt Restructuring.” Reprinted by the University of North Carolina School of Law, 5 Feb. 2015. Print.

⁹ Stiglitz, Joseph and Martin Guzman. “A Rule of Law for Sovereign Debt.” *Project Syndicate*, 15 June 2015. Web. 3 Oct. 2015. <http://www.project-syndicate.org/commentary/sovereign-debt-restructuring-by-joseph-e-stiglitz-and-martin-guzman-2015-06>.

processes as accomplished facts that, while not perfect, do not require “a new batch of uniform rules” to be reformed in ideal ways.¹⁰ Adherents to the treaty approach, meanwhile, do not have the ability to point to past experiences under a permanent regime and therefore discuss their proposals as aspirational reforms to a broken system.

One would expect that the tug of war between the ad hoc and treaty approaches would eventually merit a change of policy. Instead, the UN’s Basic Principles demonstrate that a sovereign debt debate spanning nearly four decades has barely altered the mechanisms for addressing sovereign debt restructurings. This stagnation gives rise to an important institution-driven question: why have debtor countries, the United Nations, and activist economists chosen the present moment to revisit a stalemated idea? In particular, to what extent are past clashes over the ad hoc and treaty approaches influencing the current push for a formal system?

Taking a cue from these questions, this thesis inquiry seeks to analyze how the organization of creditors and debtors within the existing ad hoc system affects the development of proposals for a permanent sovereign debt regime. The purpose of exploring creditor and debtor dynamics is twofold: by charting the mixed interactions, sentiments, and policy stances of creditor and sovereign interests over roughly forty years, it is possible to construct a picture of the steady alliances and commitments dictating each debt battle. At the same time, depicting long-standing

¹⁰ Gelpern, Anna. “Remarks presented before the UN General Assembly Ad Hoc Committee on Sovereign Debt Restructuring Processes.” Georgetown University Law Center and the Peterson Institute for International Economics, 4 Feb. 2015. Web. 24 Jan. 2016. <http://www.piie.com/publications/testimony/gelpern20150204.pdf>.

institutional interests also helps draw out where policy deviations may have occurred, thus pinpointing which agents are particularly influential in the fight over debt machinery.

II. Methodology

This thesis takes an approach in which the interests of relevant actors form the basis for making inferences about the actors' roles in shaping outcomes. Articles, transcripts, and primary documentation from a series of "episodes" revolving around the nature of the debt workout process provide the background from which the interests and behaviors of various actors and institutions, including an epistemic community of economists, can be seen as key drivers of the debt debate. Each episode – the G-77's and UNCTAD's challenges to the Paris Club in the 1970s, the rise and fall of Argentina during the Latin American debt crisis of the 1980s and the global crises of the late 1990s, the IMF's Sovereign Debt Restructuring Mechanism (SDRM) failure in 2003, and the 2014 Argentine default leading to the UN's Basic Principles – is selected based on the presence of a clearly articulated vision for a formal debt regime, the availability of primary sources to review actors' timely interests, and the involvement of influential players, such as the IMF or the G77 nations, as a common thread across all highlighted cases.¹¹ This system of case selection ensures that the fate of each proposal can be attributed to the interests of actors and institutions while accounting for the variance in those same actors' and institutions' interests over time.

¹¹ I credit Professor Thomas Callaghy and Dr. Eileen Doherty-Sil with the consultation and advice that helped me formulate this thesis methodology.

As all selected cases take place over an extended period, it is not possible to create a single “snapshot” image for comparison against other static interpretations. Instead, case analysis will prioritize the processes by which actor and institutional perspectives change in response to exogenous variables (such as a debt-related court order) or endogenous shocks (such as a change of leadership within an international financial institution). The reactions to each proposal, event, or intermediate outcome – as well as the interplay of these reactions to either forge compromises or erect policy barriers – are used to determine the extent to which an episode contributed to the evolution of the sovereign debt debate. To this effect, each case study adopts a narrative format to demonstrate how one episode feeds into the next.

III. Literature Review and Current Scholarship

Current scholarship on sovereign debt provides an adequate context for linking creditor and debtor interests to the development of formalized restructuring proposals. Most scholars can be grouped into two camps: those who view the ad hoc system of debt management as the most viable structure for addressing various debt crises, and thus consider informal relationships a natural alternative to permanent, “one-size-fits-all” solutions; and those who believe the implementation of the treaty approach is viable, given the continued pitfalls of the ad hoc system despite sincere attempts at reform. Lex Rieffel, Anna Gelpern, and Brad Setser, among others, fall into the former category. In *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery*, Lex Rieffel writes that sovereign debt workouts evolve

from political considerations that are remarkably different than the constraints found in national policymaking.¹² Since debtor countries' legitimate claims to sovereignty make them more powerful relative to private debtors, restructuring approaches "often turn on assessments of a country's ability and willingness to meet its external payment obligations."¹³ The implication is that sovereign debt restructurings are, by definition, impermanent. A country's ability and willingness to pay varies with time, economic cycles, and the availability of unique political opportunities, as does creditor interest in renegotiating debt contracts. Rieffel extends this observation to the Paris Club, noting that the Club's procedures were loosely codified in response to the North-South Dialogue of the 1970s, but broken and reformed in the 1990s to differentiate its treatment of heavily indebted poor countries from other debtor sovereigns.¹⁴

Brad Setser and Anna Gelpern take Rieffel's argument a step further by demonstrating that even the debtor countries known for supporting a permanent debt regime have substantial incentives to act within the existing ad hoc system.¹⁵ One such incentive is the ability to maneuver complex restructuring processes to a debtor country's political advantage. When managing debts held in bonds, for example, "the government [of an indebted country] can deploy voluntary and involuntary debt exchanges to alter creditors' holding patterns, governing law, and even the currency of denomination of its debt."¹⁶ This enables outcomes such as

¹² Rieffel, L. *Restructuring Sovereign Debt*. pp. 46-47.

¹³ Rieffel, L. *Restructuring Sovereign Debt*. pp. 6-7.

¹⁴ Rieffel, L. *Restructuring Sovereign Debt*. pp. 56.

¹⁵ Setser, Brad and Anna Gelpern. "Domestic and External Debt: The Doomed Quest for Equal Treatment." *The Georgetown Journal of International Law*, 2004. Print. pp. 795-796.

¹⁶ Setser, Brad and Anna Gelpern. "Domestic and External Debt." pp. 798.

Argentina's unilateral restructuring process in the early 2000s, in which the debtor sovereign was able to "more easily offer different restructuring terms to two sets of investors who once held the same instrument."¹⁷ Setser and Gelpern therefore suggest that the flexibility the ad hoc approach offers for debtor countries' bond dealings complicates international agreement on a permanent debt regime, since many regime advocates have used a "toolbox" of informal policy options to address their own debt burdens.

Among the "ad hoc" scholars, it is important to consider the dominant narratives around the failure of the IMF's Sovereign Debt Restructuring Mechanism (SDRM) – perhaps the strongest attempt to institute a permanent restructuring regime in recent memory. Susan Block-Lieb writes that the IMF's unusual support for an international workout process mirrored 1970s-era conceptions of a "Chapter 11 for country debt."¹⁸ According to this perception, the comparison of sovereign debt to a corporate reorganization plan was unconvincing to the IMF's Board of Directors and, crucially, the United States government; the growth of private sector influence created a rift between creditor governments with large financial sectors and IMF leadership, while financiers and scholars comprising the Group of 30 successfully made the case that the presence of contractual measures such as collective action clauses in sovereign bond offerings rendered the SDRM

¹⁷ Setser, Brad and Anna Gelpern. "Domestic and External Debt." pp. 800.

¹⁸ Block-Lieb, Susan. "Austerity, Debt Overhang, and the Design of International Standards on Sovereign, Corporate, and Consumer Debt Restructuring." *Indiana Journal of Global Legal Studies*. Indiana University, 2005. Print. pp. 487-489.

redundant.¹⁹ Brad Setser highlights another side of the SDRM collapse: creditors and debtors within the ad hoc system were unclear on what, if anything, they desired from a formalized process that could not already be obtained with contractual infrastructure.²⁰ Since the sovereign debt space is uniquely characterized by difficulties collecting on legal judgments against countries, creditors were uncertain how the IMF could establish a feasible legal mechanism to prioritize new financing without the possibility of asset seizure. Debtor actors initially preferred a third party apparatus to oversee all debt renegotiations, although to what extent that entity would influence debt relief was never made transparent. As a result, Setser claims that the IMF's final proposal, a system that allowed a sovereign to restructure its bonds via a single aggregated vote and the assent of a supermajority of creditors, did not provide debtors or creditors with any new advantages or protections.²¹ This failure, hinging on the complex interplay of debt holders, debtor sovereigns, and institutions, constitutes an enlightening case study for how the battle scars of the early 2000s affect today's configuration of the sovereign debt arena.

Opposing the ad hoc viewpoint is a mixture of scholars and nongovernmental organizations offering diverse explanations for why (and how) a permanent sovereign debt regime is feasible. Charles Mooney argues that the volume and costs of litigation in connection to sovereign debt restructurings have vastly outpaced

¹⁹ "Key Issues In Sovereign Debt Restructuring." *Working Group Report 9*. The Group of 30, 2002. Web. 23 Jan. 2016. http://group30.org/images/uploads/publications/G30_KeyIssuesSoverignDebtRestructing.pdf. pp. 13-20.

²⁰ Setser, Brad. "The Political Economy of the SDRM." IPD Task Force on Sovereign Debt, 2008. Print. pp. 8.

²¹ Setser, Brad. "The Political Economy of the SDRM." pp. 13-14.

what was expected in the post-SDRM debt environment.²² Indeed, he claims the recent success of court litigation in disrupting and reversing Argentina's restructuring process represents a sharp increase in the power of minority holdouts relative to a debtor sovereign and the majority of creditors. "Market participants with skin in the game," Mooney writes, "will become convinced one way or the other on the need and wisdom of implementing an SDRM."²³ As a result, the author posits that a revised SDRM, proposed outside the IMF's jurisdiction and implemented via the court systems of debtor nations in conjunction with an administering supervisor, could receive the backing of most debtor states. It is telling, however, that the circumstances of past proposals lead Mooney to concede that "a strategy of proposing a potentially optimal and comprehensive regime – while hoping against hope that important stakeholders that oppose the formal mechanism approach will conclude that they have been misguided... is unlikely to be successful."²⁴

A second treaty-based formulation comes from the Brookings Institution's Committee on International Economic Policy and Reform (CIEPR) report, which asserts that the post-recession international political economy is more conducive to an "orderly sovereign bankruptcy regime" than in years past.²⁵ In particular, CIEPR observes that there is a tendency for domestic policymakers to over-borrow or pay little attention to private debt accumulation that might become a public liability, a problem that could be resolved through international statute limiting the ability to

²² Mooney, Charles W. "A Framework for a Formal Sovereign Debt Restructuring Mechanism: The KISS Principles (Keep It Simple, Stupid) and Other Guiding Principles." *Faculty Scholarship*. The University of Pennsylvania, 2 July 2015. Print. pp. 6.

²³ Mooney, Charles W. "A Framework for a Formal Sovereign Debt Restructuring Mechanism." pp. 7.

²⁴ Mooney, Charles W. "A Framework for a Formal Sovereign Debt Restructuring Mechanism." pp. 8.

²⁵ "Revisiting Sovereign Bankruptcy." The Brookings Institution.

borrow for countries with suboptimal policies. The report goes on to suggest that the emergence of sovereign debt crises in the developed world, particularly in the Eurozone, makes it much more likely that countries with large private creditor networks will assent to an IMF-mediated debt adjustment facility. Notably, even as CIEPR's assessment reflects trends that have taken on additional salience in an unstable global economy, it echoes Charles Mooney's approach by seeking to entrench new proposals in a similar framework as the 2003 SDRM fight.

The UN's reentry into sovereign debt policy indicates the growing power of another group of treaty proponents who desire a "fresh start" without the involvement of the IMF or similar institutions. In 1995, Jeffrey Sachs argued that an international lender of last resort combined with a sanctioned stay on payments could mitigate the inefficiencies created by bond selloffs.²⁶ More recently, Joseph Stiglitz has expanded Sachs' analysis to argue that a treaty regime could resolve market inefficiencies arising from multiple and overlapping legal jurisdictions, the presence of explicit and implicit claimants in the terminology of debt contracts, and the ability of claimants to draw upon ill-defined assets – all ostensible weaknesses of the existing ad hoc system. Additionally, he proposes that sovereign debt bankruptcy regimes should be designed to ensure sustainable country debt after the restructuring process is completed.²⁷ While the definition of "sustainability" is itself contested, Stiglitz's ideal process includes a widely accepted rule of law that merges debt relief with strict provisions on creditor litigation, strengthened incentives for lending into arrears, and safeguards against the renunciation of national

²⁶ Setser, Brad. "The Political Economy of the SDRM." pp. 10.

²⁷ Stiglitz, Joseph and Martin Guzman. "A Rule of Law for Sovereign Debt."

sovereignty. In this sense, the academic literature on sovereign debt has come full circle to reconsider solutions and mechanisms first articulated in the 1970s.

Current sovereign debt entanglements and a multiplicity of viewpoints on the feasibility of a permanent debt regime highlight just how complex the evolving system of debt governance has become. In both the ad hoc and treaty approaches, scholars and policymakers alike have sought to affirm the underpinnings of an effective restructuring process, especially as seen through the lens of political viability or equitable treatment among creditors and debtors. Even so, the jury is still out on how past sovereign debt episodes impact present-day attempts to create formal workout mechanisms. It is this uncertainty that the subsequent case studies seek to address.

IV. Case Studies

I. UNCTAD and the North-South Dialogue

In 1971, the Group of 77 unveiled “The Declaration and Principles of the Action Programme of Lima” in preparation for the upcoming UNCTAD III meeting in Santiago, Chile. The Declaration, itself a laundry list of reform demands, called for “the criteria and procedures of rescheduling” to be “reviewed and revised as to ensure that the rescheduling of debts does not interfere with the orderly process of development planning in debtor countries.”²⁸ The agent responsible for such review, according to the G-77 signatories, would be a formal body “created within the

²⁸ Rieffel, L. *Restructuring Sovereign Debt*. pp. 136.

machinery of UNCTAD” that was capable of hosting consultations between creditors and debtors.²⁹

The redundancy of the G-77’s approach – creating a consultation mechanism within the UN seemed, as far as creditors were concerned, like an attempt to erase the Paris Club’s secretariat and the IMF’s structural adjustment programs – alarmed creditor interests. While the G-77’s disillusionment with a “sporadic, piecemeal and inadequate” status quo that enabled “an increasing substantial transfer of resources from developing to developed countries” had been evident since the first UNCTAD meeting, the Declaration constituted for the first time an articulated plan for creating permanent machinery in the post-Bretton Woods era.³⁰ Additionally, the proposal was considered extremely friendly to debtors, as it was attached to the United Nations and mandated an analysis of development financing requirements as well as resolutions to debt-servicing crises.³¹ For this reason, such a plan was a philosophical challenge on top of an economic call to arms: rather than applying a case-by-case approach to individual countries’ restructurings, the Declaration called for the extension of a “durable solution of the external debt problem” to “all indebted developing countries” in order to facilitate stable economic growth.³² The G-77 thus saw sovereign debt management as part of a broader “development” debate, with debt write-offs and lenient restructuring terms ensuring that emerging

²⁹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 136-137.

³⁰ Rieffel, L. *Restructuring Sovereign Debt*. pp. 137.

³¹ Harvey Shapiro, “The Search for Solutions to the LDC’s Problems,” *Institutional Investor*, Oct. 1976. Print. pp. 42.

³² Rieffel, L. *Restructuring Sovereign Debt*. pp. 137.

economies could allocate their budgets to meeting growth and human capital benchmarks rather than paying off large financial obligations.

On the other hand, creditor countries, international financial institutions, and investors resolutely supported the Paris Club. Insisting that debt negotiations should continue through ad hoc forums, many Western countries feared that the ideas embodied in the G-77's Declaration would make it easier for developing countries to repudiate or stall all debt payments, thereby disrupting international lending.³³ Indeed, by 1973, advocates of generalized debt relief were pushing for developing countries to collectively declare a unilateral payment moratorium on their external debts until economic growth or foreign aid targets had been attained. Such "extremism," as one delegate from the UN's Group B bloc of developed nations put it, boiled over into the adoption of the Declaration and Program of Action of a New International Economic Order (NIEO) at the Sixth Special Session of the UN General Assembly in May 1974.³⁴ Reinforced by the Charter of Economic Rights and Duties of States, NIEO formalized a consensus for "giving developing countries preferential treatment in the operation of the international economic system," a policy configuration that eventually included canceling the debts owed by the "least developed, land-locked and island developing countries" to bilateral donor agencies.³⁵

Threats to the Paris Club also came from UNCTAD's Ad Hoc Group of Governmental Experts, convened in 1973 to review the prospects for developing

³³ Rieffel, L. *Restructuring Sovereign Debt*. pp. 135-137.

³⁴ Rieffel, L. *Restructuring Sovereign Debt*. pp. 137.

³⁵ Rieffel, L. *Restructuring Sovereign Debt*. pp. 137-138.

country debt alleviation. The experts' March 1975 report reiterated that debt reorganizations should account for "the development prospects of the debtor country," establish "equality and non-discrimination among creditors," and include terms of debt relief that incorporated the "long term debt servicing capacity of the debtor country and the legitimate interests of the creditors."³⁶ Interestingly, the Ad Hoc Group does not appear to have been on quite the same page as the Group of 77 nations: the experts presumed an ad hoc approach for debt management and acknowledged the centrality of the Paris Club in conducting negotiations. Rather than creating debtor-friendly permanent machinery, the proposal suggested that UNCTAD could create separate meetings, chaired by a developing country, with the end goal of producing a report to augment Paris Club discussions. The report also prescribed that UNCTAD participate in Paris Club meetings alongside the IMF and the World Bank, thus introducing the interests of developing countries as a unified whole into the case-by-case debt restructurings.³⁷

As Lex Rieffel observes, developed countries made exceptional efforts to balance the generalized debt relief demands of developing countries with a desire for gradual reform in the international financial system. To this effect, the North-South Dialogue, initiated via the Conference on International Economic Cooperation, served as a *détente* between creditor and debtor interests in order to deflect a looming movement for generalized debt relief. A major win for developed countries

³⁶ United Nations Conference on Trade and Development. *Debt Problems of Developing Countries. Report of the Ad Hoc Group of Governmental Experts on Its Third Session.* TD/B/545/Rev. 1. Geneva, 1975. Print. pp. 9.

³⁷ United Nations Conference on Trade and Development. *Debt Problems of Developing Countries.* pp. 9-10.

and creditors came in the form of the G-77's acquiescence to a resolution considering possible improvements to the Paris Club, in exchange for creditors accepting the notion that certain balance-of-payments difficulties for developing countries required immediate attention.³⁸ One result of this agreement was the establishment of retroactive terms adjustment (RTA) procedures, designed to allow developed countries to convert loans to grants in order to alleviate developing countries' older debt obligations. Stephen Cohen is quick to note that "no standardized operational procedure was adopted and no standardized country eligibility list was created" to assist the implementation of RTA, giving donor countries considerable leeway when deciding how to transform loans into grants and when determining which developing countries were eligible for assistance.³⁹ RTA consequently preserved the ad hoc machinery preferences of developed countries while pushing the G-77 to "press for a progression of separate concessions that would affect the Paris Club's procedures for approving debt rescheduling."⁴⁰ By the end of the ninth special session of the UNCTAD Trade and Development Board in March 1978, developed countries had largely fended off the accusation that the Paris Club and creditor interests were unresponsive to debtor needs, with G-77 interests instead turning to expanding RTA eligibility and modifying Paris Club procedures for RTA aid recipients.⁴¹

³⁸ Rieffel, L. *Restructuring Sovereign Debt*. pp. 142.

