Vanderbilt Journal of Transnational Law

Volume 50
Issue 4 *October 2017*

Article 6

2017

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## Recommended Citation

Stephen K. Park and Tim R. Samples, Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement, 50 *Vanderbilt Law Review* 1033 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol50/iss4/6

# Tribunalizing Sovereign Debt: Argentina's Experience with Investor–State Dispute Settlement

*Stephen Kim Park*[*] *& Tim R Samples*[**]

**ABSTRACT**

*The global sovereign debt market, lacking a formal bankruptcy regime or binding regulatory oversight, is fundamentally shaped by the specter of conflicts between debtors that refuse to pay and holdout creditors that refuse to settle. Never was this more evident than in Argentina's most recent sovereign debt crisis, which spurred daring, innovative, and often controversial legal strategies. This Article focuses on one of the legacies of Argentina's sovereign debt crisis: the use of investor–state arbitration under international investment law to enforce sovereign bond contracts. Following Argentina's financial collapse in 2001, private creditors brought dozens of cases against Argentina before the International Center for the Settlement of Investment Disputes (ICSID). Among these ICSID cases was* Abaclat and Others v. The Argentine Republic, *which marked the first time that an arbitral tribunal ruled that it had jurisdiction to rule on a sovereign debt default and restructuring under international investment law. With the proliferation of investor–state dispute settlement (ISDS) mechanisms in bilateral investment treaties (BITs) and other international investment agreements, this remedy will likely grow in importance. In light of Abaclat and subsequent ICSID cases, this Article analyzes Argentina's experience with sovereign debt claims under BITs in the broader context of sovereign debt disputes and ongoing measures undertaken by*

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The authors wish to thank the *Vanderbilt Journal of Transnational Law* for organizing the symposium on Sovereign Conduct on the Margins of the Law, as well as colleagues, friends, and family for their support and encouragement. Special thanks to Sebastian Puerta for contributing valuable research and design assistance to the timeline in Annex 1. Prior versions of this Article were presented at the 2017 Annual Conference of the Academy of Legal Studies in Business and the 2016 Annual Conference of the Southeastern Academy of Legal Studies in Business. All errors and omissions are our own.

*sovereigns in response to tribunalization. Looking forward, this Article assesses the systemic implications of ISDS for the exercise of sovereign authority in sovereign debt finance.*

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## I. INTRODUCTION

It is fair to say that the global sovereign debt market is governed by what its participants think the law should be—rather than what it actually is.[1] The role of legal imagination—and constant re-imagination—is stronger in sovereign debt finance than arguably any other part of the global financial system. The absence of a formal bankruptcy regime or binding regulatory oversight is fertile ground for rogue behavior by opportunistic debtors and creditors alike.[2] Nowhere has this been more evident than in Argentina's decades-long dispute with holdout creditors following its historic default in 2001.

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1. *See* Lee C. Buchheit & G. Mitu Gulati, *Responsible Sovereign Lending and Borrowing*, 73 L. & CONTEMP. PROBS. 63, 65 (2010) ("The law of sovereign debt is therefore mostly about what the international community expects sovereign states to do by way of honoring their financial commitments, and only marginally about the rules that national courts apply when a sovereign debtor is sued under a commercial debt instrument.").

2. *See* Stephen Kim Park & Tim R Samples, *Towards Sovereign Equity*, 21 STAN. J. L. BUS. & FIN. 240, 249–54 (2016) (examining rogue trends in sovereign debt).

While Argentina's standoff with its holdout creditors appears to finally be over,[3] its reverberations will be felt for decades.

The search by creditors for the holy grail of enforceability has spurred a range of novel legal strategies. Arguably one of the most important consequences of Argentina's debt crisis is the use of investor–state dispute settlement (ISDS) to adjudicate and enforce sovereign debt obligations. In *Abaclat and Others v. The Argentine Republic*, an arbitral tribunal at the International Center for the Settlement of Investment Disputes (ICSID) determined that it had the legal authority to hear mass claims by Italian bondholders brought under Argentina's bilateral investment treaty (BIT) with Italy.[4] This landmark decision has been followed by two other ICSID cases against Argentina.[5]

The use of ISDS in Argentina's debt disputes raises two intertwined questions. First, what are appropriate fora for resolving sovereign debt disputes? Sovereign debt is typically refinanced through the exchange of original bonds for new bonds following *ad hoc* negotiations between sovereign debtors and their creditors.[6] Argentina's unilateral exchange offers in 2005 and 2010 involved limited and narrow negotiations and the presentation of "take-it-or-

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3. *See* Benedict Mander & Elaine Moore, *Argentina Puts an End to Long Holdouts Saga*, FIN. TIMES (Apr. 22, 2016), https://www.ft.com/content/516ab98a-08a1-11e6-876d-b823056b209b (last visited Aug. 27, 2017) (subscription required) [https://perma.cc/6ARC-S6UF].

4. Abaclat v. The Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf (last visited Aug. 27, 2017) [https://perma.cc/T2FB-3BS2] (archived Aug. 27, 2017) [hereinafter *Abaclat*]. *Abaclat* only addressed jurisdiction and refrained from determining the arbitration procedure pending the merits phase of the proceedings. *See* Jessica Beess und Chrostin, *Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID, The* Abaclat *Case*, 53 HARV. INT'L L. J. 505, 515 (2012). In 2016, Argentina reached a settlement agreement with the *Abaclat* claimants before the issuance of an award. Caroline Simson, *Argentina Settles Historic ICSID Row With Italian Bondholders*, LAW360 (Feb. 2, 2016, 7:35 PM), http://www.law360.com/articles/754309/argentina-settles-historic-icsid-row-with-italian-bondholders (last visited Aug. 27, 2017) [https://perma.cc/7W4X-JVP9] (archived Aug. 27, 2017).

5. Ambiente Ufficio S.P.A. v. The Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf (last visited Aug. 27, 2017) [https://perma.cc/8BR9-4BHG] (archived Aug. 27, 2017) [hereinafter Ambiente Ufficio]; Giovanni Alemanni v. The Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (Nov. 17, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4061.pdf (last visited Aug. 27, 2017) [https://perma.cc/L77F-LC9R] (archived Aug. 27, 2017) [hereinafter Alemanni].

6. *See* Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 712 (2007) (contrasting sovereign debt restructurings to corporate reorganizations).

leave-it" offers to creditors.[7] Refusing to participate in these exchange offers, holdout creditors filed hundreds of lawsuits in New York and other jurisdictions, arguing that they were entitled to full repayment.[8] Given the likelihood of future cases before other ICSID panels and other arbitral tribunals, how should the "tribunalization" of sovereign debt finance be addressed in the event of overlap or conflict with litigation in national courts?[9] In the years following *Abaclat*, legal scholars have started to grapple with the implications of this source of pluralism in the global sovereign debt market.[10]

Second, what interests should be taken into account in ISDS cases involving a sovereign debtor? BITs and other international investment agreements (IIAs) have dramatically grown in number and importance in the past couple of decades.[11] At their heart is the private right of action granted to foreign investors to sue host countries for violation of a treaty-based standard of protection.[12] As this Article shows, *Abaclat* and its progeny may be viewed as a consequence of Argentina's extraordinary intransigence.[13] However, responses to rogue debtors, such as Argentina, often make bad law.[14] Critics remain skeptical that ISDS is likely to rectify fundamental problems in sovereign debt restructuring. In fact, prescriptions for the widespread or standardized application of ISDS underestimate

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7. *See* Anna Gelpern, *What Bond Markets Can Learn From Argentina*, INT'L FIN. L. REV. 19, 19 (2005), http://www.iie.com/publications/papers/gelpern0405.pdf (last visited Aug. 27, 2017) [https://perma.cc/Z7VG-9FG2] (archived Aug. 27, 2017) (characterizing Argentina's restructuring negotiations as "unusually contentious").

8. Julian Schumacher, *Sovereign Debt Litigation in Argentina: Implications of the Pari Passu Default*, 1 J. FIN. REG. 143, 144 (2015).

9. *See* Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order Symposium- The Normalizing of Adjudication In Complex International Governance Regimes: Patterns, Possibilities, and Problems*, 41 N.Y.U. J. INT'L L. & POL. 959, 959 (2009) (defining tribunalization as "the increase in the number of international courts and tribunals and the greater use of such bodies to interpret and enforce international law, and to resolve disputes between states and other actors in the international system").