³⁹ Cohen, Stephen. "Forgiving Poverty: The Political Economy of the International Debt Relief Negotiations." *International Affairs*, Vol. 58 (1), 1981. Print. pp. 67.

⁴⁰ Cohen, Stephen. "Forgiving Poverty," pp. 76.

⁴¹ Cohen, Stephen. "Forgiving Poverty," pp. 68.

While generalized debt relief was palatable to the governments of developed countries, creditors and debtor sovereigns found very little common ground over proposals to directly restructure existing ad hoc debt machinery. At an October 1978 meeting of UNCTAD's Intergovernmental Group of Experts on Debt and Development Problems of Developing Countries, the Group B developed countries insisted that the Paris Club could be improved iteratively without the need for further UN negotiations. Unsurprisingly, the G-77 countered with a campaign for new, permanent fixtures, including "an independent forum—which does not consist only of creditors—[that] could be given responsibility for supervising the negotiations concerning the debt reorganization."⁴² The developing countries envisioned existing machinery, including the Paris Club and the International Monetary Fund, as attachments to a new implementing institution cemented in international law. Such creditor clubs would provide technical expertise and institutional memory for the executing organization, although their ability to act on debt rescheduling and economic readjustment preferences would be severely curtailed.⁴³

The G-77's conception of permanent machinery, culminating in the International Debt Commission (IDC) proposal and the Arusha Programme for Collective Self-Reliance and Framework for Negotiations, represented a return to the 1971 Lima Declaration's emphasis on an economically sensitive, UNCTAD-driven debt workout regime. Some of the most important (and largely contested)

⁴² United Nations Conference on Trade and Development. Trade and Development Board. *Elaboration of Detailed Features for Future Operations Relating to Debt Problems of Interested Developing Countries: Note by the UNCTAD Secretariat*. TD/B.AC.28/2. Geneva. 1978. Print. pp. 3-5.

⁴³ Rieffel, L. *Restructuring Sovereign Debt*. pp. 143.

features of this model included a “comprehensive treatment” that required problems with both official and private debt to be addressed so that it would “no longer be necessary for a debtor country to go to a succession of meetings each dealing with individual aspects of its debt problem.”⁴⁴ Other elements demanded that all institutional arrangements for debt negotiations occur outside the agency of a country or particular group of countries, effectively relegating the Paris Club, the IMF, and other creditor forums to observer status. Furthermore, the G-77 asserted that any adjustment package constructed by a new permanent institution would have to be “carefully designed so that within a given time the package of measures properly implemented would lead the debtor developing countries back to a development path consistent with the minimum rates of growth endorsed by the international community.”⁴⁵ This last stance alarmed creditors who feared that economic crises could be used as excuses to repudiate developing country debts altogether.

At the 1979 UNCTAD V meeting in Manila, the International Debt Commission suffered a failure to launch. Led by Michel Camdessus, then the chairman of the Paris Club, the developed countries compiled a paper on “features to guide negotiations” that explicitly ruled out the need for a permanent debt restructuring forum. With G-77 and creditor interests solidified around two incompatible proposals, both the developed countries’ policy preferences and the

⁴⁴ United Nations Conference on Trade and Development. Trade and Development Board. *Report of the Intergovernmental Group of Experts on Debt and Development Problems of Developing Countries*. TD/B/AC.28.3. Geneva. 1978. Print. pp. 3-5.

⁴⁵ United Nations Conference on Trade and Development. Trade and Development Board. *Report of the Intergovernmental Group of Experts*. pp. 5.

IDC were submitted without comment to the UNCTAD Trade and Development Board.⁴⁶ The effective stonewalling of the G-77 terminated the North-South Dialogue, bringing a lengthy negotiation process to a quick conclusion and ending the immediate possibility of an existential threat to the Paris Club and the ad hoc system of debt management.

Despite the seeming victory of creditor interests over debtor sovereigns in the UNCTAD battle, it is not clear that sustained resistance on the part of developed countries was the only significant reason for disrupting the G-77's momentum. By the late 1970s, support for both enhanced debt relief and an IDC-like regime had begun to dry up within the G-77. Cohen writes that Mexico and Brazil, developing countries with close ties to American and European creditors, "made no effort to disguise their disdain for generalized debt relief" and sat on the sidelines when the IDC was first formulated.⁴⁷ Eric Helleiner contends that a larger cohort of wealthier G-77 members "expressed concerns that the endorsement of debt restructuring and debt relief might discourage future capital flows to the developing world."⁴⁸ Such concerns resulted in the G-77 withdrawing its support for the IDC in 1980 and foreshadowed the prevalence of capital flight concerns up to the International Monetary Fund's Sovereign Debt Restructuring Mechanism (SDRM) proposal. The G-77's internal breakdown also revealed that debtor countries, while generally united in opposition to less efficient aspects of ad hoc debt management, constituted a wide

⁴⁶ Rieffel, L. *Restructuring Sovereign Debt*. pp. 145-146.

⁴⁷ Cohen, Stephen. "Forgiving Poverty," pp. 73.

⁴⁸ Helleiner, Eric. "The Mystery of the Missing Sovereign Debt Restructuring Mechanism." *Contributions to Political Economy*, Vol. 27 (1), 2008. Print. pp. 105.

variety of economic and political systems with very different policy perspectives.⁴⁹ This made a post-IDC challenge to the Paris Club an increasingly remote possibility as the Latin American debt crisis of the 1980s and the global shift from loans to bonds altered international financial practices.

The legacy of the UNCTAD debt debate outpaces its substantive accomplishments. Rieffel writes that “the experience of the North-South debate suggests that the proponents of creating permanent machinery are unlikely to prevail,” although challenges to the Paris Club and creditor institutions remain dominant political goals for indebted sovereigns to this day.⁵⁰ What changes came out of the 1970s amounted to cosmetic effects: developed countries agreed to allow an UNCTAD observer to attend all Paris Club negotiations in a bid to increase the transparency of debt restructurings, the Paris Club secretariat agreed to provide more up-front expectations and guidelines to potential clients, and the negotiations venue was moved from the French Treasury to a more politically neutral site.⁵¹ Ironically, UNCTAD’s lasting impact was to begin a process of codifying already established ad hoc assumptions, effectively acceding to the “principles and procedures that had guided the Paris Club negotiations during its first twenty years

⁴⁹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 146-149.

⁵⁰ Rieffel, L. *Restructuring Sovereign Debt*. pp. 148.

⁵¹ As fate would have it, the “neutral site” the secretariat had in mind was none other than the French International Conference Center near the Arc de Triomphe – the former headquarters of the Gestapo during the Nazi occupation of France. This diplomatic *faux pas* was “rectified” when the negotiations were again relocated to the new French Treasury in the Bercy district of Paris, a decision that nullified the Paris Club’s original intentions. See “Paris Club.” United Nations Conference on Trade and Development, n.d. Web. 25 Jan. 2016. [unctad.org/en/Pages/Debt and Development Finance/Paris-Club.aspx](http://unctad.org/en/Pages/Debt%20and%20Development%20Finance/Paris-Club.aspx).

in a UN resolution.”⁵² The result was a downplaying of debt issues in the UN’s subsequent development programs, with emphases placed on increasing new aid flows and establishing IMF special drawing rights for developing countries rather than giving the green light for international sovereign debt reforms.⁵³

II. Argentina I: The Road to Meltdown

Even as the North-South Dialogue faded away, with debtor countries grudgingly accepting the role of the Paris Club as a forum for efficient – if not always long-lasting – debt rescheduling, a different type of threat to the international financial system started to emerge: bank lending to developing countries, driven by optimism over the relatively advanced economies of the heaviest borrowers, was rapidly becoming less sustainable. The oil shock of 1979-1980 and the decision of the U.S. Federal Reserve to increase the Federal Funds rate resulted in a commodities price collapse and severely curtailed exports from countries in Latin America and Asia.⁵⁴ Such economic stagnation not only confirmed that debt repayments would be unlikely, but also revealed the overexposure of major banks to regions that, until recently, were considered to possess only moderate risk. Michael Bowe and James Dean observe, for example, that by the Mexican crisis of 1982, U.S.

⁵² Schneider, Benu. “Clubbing in Paris: Is Debt Sustainability an Illusion?” Workshop on Debt, Finance, and Emerging Issues in Financial Integration. 6 April 2008. Web. 20 Jan. 2016.
<http://www.un.org/esa/ffd/events/2008debtworkshop/papers/Benu-Schneider-Paper.pdf>.

⁵³ Cohen, Stephen. “Forgiving Poverty,” pp. 76.

⁵⁴ Rieffel, L. *Restructuring Sovereign Debt*. pp. 154.

banks would have deprived themselves of essentially all available capital by writing off just 30% of their outstanding developing country loans.⁵⁵

One previously “safe” loan recipient was Argentina, which, like most South American countries, had used external borrowing to help finance high aggregate demand. However, compared to its Southern Cone neighbors such as Chile and Uruguay, Argentina continued to suffer from an import substitution legacy that left it with sizeable government spending and crowded-out private investment. In the past, particularly when dealing with the first oil squeeze of the early 1970s, Argentina’s structural weaknesses had been mitigated by lending from American and British banking institutions; by the 1980s, it was clear that ongoing public sector expenditure, combined with inflationary pressure from borrowing, meant that the Argentine state would face default unless creditor governments provided interim help with new debt servicing arrangements.

The international response to Mexico’s crisis hinted at a way out for Argentina. Taking the lead along with the IMF, the G-7 creditor countries realized that Mexico’s economic condition required both emergency liquidity and high-level negotiations with the IMF to initiate a recovery program. Rieffel notes that the cash gap was compensated via bridge financing, with the U.S. government and the Bank for International Settlements agreeing to provide \$1.85 billion in parallel bridge loans.⁵⁶ Concurrently, the IMF developed a \$3.7 billion three-year extended

⁵⁵ Bowe, Michael and James Dean. “Has the Market Solved the Sovereign-Debt Crisis?” Princeton Studies in International Finance, Aug. 1997. Print. pp. 3-6.

⁵⁶ Rieffel, L. *Restructuring Sovereign Debt*. pp. 158.

arrangement with Mexican finance minister Jesus Silva Herzog.⁵⁷ Unlike previous restructuring arrangements, in which commercial banks had been free to conclude workouts bilaterally, the IMF used the creation of a Mexican stabilization program to establish a baseline for banks' involvement in any restructuring deal. Creditor institutions holding nearly \$32 billion in Mexican debts were required to restructure \$20 billion in principal payments while simultaneously extending \$5 billion in new loans in order for the IMF plan to go into effect.⁵⁸ The early Latin American crisis thus witnessed a major shift in the activities of international financial institutions, with lending to restructuring countries becoming effectively involuntary for a temporary period of time. The compromise – as well as the reason such IMF strong-arming was palatable to private actors – was that the banks could iterate within defined parameters to achieve a mutually acceptable outcome for creditors and debtors.

By fashioning a network of creditor governments, banks, and debtors into a stepwise pattern of financing and restructuring, the IMF set off a flurry of renegotiations between 1982 and 1984. Bank Advisory Committees (synonymous with the London Club), usually chaired by U.S. fixtures such as Citibank and Bank of America, ensured that creditors could enforce any collective decisions, and “virtually all of the deals concluded after the Mexican crisis were closely linked to IMF-supported adjustment programs” that gave a “green light” for private arrangements.⁵⁹ Argentina's case was no exception. In addition to spiraling inflation,

⁵⁷ Rieffel, L. *Restructuring Sovereign Debt*. pp. 158.

⁵⁸ Kraft, Joseph. *The Mexican Rescue*. New York: Group of 30, 1984. Print. pp. 51.

⁵⁹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 159.

the country was faced in 1983 with the overthrow of its military junta and a lack of access to international capital markets as a result of its unsuccessful war in the Falkland Islands. Furthermore, most of its outstanding obligations were couched in extended single-bank loans, meaning that without a strong negotiation mechanism there was significant potential for a creditor holdout scenario.⁶⁰ Just as with Mexico, Argentina's creditors were informed by IMF Managing Director Jacques de Larosiere that the Fund "would not commit its resources under an adjustment program until the banks had increased their exposure" to the beleaguered country.⁶¹

Argentina's eventual deal, a lengthy three-year process, made extensive use of the London Club to ensure that multilateral reschedulings and debt relief efforts were compliant with the new ad hoc framework for Latin American debt management. In January and August of 1983, Argentina secured \$1.8 billion in direct assistance from debt-holding banks and opened the door for a multiyear rescheduling agreement, or MYRA, that included on-lending and trade facility options for further commitments of new money.⁶² Along with Mexico, Argentina's case differed from the London Club norms that had been established following Zaire's 1976 restructuring. Rather than having creditor banks devise a single (and often complex) contract representative of collective creditor interests, the Argentine negotiations gave London Club members enough leeway to come to several separate contractual agreements with the debtor country. Additionally, whereas past London

⁶⁰ Rieffel, L. *Restructuring Sovereign Debt*. pp. 159-160.

⁶¹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 158.

⁶² Haggard, Stephen and Robert Kaufman, "The Politics of Stabilization and Structural Adjustment," in *Developing Country Debt and Economic Performance*, Vol. 1. Chicago: University of Chicago Press, 1989. Print. pp. 212.

Club arrangements had only informally operated in tandem with Paris Club decisions, the creditor banks looked to public lenders to gauge private liabilities and even shared ideas (such as MYRAs) for the Paris Club to experiment with “in a more restrictive form.”⁶³

While the initial fixes up until 1984 managed to reduce the severity of the Latin American debt crisis, Christine Bogdanowicz-Bindert writes that the birth of a “restructuring market” for private creditors and debtor sovereigns “concealed some troubling underlying trends for the world economy.”⁶⁴ Argentina exemplified the ongoing struggles of debtors: commodity prices remained at an “unprecedented low level,” while an IMF-inspired austerity program to convert public assets to private ownership, phase out subsidies, and slow the country’s credit growth rate had failed to improve debt servicing despite an anticipated boost in exports via currency devaluation.⁶⁵ The 1985 Baker Plan, or the Program for Sustained Economic Growth, identified Argentina as a recipient for new financing in order to improve the country’s economic growth prospects, although the growing practice of “concerted lending” forged by the IMF rendered the Baker Plan’s more ambitious goals difficult to implement. In particular, the Plan’s objective of providing \$20 billion in private financing over a three-year period, possibly augmented by a U.S. trust capable of concessionary lending, split creditor banks into a European group that favored interest capitalization and an American group that feared the U.S. regulatory system

⁶³ Harrison, Glennon. *Rescheduling International Debt*. Washington: Library of Congress, Congressional Research Service, 1989. Print. pp. 6.

⁶⁴ Bogdanowicz-Bindert, Christine. “The Debt Crisis: The Baker Plan Revisited.” *Journal of Interamerican Studies and World Affairs*, Vol. 28(3), 1986. Print. pp. 33-34.

⁶⁵ Bogdanowicz-Bindert, Christine. “The Debt Crisis: The Baker Plan Revisited.” pp. 35.

would make the capitalization of interest quite costly.⁶⁶ With regulatory and tax treatment variations preventing the same type of cohesion witnessed from 1982-1984, it is doubtful that the Baker Plan achieved its objectives. Instead, Rieffel argues that “the main contribution of the plan may have been to buy time for countries to introduce essential policy reforms and for banks to build up their reserves against eventual losses.”⁶⁷

Argentina did not sign a Baker Plan deal until August 1987. At that point, creditor banks had already begun to move on from the Baker Plan and were experimenting with different forms of debt restructuring that incorporated debt reduction. Argentina’s restructuring package previewed a set of “menu options” that reflected creditor banks’ newfound flexibility, including cofinancing with the World Bank, new-money bonds, and an ultimately unsuccessful exit bond that featured a below-market interest rate.⁶⁸ Perhaps more importantly, the Argentine agreement emphasized the need for a creditor country with strong political capital to spearhead broader debt reduction efforts if developing country growth remained arrested under menu option-based ad hoc contracts.

The dissolution of the Baker Plan also gave rise to the concept of an “exit strategy” for developing countries, as articulated by U.S. Treasury Secretary Nicholas Brady in 1989.⁶⁹ Unlike previous debt management attempts, the Brady Plan prioritized the political commitment of the United States over innovations in

⁶⁶ Rieffel, L. *Restructuring Sovereign Debt*. pp. 163-164.

⁶⁷ Rieffel, L. *Restructuring Sovereign Debt*. pp. 164.

⁶⁸ Rieffel, L. *Restructuring Sovereign Debt*. pp. 165.

⁶⁹ Unal, Haluk, Asli Demirguc-Kunt and Kwok-Wai Leung, “The Brady Plan, the 1989 Mexican Debt Reduction Agreement, and Bank Stock Returns in the United States and Japan.” The World Bank International Economics Department, Nov. 1992. Print. pp. 3.

existing debt contracts and allowed for relatively large debt reductions at the outset of the Plan's implementation. Argentina's Brady Plan deal, completed in April 1993, was midwifed by the London Club and granted the country a 35% reduction in its debts (a sum of roughly \$10 billion).⁷⁰ Like many other Brady contracts, Argentina's agreement encapsulated input from a Bank Advisory Committee that focused on reconciling the different regulatory regimes of participating creditor banks while maintaining financial equivalence for any debt reduction strategy. Also similar to other middle-income developing countries, Argentina's case marked a transition from bank loans to bonds. Having declared a general moratorium on bank debt, and still recovering from a default on internal debts in 1989, the Argentine government was able to issue Brady Bonds as part of a restructuring deal that saw the country's non-performing loans converted into par bonds, discount bonds, and cash payments. The result of this switch was a workout process that "left relatively few scars to interfere with new borrowing from market sources" by pairing debt reduction with Argentina's unique economic circumstances.⁷¹ Ideally, the success of this scheme meant that creditors could better judge the performance of the Argentine state and economy – benchmarked by the gradual abandonment of inward-looking, government-driven growth models – by observing the interest rate spreads on Brady Bonds.

The Brady Plan established bonds as the dominant mechanisms for Argentina's debt management practices in the 1990s. Nevertheless, other elements of the Brady Plan's success, including a cooperative approach among debtor

⁷⁰ Rieffel, L. *Restructuring Sovereign Debt*. pp. 172.