10. *See* S.I. Strong, *Rogue Debtors and Unanticipated Risk*, 35 U. PA. J. INT'L L. 1139, 1142 (2014).

11. In addition to BITs, IIAs include investment chapters in free trade agreements (FTAs), such as NAFTA, and other bilateral economic agreements. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L. J. 427, 428–29 (2010); *see also* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 176–77 (2005) (noting the intermingling of trade and investment provisions in international economic agreements).

12. Salacuse, *supra* note 11, at 459; *see also* Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1607–10 (2011) (identifying ICSID arbitration as an example of privatized international lawmaking).

13. *See infra* Part III.

14. *See* Anna Gelpern, *Contract Hope and Sovereign Redemption*, 8 CAP. MKTS. L. J. 132, 133 (2013) (observing propensity of sovereign debt litigation to produce bad law) [hereinafter Gelpern, Contract Hope].

the systemic implications of sovereign debt restructuring.[15] Rather than fixing sovereign debt restructuring, the tribunalization of sovereign debt disputes through ISDS undermines the need for flexibility and the importance of politically palatable settlements.[16]

This Article proceeds as follows. Part II describes the convergence of international investment law and sovereign debt finance. The Article explains how the unique challenges of enforcing creditor claims against sovereign debtors and the proliferation of ISDS mechanisms gave rise to this new remedy. Part III examines Argentina's debt restructuring cases before ICSID as a case study. Retrospectively, the Article analyzes *Abaclat* and its progeny in the context of Argentina's experiences in litigation in national courts. Prospectively, the Article identifies and addresses current and possible future measures by Argentina in response to sovereign bondholder arbitration. Part IV addresses the systemic implications of ISDS for the exercise of sovereign authority in the context of sovereign debt restructurings.

## II. THE APPLICATION OF INTERNATIONAL INVESTMENT LAW TO SOVEREIGN DEBT FINANCE

The use of ISDS is a product of iterative efforts by Argentina and holdout creditors to exploit legal uncertainty and ambiguity in the sovereign debt restructuring process. The following discussion examines the legal and institutional basis for applying international investment law to resolve sovereign debt disputes.

### A. *The Problem of Rogues and the Challenges of Enforcement in Sovereign Debt*

The global sovereign debt market differs from the commercial debt market in several fundamental ways. There is no global court or regulator to enforce debt commitments or monitor restructurings,[17] and there is no bankruptcy law to determine priority of payment to creditors.[18] Due to a lack of enforcement mechanisms, sovereign

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15. *See infra* Part IV.

16. *See* Lee C. Buchheit & Elena L. Daly, *Minimizing Holdout Creditors, in* SOVEREIGN DEBT MANAGEMENT para. 1.43 (Rosa M. Lastry & Lee Buchheit eds., 2014) (noting domestic political opposition to creditor-oriented inducements in restructurings); *see also* Julian G. Ku, *Don't Cry for Sovereign Debtors: Why Argentina's Defeat in U.S. Courts Does Not Justify a Sovereign Debt Treaty*, 36 U. PA. J. INT'L L. 433, 454 (2015) (noting the policy dislocations caused by bondholder litigation against Argentina).

17. Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L. J. 1047, 1048 (2014).

18. Anna Gelpern, *Building a Better Seating Chart for Sovereign Restructurings*, 53 EMORY L. J. 1115, 1120 (2004) [hereinafter Gelpern, Seating Chart].

debtors have the discretion to default opportunistically.[19] However, most sovereigns do in fact satisfy their debt obligations, sometimes even under significant economic duress.[20] To explain this compliance, many scholars cite the threat of reputational sanctions, political pressure, and internal collateral damage.[21]

Traditionally, sovereign insolvencies are resolved through voluntary negotiated exchanges of existing debt obligations for new debt obligations.[22] Holdout creditors seeking full repayment have chosen to sue sovereigns in foreign courts, typically in New York City and London.[23] Creditors have had little difficulty establishing jurisdiction over sovereign debtors, either by negotiating waivers of sovereign immunity in loan documents *ex ante* or through the commercial activity exception to foreign sovereign immunity.[24] However, creditors have limited recourse collecting judgments against sovereigns that assert immunity against attachment of assets[25] or contract out of debt liability.[26]

This *ad hoc*, decentralized restructuring process has deteriorated dangerously in recent years.[27] Negotiation between sovereigns and their private creditors has drifted towards "litigotiation"—an unstable situation in which litigation and negotiation in different courts against multiple sovereigns blurs with unpredictable results.[28]

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19. *See* Fisch & Gentile, *supra* note 17, at 1052–53.

20. *See, e.g.*, Sebastian Boyd, *Venezuela Refuses to Default. Few People Seem to Understand Why*, BLOOMBERG (July 4, 2016, 7:00 PM), https://www.bloomberg.com/news/articles/2016-07-04/venezuela-refuses-to-default-few-people-seem-to-understand-why (last visited Aug. 27, 2017) [https://perma.cc/X7F6-TTPG] (archived Aug. 27, 2017); *Running Out of Time*, ECONOMIST (Oct. 22, 2016), http://www.economist.com/news/finance-and-economics/21709042-devastating-spiral-continues-running-out-time (last visited Aug. 27, 2017) [https://perma.cc/ETD6-ACX8] (archived Aug. 27, 2017).

21. *See* Mitu Gulati & George Triantis, *Contracts Without Law: Sovereign Versus Corporate Debt*, 75 U. CIN. L. REV. 977, 987–88 (2007); Ugo Panizza, Federico Sturzenegger & Jeromin Zettelmeyer, The Economics and Law of Sovereign Debt and Default, 47 J. ECON. LITERATURE 651, 692 (2009).

22. Park & Samples, *supra* note 2, at 247.

23. *See* Gregory R. Day, *Market Failure, Pari Passu, and the Law and Economics Approach to the Sovereign Debt Crisis*, 22 TUL. J. INT'L & COMP. L. 225, 232–33 (2014) (noting foreign creditors' concern about prejudicial treatment in a sovereign's domestic courts).

24. Karen Halverson Cross, *The Extraterritorial Reach of Sovereign Debt Enforcement*, 12 BERKELEY BUS. L. J. 111, 117 (2015) [hereinafter Cross, Extraterritorial Reach].

25. *See* Day, *supra* note 23, at 235–39.

26. *See* Fisch & Gentile, *supra* note 17, at 1086–87.

27. *See* Anna Gelpern, *Sovereign Debt: Now What?*, 41 YALE J. INT'L L. ONLINE 45, 69– 85 (2016) (characterizing restructurings by Argentina, Greece, and Ukraine as "shocks" that have highlighted weaknesses and spurred numerous reform initiatives) [hereinafter Gelpern, Now What?].

28. *See* Joseph Cotterill, *Sovereign Pari Passu and the Litigators of the Lost Cause*, 9 CAP. MKTS. L. J. 18, 21–23 (2014) (observing how holdout creditor litigation against concerning the pari passu clause has become a broad-based, powerful

Fragmentation among creditors that have weak institutional relationships with each other and divergent interests has enabled rogue behavior by sovereign debtors and creditors.[29] Reputational considerations, creditor coordination mechanisms, and cross-conditionality all have weakened as sources of order and authority in the global sovereign debt market.[30] Contentious, costly, and inequitable restructurings—most notoriously, Argentina's—have incited calls for legal reform.[31]

For the past couple of decades, reformers have fallen into two camps: the public law institutionalists and the private law contractualists.[32] Among institutional reform advocates, the International Monetary Fund's proposed Sovereign Debt Restructuring Mechanism (SDRM) exemplified efforts to transplant bankruptcy-like procedures into sovereign debt restructurings.[33] In contrast, contractual reform advocates point to the ability of sovereign debt contracts to impose meaningful restraints on sovereign behavior, in spite of the weakness of coercive external enforcement.[34] First and foremost among the contractual innovations that have taken root are collective action clauses (CACs), which permit a majority or a supermajority of bondholders to change the payment terms of an issue of bonds.[35] Coupled with exit consents, which enable a sovereign debtor to implement modifications to nonpayment terms

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negotiating tool). *But see* Ku, *supra* note 16, at 452–53 (arguing that creditors will have difficulty in asserting pari passu claims in future cases against other sovereigns).