⁷¹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 176.

countries, multilateral agencies and international financial institutions, bilateral donor agencies, and private lenders to construct and enforce debtor-specific workouts, did not persist in the new status quo. A portfolio investment boom in the early 1990s, coming on the heels of renewed confidence in Latin American markets, contributed to high levels of corruption and provided incentives for the Argentine government to increase public debt without demonstrating that it could service its increasing obligations.⁷² Such behavior was amplified by the IMF's willingness to lend to Argentina and elongate payment schedules in exchange for, as Arthur MacEwan later asserted in a 2002 *Foreign Policy in Focus* article, "leverage to guide Argentine policymakers as they adopted the IMF's conservative economic agenda."⁷³ The IMF's increased "escalation of commitment" to Argentina's financial affairs corresponded to a lack of technical oversight in Argentina's domestic policies and the dissolution of informal debtor-creditor consortiums arranged during the 1980s. Argentina's convertibility regime, in which the peso was pegged to the dollar at a one-to-one ratio, was a sore point in the relationship between the Fund and creditor banks: the Fund grudgingly accepted the regime as part of a broader policy package, while many private creditors feared (correctly) that Argentina's inability to allow for real exchange rate adjustment would create misaligned monetary policy and suppress growth as the U.S. dollar strengthened.⁷⁴ The IMF's treatment of creditor commitments was also unusual given recent precedent. Even as the organization

⁷² Kehoe, Timothy. "What Can We Learn from the 1998-2002 Depression in Argentina?" Federal Reserve Bank of Minneapolis, Sept. 2002. Web. 23 Feb. 2016. <http://www.econ.umn.edu/~tkehoe/papers/argentina.pdf>. pp. 1-2.

⁷³ MacEwan, Arthur. "The IMF and Argentina's Spiraling Crisis." *Foreign Policy in Focus*, 1 Sept. 2001. Web. 26 Jan. 2016. http://fpif.org/the_imf_and_argentinas_spiraling_crisis/.

⁷⁴ International Monetary Fund. "The Role of the IMF in Argentina, 1991-2002." Independent Evaluation Office of the IMF, July 2003. Print. pp. 5-6.

increased its financial support through the end of the 1990s, when Argentina began to face concurrent banking and currency crises, the Fund “opted... for a relatively confrontational approach to burden sharing by private creditors,” attempting to corral bondholders into absorbing losses rather than selling their holdings.⁷⁵

By 2000, the strains among the Argentine government, the IMF, and private creditors reached a breaking point. A \$40 billion readjustment package, of which the IMF contributed \$14 billion, was too late to hold back the tide of spooked bondholders; a weakening U.S. economy, combined with unstable domestic support for the economic programs proposed by Argentine economics minister Domingo Cavallo, catalyzed the movement of the country’s bond spreads from junk status to default territory.⁷⁶ Now fully at odds with private creditors, the IMF, spurred on by the G-7 governments, continued to commit resources to Argentina until the end of 2001. At that point, a Brookings study notes, the Fund “refused to disburse a \$1.24 billion tranche” of an already-instituted financing program “when it became clear that the agreed program was no longer sustainable.”⁷⁷

Argentina’s December 2001 default on its public debt, at roughly \$132 billion, went down in history as the biggest sovereign default on record. The severity of Argentina’s external obligations – representing almost one seventh of all money borrowed by developing countries at the time – was compounded by a domestic financial crisis brought on by a November 2001 bank run and the over-

⁷⁵ Rieffel, L. *Restructuring Sovereign Debt*. pp. 177.

⁷⁶ Cavallo, Domingo. “The Fight to Avoid Default and Devaluation.” Domingo Cavallo, 25 April 2002. Web. 1 Feb. 2016. http://www.cavallo.com.ar/wp-content/uploads/the_fight.pdf. pp. 1.

⁷⁷ Graham, Carol and Paul Masson. “The IMF’s Dilemma in Argentina: Time for a New Approach to Lending?” Brookings Institution Policy Brief, Nov. 2002. Print. pp. 3.

borrowing of “quasi-currencies,” or complementary currencies issued by regional governments to account for cash shortages.⁷⁸ What had once looked like a promising turnaround following the Latin American crisis of the 1980s now revealed the inability of national leaders and international financial institutions to diagnose Argentina’s underlying economic trends and account for its deep indebtedness.

The two decades between the very beginnings of the Latin American debt crisis and Argentina’s spectacular 2001 default are notable as a period in which ad hoc mechanisms reigned without significant political challenges. Whether through a lack of coordination among various developing country governments, many of which viewed creditor inflows as the chief drivers of domestic growth, or the dominance of bank loans rather than public sector instruments (the domain of the Paris Club), most debtor countries seemed content to incorporate themselves into a series of case-by-case negotiations. This fact did not prevent the proposal of new mechanisms, some with direct linkages to the earlier UNCTAD battle: Princeton University’s Peter Kenen proposed the creation of an International Debt Discount Corporation in 1983 for the purpose of “reduc[ing] the developing countries’ debt burdens so that they do not have to pursue domestic policies that jeopardize internal stability and interfere with worldwide recovery.”⁷⁹ Kenen’s Corporation straddled the line between private sector realities and earlier demands for an international debt arbiter, culminating in a workout process that issued long-term

⁷⁸ “Timeline: Argentina’s Economic Crisis.” *The Guardian*, 20 Dec. 2001. Web. 14 Feb. 2016. <http://www.theguardian.com/world/2001/dec/20/argentina1>.

⁷⁹ Kenen, Peter. “Forum; A Bailout Plan for the Banks.” *The New York Times*, 6 March 1983. Web. 16 Jan. 2016. <http://www.nytimes.com/1983/03/06/business/forum-a-bailout-plan-for-the-banks.html>.

bonds to banks at a discount while serving as a G-7 “successor claimant” to creditor banks.⁸⁰ In 1988, the U.S. Congress directed the executive branch to take steps toward establishing an “International Debt Management Authority” that would make debt reduction palatable for American creditors.⁸¹ While these ideas never made much of a policy impact, they represented a change in the disposition of creditor interests toward countries suffering from debt overhangs.

One institution that did emerge from the Latin American crisis was the Institute of International Finance (IIF), an organization dedicated to monitoring and evaluating bank exposure in individual developing countries. Essentially acting as a “private IMF,” the IIF aspired to supply member banks with collective analyses of private capital flows and act as an accessible risk management tool for regional financial centers that lacked the skill sets or institutional history to make accurate risk assessments.⁸² While somewhat tangential to bank loan debt management – the IIF later accepted insurance companies, mutual funds, and other nonbank financial firms as members focusing on broader policy issues in the international financial system – the organization was encouraged by the IMF as a way to establish “private sector involvement in crisis prevention and resolution” that ensured coherent responses in future debt deals.⁸³

Argentina’s descent into financial oblivion at the end of the 1990s demonstrates that a cohesive strategy for debt management did not hold up in the post-Brady international financial system. A return to bonds meant that both the

⁸⁰ Kenen, Peter. “Forum; A Bailout Plan for the Banks.”

⁸¹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 169.

⁸² Rieffel, L. *Restructuring Sovereign Debt*. pp. 160-161.

⁸³ Rieffel, L. *Restructuring Sovereign Debt*. pp. 161.

manner of collaboration and the identity of the country's creditors changed almost overnight: as Argentina's financial situation worsened, European and Asian retail investors took the place of institutions, while speculators dove into defaulted foreign bonds. These new actors were less aware of developing country risks than their predecessors and had less reason than commercial banks to collaborate in the absence of an evident crisis.⁸⁴ The IMF was consequently troubled by its inability to rope Argentina's new investors into a rescue strategy, especially since newcomer creditors were more likely to abandon their investments than see them through a Fund-directed economic program. Additionally, the IMF's conditions had come under heavy fire from economists and policy leaders who interpreted the Fund's actions as encouraging too much "moral hazard." This view was especially popular in the U.S. Congress, which argued that the IMF's emergency loans "undermine[d] market discipline and encourage[d] imprudent lending since private creditors are not made to bear the consequences of the risks they take."⁸⁵ The Meltzer Report, a scathing indictment of the Fund's place in existing international financial architecture, called for "severely downsizing and limiting the IMF's role" in future solvency and liquidity crises, especially for countries like Argentina that had significant ties to American lenders.⁸⁶

Seemingly besieged by the circumstances, and facing pressure from the political establishment of creditor nations rather than developing country

⁸⁴ Rieffel, L. *Restructuring Sovereign Debt*. pp. 188-189.

⁸⁵ Hornbeck, J.F. "IMF Reform and the International Financial Institutions Advisory Commission." CRS Report for Congress, 5 Jan. 2001. Print. pp. 5.

⁸⁶ Hornbeck, J.F. "IMF Reform and the International Financial Institutions Advisory Commission." pp.6-7.

governments, the IMF began to seriously consider and present its own proposals for internationalized insolvency procedures and global debt reform. In this respect, while traditional creditor-debtor fault lines did not emerge in cases such as Argentina's collapse, the sum total of institutional and epistemic concerns drove the IMF to conjure up its own variation of a permanent sovereign debt restructuring mechanism.

III. The Sovereign Debt Restructuring Mechanism, 2001 - 2003

The early 2000s faced a different sovereign debt challenge than the political back-and-forth of the 1970s and the private bank overexposure of the 1980s. While the players remained largely the same – the Group of 77 and its allies continued to eye the ad hoc system warily, while OECD nations and institutions such as the Paris Club persisted as dominant fixtures in debt rescheduling agreements – other familiar organizations, such as the International Monetary Fund, found themselves advocating for a different set of rules. In 2001 and 2002, IMF Deputy Managing Director Anne Krueger proposed the drafting of an international treaty to amend the Fund's Articles of Agreement and create an international sovereign bankruptcy court "outside the auspices of the IMF."⁸⁷ While Krueger's initial plan called for sovereign debt issued under domestic law to be applied to the new court's jurisdiction on a case-by-case basis, she acknowledged the capacity of her proposal to override national laws in crisis scenarios. In an almost immediate response, the United States' Undersecretary of the Treasury for International Affairs, John Taylor,

⁸⁷ Ziai, Aram. "The rise and fall of the SDRM proposal in the IMF." *Hamburg Review of Social Sciences*, Vol. 6 (1), 2012. Print. pp. 2.

issued another proposal for a “soft” international regime, advocating for the “widespread, semi-voluntary inclusion of a set of workout clauses in cross-border financial contracts.”⁸⁸ Even though Taylor appeared to distance the U.S. Treasury from Krueger’s ideas, his goal of couching common international principles in contractual terms appeared to signal growing interest among the major creditor countries in making alterations to the existing ad hoc approach (in fact, Treasury leadership was split on the issue).⁸⁹ Aspects of Krueger’s and Taylor’s work would find their way into a sovereign debt restructuring mechanism (SDRM) framework by the beginning of 2003.

As Brookings’s Edwin M. Truman remarked the week after the Krueger proposal’s public debut, the implementation of an “SDRM-lite,” while not revolutionary, was a significant evolution toward a permanent sovereign debt regime.⁹⁰ What made the prospect of a treaty-based system so unique in this case was not the rise of exogenous political pressures from developing countries, as in the North-South Dialogue. Nor was it the perceived need for debt forgiveness when dealing with the poorest countries, as had been the case in the 1970s and again with the implementation of the Heavily Indebted Poor Countries Initiative (HIPC);⁹¹ indeed, Taylor responded to market criticism of his proposal by asserting “the aim of reforming the sovereign debt restructuring process is not to reduce the incentives

⁸⁸ Truman, Edwin. “Debt Restructuring: Evolution or Revolution?” *Brookings Papers on Economic Activity*. The Brookings Institution, 2002. Print. pp. 342-343.

⁸⁹ Treasury Secretary Paul O’Neill was, for a time, an open advocate for a “sovereign bankruptcy” system, while other Treasury officials had indicated in nonofficial forums that they would be amenable to a mild set of principles for sovereign debt restructurings (see Aram Ziai’s discussion of pre-proposal policy stances).

⁹⁰ Truman, Edwin. “Debt Restructuring: Evolution or Revolution?,” pp. 342.

⁹¹ Callaghy, Thomas. “Innovation in the Sovereign Debt Regime: From the Paris Club to Enhanced HIPC and Beyond,” pp. 26.

that sovereign governments have to pay their debts in full and on time.”⁹² Instead, a combination of market conditions and changing perspectives among a handful of policy officials enabled the SDRM to come to fruition as a serious alternative proposal to the ad hoc method of debt restructuring.

By the time the Fund’s SDRM concept had been introduced, the IMF’s economic prescriptions and loan assistance programs had already been severely tested by successive Asian, Latin American, and Russian debt crises. While rejecting Jeffrey Sach’s argument that many of the debtor nations required a “fresh start,” the IMF feared that countries in the immediate post-crisis atmosphere were poorly prepared to promptly address their external financial situations, especially due to a lack of political will or a discrepancy between national governments’ policy responses and the expectations of private creditors.⁹³ The official sector was acutely aware of the complications and moral hazard involved in workouts that were unaccompanied by defaults, since creditors in those scenarios often turned to the IMF itself to ensure a sovereign’s ability to meet its obligations. Meanwhile, developing and “emerging market” countries – particularly those that had recently adopted an IMF program or accepted restructuring terms – put increasing pressure on the Fund and creditor nations to discourage debt holders from demanding a higher risk premium after a workout process had been completed. These countries, notably Argentina, Brazil, and Turkey, looked to the argument put forth by Anna

⁹² Truman, Edwin. “Debt Restructuring: Evolution or Revolution?,” pp. 344-345.

⁹³ International Monetary Fund, “Sovereign Debt Restructuring – Recent Development and Implications for the Fund’s Legal and Policy Framework.” International Monetary Fund Inter-Departmental Report, 26 April 2013. Web. 2 Dec. 2015. www.imf.org/external/np/pp/eng/2013/042613.pdf. pp. 4-5.

Gelpern and Robert Gray, among others, that steps made to regularize payment expectations would benefit both capital-deprived economies and their skittish creditors. The same sovereigns, however, broke ranks with Gelpern and Gray on the question of a structured regime, preferring an alternative structured approach to the current state of “IMF dominance.”⁹⁴ The Fund thus found itself in the midst of an unusual confluence of forces, one emanating from its own musings that the current ad hoc regime was flawed and the other emerging from debtor sovereigns, creditors, and economists who desired a streamlined approach to workouts – even if they differed in what a “streamlined” system was supposed to look like.

It is possible that an SDRM proposal, lacking the appropriate leaders to will it into existence, would never have surfaced even in a turbulent market atmosphere. Remarkably, the emergence and relative longevity of the 2003 SDRM proposal appears to be almost entirely attributable to two individuals: the IMF’s Anne Krueger and U.S. Treasury Secretary Paul O’Neill. The fact that the SDRM was Krueger’s initiative is illustrated by the strong response it elicited among the IMF’s traditional cohort of supporters, including the Institute of International Finance, the Emerging Markets Traders Association, and several large banks and institutional investors.⁹⁵ An intense lobbying campaign on behalf of banks and bondholder associations succeeded in walking back Krueger’s proposal, to the effect that by the end of 2002 the IMF had agreed to adopt John Taylor’s emphasis on collective action

⁹⁴ Gelpern, Anna and Robert Gray. “Beyond Balancing the Interests of Creditors and Developing States.” *Proceedings of the Annual Meeting of the American Society of International Law*. The American Society of International Law, 2 April 2003. Print. pp. 222-223.

⁹⁵ Dizard, John. “Bankruptcy and the business approach.” *The Financial Times*, 4 Oct. 2002. Web. 2 Dec. 2015. <http://search.proquest.com/docview/249256854?pq-origsite=summon>.

clauses even as it maintained such clauses were insufficient to resolve sovereign debt crises. A review of previous discussions about reforming the ad hoc system demonstrates just how easily Anne Krueger was able to rock the boat: while the response of the G-7 nations to the Asian financial crisis, encapsulated by the 1999 Cologne summit's Report of the Finance Ministers, included consideration of "a framework for private sector involvement in crisis resolution," the official sector had been extremely careful to excise mentions of uniform international principles or treaty-mediated resolution mechanisms.⁹⁶ Now, Krueger had not only articulated an international insolvency procedure either within or midwived by the IMF, she had hit on themes such as stays on litigation, equal treatment of creditors, preferred creditor status to encourage private lending, and even temporary exchange controls to discourage capital flight as ways to ensure that the ad hoc system would not "require the international community to bail out the private creditors."⁹⁷ Even IMF critic Kunibert Raffer, commenting on a position that seemed closer to UNCTAD's past stances than the IMF's own behavior, had to admit that Krueger's proposal represented a "sudden and unexpected U-turn" for the international financial system.⁹⁸

Krueger may have had a kindred spirit in U.S. Treasury Secretary Paul O'Neill, whose September 2001 hearing before the Committee on Banking, Housing and Urban Affairs in the U.S. Senate surprised the international financial system and

⁹⁶ Crean, John. "Sovereign Debt Restructuring Mechanisms – Unintended Consequences of the 2002 IMF Proposal." *RePEc Working Papers Series*, April 2012. Print. pp. 8.

⁹⁷ Ziai, Aram. "The rise and fall of the SDRM proposal in the IMF," pp. 6-7.

⁹⁸ Raffer, Kunibert. *Debt Management for Development: Protection of the Poor and the Millennium Development Goals*. Cheltenham: Edward Elgar, 2010. Print. pp. 42.

O'Neill's own staff when the Secretary called for "an agreement on an international bankruptcy law, so that we can work with governments that, in effect, need to go through a Chapter 11 reorganization instead of socializing the costs of bad decisions."⁹⁹ Like Krueger, O'Neill was troubled by what he saw as bailouts to private creditors rather than sustainable restructuring practices; he was further motivated by his moral opposition to "giving money to government ministers with six limousines" and may have seen the IMF's existing assistance as wasteful.¹⁰⁰ His two biggest contributions to the SDRM's development were the partial formulation of a formal bankruptcy procedure, adopted and later dropped by the IMF under pressure from both creditor and debtor governments, and, perhaps more importantly, the creation of a previously nonexistent political space for the SDRM's genesis via his temporary suspension of the U.S. veto on work toward a permanent debt regime.¹⁰¹ But O'Neill was out of step with the rest of the Treasury and, for that matter, the policies of the U.S. administration writ large. Taylor's proposal for a series of cross-border collective action clauses, a far cry from O'Neill's advocacy for a Chapter 11 bankruptcy procedure for sovereigns, reveals as much; additionally, a 2010 report by former Assistant Secretary for the U.S. Treasury Randall Quarles hints that O'Neill was not clear, at least publicly, on whether he truly supported a bankruptcy regime or simply wanted to expand restructuring options for bond covenants while reducing the need for loan assistance from international financial

⁹⁹ Mattli, Walter and Ngaire Woods. *The Politics of Global Regulation*. Princeton: Princeton University Press, 2009. Print. pp. 100.

¹⁰⁰ Dizard, John. "Bankruptcy and the business approach."

¹⁰¹ Mattli, Walter and Ngaire Woods. *The Politics of Global Regulation*, pp. 100-102.

institutions.¹⁰² His seeming willingness to charge ahead with the SDRM proposal meant that by April 2003, the United States government was entirely dislodged from the IMF's plan.

One would assume, given developing countries' past preferences for a treaty-based or statutory regime, that Krueger and O'Neill would have been supported by the G-77 nations or the newly industrializing countries (NICs). Instead, by the fall of 2002, the emerging markets were decidedly against the SDRM. Mexico's Deputy Finance Minister, for example, fretted that "perception is substance... as long as there is a problem with the SDRM for the private sector, there is a problem for the issuer."¹⁰³ Disturbed by the reaction of creditor associations, banks, and institutional investors to the SDRM, even in a watered-down form, the developing countries were predisposed to take their cues from debt holders. The same trepidation about a post-restructuring capital squeeze that once motivated the NICs to seek a "streamlined" workout process now clashed with the IMF's proposal, leading Brad Setser to observe that "the concerns of private creditors were expressed by emerging markets active in the international market. Emerging economies warned against any steps – including granting sovereign debtors bankruptcy protection – that might upset the international bond market."¹⁰⁴ In this environment, even Taylor's collective action clause project was deemed too destabilizing. Such an aversion to stirring the waters of the international financial

¹⁰² Quarles, Randal. "Herding Cats: Collective-Action Clauses in Sovereign Debt – The Genesis of the Project to Change Market Practice in 2001 Through 2003." *Duke University Law Transcripts*. Duke University, 2010. Print. pp. 35.

¹⁰³ Ziai, Aram. "The rise and fall of the SDRM proposal in the IMF," pp. 10.

¹⁰⁴ Setser, Brad. "The Political Economy of the SDRM," pp. 16-17.

system marks a complete reversal from developing countries' 20th century pushes for a statutory regime.

In one sense, however, the emerging market countries' opposition to the SDRM resembled a traditional complaint of debtor nations. Supported by an activist community that perceived the IMF as a creditor-biased organization, debtor nations feared that the SDRM could sacrifice national sovereignty to the Fund, and, by extension, a country's debt holders.¹⁰⁵ Despite Krueger's reassurances that the SDRM would not subject domestic debts to the same treatments as external obligations, and despite the inclusion of a Dispute Resolution Forum (DRF) that placed restructuring contentions under a different third party mediator, developing countries were skeptical of a formal mechanism that appeared to have been minted by political foes. This was especially true of Argentina, which had been weighing the possibility of swapping its international sovereign bonds for domestic law instruments and desired to avoid blurring the international-domestic distinction.¹⁰⁶

By April 2003, the SDRM was effectively dead in the water. A persistent campaign from private financial actors had succeeded in eliminating an automatic stay of litigation from the final proposal, while decisions such as a temporary stay or the terms of a restructuring were allocated to a 75%-majority of represented creditors.¹⁰⁷ This iteration ensured that creditors would not be forced to accept any

¹⁰⁵ Ziai, Aram. "The rise and fall of the SDRM proposal in the IMF," pp. 8-10.

¹⁰⁶ Soederberg, Susanne. "The International Dimensions of the Argentine Default: The Case of the Sovereign Debt Restructuring Mechanism." *Canadian Journal of Latin American and Caribbean Studies*, Vol. 28 (55/56), 2003. Print. pp. 110-114,

¹⁰⁷ International Monetary Fund, "Proposed Features of a Sovereign Debt Restructuring Mechanism." The Legal and Policy Development and Review Departments of the International Monetary Fund, 12 Feb. 2003. Print.

changes to the current ad hoc system, rendering the SDRM toothless.¹⁰⁸ Wall Street and debtor pressures alike confirmed the proposal's death when it failed to attain a required majority of 85% in the IMF's Executive Board vote.¹⁰⁹

The sovereign debt restructuring mechanism saga serves as a pivot point in the fight between the existing ad hoc system and proponents of a treaty approach. On one hand, it demonstrated that the battle lines were not as clear as previously believed; the IMF's attempts to create a structured regime revealed that a permanent sovereign debt regime could represent an "evolution" from established ad hoc machinery rather than a "revolution" in international financial relations led by debtor countries and their allies.¹¹⁰ More importantly, the SDRM's collapse meant that most concerns about the existing ad hoc system were left unaddressed. One of Anne Krueger's motivations for the introduction of an SDRM had been her concern over a potential creditor holdout problem, witnessed in a 2000 dispute between Peru and the hedge fund Elliott Management. Without provisions to "prevent creditors from disrupting negotiations leading to a restructuring agreement by seeking repayment through national courts," Krueger worried that even contracts with enhanced collective action clauses would be susceptible to a holdout threat.¹¹¹

While dismissed at the time, since holdout litigation had yet to stall an entire

¹⁰⁸ Salmon, Felix. "SDRM finds few friends in the markets." *Euromoney*, Nov. 2002. Web. 12 Nov. 2015. <http://search.proquest.com/docview/198926282?pqorigsite=summon>; Beattie, Alan. "US set to block 'sovereign chapter 11' proposals." *The Financial Times*, 31 Mar. 2003. Web. 1 Dec. 2015. <http://search.proquest.com/docview/249376679?pq-origsite=summon>.

¹⁰⁹ Blustein, Paul. "'Bankruptcy' System for Nations Fails to Draw Support." *The Washington Post*, 2 April 2004. Web. 1 Dec. 2015. http://wx3zg9re3e.search.serialssolutions.com/?ctx_ver=Z39.88-2004; "SDRM is dead, and that's official." *Euromoney*, May 2003. Web. 3 Dec. 2015. <http://search.proquest.com/docview/198875114?pq-origsite=summon>.

¹¹⁰ Truman, Edwin. "Debt Restructuring: Evolution or Revolution?," pp. 342.

¹¹¹ Soederberg, Susanne. "The International Dimensions of the Argentine Default: The Case of the Sovereign Debt Restructuring Mechanism," pp. 119-120.

restructuring process, Krueger's observation would have strong implications for the ongoing Argentine debt workout.

The most profound result of the SDRM failure was the IMF's loss of face in the international financial community. Despite what seemed like widespread need for a reformed sovereign debt regime, the Fund – and specifically Anne Krueger - had interpreted broad disequilibrium as a catalyst for deeper political commitment to changing the system itself. Its commitment to the technical details of an SDRM when, as Brad Setser observes, it “need[ed] to communicate with national capitals,” made it seem out of touch with the nuances of creditor and debtor relations.¹¹² Furthermore, the sudden emergence of a formal proposal, to the extent that nearly every actor in the ad hoc regime was caught off guard, highlighted the question of whether a multilateral institution for sovereign debt was considered necessary by all but a select group of institutional and epistemic activists. The arrival of John Snow as O'Neill's replacement in the U.S. Treasury was a humbling reminder of the IMF's weakened status: Secretary Snow took it upon himself to declare that “it is neither necessary nor feasible to continue working on an SDRM” in a statement that revealed the capacity of the United States to unilaterally rein in the Fund.¹¹³ The IMF's subsequent reticence to take another sincere look at a permanent debt regime appears to have further extended the lifespan of the existing ad hoc system.

¹¹² Setser, Brad. “The Political Economy of the SDRM,” pp. 18.

¹¹³ Snow, John. “Statement by Secretary John W. Snow, United States Treasury.” The Meeting of the International Monetary and Financial Committee (IMFC), 12 April 2003. Web. 26 Nov. 2015. www.imf.org/external/spring/2003/imfc/state/eng/usa.htm.

IV. Argentina II: From Default to the UN's Basic Principles

Argentina's most recent sovereign debt struggles began in 2001, when a high external debt burden, an overvalued currency pegged to the U.S. dollar, and decreasing export competitiveness forced the Republic into the first of its two 21st century defaults. On Christmas Eve of that year, the interim Saá administration declared a payment suspension on foreign debt, triggering the first lawsuits by American investors in March 2002. When it became clear that the present value loss to investors in Argentine debt could exceed 90 percent, however, creditors switched from court rulings to creditor committees in the hopes of resolving coordination obstacles and minimizing the impact of a looming haircut.¹¹⁴ This approach, as Setser notes, made for interesting bedfellows: American, German, Italian, and Japanese interests sat at the same table as international institutional investors and Argentine pension funds. Particularly troubling for the stability of debt renegotiation was the fact that these creditor groups, cobbled together in a matter of months, included an unusually large number of retail investors and represented connections to over 90 outstanding debt instruments.¹¹⁵

Perhaps unsurprisingly, the period from 2003 to 2012 is characterized by an unusual lack of alignment between Argentina, its creditors, and the institutions responsible for facilitating the ad hoc restructuring process. The IMF is notable for its sidelined role: although the Fund had recently assumed responsibility for the negotiation of a medium term economic program to complement debt

¹¹⁴ Schumacher, Julian. "Sovereign Debt Litigation In Argentina: Implications of the *Pari Passu* Default." *Journal of Financial Regulation*, 2015. Print. pp. 1.

¹¹⁵ Schumacher, Julian. "Sovereign Debt Litigation In Argentina: Implications of the *Pari Passu* Default," pp. 1-2.

restructurings in Pakistan, Ukraine, Ecuador, Russia, and Uruguay, it established only minimum targets for Argentina to repay major international financial institutions and domestic debts.¹¹⁶ As a result, the content of the IMF's economic program for Argentina was left to whatever bargains could be attained between creditors and the debtor sovereign. In the post-SDRM world, the IMF's influence was further limited by the U.S. Treasury's stance that creditor-debtor negotiations could be hindered by the Fund's concurrent attempts to create new macroeconomic parameters. An April 12th, 2003 statement from Treasury Secretary John Snow to the IMF's International Monetary and Financial Committee made it abundantly clear that the United States no longer saw the IMF's mission in Argentina and other indebted countries as a primary avenue for successful debt workouts; instead, Secretary Snow advocated for "broad voluntary approaches" that included the implementation of collective action clauses for contracts covering external debts. Since, under this interpretation, the source of collective action problems "lies in the relationships and agreements of debtors and their creditors," the IMF would be relegated to helping negotiating parties "assume responsibility for the solution."¹¹⁷ In effect, this meant that the established "market system with IMF assistance" approach quickly evolved into the expectation that the Argentine Republic and its creditors would iron out the details among themselves.¹¹⁸

¹¹⁶ Diaz-Cassou, Javier, Aitor Erce-Dominguez, and Juan J. Vazquez-Zamora. "The Role of the IMF in Recent Sovereign Debt Restructurings: Implications for the Policy of Lending Into Arrears." *Documentos Ocasionales*. The Bank of Spain, 2008. Print. pp. 13.

¹¹⁷ Snow, John. "Statement by Secretary John W. Snow, United States Treasury."

¹¹⁸ Soederberg, Susanne. "The International Dimensions of the Argentine Default: The Case of the Sovereign Debt Restructuring Mechanism," pp. 119-120.

Nevertheless, even a soft-pedaled approach to IMF involvement in Argentina proved too odious for the debtor. By August 2004, less than a year after the Argentine government agreed to a three-year stand-by commitment from the IMF, the Republic announced that it would “suspend” its agreement with the Fund, forfeiting future temporary lending assistance.¹¹⁹ This decision led to the evaporation of IMF influence over the workout process for much of the next decade: Argentina’s 2005 and 2010 debt exchanges were conducted without IMF advice or involvement, and by 2013, when “holdout” creditors began to gain an upper hand in U.S. courts, the Fund’s role had been reduced to monitoring judicial opinions and warning against the empowerment of minority credit holders over national governments. When the Argentine government secured a deal with the Paris Club to resume debt payments and clear nearly \$9.7 billion in arrears, then-President Cristina Fernandez de Kirchner was able to gloat (with questionable accuracy) that it was “the first time that a country negotiates without the intervention of the International Monetary Fund.”¹²⁰

The Paris Club, for its part, appears to have played an indirect role in the disequilibrium of the ad hoc system prior to its arrangement with Argentina. As late as 2009, Paris Club member nations continued to insist that Argentina participate in an IMF program in exchange for debt restructuring.¹²¹ This did not, however,

¹¹⁹ International Monetary Fund, “Press Release: IMF Approves US\$12.55 Billion Three Year Stand-By Credit for Argentina.” International Monetary Fund Press Release No. 03/160, 20 Sept. 2003. Web. 1 Dec. 2015. www.imf.org/external/np/sec/pr/2003/pr03160.htm.

¹²⁰ Johnston, Jake. “Argentina Reaches Paris Club Debt Deal without IMF Intervention: Creditors Come Under Fire.” The Americas Blog, 30 May 2014. Web. 4 Dec. 2015. cepr.net/blogs/the-americas-blog/argentina-reaches-paris-club-debt-deal-without-imf-intervention-creditors-come-under-fire.

¹²¹ Schumacher, Julian. “Sovereign Debt Litigation In Argentina: Implications of the *Pari Passu* Default,” pp. 3.

prevent Argentina from normalizing relations with the Club, raising fears that the country would opt to negotiate its late arrears in Paris and further postpone an IMF intervention. Institutional investors specifically worried that Argentina could use a successful negotiation with the Paris Club to improve market sentiment for a new debt placement, allowing the country to “kick the can down the road” for any potential settlements with holdout creditors from the 2005 and 2010 restructurings.¹²²

Despite this concern, there was not universal consensus that Argentina viewed a Paris Club agreement as a valuable bargaining chip. By the 2010 debt exchange, J.F. Hornbeck, writing on behalf of the United States’ Congressional Research Service, noted that for Argentina’s restructuring process, “the Paris Club so far... has been a loser in this case. The Argentine case demonstrates that national governments may be limited in their efforts to influence a sovereign nation that is determined to delay or deny debt repayment. In the end, it was fiscal necessity and the international markets that appeared to have the greatest leverage on Argentine decision making.”¹²³ The Club members’ inability to compel the Argentine government to address its debts through the usual means, including sanctions, legislative proposals, and separate bilateral agreements, may have actually reinforced the debtor country’s feet-dragging. Such conditions contrast with the Paris Club’s May 2014 announcement that a compromise on principal, interest, and arrears payments had been reached with the Argentine economy minister. While

¹²² Johnston, Jake. “Argentina Reaches Paris Club Debt Deal without IMF Intervention: Creditors Come Under Fire.”

¹²³ Hornbeck, J. F. “Argentina’s Defaulted Sovereign Debt: Dealing with the “Holdouts.” *CRS Report for Congress*. Congressional Research Service, 2 July 2010. Print. pp. 1-4.

the Club's announcement became a sideshow to a looming technical default and last minute wrangling with the U.S. judiciary, the results of the negotiation enabled Argentina to score a political win by appearing to come to Paris on its own terms.¹²⁴ The country's posturing prompted the American Task Force Argentina (ATFA), an association of creditors, to openly suggest that the "Paris Club's legitimacy and authority... will be at serious risk if it entertains the self-serving proposals by the current Argentine government."¹²⁵

In the midst of Argentina's challenges to existing ad hoc machinery, it is surprising that few strong proponents of the treaty approach to sovereign debt emerged between 2003 and 2012. The idea of a permanent sovereign debt regime, despite the SDRM's failure, was not passé: in 2004, Hornbeck and Gelpern observed that "should the Argentine case fail to be resolved to the mutual satisfaction of all parties, it could reinvigorate interest in a systemic and internationally recognized debt restructuring system."¹²⁶ With the SDRM's collapse casting such a long shadow, it took the rise of the holdout creditor and a series of controversial decisions in the U.S. District Court for the Southern District of New York to "reinvigorate" advocates of treaty-based formulations.

Argentina's holdouts – those creditors who refused to renegotiate the value of their bonds in 2005 and 2010 – scored a major victory on November 21st, 2012, when U.S. District Court Judge Thomas Griesa ruled that Argentina's debts, held

¹²⁴ "Creditor Nations Paris Club and Argentina will begin debt discussions in May." *MercoPress*, 15 March 2014. Web. 11 Dec. 2015. www.algodongroup.com/news/industry/003598.

¹²⁵ "ATFA: Argentina Continues to Defy Paris Club's Rules and Requirements." *PR Newswire*, 28 May 2014. Web. 5 Dec. 2015. www.prnewswire.co.uk/newsreleases/atfa-argentina-continues-to-defy-paris-clubs-rules-and-requirements-260878361.html.

¹²⁶ Hornbeck, J.F. "Argentina's Sovereign Debt Restructuring." *CRS Report for Congress*. Congressional Research Service, 19 Oct. 2004. Print. pp. 1.

under U.S. law, would have to be paid to all creditors simultaneously under a contractual *pari passu*, or inter-creditor equity, clause.¹²⁷ This meant that Argentina was barred from servicing the debt held by non-holdout creditors without compensating its holdouts as well. Griesa's interpretation of *pari passu* elicited strong condemnation from the "epistemic community" of economists and NGOs and sparked a review of the "market-based system" of restructuring; Benu Schneider encapsulated this group's central contentions by suggesting Argentina's case revealed the current system's lack of a "centralized dispute resolution mechanism, enforceable priority rules for creditors and an organized representation of all stakeholders."¹²⁸ The ruling also rekindled North-South Dialogue-era rhetoric, especially for the concept of sovereignty: in an address before the United Nations' Group of 77 countries, the Argentine economy minister declared that the U.S. court ruling, coupled with the District Court's lack of interest in a payment deadline extension, was creating odious macroeconomic conditions that rendered his government incapable of setting its own domestic policies.¹²⁹ By Argentina's July 2014 default, the debtor country had further integrated its message within the political environment of the United Nations, revisiting the idea of a legal framework adopted by the international community.

¹²⁷ United States District Court, Southern District of New York. Opinion, 08 Civ. 6978, 09 Civ. 1707, 09 Civ. 1708 (TPG). 21 Nov. 2012. Web. 7 Dec. 2015. www.creditslips.org/files/argentina.nmlparipassugriesaopinion1121121.pdf.

¹²⁸ Schneider, Benu. "Sovereign Debt Restructuring: The Road Ahead." *International Economic Association Series*, 2014. Print. pp. 203.

¹²⁹ "Argentina economy minister says nation being pushed to default." *CNBC News Online*, 24 June 2014. Web. 12 Dec. 2015. <http://www.cnbc.com/2014/06/25/argentina-economy-minister-says-nation-being-pushed-to-default.html>.

The United Nations, particularly UNCTAD, had largely been a bystander to the sovereign debt debate since the conclusion of the North-South Dialogue. While another proposal for a permanent regime, centered on the idea of extending Chapter 11 reorganizations from private entities to sovereign countries, was considered by UNCTAD in 1986, it received little attention from creditor interests due to the ongoing Latin American debt crisis and the beginnings of the Brady Plan.¹³⁰ The holdout problem, however, presented a catalyst for reorienting the debate back toward the UN. In a June 24th, 2014 online essay, UNCTAD wrote that the U.S. court injunctions against Argentina paying its debts “create a precedent for awarding holdout creditors and penalizing creditors who participated in a debt restructuring,” to the effect that the *pari passu* clause and “boilerplate” collective action clauses had been converted into a “strong weapon” for bond holders.¹³¹ Additionally, UNCTAD declared that the U.S. judiciary was in violation of the United States Foreign Sovereign Immunities Act, a rallying cry reminiscent of the 1970s refrain that developing countries’ domestic economic policies were being undermined by foreign creditors. Finally, the UNCTAD essay set its sights on the IMF, noting that “one wonders whether the IMF is best positioned to give timely and fair judgments” when the IMF’s post-SDRM proposals for resolving sovereign debt difficulties appeared to advocate for maintaining a market-based course.¹³² Such strongly

¹³⁰ Block-Lieb, Susan. “Austerity, Debt Overhang, and the Design of International Standards on Sovereign, Corporate, and Consumer Debt Restructuring,” pp. 487-489.

¹³¹ United Nations Conference on Trade and Development, “Argentina’s ‘vulture fund’ crisis threatens profound consequences for the international financial system.” United Nations Conference on Trade and Development Public Information, 24 June 2015. Web. 15 Dec. 2015. <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=783>.

¹³² United Nations Conference on Trade and Development, “Argentina’s ‘vulture fund’ crisis threatens profound consequences for the international financial system.”

worded language, written prior to Argentina's technical default, highlighted the extent to which developing countries had already achieved a consensus on litigation in the existing ad hoc system.

This consensus emerged as a set of principles adopted by the United Nations. Not unlike the recommendations put forward by UNCTAD's Ad Hoc Group of Governmental Experts in 1975, the new resolution on "Basic Principles on Sovereign Debt Restructuring Processes" called for alterations to existing debt management protocol but did not directly challenge the centrality of ad hoc machinery such as the Paris Club. Instead, the document embedded its directives in concepts such as legitimacy, transparency, impartiality, and "good faith by both the sovereign debtor and all its creditors" to ensure "constructive sovereign debt workout negotiations."¹³³ The Principles had the ostensible goal of establishing a basic framework for later "international rules and mechanisms to better manage sovereign debt problems," with Argentine Secretary of International Economic Relations Carlos Bianco stating that he envisaged the Principles as a foundation for regulating holdout creditors and "vulture funds" during future litigation battles.¹³⁴

Predictably, the response to this new movement on the part of creditors and developed countries was to toe the line at market-based solutions. As in the 1970s, the United States registered the most opposition, taking issue with the Principles'

¹³³ United Nations Res. A/69/L.84, "Basic Principles on Sovereign Debt Restructuring Processes," 29 July 2015. Print.

¹³⁴ United Nations Conference on Trade and Development, "United Nations lays down clear principles in tackling sovereign debt." United Nations Conference on Trade and Development Public Information, 29 July 2015. Web. 16 Dec. 2015. <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1047>.

affirmation that countries have a “right” to restructure their debts.¹³⁵ The European Union common position, meanwhile, asserted that the work of the United Nations “should be limited to the elaboration of a non-binding ‘set of principles’ which builds upon a market-based voluntary contractual approach to sovereign debt restructuring and aims at furthering its implementation and use.”¹³⁶ For the plight of countries like Argentina, in particular, the United States, Germany, and France suggested that improved sovereign bond contracts, infused with enhanced collective action clauses, could be sufficient ad hoc solutions to reduce the threat of future holdouts. Importantly, the developed countries reaffirmed that the IMF and the Paris Club were the appropriate venues for conducting debt restructurings and considering alternative proposals, with the EU even suggesting that UNCTAD utilize the “recent and ongoing work on sovereign debt restructuring undertaken in the IMF... [and] the Paris Club, which has a history of discussing sovereign debt restructuring issues.”¹³⁷ In an effective replay of the North-South Dialogue, UNCTAD and the Group of 77 ran into a brick wall as creditor interests held their ground. The result was that the Principles, while officially endorsed by the United Nations, were capable of creating very little political room for more detailed conversations about improvements to the ad hoc system, much less the development of a permanent sovereign debt regime.

¹³⁵ “U.N. General Assembly Adopts ‘Basic Principles’ on Sovereign Debt Restructuring.” *Harvard International Law Journal Online*, 20 Sept. 2015. Web. 16 Dec. 2015. <http://www.harvardilj.org/2015/09/u-n-general-assembly-adopts-basic-principles-on-sovereign-debt-restructuring/>.

¹³⁶ Council of the European Union, “EU common position on the UN draft resolution A/69/L.84 on ‘basic principles on Sovereign debt restructuring processes.” Council of the European Union Common Position Draft, 7 Sept. 2015. Web. 16 Dec. 2015. <http://data.consilium.europa.eu/doc/document/ST-11705-2015-INIT/en/pdf>. pp. 2.

¹³⁷ Council of the European Union, “EU common position on the UN draft resolution A/69/L.84 on ‘basic principles on Sovereign debt restructuring processes,” pp. 3.

Argentina's debt crisis reveals two trends in the ongoing restructuring debate. First, fallout from the IMF's SDRM debacle may have disrupted the well-oiled linkages between existing ad hoc machinery. This is most apparent in the lack of coordination between the Paris Club and the IMF for handling an Argentine restructuring; the Paris Club's decision to receive Argentina's demands left it open to criticism from the bond market, which viewed the Club's actions as ill-advised attempts to appease a recalcitrant sovereign.¹³⁸ Even academic observers have noted weakness among the central players of the ad hoc system. Nouriel Roubini and Brad Setser, for instance, write that "in Argentina, the official sector has come close to abdicating its traditional role of negotiating an economic program with the debtor that outlines, in broad terms, the official sector's assessment of what the country and its creditors need to do to restore debt sustainability."¹³⁹ This indictment, falling squarely on the IMF's shoulders, suggests that the suboptimal performance of critical institutions in the Argentine episode may have contributed to the resurgent popularity of a permanent sovereign debt regime among developing countries.

Second, the UN's Basic Principles demonstrate the increased political willpower of older debt debate veterans, such as the Group of 77, to reconsider the existing ad hoc system. The fate of the Principles, however, hints that creditors – even those negatively impacted by holdout litigation – seem just as committed to

¹³⁸ "ATFA: Argentina Continues to Defy Paris Club's Rules and Requirements."

¹³⁹ Roubini, Nouriel and Brad Setser. "The Reform of the Sovereign Debt Restructuring Process: Problems, Proposed Solutions and the Argentine Episode." *Institute for International Economics Conference*, 9 March 2003. Web. 12 Dec. 2015. people.stern.nyu.edu/nroubini/papers/debtreform.pdf. pp. 9.

market-driven restructurings as they were at the height of the North-South Dialogue. From this vantage point, it makes sense that the greatest success of the UN's recent efforts was the simple definition, "in a clear and systemic manner, [of] the existing and well-rooted principles which apply to the field of sovereign debt."¹⁴⁰

V. Case Comparisons

I. The International Monetary Fund

The recent history of the International Monetary Fund is often described as an arc, with its influence as a component of the ad hoc restructuring process growing during the late 1970s and early 1980s, peaking during the "neoliberal" era of the 1980s and early 1990s, and declining or moderating thereafter.¹⁴¹ While some aspects of the previous four cases confirm this trend, the IMF's role is better described as an oscillation between a strongly pro-creditor, pro-ad hoc position and support for a consociational creditor-debtor negotiating process with room for a permanent workout mechanism. Critically, the IMF's relative weight in the sovereign debt debate appears to be a function of its perceived policy competence; for example, the Fund laid the groundwork for Bank Advisory Committees at a time when its liberalization programs were held in high regard by most private creditors, but failed to construct similar foundations for SDRM approval precisely because its recommendations were out of sync with creditor and debtor expectations that the

¹⁴⁰ "Restructuring of Sovereign Debt: UN Expert stresses GA principles are binding." United Nations Human Rights Office of the High Commissioner, n.d. Web. 16 Dec. 2015. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16408&LangID=E>.

¹⁴¹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 26-29.

Fund would scale down its involvement in debt workouts.¹⁴² Regardless of the amount of faith placed in the IMF by institutional and private actors, however, it is clear the Fund played an outsized part in the sovereign debt debate over the last forty years.

The IMF's role is especially intriguing given its occasional support for a sovereign debt restructuring mechanism, an anomaly among Bretton Woods legacy institutions. Prior to the reemergence of bonds as the financial world's dominant debt instruments, there was little concern among top leadership that "financial chaos" would result from existing ad hoc practices. Instead, the Fund adopted a narrow view of its activities, adhering to the language in its Articles of Agreement that placed it at the center of an "international monetary system" consisting of oversight over the monetary and exchange rate regimes of currency zones, the "stock of international liquidity and the arrangements for its management," and the economic policies of Fund member countries.¹⁴³ With the exception of the Fund's activities during the Latin American debt crisis, this viewpoint meant that the organization did not have the analogous authority to oversee international capital flows or the international financial system through the lens of collective action problems and debt workout procedures among a multitude of creditors.

While Anne Krueger's concept of an SDRM that precluded holdout threats seems prescient in the context of Argentina's 2014 default and ongoing debt battle, the narrow view of the IMF's place in international finance is still the most resonant

¹⁴² Setser, B. "The Political Economy of the SDRM." pp. 17.

¹⁴³ International Monetary Fund, "Articles of Agreement of the International Monetary Fund." About the IMF, n.d. Web. 2 March 2016. <http://www.imf.org/external/pubs/ft/aa/index.htm>.

narrative among creditors and developed country governments. Smitha Francis notes that the SDRM debate did not change the commonly-held views among private actors, G-7 nations, and debtor sovereigns that the IMF is also a creditor, and often the biggest lender for countries otherwise isolated from international capital markets.¹⁴⁴ Therefore, while creditor banks generally embraced the Fund's 1982-1984 position as an informal collective action enforcer (the IMF used its status as a lender of last resort to convince private creditors to pursue their own restructuring deals), the prospect of a SDRM created through "an amendment of [the Fund's] article of agreement" struck both detractors and allies as a fundamental conflict of interest.¹⁴⁵ This perspective remains pervasive in the present day: even Brookings' CIEPR report clarifies that, in the years since the IMF's shareholders rejected the SDRM, a sovereign bankruptcy regime is largely understood to be "a mix of national and international institutions that would, in some conditions, sanction a comprehensive modification of sovereign debt contracts," rather than a single entity with legally defined arbitration and enforcement authority.¹⁴⁶ CIEPR's soft-pedaled suggestions hint that most creditor institutions and interests have a continued aversion to any proposal mimicking the Fund's ill-fated attempt to centralize a restructuring process while expanding organizational mandates.

It follows that the IMF continues to toe the line with creditor governments by advocating for collective action clauses in place of a fully developed SDRM. Taking "great pains," as Anna Gelpern presumes, to "establish that the core political reality

¹⁴⁴ Francis, Smitha. "IMF's SDRM Proposals: An Updated Critique of Conceptual Issues." International Development Economics Associates, 9 May 2003. Print. pp. 2-3.

¹⁴⁵ Setser, B. "The Political Economy of the SDRM." pp. 17.

¹⁴⁶ "Revisiting Sovereign Bankruptcy," pp. 1.

has not changed,”¹⁴⁷ a 2013 IMF report observes that CACs can adequately “shift decision making on a debt restructuring to creditors as a group to reflect their collective will,” thereby preventing holdout litigation from occurring among bondholders within the same issue.¹⁴⁸ Echoing U.S. Treasury Secretary Snow’s preferences at the end of 2003, the document also contends that a third party-mediated “aggregated voting” process is politically unpalatable, since such a procedure would bind all creditors regardless of their holdings.¹⁴⁹ Instead, the Fund has placed itself on standby to observe, although not interfere with, the implementation of collective action clauses via case-specific inter-creditor negotiations.

A more entrenched form of resistance to the IMF comes from the investor community, the most outspoken opponents of the SDRM and the Dispute Resolution Forum. Unlike the institutional creditors that worked with the IMF to resolve Latin American loan obligations, contemporary private investors are much less disposed to heed the IMF’s advice and are much more concerned about the possibility of an SDRM-like program disrupting the sovereign debt market altogether. Proponents of an SDRM within the Fund now have to respond to a growing chorus of voices that claims a mechanism designed to make restructuring less costly “would undermine the incentives to pay back, inducing debtor moral hazard, encouraging default, [and]

¹⁴⁷ Gelpern, Anna. “The IMF Revisits Sovereign Debt Restructuring, Not the SDRM.” Peterson Institute for International Economics, 24 May 2013. Web. 18 Jan. 2016. <http://blogs.piie.com/realtime/?p=3593>.

¹⁴⁸ International Monetary Fund, “Sovereign Debt Restructuring – Recent Development and Implications for the Fund’s Legal and Policy Framework.”pp. 14.

¹⁴⁹ International Monetary Fund, “Sovereign Debt Restructuring – Recent Development and Implications for the Fund’s Legal and Policy Framework.”pp. 30.

making sovereign debt more expensive.”¹⁵⁰ While Krueger and O’Neill have gone on the record to clarify that any IMF-mediated system is intended to merely reduce the transaction costs that crop up via a reliance on bond financing, the IMF and its supporters have only weakly argued that a permanent regime would necessarily strengthen creditor rights and bolster the sovereign bond market.¹⁵¹

Debtor dispositions also remain a barrier to the IMF’s concept of a permanent sovereign debt regime. Distrust of the Fund as a pro-creditor institution has been a constant theme of developing countries and the G-77 since at least the North-South Dialogue, especially in controversies over national sovereignty. However, the IMF’s policy struggles in the 1990s, combined with the methods by which it tried to implement the SDRM, have converted this wariness into outright belligerence, as witnessed in the Fund’s 2004 expulsion from Argentina’s recovery program. Revealingly, the IMF has identified what it considers to be its counterproductive activities in the months leading up to Argentina’s 2001 collapse, claiming that the organization’s policies were ill-suited for the existing Argentine economy and “overestimate[d] its growth potential” while “underestimating its vulnerabilities.”¹⁵² These “insufficiently ambitious and excessively accommodative” directives included “slippages of debt and deficit targets,” which the Fund considered highly damaging to balanced-budget efforts, insufficient structural content and conditionality, and the continued financing of the Argentine

¹⁵⁰ Simpson, Lucio. “The Role of the IMF in Debt Restructurings: Lending Into Arrears, Moral Hazard and Sustainability Concerns.” G-24 Discussion Paper Series, May 2006. Print. pp. 4; “Restructuring Commercial Bond Debt,” UNCTAD Virtual Institute, n.d. Web. 2 Feb. 2016. [http://vi.unctad.org/debt/debt/m3/Section%20II\(ii\).htm](http://vi.unctad.org/debt/debt/m3/Section%20II(ii).htm).

¹⁵¹ Ziai, A. “The rise and fall of the SDRM proposal in the IMF.” pp. 2-4.

¹⁵² International Monetary Fund. “Lessons from the Crisis in Argentina.” Policy Development and Review Department, 8 Oct. 2003. Print. pp. 71-72.

government even when an early restructuring would have stabilized the country's debt dynamics.¹⁵³ These admissions of failure – significantly, the IMF's belief that stronger conditionality and enforcement could have prevented a crisis – are the exact opposite of the conclusions many debtor sovereigns have drawn from an autopsy of the late 1990s. Instead, Argentina is representative of the buyer's regret felt by many IMF-assisted developing countries: J.F. Hornbeck writes that the Fund's emphasis on social spending reduction may have contributed to the country's failure to meet consensus expectations for growth between 2000 and 2001, while Arthur MacEwan asserts that the IMF's fixation on balanced spending prevented the debtor from engaging in “desirable counter-cyclical policy.”¹⁵⁴ Such a wide paradigm gap between the Fund and developing countries signals that the IMF is less likely than ever to convince debtor sovereigns to sign on to another scheme for a permanent sovereign debt regime.

In keeping with this divide, the IMF's 2001 – 2003 Sovereign Debt Restructuring Mechanism debacle alarmed and alienated debtor countries in its immediate aftermath. The SDRM's (alleged) basis in corporate debt restructuring gave rise to fears that sovereignty would be sacrificed to prioritize bondholder compensation, while the idea of a “neutral” debt resolution forum established by the IMF continues to reinforce the shared conviction among debtor sovereigns that international creditors hold most of the cards.¹⁵⁵ One particularly lasting legacy of

¹⁵³ International Monetary Fund. “Lessons from the Crisis in Argentina.” Print. pp. 73.

¹⁵⁴ MacEwan, Arthur. “Economic Debacle in Argentina: The IMF Strikes Again.” *Third World Traveller and Dollars and Sense Magazine*, March 2002. Web. 13 Jan. 2016.
http://www.thirdworldtraveler.com/South_America/EconDebacle_Argentina.html.

¹⁵⁵ Setser, B. “The Political Economy of the SDRM.” pp. 9.

the SDRM fight is a desire among middle-income countries to avoid entrapment between escalating obligations and post-restructuring financing difficulties; since the IMF is uniquely disposed to lend in crisis circumstances, its involvement through a debt resolution forum suggests that any Fund-constructed permanent machinery would carry the weight of a last-resort option and scare off nervous creditors. Furthermore, fears that an SDRM will replace guaranteed IMF lending remain as potent as ever. As Lucio Simpson declares in a 2006 UNCTAD paper, the “weak legal protections of debtors’ rights [can] not make up for the loss of emergency access to multilateral financing.”¹⁵⁶

There is little reason to believe that the Fund will regain the political clout it possessed in the debt debate prior to the unraveling of its liberalization programs in the 1990s, the SDRM failure in 2003, and the organization’s virtual exile from debt reform discussions post-SDRM. While Argentina’s holdout problem presents a new platform to reexamine the “best practices” of ad hoc debt management – IMF chief economist Olivier Blanchard argued in July 2014 that the case “tells us we need to work on improving resolution mechanisms,”¹⁵⁷ with reference to existing collective action clauses for bond contracts – the Fund lacks the impetus to challenge the ad hoc status quo without OECD, or at least G-7, backing. A confluence of creditor and debtor pressures therefore means that the IMF is likely to give on the issue,

¹⁵⁶ Simpson, L. “The Role of the IMF in Debt Restructurings: Lending Into Arrears, Moral Hazard and Sustainability Concerns.” pp. 4.

¹⁵⁷ “Argentina Pushes for Global Sovereign Debt Restructuring Mechanism.” *Financial Sense*, 2 Dec. 2014. Web. 13 Feb. 2016. <http://www.financialsense.com/contributors/global-risk-insights/argentina-pushes-global-debt-restructuring-mechanism>.

relegating itself to support for incremental adjustments to the ad hoc system in the meantime.

II. The Paris Club

From the 1970s onward, the Paris Club has been less active than the IMF in shaping the sovereign debt debate, precisely because it acts as the intergovernmental locus of the existing ad hoc system and stands to benefit from a pro-status quo policy stance. Although the Paris Club was bandied about as a political football during the North-South Dialogue and again during Argentina's holdout debacle, the Club's lasting success has been its ability to accommodate prominent ad hoc skeptics while gradually gaining approval from developing country interests. This tactic is most recognizable in the Club's response to the UNCTAD Ad Hoc Group of Governmental Experts' 1975 recommendation that the United Nations Conference on Trade and Development "be invited to participate in the multilateral debt negotiations on the same basis as the representatives of other international organizations;" since 1978, and without much controversy, UNCTAD has been an acknowledged observer and unofficial debtors' representative in the Paris Club restructuring process.¹⁵⁸ The emerging coordination between the Club's objectives and UNCTAD insights toward the end of the G-77's push for an "independent forum" partially explains why the Paris Club enjoyed significant legitimacy during the debt crises of the 1980s.¹⁵⁹

¹⁵⁸ United Nations Conference on Trade and Development, "UNCTAD at 50: A Short History." UNCTAD Secretariat, 2014. Print. pp. 66.

¹⁵⁹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 59-60.

More evident than the eventual co-optation of developing country actors is the fact that, in the interregnum between the North-South Dialogue and the post-SDRM world, the Paris Club cemented its position as a debt resolution mechanism even as the IMF slid from a prominent economic linchpin to an organization mired in debtor distrust. Enrique Cosio-Pascal observes that while most of the Latin American crisis “mainly had to do with the consequences for the international banks that had over-lent,” debt woes affiliated with banks and private individuals also drove middle and low-income countries to consult the Paris Club and “[seek] relief from their official creditors.”¹⁶⁰ Whereas the Club had previously consisted of occasional meetings inspired by IMF-directed restructuring targets, this unusual period of cooperation between public creditors and debtor sovereigns appears to have produced a forum that was more likely to experiment (as in the restricted implementation of MYRAs), more likely to sacrifice “short leash” restructurings in exchange for longer-term targets and debt forgiveness initiatives, and more accepting of “exceptional treatment” for countries struggling to make up for their odious arrears.¹⁶¹ Seen from another angle, the Club’s response to UNCTAD’s 1989 musings that “the pervasiveness of debt problems is such that debt rescheduling... has now become an established feature of the financial system” was to delve deeper into ad hoc solutions, violating some of its own established norms along the way.¹⁶²

¹⁶⁰ Cosio-Pascal, Enrique. “Paris Club: Intergovernmental Relations in Debt Restructuring.” Initiative for Policy Dialogue, Dec. 2007. Print. pp. 20.

¹⁶¹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 59-63.

¹⁶² United Nations Conference on Trade and Development. “Trade and Development Report, 1989.” UNCTAD, Sept. 1989. Print. pp. 33-36.

As the lack of public and private creditor support for the SDRM suggests, the Paris Club dovetailed with the IMF sometime during the 1990s. This may have been a direct result of institutional biases: while the Fund fretted about the rise of retail investors and hedge funds in a bond-based debt marketplace, the Paris Club's focus on official debt treatments – and the use of the London Club to address most private bank concerns – kept its members from expanding their purviews to encompass private bond contract mechanisms.¹⁶³ Additionally, the Paris Club's activities remain fundamentally indistinguishable from the preferences of G-7 countries, since its core membership is comprised of OECD financial leadership. As a result, the Paris Club had little incentive to join the Fund in its SDRM experiment, especially since the IMF was motivated by the potential for messy private sector agreements and not the externalities imposed on creditors or debtors by the Club's informal workout process. In fact, Patrick Bolton and David Skeel write that the IMF took special care to “implicitly recognize a higher priority to Paris Club debt as a *fait accompli*,” effectively excluding official debts in order to enforce absolute priority within the SDRM.¹⁶⁴ With G-7 interests wanting little to do with a sovereign bankruptcy regime, and unable to see any justified reason for official debts to fall under the IMF's umbrella, the Paris Club was unmoved by the Fund's entreaties to support a permanent workout process.

An important component of IMF-Paris Club relations that has only recently come into question is the Club's insistence that all debtor sovereigns undergo an

¹⁶³ Rieffel, L. *Restructuring Sovereign Debt*. pp. 59-60.

¹⁶⁴ Bolton, Patrick and David Skeel. “Redesigning the International Lender of Last Resort.” *Chicago Journal of International Law*, Vol. 6(1), 2005. Print. pp. 184.

IMF evaluation and adopt a corresponding economic plan prior to reaching a restructuring arrangement.¹⁶⁵ This practice, reinforced by the Club's emphasis on debt sustainability, made official debt restructuring synonymous with economic liberalization (or, alternately, austerity) in the eyes of debtor governments; this explains, then, why Argentina's agreement with the Paris Club sans IMF approval served as a minor political win for the Kirchner government and constituted another poke in the eye for the Fund's ongoing efforts to reestablish a rapport with Latin American debtors. The 2014 deal hints that the Club, and by extension many creditor governments, may be less likely to seek IMF consultation in future holdout situations, even if most developed countries are unwilling to replace the Fund's surveillance and auditing capacities with another institution's oversight. Instead, in true ad hoc form, it is possible that official lenders will work around the IMF's prescriptions in the event that protracted ideological battles threaten the possibility of repayment.

At first glance, the Argentine saga, and, particularly, J.F. Hornbeck's conclusion that the Paris Club was a "loser" in the 2014 debt restructuring deal, implies that the Club is once again threatened by developing country dissatisfaction with the ad hoc system. This observation is not necessarily correct. Argentina's attempts to revive old G-77 and UNCTAD alliances, while successful in generating political passions reminiscent of the North-South Dialogue, were less capable of provoking a reaction not only among developed countries, but also, as in the SDRM

¹⁶⁵ Levy, Natan. "IMF involvement the main stumbling block to Argentine deal with the Paris Club." *BNamericas*, 19 Feb. 2014. Web. 27 Jan. 2016. <http://www.bnamericas.com/news/banking/imf-involvement-the-main-stumbling-block-to-argentine-deal-with-paris-club>.

battle, among developing economies with significant exposure to the international financial market.¹⁶⁶ The UN's "Basic Principles on Sovereign Debt Restructuring Processes" consequently make no reference to the Paris Club, or any other established creditor forums, preferring to "consider improved approaches to restructuring sovereign debt, taking into account the Basic Principles... and work carried out by the international financial institutions, in accordance with their respective mandates."¹⁶⁷ If these statements are to be believed, not only is the Paris Club free from G-77 challenges, but the Principles themselves represent a partial capitulation to the developed country ideals of collective action clauses, equal treatment, and the case-by-case evolution of bilateral contract norms!

Ironically, a greater threat to the Paris Club's goals comes from the judicial systems of the G-7 countries themselves. Thomas Griesa's 2012 *pari passu* ruling represented a fairly radical departure from previous holdout scenarios by effectively forcing all private creditors to bear the costs of a minority seeking bond repayment at face value; under this interpretation, private bondholders are less likely to view bilateral contracts with CAC enhancements as ironclad safeguards against an uncompromising subset of creditors.¹⁶⁸ Yet the Paris Club considers its role in preserving debt sustainability to be the facilitation of improved bilateral arrangements through "increase[d] transparency and predictability on features of debt treatment" and "regular contracts and transparency efforts from the debtor to

¹⁶⁶ Mexico, for example, abstained from the Basic Principles vote despite its historical affiliations with other pro-Principles Latin American debtors.

¹⁶⁷ United Nations Res. A/69/L.84, "Basic Principles on Sovereign Debt Restructuring Processes."

¹⁶⁸ Alfaro, Laura. "Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling." Harvard Business School and National Bureau of Economic Research, n.d. Web. 3 Feb. 2016. <http://www.hblr.org/wp-content/uploads/2015/03/HBLR-5.1-Alfaro-Sovereign-Debt.pdf>. pp. 60-62.

all its creditors.”¹⁶⁹ Irregular court rulings from domestic judiciaries – with corresponding confusion over whether such rulings and injunctions apply to debts held in other currencies and under other national laws – render moot this aspect of the Paris Club’s stabilization efforts and contribute to official creditors’ worries that crises involving private debt holders may impact public debt servicing.¹⁷⁰

Fortunately, since the U.S. District Court ruling on Argentine bonds remains a new phenomenon, the Club and its developed country affiliates are not currently faced with a systemic legal breakdown of the market for bond-denominated debts. Unless holdout private creditors are repeatedly validated by the courts of the world’s most powerful financial centers, the Paris Club has little reason to give up its backing for an ad hoc system dominated by incremental contractual improvements.

The vagaries of the contemporary bond market also reveal that the Paris Club is less central to sovereign debt restructuring than in the past. In the 1990s, “when flows of official capital to the emerging market countries stagnated, but flows of private capital surged,” the Club began to switch its role in the international financial system from that of a direct lender to a more nebulous influencer, using its status as a central forum for official creditors to issue signals to the market and make recommendations for private contract enforcement.¹⁷¹ This new position, reflected in the previous paragraph’s discussion of debt sustainability and court

¹⁶⁹ Cheremetinski, Claire. “Paris Club and debt restructuring: Lessons from past crises and new approaches in debt restructuring.” The Paris Club and World Bank, n.d. Web. 28 Jan. 2016. <http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1170954447788/3430000-1266857316075/2010Tunis03Cheremetinski.pdf>.

¹⁷⁰ Norris, Floyd. “Ruling on Argentina Gives Investors an Upper Hand.” *The New York Times*, 19 June 2014. Web. 25 Jan. 2016. <http://www.nytimes.com/2014/06/20/business/economy/ruling-on-argentina-gives-investors-an-upper-hand.html>.

¹⁷¹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 94.

interference, is likely to become the Club's replacement foundation, since Rieffel observes that "the dominance of private flows is expected to prevail indefinitely."¹⁷² The result is a creditor's forum that increasingly relies on market solutions to prevent future debt crises, even as the frequency of those very scenarios, as well as the need for debt reduction among certain middle and low-income countries, remains high.

III. Creditor Governments and Their Courts

With the notable exception of U.S. Treasury Secretary O'Neill's push for an SDRM – and even then, the rest of the Treasury took significant measures to counteract his public statements – representatives of the G-7 have rarely expressed support for a coherent, permanent alternative to existing ad hoc machinery.¹⁷³ A veteran of the 1970s UNCTAD debt showdowns would observe that the position of developed countries on sovereign debt workouts has barely budged over the past forty years, although "market solutions" are now qualified with collective action recommendations and increasingly consist of retail investor involvement in place of official lending. The response of the United States, Canada, Germany, and Japan to the UN'S "Basic Principles" is a textbook example of the stonewalling that derailed the G-77's proposals during their original UNCTAD-mediated campaign against ad hoc restructuring: despite developing country concerns that existing forums for debt workouts allow creditor governments to "control the arbitration," developed countries continue to suggest that the IMF and the Paris Club are the most

¹⁷² Rieffel, L. *Restructuring Sovereign Debt*. pp. 94.

¹⁷³ Snow, John. "Statement by Secretary John W. Snow, United States Treasury."

appropriate debt management venues.¹⁷⁴ Additionally, the United States remains strongly opposed to any document – including the Basic Principles – that suggests “countries have the unilateral right to restructure their debt,” considering debt reduction has attained a level of acceptance not witnessed during the height of the North-South Dialogue.¹⁷⁵

Creditor governments’ consistent adherence to the ongoing ad hoc regime has not been without its fluctuations, however. G-7 financial architects played a very active part in creating Bank Advisory Committees and bolstering the London Club during the Latin American loans crisis, taking deliberate measures to sustain noninflationary growth in developed countries while pushing the IMF and other international financial institutions to provide financing for buybacks, bond collateral, and other enhancements.¹⁷⁶ Brady Bonds thus constitute the end result of a very hands-on period for creditor governments, all of which recognized the insufficiency of refinancing alone and encouraged the IMF to develop cooperative procedures involving debtor sovereigns, private creditor institutions, and official agencies.¹⁷⁷ However, the involvement of creditor governments in such “contingent strategies” did not survive the 1990s, as G-7 leaders sought to incorporate bondholders into rescue operations to help indebted sovereigns avoid default. Instead, this hard-line policy on private sector involvement resulted in poor communications between the G-7, the Paris Club, creditor banks, and bondholders,

¹⁷⁴ Muchhala, Bhumika. “The UN GA Adopted A Resolution On Principles To Guide Sovereign Debt Restructuring Processes.” The SID Forum, n.d. Web. 21 Feb. 2016. <http://www.sidint.net/content/un-ga-adopted-resolution-principles-guide-sovereign-debt-restructuring-processes>.

¹⁷⁵ United Nations Res. A/69/L.84, “Basic Principles on Sovereign Debt Restructuring Processes.”

¹⁷⁶ Rieffel, L. *Restructuring Sovereign Debt*. pp. 159-162.

¹⁷⁷ Rieffel, L. *Restructuring Sovereign Debt*. pp. 168-170.

especially since the latter were routinely left out of consultations, and, unlike the more experienced private financial institutions, did not take kindly to the idea of a “forced restructuring” mandated by a small collection of governing mechanisms.¹⁷⁸ Argentina’s collapse at the beginning of the new millennium appears to be the final straw: nothing illustrates the death knell of the G-7’s heavy-handed strategy better than bondholders exiting on a mass scale despite the IMF’s continued commitment to pump money into the struggling debtor.

From this perspective, the G-7’s frustration with the IMF’s failures in Argentina and other middle-income developing countries also stemmed from the Fund’s lack of a coherent debt management strategy in the 2001 – 2002 Argentine aftermath. The IMF’s Anne Krueger took the wrong lessons from the G-7’s pressure, since despite creditor governments’ acknowledgements that debt workouts required reform, there is no indication that any political willpower existed to throw off decades of ad hoc policies in exchange for a permanent mechanism. Brad Setser is therefore correct when he points out that the SDRM’s collapse was not so much a matter of technical complexities as it was a failure to translate general principles among stakeholder governments into a palatable political arrangement.¹⁷⁹ Additionally, the SDRM put the G-7 in a bind between their commitments to protect private creditor interests and their fears that domestic taxpayers would have to cover foreign countries’ economic rescue packages, converting disinterest in a

¹⁷⁸ Buchheit, Lee and G. Mitu Gulati, “Sovereign Bonds and the Collective Will.” Georgetown-Sloan Project on Business Institutions, March 2002. Print. pp. 1-4.

¹⁷⁹ Setser, B. “The Political Economy of the SDRM.” pp. 18.

sovereign debt restructuring mechanism into an outright aversion.¹⁸⁰ It comes as no surprise that creditor governments' post-SDRM dispositions remain reliant on the market principle, since an ad hoc system based predominantly on private contracts and generalized institutional guidance prevents developed countries from having to choose between their financial centers and their taxpaying citizenry.

If the SDRM startled creditor governments, it also upended their roles as agenda-setters. At the outset of the restructuring proposal, the G-7 thought of the SDRM as a benign, if not entirely necessary, attempt to "scale back large IMF rescue loans and to force the IMF to return to its original limits" – in other words, a mechanism for correcting the moral hazard dilemma made clear by Argentina's collapse and the Asian financial crisis of the late 1990s.¹⁸¹ By 2003, the consensus on the SDRM's structure was much less pronounced. While some creditor countries, including France, continued to discuss the merits of an international regime that reduced aggregate litigation costs and utilized supermajority voting to approve debtor countries' debt restructuring plans, the United States Treasury noted that the SDRM had achieved its desired effect by proposing to override existing bond documentation.¹⁸² Mexico's shift to preferred clauses, along with the U.S. Treasury's own prioritization of enhanced bond contracts, highlighted the "new market standard" of aggregated voting and CACs even as it undermined years of creditor government-influenced precedent.¹⁸³ Uruguay's successful post-SDRM restructuring, for example, undermined the IMF's case for an amendment to the

¹⁸⁰ Setser, B. "The Political Economy of the SDRM." pp. 3.

¹⁸¹ Setser, B. "The Political Economy of the SDRM." pp. 3.

¹⁸² Helleiner, E. "The Mystery of the Missing SDRM." pp. 105-107.

¹⁸³ Setser, B. "The Political Economy of the SDRM." pp. 23.

Fund's Articles but also demonstrated how creditors could act, without public backing, to present a coherent representation to a debtor sovereign at the bargaining table.¹⁸⁴ U.S. leadership may have pointed to these more recent market norms as indicators that Krueger's holdout fears were overblown; the Bush administration may as well have proclaimed the era of creditor government intervention, embodied by the IMF's bank-herding role in the Latin American crisis, to be in its twilight years.

The legal Gordian's Knot leading up to Argentina's 2014 default remains one of the strongest counterfactuals to developed countries' market complacency. Although the premature failure of the "market system with IMF assistance" framework stemmed from Argentina's rejection of the Fund's economic programs, the 2005 and 2010 restructurings blew the lid off creditor governments' assumptions that contract innovation would incentivize bargaining behavior among retail investors and hedge funds. Instead, the preponderance of new clauses and legal devices, including Elliott Management's unusual use of inter-creditor equity arrangements to extract the face value of Argentine bonds, has actually reinforced holdout scenarios at a time when governments are largely unwilling to reorganize the debt market. The potential for further hiccups in future debt deals has led scholars of the financial world's political economy, such as the University of Pennsylvania's William Bratton and Duke University's G. Mitu Gulati, to suggest that "strengthened" contracts enable creditors and savvy debtor sovereigns alike to use newly introduced provisions as smoke screens for rejecting or violating established

¹⁸⁴ Setser, B. "The Political Economy of the SDRM." pp. 3.

agreements.¹⁸⁵ Weaknesses in an improved ad hoc system, then, appear to stem from the apparently self-negating aims of collective action clauses and similar instruments: in Greece, and again for a brief period during the Argentine restructuring process, minority groups of shareholders were able to short-circuit bond renegotiations by either using enhanced contracts to secure haircut exemption, or, more successfully, overriding parts of a restructuring deal by accumulating a large share in a single bond series.¹⁸⁶

A great irony of creditor government's laissez faire approach to the sovereign bond market is that, almost by necessity of financial law, New York, London, and Paris have become important battlegrounds over litigation instead of policy. Creditor nations' courts are therefore tasked with ironing out the contradictions and competing interests of debt restructurings constituting hundreds, if not thousands, of individual bondholders. This process is messy, and, as the specifics of Argentina's 2014 default highlight, it is also much less predictable than outcomes mediated by other institutional routes.

The role of creditor countries' judicial systems in contract enforcement and dispute resolution has expanded as sovereign immunity, act of state doctrine, and international comity norms have faded away. The U.S.'s evolving interpretation of the Foreign Sovereign Immunities Act, and by extension the definition of "commercial activities" as undertaken by sovereign states, underscores the emerging political differences between debtor governments and a contemporary

¹⁸⁵ Bratton, William and G. Mitu Gulani. "Sovereign Debt Reform and the Interests of Creditors." *Faculty Scholarship*, 2004. Web. 2 Feb. 2016. http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1867&context=faculty_scholarship. pp. 20-21.

¹⁸⁶ Bratton, W. and G. M. Gulani. "Sovereign Debt Reform and the Interests of Creditors." pp. 21-22.

vein of financial law. Argentina's case before the New York district court floundered precisely because the country's understanding of the Foreign Sovereign Immunities Act failed to incorporate precedent established by the U.S. Supreme Court that "suspending payments on debt contracts that call for payment in the United States entails direct effects within the United States sufficient to satisfy the U.S. nexus requirement under the FSIA."¹⁸⁷ In a twist of fate, the same SDRM detractors who feared their sovereignty would be violated by an international bond tribunal now face the prospect of arguing for immunity privileges in the courts of their long-standing debt opponents. Additionally, a string of 1980s and 1990s court cases – from *Republic of Argentina v. Weltover* to *Allied Bank International v. Banco Credito Agricola de Cartago* – found most aspects of debt restructuring or default to be as justiciable as if a private debtor had entered into bankruptcy under domestic law; Ugo Panniza, Federico Sturzenegger, and Jeromin Zettelmeyer are quick to point out that U.S. courts in particular are likely to believe that "defaulting on debtors payable in international jurisdictions is not considered to be a sovereign act worthy of judicial deference."¹⁸⁸ With most national treatment procedures eroding bit by bit in each court case, debtors and some public creditor interests, including a small contingent of beaten-down reformists in the IMF, are sensibly concerned that the emerging legal framework is encouraging holdout actors by reducing the transaction costs and barriers of litigation at a faster rate than the establishment of collective action incentives across bond series.

¹⁸⁷ Power, Philip. "Sovereign Debt: The Rise of the Secondary Market and Its Implications for Future Restructurings." *Fordham Law Review*, Vol. 64(6), 1996. Print. pp. 2702.

¹⁸⁸ Panniza, Ugo, Federico Sturzenegger, and Jeromin Zettelmeyer. "The Economics and Law of Sovereign Debt and Default." *Journal of Economic Literature*, Vol. 47(3), 2009. Print. pp. 654.

Perhaps even more troublingly, it is unclear that creditor countries' courts are sufficiently well versed in the application of bond contract enhancements to create socially efficient outcomes from debt controversies. At the very outset of collective action clauses, New York courts focused on a narrow set of instruments and activities related to the litigating creditor, notably the "Champerty Law" that prohibited litigation on a claim purchased for the purpose of a lawsuit, and the behaviors of debtor sovereigns, including whether it appeared a sovereign would be taking a free ride on debt workouts agreed to by a majority of creditors.¹⁸⁹ As a result, despite holdout successes such as Elliott's 1996 victory over Peru,¹⁹⁰ attempts to block restructuring negotiations or debt exchanges through legal conflicts were not extremely common or fruitful as the majority of bondholders transitioned from institutional investors to retail and hedge fund claimants. The 2012 Argentine affair, on the other hand, broadened the purview of the courts by focusing on all creditor-debtor transactions under the jurisdiction of specialized, if poorly understood, clauses: Griesa's *pari passu* interpretation, for example, rejected a limited vision of inter-creditor equity as a protection against a debtor's attempts to "legislatively subordinate the claims of one group of creditors relative to another group of similarly situated creditors" in favor of an approach that took payment activities to be the primary indicators of creditor favoritism.¹⁹¹ The court's "clarification" of inter-creditor equity practices disrupted not just debtors' faith in

¹⁸⁹ Panniza, U., F. Sturzenegger, and J. Zettelmeyer. "The Economics and Law of Sovereign Debt and Default." pp. 686.

¹⁹⁰ Bratton, William. "Pari Passu and a Distressed Sovereign's Rational Choices." *Georgetown Law Faculty Publications*, Jan. 2010. Print. pp. 823-824.

¹⁹¹ United States District Court, Southern District of New York. Opinion, 08 Civ. 6978, 09 Civ. 1707, 09 Civ. 1708 (TPG).

their existing bond covenants, but also creditor governments' hopes that ex-ante contract incentives could independently preclude holdout situations. Critically, even wealthier sovereigns (Italy among them) felt compelled to alter their agreements in the fallout from Griesa's argument, a flurry of revisions that temporarily tipped the political momentum toward UNCTAD's newfound criticism of market solutions.¹⁹²

Post-SDRM and post-Argentina, creditor countries are in a perfect storm of competing headwinds: while there is no institutional willpower to revisit a sovereign debt restructuring mechanism, there is greater market uncertainty than in the previous decade over whether sovereigns can reliably restructure their debts without starting a war of attrition with increasingly empowered retail and hedge fund investors. The reality is that creditor governments and their courts are not quite in step, since holdouts pose almost as significant a problem for the traditional interests such governments have supported as they do for debtors. In this environment, it is evident that the G-7 and its allies, while welcoming of a hands-off approach to debt management, may not have fully understood the nuances of an ad hoc system that did not rely on dominant public sector involvement in crisis resolution. Setser and Roubini's observation that the official sector may have abdicated its assumed responsibilities during the Argentine crisis may also be a reflection of developed countries' struggle to anticipate complex (and potentially court-influenced) market conditions.¹⁹³

¹⁹² Alfaro, Laura. "Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling." pp. 66.

¹⁹³ Roubini, N. and B. Setser. "The Reform of the Sovereign Debt Restructuring Process: Problems, Proposed Solutions and the Argentine Episode." pp. 9.

IV. Private Creditors: Banks, Investors, and Hedge Funds

What (and who) private creditors actually represent has changed remarkably since the North-South Dialogue. At the height of the 1970s debate, a majority of debtor sovereigns had little access to international capital markets – that is to say, most inflows were from public sources. The exceptions to public financing were the major banks of creditor nations, which from World War II until the appearance of Brady Bonds were the stars of private sector lending in the form of loans. Commercial bank lending increased sharply during the 1970s through the process of petrodollar recycling, leading to ballooning debts among oil-importing countries as the oil squeeze took its toll on the global economy.¹⁹⁴ Despite acting as catalysts for the UNCTAD debt fight, however, commercial banks did not register as significant participants in the North-South Dialogue framework, instead playing second fiddle to the Paris Club and its official backers during negotiations over debt relief and retroactive terms adjustment.

The London Club remains creditor banks' most visible ad hoc mechanism for debt workouts, although the Club's current iteration is far less important than the advisory and restructuring enforcement role it fulfilled during the Latin American crisis. Its weakened stature is a function of Brady Bonds themselves: the write-offs associated with converting loans to bonds, even with an end result of financial stability for debtor sovereigns, increased banks' risk assessments of emerging market governments and made large institutions, such as Citibank and Bank of

¹⁹⁴ Rieffel, L. *Restructuring Sovereign Debt*. pp. 35-36.

America, increasingly reticent to reenter public finance in developing countries.¹⁹⁵ As Rieffel writes, “commercial bank lending is more naturally directed to private sector borrowers,” with the London Club acting as a legacy institution for unresolved or ongoing private loan programs instead of its former position as a private sector executor of IMF or Paris Club-mediated restructuring initiatives.¹⁹⁶

Commercial banks made a short comeback in the 1990s, but the SDRM debate demonstrates that by the time a revision to the existing IMF mandate was conceived, individual bondholders and investors had superseded banks as debtor sovereigns’ most involved claimants. Aside from feeling the effects of augmented risk, banks were also burned by the G-7’s emphasis on debt forgiveness as a viable avenue for several Latin American countries; Nicaragua’s 1995 program, for instance, required that commercial banks absorb a 90 percent reduction in the debtor’s payments even though a corresponding Paris Club deal had only axed 55 percent of public creditors’ bond values.¹⁹⁷ The sovereign debt market was therefore too fraught with political externalities for banks to continue participating, although the same uncertainty, along with the prevalence of high-interest and junk bonds, made the debt market a desirable playground for hedge funds as well as an intriguing sector for mutual funds to increase portfolio earnings.

Retail investors and hedge funds currently carry the most private sector weight in debt discussions, but, unlike creditor banks, they consist of multiple voices with differing intentions broken along jurisdictional and regional lines as well as

¹⁹⁵ Rieffel, L. *Restructuring Sovereign Debt*. pp. 36.

¹⁹⁶ Rieffel, L. *Restructuring Sovereign Debt*. pp. 35-36.

¹⁹⁷ Howell, Carl. “Public Debt and the Caribbean: An Agenda for Reduction and Stability.” Caribbean Development Bank, 23 May 2013. Print.

broader political and economic goals. The IMF's SDRM constituted a rallying point for private bondholders, since many investors understood the need to reduce moral hazard but failed to see why a permanent resolution forum would do the trick. Instead, bondholders argued that the IMF had opened a Pandora's box by "bailing out" countries with geostrategic significance, hence developing countries' fears that private investors would drop their holdings if the SDRM's Dispute Resolution Forum or majority shareholder provisions smacked of too much tolerance for outright debt repudiation.¹⁹⁸ Furthermore, unlike conservative economists within the IMF and most G-7 countries' official stances, private investors' organizations were reluctant to institute CACs in new bond contracts for fear of "signaling that they contemplate or countenance an eventual default."¹⁹⁹ While the U.S. Treasury's support for CACs, combined with Brazil and Mexico's contract innovations in the post-SDRM atmosphere, effectively forced private bondholders to fall in line, Arturo Porzecanski notes that a contingent of investors remain philosophically opposed to the idea of a "smooth restructuring."²⁰⁰ Their argument, which interprets ad hoc reform efforts as the beginning of a slippery slope toward "reform fatigue" and fiscal indiscipline among debtor sovereigns, not only flies in the face of Kruegerian efforts to address creditor coordination difficulties, but has also been invoked by holdouts, notably Paul Singer, who justify their litigation on disciplinary grounds. This cadre of debt holders ends up creating a headache for creditor governments as well as negotiating debtors.

¹⁹⁸ Setser, B. "The Political Economy of the SDRM." pp. 6.

¹⁹⁹ Porzecanski, Arturo. "The Constructive Role of Private Creditors." *Ethics & International Affairs*, Vol. 17(2), 2003. Print. pp. 4-5.

²⁰⁰ Porzecanski, A. "The Constructive Role of Private Creditors." pp. 6.

Argentina's recent debt conundrum illustrates two additional components of private investors' activities. First, investors are incredulous that the nightmare 2001-2002 Argentine scenario, with IMF lending occurring beyond any economic rationale, can be resolved through a permanent sovereign debt restructuring mechanism or contract enhancements. Bondholders' alternate directive, represented by the viewpoints of ABN AMRO's Emerging Markets Sovereign Research division, is the contention that the G-7 should "scale back the official financial support made available to errant [debtor] nations."²⁰¹ In effect, even though private investors remain skeptical of the efficacy of creditor governments' support for contract innovations, they find themselves in close alliance with the G-7 over a shared distaste for IMF-sponsored rescues.

Second, the Argentine holdout scenario has diminished investor confidence in the application of New York bond contracts and widened the cleavages among retail investors and hedge funds. Elliott's *pari passu* upset stranded close to 93% of all of Argentina's creditors, giving rise to an unusual circumstance in which the Argentine state, despite having the capacity to make its interest payments on restructured debts, was unable to convince its trustee bank to release the country's funds to creditors in time to avoid a selective default.²⁰² For investors lacking the financial or legal backing to engage in long-term litigation, the Argentine case is a scary precedent for bonds issued under New York law. Even the American Bankers

²⁰¹ Porzecanski, Arturo. "A Critique of Sovereign Bankruptcy Initiatives." *Business Economics*, Jan. 2003. Print. pp. 44.

²⁰² Primo Braga, Carlos. "Crying with Argentina: Why This Time Is Different." *Seeking Alpha*, 23 Aug. 2014. Web. 18 Jan. 2016. <http://seekingalpha.com/article/2446215-crying-with-argentina-why-this-time-is-different>.

Association, an original proponent of earlier pro-bondholder Champerty Law rulings and creditor rights enforcement, has warned that Griesa's revised implementation of the equal terms provision could enable a single creditor to "undermine the decades of effort the United States has expended to encourage a system of cooperative resolution of sovereign debt crises."²⁰³

In the post-Argentina environment, creditors can be reliably grouped into two broad factions: the first, composed of larger hedge funds, is opposed to bond write-downs, especially for countries (including Argentina) that exhibited strong economic growth and increased bond values almost concurrently with supposedly necessary restructuring processes. This group of "vulture funds" has found its most prominent ally in the American court system, embodied by the New York Second Court's admonishment that "the interest – one widely shared in the financial community – in maintaining New York's status as one of the foremost financial centers is advanced by requiring debtors, including foreign debtors, to repay their debts."²⁰⁴ The second loose coalition, constituting a numerical majority of bondholders if not always a proportionally large amount of financial holdings, is much more willing to engage in restructuring negotiations with debtor sovereigns. These creditors have the advantage of hindsight when advocating for restructurings free of litigation: those who held their noses and went through the 2005 and 2010 restructurings received a 135 percent return on their bonds in 2015, a performance

²⁰³ "Argentina loses appeal against vulture funds." Maryknoll Office for Global Concerns, n.d. Web. 11 Feb. 2016. <http://maryknollogc.org/article/argentina-loses-appeal-against-vulture-funds>.

²⁰⁴ McGill, Matthew and Alexander Harris. "NML Capital v. Argentina: Enforcing Contracts in the Shadow of the Foreign Sovereign Immunities Act." *Maryland Journal of International Law*, Vol. 3(1), 2015. Print. pp. 6.

far exceeding the realized returns on litigating hedge funds' holdings.²⁰⁵ For what it is worth, the anti-litigation crowd also has the U.S. Treasury and the vast majority of creditor banks on their side, providing a much-needed political element of support as well as an economic rationale for participating in debt management procedures.

In this respect, continued New York court deference to holdouts' appeals threatens to stall repayment to most creditors, especially if further rulings draw from the broadest interpretation of *pari passu* and Rights Upon Future Offers (RUFO) clauses.²⁰⁶ To the extent that potentially disadvantaged investors have fought back against potential holdouts, however, most proposals mirror the actions undertaken by debtor countries in creating "workarounds" to block future injunctions. Fordham University's Natalie Turchi recently argued that "a contractual solution targeted at preventing vulture fund investors from access to *pari passu* injunctive relief coupled with creative restructuring strategies for outstanding bonds awaiting maturity" can help diminish holdout leverage while preserving creditor rights against coercive exchange terms on the part of the debtor sovereign.²⁰⁷ Similarly, the International Capital Market Association used the Argentine default as an opportunity to disavow ratable payment, ensuring that

²⁰⁵ Porzecanski, Katia and Emma Orr, "Argentina Hands 135% Return to Bondholders Who Braved Crises." *Bloomberg Business*, 1 Oct. 2015. Web. 3 Dec. 2015. <http://www.bloomberg.com/news/articles/2015-10-01/argentina-hands-bondholders-who-braved-myriad-crises-135-return>.

²⁰⁶ Kraemer, Moritz and Delfina Cavanaugh. "Why Argentina's Legal Defeat To Creditors Is Unlikely To Set A Precedent For Other Sovereign Debtors." Standard & Poor's Ratings Services, 26 Nov. 2014. Print. pp. 4.

²⁰⁷ Turchi, Natalie. "Restructuring a Sovereign Bond *Pari Passu* Work-Around: Can Holdout Creditors Ever Have Equal Treatment?" *Fordham Law Review*, Vol. 83(4), 2015. Print. pp. 2171.

anticipated creditor equity disputes would not treat engaged bondholders and holdouts under the same legal conditions.²⁰⁸

Non-holdouts' responses to the Argentine debt debacle demonstrate just how entrenched the ad hoc model remains in the day-to-day operations of private bondholders. Although sovereign debt bears somewhat higher political and market risks than it did under a cohesive system of financial institutions guided by Banking Advisory Committees, the creditors who supposedly gain the most from an SDRM – retail investors without the means or knowledge to avoid coercion from other players at the bargaining table – do not consider a permanent restructuring regime, or even an official sector review of existing debt practices, to be particularly relevant to their needs. This much is illustrated by UNCTAD's complete failure to pique private creditor interest in its Basic Principles on Sovereign Debt Restructuring Processes, as the UN's overt declarations that "no creditor or creditor groups should be excluded ex ante from the sovereign debt restructuring process" or "sovereign debt restructuring agreements that are approved by a qualified majority of the creditors of a State are not to be affected, jeopardized or otherwise impeded by other States or a non-representative minority of creditors" only managed to confirm the status quo that had existed prior to the Argentine holdout crisis.²⁰⁹

Retail investors and hedge funds, more than any other collection of actors, are keen on letting the market determine winners and losers in the sovereign debt

²⁰⁸ Bowman, Louise. "ICMA tackles activist sovereign holdouts." *Euromoney*, Sept. 2014. Web. 28 Feb. 2016. <http://www.euromoney.com/Article/3377556/ICMA-tackles-activist-sovereign-holdouts.html>.

²⁰⁹ United Nations Res. A/69/L.84, "Basic Principles on Sovereign Debt Restructuring Processes."

sector, and are more likely than creditor governments to hesitate at restructurings and enhanced contractual arrangements for indebted sovereigns with a spotty debt record. Nevertheless, most private creditors have tacitly played along with developed countries' push for strengthened contract enforcement, if only to present a united front when arguing for creditors' rights against unilateral debtor actions like Argentina's 2005 and 2010 restructurings.²¹⁰ Whether the same cohesion exists for enhanced clauses affecting creditor interaction is a function of ongoing litigation incentives for holdouts, the dispositions of American courts toward noncompliant bondholders, and the ability of other private investors to balance their conservative support for an ad hoc restructuring system with the need to occasionally anticipate and resolve contractual loopholes.

V. UNCTAD and the Group of 77

The Group of 77 and the United Nations Conference and Trade and Development lost a tremendous amount of political clout in the years following the North-South Dialogue, as their eventual compromise codifying the Paris Club's debt workout procedures in a UN resolution dismantled a brewing revolt among low and middle-income countries. The Basic Principles' fate poetically replicates the same process, down to the codification of already-established norms, and hints at the UN's struggles to attain long-standing relevance in the sovereign debt debate.

²¹⁰ Cruces, Juan and Tim Samples. "Time to Settle Sovereign Debt's 'Trial of the Century'?" *The Columbia Law School Blue Sky Blog*, 26 Jan. 2016. Web. 24 Feb. 2016. <http://clsbluesky.law.columbia.edu/2016/01/26/time-to-settle-sovereign-debts-trial-of-the-century/>.

G-77 countries and their supporters may rank among the original proponents of a UN-mediated permanent restructuring mechanism, but shared convictions among G-77 membership have faded over time. In particular, emerging economies in Latin America and East Asia, including Brazil and China, are sensitive to how creditor banks and bondholders perceive a political willingness to repay debts, especially since their economies are significantly exposed to international capital flows. These countries' emerging caution has led them to implicitly side with private creditors on a number of enforcement issues, from disapproval of a "debtors' cartel" to skepticism regarding the practical applications of CACs.²¹¹ The contemporary G-77 is thus split between a more "extreme" segment of governments and economists, some of whom continue to favor the prospect of outright debt repudiation in addition to a sovereign debt restructuring mechanism within the UN, and a growing assortment of middle-income countries that either fret about private investors' market confidence or worry about losing access to IMF funds in the event of a debtor-initiated restructuring regime (although the latter concern is less pronounced than in the recent past). Tellingly, the First and Second Conferences for Financing for Development, held by the UN in 2002 and 2008, resulted in several abortive sovereign debt frameworks as the G-77 quickly moved from widespread disillusionment with the ad hoc system to unsuccessful efforts to establish a compromise mechanism.²¹² The Basic Principles' efforts to enshrine accomplished

²¹¹ Panniza, U., F. Sturzenegger, and J. Zettelmeyer. "The Economics and Law of Sovereign Debt and Default." pp. 682-686.

²¹² "UNCTAD Statement to the First Drafting Session for the outcome document of the Third International Conference on Financing for Development." UNCTAD, Jan. 2015. Web. 3 Feb. 2016. <http://www.un.org/esa/ffd/wp-content/uploads/2015/01/1ds-gd-Statement-unctad-Jan2015.pdf>.

facts within the debt workout regime can be interpreted as yet another example of the G-77's inability to move forward with another comprehensive proposal to replace the ad hoc regime, considering the fact that the United States and European interests had little involvement with the Principles' drafting to begin with!²¹³

Perhaps owing to its specific charge as a forum for promoting developing countries' development, UNCTAD has largely preserved its pro-debtor policy stances since the end of the 1970s. Part of the organization's consistency stems from its relative lack of engagement in the debt debates occurring between the Latin American debt crisis and the post-SDRM Argentine meltdown. Like the G-77 governments themselves, UNCTAD had not anticipated the replacement of loans with bonds over a period as short of a decade; the IMF's coordination with the London and Paris Clubs, as well as the muscular policy assumed by the U.S. Treasury in the late 1980s and early 1990s, left UNCTAD with a bit role as a watchdog for Paris Club restructurings and ongoing debtors' development initiatives.²¹⁴ In the world of Brady Bonds, the UN often found itself on the periphery of bond agreements, as in its 1993 dispute over IMF numbers on Argentina's economic performance and outstanding obligations.²¹⁵

A more substantial factor contributing to UNCTAD's immovability is the persistent, shared belief of its most outspoken members that the ad hoc system uniquely advantages creditors. Both the policy battle over the G-77's concept of an

²¹³ Third World Network, "UN adopts landmark resolution on principles for sovereign debt restructuring." Committee for the Abolition of Third World Debt, 15 Sept. 2015. Web. 3 Feb. 2016. <http://cadtm.org/UN-adopts-landmark-debt-resolution>.

²¹⁴ Griffith-Jones, Stephany. "The Paris Club and the Poorer Countries." *Savings and Development*, Vol. 11 (2), 1987. Print. pp. 137-139.

²¹⁵ United Nations Conference on Trade and Development, "UNCTAD at 50: A Short History." pp. 14-15.

International Debt Commission – an institutional arrangement “independent of any particular country or group of countries” that “must enjoy impartiality and the confidence of all for... its inclination to support the development of developing countries”²¹⁶ – and the Basic Principles’ emphasis on “sustained and inclusive economic growth” reveal UNCTAD’s deep-seated fears of creditors gaining the ability to “frustrate” or “impede” the macroeconomic policies of debtor nations.²¹⁷ Second to none in its traditional advocacy for debtors’ sovereign immunity, UNCTAD’s distrust of creditor arrangements made it a perfect forum for Argentina’s Kirchner regime to transform a political and economic loss into a rallying cry for better debtor protections, even if the ostensible aggressors were private hedge funds and not the typical international financial institution “imperialists.” It therefore makes sense that the Basic Principles have thus far been a flash in the pan rather than a catalyst for policy discussions, since Argentina’s case dug up old, path-dependent rhetoric instead of a new institutional understanding for recent holdout phenomena.

While the G-77 and UNCTAD may have struggled to convert the Basic Principles into a further rehash of the 1970s, they have at least witnessed one desired effect of the debt battles between 1980 and 2003. With the IMF at its political nadir following its SDRM failure, developing countries’ Stiglitz-infused assertions that the Fund is a compromised candidate for a permanent restructuring mechanism are now complemented by the G-7’s attempts to replace Fund mediation

²¹⁶ United Nations Conference on Trade and Development. *Report of the Intergovernmental Group of Experts on Debt and Development Problems of Developing Countries*. pp. 3-5.

²¹⁷ United Nations Res. A/69/L.84, “Basic Principles on Sovereign Debt Restructuring Processes.”

with incremental contract improvements. Argentina's 2004 repudiation of an IMF program was not only a blow to the IMF's existing agency as a lender and economic advisor, but also mirrored UNCTAD's own attempts to sideline the Fund at the height of the North-South Dialogue.²¹⁸ Likewise, Argentina's surprise Paris Club restructuring demonstrated how a determined debtor could decouple Fund conditions from a potential workout as part of a negotiating process, providing a rare (and since, unrepeated) example of the Lima Declaration's vision for a debt regime that "does not interfere with the orderly process of development planning in debtor countries."²¹⁹

The rest of the story for UNCTAD and the G-77 is a laundry list of bad news. First, the divide between creditor governments and their courts over bond contract clauses suggests that standard diplomatic avenues for debt management are less consequential than during the heyday of the North-South Dialogue. Much of this transition is inherent in the shift from public financing to creditor banks to small private investors, although litigation, once the "nuclear option" for aggrieved creditors, now looks likely to play a bigger role in setting future bond arrangements. In the absence of an international code for sovereign debt restructuring, debtors may see the prospect of issuing bonds under another country's national legal system to be much riskier than adopting local law, even if such laws are insufficiently robust to instill confidence in investors.²²⁰ Argentina's desperate attempt to

²¹⁸ United Nations Conference on Trade and Development. Trade and Development Board. *Report of the Intergovernmental Group of Experts on Debt and Development Problems of Developing Countries.*

²¹⁹ Rieffel, L. *Restructuring Sovereign Debt.* pp. 136.

²²⁰ "The *Pari Passu* Clause and the Argentine Case." Allen & Overy Global Law Intelligence Unit, 27 Dec. 2012. Print. pp. 6.

reorganize its debts in the weeks before its technical default represents one type of nightmare for other debtor sovereigns.

Second, UNCTAD's Basic Principles were a non-event. The most contentious responses to the resolution have come from U.S. government sources and largely concern the idea that debtors have a "right" to smooth restructuring agreements, language that creditor governments equate with unilateral restructurings and sudden debt repudiation.²²¹ The fact that UNCTAD's most visible sovereign debt efforts since the 1970s have produced a dud – again – undermines the forum's claim that it can adequately host a debt dispute mechanism capable of meeting debtor needs precisely because UNCTAD is no longer a central platform for constructing debt management policies (nor has it ever been for the legal structures governing bonds). While it remains to be seen whether another crisis will boost UNCTAD's involvement in sovereign debt workouts, the Basic Principles' effective capitulation to creditor countries' contractual reform policies is likely to deflate debtor sovereigns' criticisms of ad hoc restructurings. This is true even if the United States remains isolated "as the most serious obstacle to ensuring the minimum political space that would allow for intergovernmental discussions to actually take place within the UN," since the Basic Principles hint that even the expulsion of strong creditor interests from resolution drafting procedures is not sufficient to move past the sovereign debt status quo.²²²

²²¹ Derderian, Jill. "Remarks on the UN General Assembly Draft Resolution, Basic Principles on Sovereign Debt Restructuring Processes." United States Mission to the United Nations, 10 Sept. 2015. Web. 15 Jan. 2016. <http://usun.state.gov/remarks/6826>.

²²² Social Watch, "United Nations: Historic Vote On A Multilateral Sovereign Debt Mechanism." *Social Watch*, 25 Sept. 2014. Web. 22 Feb. 2016. <http://www.socialwatch.org/node/16653>.

Third, developing countries have ignored UNCTAD's distrust of contract enhancements. Despite UNCTAD Secretary-General Supachai Panitchpakdi's April 2013 speech railing against an "ad hoc collection of arrangements" that "hinders the ability of countries to quickly address debt difficulties when they arise," emerging market economies generally readjusted their existing contracts to comply with the 2012 Argentine *pari passu* ruling without protracted negotiation.²²³ In a February 2015 Centre for International Governance Innovation report, Gregory Makoff and Robert Kahn reported that Mexico, Kazakhstan, and Vietnam had all implemented the ICMA's proposed *pari passu* ratable payment revisions, and, far from establishing an international baseline for future adjustments, had cherry-picked the trust indenture or fiscal agency agreement structures to comply with creditors' country-specific investment concerns.²²⁴ This fairly quick implementation of a "corrected" contractual mechanism, even during the height of UNCTAD's efforts to vindicate Argentina's selective default, reflects that debtor governments may have less qualms about a market-heavy ad hoc system than UNCTAD leadership. A cynic may also note that debtors' quiet acceptance of new ICMA terms signals a curious disconnect between the rhetoric of permanent restructuring regime proponents and the economic necessities of reliable, case-by-case relationships with private creditors.

²²³ Panitchpakdi, Supachai, "Statement by the Secretary-General of UNCTAD." ECOSOC Special Event, External Debt Sustainability and Development, 23 April 2013. Print. pp. 3.

²²⁴ Makoff, Gregory and Robert Kahn. "Sovereign Bond Contract Reform: Implementing the New ICMA *Pari Passu* and Collective Action Clauses." Center for International Governance Innovation, Feb. 2015. Print. pp. 7.

The great battle for the G-77 and UNCTAD going forward is a struggle to stay politically relevant as private, single-investor inflows become the backbone of the sovereign debt market.²²⁵ In some respects, these ad hoc skeptics are suffering the same fate as the “creditor-dominated” organizations they oppose: with international financial institutions transitioning to an advisory role and scaling back lending commitments, debtor sovereigns are much more aware of the need to haggle with bondholders to ensure financial sustainability. In turn, the political appetite for a permanent sovereign debt regime has waned – after all, how can numerous bond series with different contractual legacies and expectations fall under a single, impartial arbitration body? Therefore, while it is safe to assume that hiccups in the ad hoc system will continue to fuel a need for declarations, resolutions, and other diplomatic devices used to put pressure on creditor interests, UNCTAD and G-77 activities are likely to remain diminished corollaries to an evolving system of bond governance that accounts for economic expedience and private sector willpower over official sector debates.

VI. Conclusions

I. The State of the Debate

While it is difficult to directly compare the performance of the existing ad hoc system with a series of intellectual or aspirational permanent sovereign debt regime proposals, the IMF’s trepidation that “chaos” could result from a lack of a sovereign debt restructuring mechanisms or similar apparatus provides a sufficient analytical

²²⁵ Rieffel, L. *Restructuring Sovereign Debt*. pp. 94.

basis for the post-SDRM environment. Argentina's creditor holdout situation offers one way in which the market for sovereign debt has become less stable in the absence of codified machinery, as presaged in Anne Krueger's belief that national courts could replace the Fund and the Paris Club as the principal agenda-setters for bond contract development.²²⁶ At least from a rhetorical vantage point, the U.S. Treasury and State Department contention that the Argentine debt ruling was "impermissibly broad" and "could undermine the decades of effort the United States has expended to encourage a system of cooperative resolution of sovereign debt crises" mirrors the worst-case scenarios played out by the IMF and several dedicated groups of economists at think tanks and international financial institutions around the world.²²⁷ Brookings' return to an SDRM discussion, in particular, highlights how even developed countries' civil societies have become more skittish about the evolution of sovereign debt workouts toward ex-ante clauses and national court arbitration.²²⁸

Aside from the Argentine crisis, however, there is little reason to read chaos into the metamorphosis of sovereign debt restructuring processes. Ad hoc solutions weathered the joint shocks of the jump from loans to bonds and the IMF's slide from chief debt strategist to relative ignominy fairly well; as Anna Gelpern asserts, whereas UN debates have often "turned into... endless and fruitless contest[s] between 'statute' and 'contract,'" institution-driven norms and contract templates

²²⁶ Setser, B. "The Political Economy of the SDRM." pp. 13.

²²⁷ "U.S. sides with Argentina in 'pari passu' controversy with defaulted bondholders." *Mercopress*, 24 July 2012. Web. 13 Feb. 2016. <http://en.mercopress.com/2012/07/24/us-sides-with-argentina-in-pari-passu-controversy-with-defaulted-bondholders>.

²²⁸ "Revisiting Sovereign Bankruptcy," p. 1-2.

have been much more effective at addressing lingering questions regarding enforcement needs, debt repudiation, and collective enforcement.²²⁹ It is unclear, in fact, that a permanent sovereign debt restructuring mechanism would have resulted in any better outcomes than the existing regime established through bondholder interactions. Just as Paris Club creditors organized around and defended a series of restructuring practices in the 1970s, or commercial banks organized around the London Club and IMF-supported Bank Advisory Committees in the late 1970s and 1980s, there is no reason to believe that bondholders are uniquely incapable of aggregating their interests for the purpose of risk reduction. The formation of bondholder committees during the fallout of Argentina's 2001-2002 economic collapse, for example, proves that private investors have significant incentives to avoid inter-creditor disputes.²³⁰ Additionally, private creditors' associations, most visibly the ICMA, have successfully counteracted the "disruptive" rulings of the New York Second Court and have even assumed an IMF-like role in providing guidance and recommendations for retail investors and debtor sovereigns alike. Testament to the efficacy of this approach is the observation that, with the exception of a brief holdout scare among Ecuador's bondholders, "vulture funds" have not been able to translate Griesa's 2012 rulings to other debtors.²³¹ Elliott and NML, always exceptions to bondholder comity, have come away from the Argentine litigation saga with a significant, but case-limited, payday: as of February 2016, Argentina's

²²⁹ Gelpern, A. "Remarks presented before the UN General Assembly Ad Hoc Committee on Sovereign Debt Restructuring Processes." pp. 2.

²³⁰ Rieffel, L. *Restructuring Sovereign Debt*. pp. 269-270.

²³¹ Gelpern, A. "Remarks presented before the UN General Assembly Ad Hoc Committee on Sovereign Debt Restructuring Processes." pp. 1.

four largest holdout creditors expect to receive a 25 percent haircut in exchange for an end to their multi-year legal blockade, terms remarkably better than the 70 percent reductions encountered by other investors.²³² Yet Gelpern contends that this outcome is “bloody for everyone involved,” demonstrating that the intractability of sovereign debt disputes limits the effectiveness of holdout strategies.²³³ It appears that, at least for now, ad hoc skeptics must still contend with hypotheticals in a bond landscape characterized by messy, but still predictable, crisis resolution.

Adding to institutional and investor biases toward ad hoc solutions, developing countries and their allies have been unable to convert alternate permanent regime proposals into political action. To date, the most comprehensive and palatable alterations proposed by debtor sovereigns remain the UNCTAD Ad Hoc Group of Governmental Experts’ recommendations for an enhanced Paris Club process complemented by parallel UN meetings.²³⁴ This effort, at least, managed to secure UNCTAD a tacit seat at the Paris Club negotiating table, although it did so at a time when the Club’s relative importance was giving way to the preferences of banks and private investors. If the Basic Principles on Sovereign Debt Restructuring Practices are any indication of developing countries’ policy stances in the post-Argentina bond market, UNCTAD and the G-77 are on a far different trajectory than most creditor groups, developed country governments, and even middle-income nations with stable access to international credit.

²³² Bases, Daniel. “Argentina and creditors settle historic sovereign debt dispute.” *Reuters*, 29 Feb 2016. Web. 3 March 2016. <http://www.cnbc.com/2016/02/29/reuters-america-factbox-argentina-and-creditors-settle-historic-sovereign-debt-dispute.html>.

²³³ Blitzer, Jonathan. “A Good Week for the Vulture Funds.” *The New Yorker*, 5 March 2016. Web. 27 March 2016. <http://www.newyorker.com/business/currency/a-good-week-for-vulture-funds>.

²³⁴ United Nations Conference on Trade and Development. *Debt Problems of Developing Countries*.

Although debt markets have drastically evolved since the North-South Dialogue, it is perhaps a reflection of creditor and debtor requirements to balance flexibility with certainty that Rieffel's "ad hoc machinery" has stayed in place for the past four decades. While the progression from public financing to banks, and from banks to retail investors and hedge funds, has encouraged developed countries and international financial institutions to hand the reins of sovereign debt management over to bondholders and lawyers, even the Argentine holdout scenario has failed to provoke a breakdown of the ad hoc system. Absent a legal practice, political circumstance, or economic contagion capable of challenging multiple restructurings and debt relief efforts across bond series and countries, the debate over a permanent sovereign debt regime will persist in academic circles and debtor-friendly forums without making much of an impact on restructuring practices.

II. The Future of Ad Hoc Machinery

Dim prospects for a permanent sovereign debt regime do not necessarily suggest that the sovereign debt market will witness a "settled" ad hoc arrangement of institutions and norms. Any number of fault lines within the ad hoc framework can lead to another evolution in debt management practices: creditor governments must contend with a disparity between official positions and the decisions of their judicial branches, private creditors and banking interests must preempt or work around minority opposition to restructuring agreements, debtor sovereigns find themselves increasingly torn between political calls for favorable treatment and the widespread implementation of bond contract enhancements, and the

“old guard” mechanisms – namely the IMF and the Paris Club – have relinquished their central roles in proportion to the rise of private investors.

One implication of Argentina’s fifteen-year battle is that, unlike the 1980s, G-7 architects will continue to harbor biases against using a combination of sticks and carrots to motivate stable restructurings. Setting aside questions of whether creditor government or IMF-led groupings of bondholders are even feasible, developed countries are only likely to return to their previous regulatory positions in the event of a systemic threat on par with the Latin American debt crisis.²³⁵ Fortunately, by virtue of private investors’ decentralized activities, any potential contagion can be nipped in the bud in ways that are not available to overexposed commercial banks. As alarming as the 2012 Argentine ruling may have been, its inability to provoke the development of “a bolder mechanism that is more driven by the public sector” hints at just how much future restructuring activities will remain embedded in private investors’ decisions rather than creditor government oversight.²³⁶

While the continued evolution of the sovereign debt market toward more complex frameworks, legal templates, and lender-debtor relationships is employed as a strong argument for devolving coordination and governance responsibilities to bondholders themselves, it is not necessarily true that this pattern will disadvantage the Paris Club in the long term. At a 2013 presentation to the United Nations in Geneva, the U.S. Department of State’s Andrew Haviland reported that sovereign-to-sovereign lending, although reduced in importance through a combination of

²³⁵ Rieffel, L. *Restructuring Sovereign Debt*. pp. 270-271.

²³⁶ Rieffel, L. *Restructuring Sovereign Debt*. pp. 271.

increased private investor participation and official sector loan-to-grant programs, had the potential to radically alter the Paris Club's internal makeup and existing debt management principles. Haviland's line of thinking reflects on "the emergence of non-Paris Club creditors such as China, Brazil, India, Venezuela, and others as significant providers of credit to developing countries," as well as the observation that the Paris Club can boost its relevance to a broader swath of creditor interests by opening up its membership to new official lenders.²³⁷ This possibility may be the silver lining around UNCTAD's stalled efforts to reconsider the ad hoc system: an expanded Paris Club would incorporate many of the prominent signatories involved in the Basic Principles' presentation to the UN General Assembly. Augmented Paris Club membership may also reduce the political impetus for an SDRM-like proposal, effectively preserving the balance between official loans and private bonds while reassuring developing countries of their continued influence in debt negotiations. It remains to be seen, however, whether this expansion is likely and what kinds of consequences such a transition would elicit.

The path forward for the IMF is much narrower. The Fund itself has engaged in quite a bit of soul-searching since its 2004 Argentine rebuke, writing in an April 2013 paper that a "reprofiling" of debt, in which sovereign debtors would "extend maturities on all private sector bonds and loans falling due within the life of the [IMF] programme," could potentially reduce the moral hazard problem troubling

²³⁷ Haviland, Andrew. "The Changing Landscape of Sovereign Debt." A Presentation to the United Nations in Geneva, 11 April 2013. Print. pp. 2.

creditor governments.²³⁸ Despite these sincere attempts to resolve the Fund's past mistakes, however, it is unlikely that private bondholders and ratings agencies will play along. Instead, just as developing countries once fretted that submitting debt negotiations to an SDRM would scare off investors, the IMF's proposals to disentangle public funds from private creditors are likely to be viewed as preludes to sovereign default. If the Fund's introspection is any indicator of its evolving policy stances, it is much more probable that debtor governments will strive to disintermediate the IMF and turn to alternative crisis lending sources in the near future.²³⁹

Finally, the language of bond contracts is likely to become even more fluid as private creditors adopt more sophisticated outlooks on debt management. Reactions to New York bond frameworks are a toss-up: the judicial system's willingness to rule on hedge fund suits brought against debtor sovereigns ups the ante for retail investors and other small creditors looking to promote market stability, but the rise of New York-constructed "trust structures" offers a viable alternative template for investors looking to deter disruptive litigation.²⁴⁰ In a similar fashion, bondholders are becoming more cognizant of how enhanced contractual provisions affect the fungibility of bond issuances; despite developed countries' support for widespread adoption of CACs and related components, a "menu option," by which bondholders pick and choose amendments to an existing

²³⁸ Sterne, Gabriel and Charles Blitzer. "The IMF Approach to Sovereign Debt Restructuring." *The Financial Times*, 4 April 2014. Web. 6 Feb. 2016. <http://ftalphaville.ft.com/2014/04/04/1819992/guest-post-the-imf-approach-to-sovereign-debt-restructuring/>.

²³⁹ Sterne, G. and C. Blitzer, "The IMF Approach to Sovereign Debt Restructuring."

²⁴⁰ International Monetary Fund, "Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts." International Monetary Fund, Sept. 2015. Web. 2 Feb. 2016. <http://www.imf.org/external/np/pp/eng/2015/091715.pdf>. pp. 14.

debt agreement, has the potential to become the new norm.²⁴¹ Private creditor preferences are thus contributing to the most diverse sovereign debt marketplace witnessed over the previous forty years.

Whatever the outcome of the ad hoc system's ongoing quirks, the use of specific tools, principles, forums, and legal mechanisms to resolve sovereign debt restructurings on a case-by-case basis persists as a sustainable status quo. If, as this thesis posits, the history of sovereign debt has repeated itself, it has only done so because existing debt machinery has consistently outpaced predictions of systemic demise. It follows that the future of ad hoc machinery will take after its past – turbulent, contentious, and legally complicated, but also viable even in the midst of massive political and economic shifts.

²⁴¹ Rieffel, L. *Restructuring Sovereign Debt*. pp. 171.

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