29. *See* Park & Samples, *supra* note 2, at 249–52.

30. *See* Gelpern, Now What?, *supra* note 27, at 61–63.

31. *See* John A.E. Pottow, *Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign-Debt Restructurings*, 49 TEX. INT'L L. J. 219, 224–27 (2014) (describing the costs of holdout creditors' tactics against Argentina); *see also* Gelpern, Now What?, *supra* note 27, at 71–73 (underscoring intercreditor equity problems in Argentina's debt settlement).

32. *See* Park & Samples, *supra* note 2, at 279 (discussing problems with both approaches to addressing rogue trends in sovereign debt); *see also* Steven L. Schwarcz, *Sovereign Debt Restructuring Options: An Analytical Comparison*, 2 HARV. BUS. L. REV. 95, 98–101 (2012) (describing the two potential alternatives to bailouts).

33. *See* ANNE O. KRUEGER, IMF, A NEW APPROACH TO SOVEREIGN DEBT RESTRUCTURING (2002), http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf (last visited Aug. 27, 2017) [https://perma.cc/Q9CB-V7ZM] (archived Aug. 27, 2017); *see also* Patrick Bolton & David A. Skeel, Jr., *Redesigning the International Lender of Last Resort*, 6 CHI. J. INT'L L. 177 (2005); Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299, 300-01 (2005); Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956 (2000).

34. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 131, 133 (2012); *see also* W. Mark C. Weidemaier, *Contracting for State Intervention: The Origins of Sovereign Debt Arbitration*, 73 L. & CONTEMP. PROB. 335, 353–55 (2010) (characterizing dispute settlement provisions in early twentieth century sovereign debt contracts as a means to influence third party behavior).

35. Fisch & Gentile, *supra* note 17, at 1096–97. CACs increasingly include aggregation clauses, which enable a sovereign debtor to amend payment terms across multiple series of bonds. Choi et al., *supra* note 34, at 141.

as a condition to participating in an exchange offer,[36] CACs are a powerful tool against holdout creditors. However, CACs are not a panacea: among various shortcomings, many old sovereign bonds do not include them, and they do not address coordination problems in loans and other non-bond debt.[37]

### B. *Enforcing Sovereign Debt Obligations through Investor–State Dispute Settlement*

Amidst ongoing differences about the optimal manner to resolve sovereign debt disputes, international investment law has emerged to fill a perceived enforcement gap. There is no multilateral treaty regime equivalent to the World Trade Organization (WTO) for international trade or the Bretton Woods institutions.[38] Rather, international investment law consists of over three thousand separate, independent, and freestanding IIAs.[39] Despite their number, IIAs arguably constitute a cohesive global regime for international investment, with its own architecture and decisionmaking processes.[40]

ISDS provisions in IIAs predominantly enable foreign investors to opt to bring an investment-related claim to international arbitration or to initiate a proceeding in a domestic court.[41] IIAs generally provide for investor–state arbitration under ICSID rules or, alternatively, under *ad hoc* arbitration governed by the rules of the United Nations Commission on International Trade Law (UNCITRAL).[42] Investor–state arbitration empowers investors to

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36. *See* Lee C. Buchheit & G. Mitu Gulati, *Exit Consents in Sovereign Bond Exchanges*, 48 UCLA L. REV. 59, 65–66 (2000).

37. Park & Samples, *supra* note 2, at 280.

38. Frédéric G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements*, 11 SANTA CLARA J. INT'L L. 335, 342–44 (2013).

39. *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, INVESTOR-STATE DISPUTE SETTLEMENT: A SEQUEL 18 (UNCTAD Series on Issues in Int'l Inv. Agmts., 2013), http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf (last visited Aug. 28, 2017) [https://perma.cc/3MZV-M7GR] (archived Aug. 28, 2017). The United Nations Conference on Trade and Development (UNCTAD) maintains a database of IIAs and model agreements. *See* International Investment Agreements Navigator, UNCTAD, http://investmentpolicyhub.unctad.org/IIA (last visited Aug. 28, 2017) [https://perma.cc/6ZKR-BLDG] (archived Aug. 28, 2017).

40. *See* Salacuse, *supra* note 11, at 463–68.

41. Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY 11 (OECD Working Papers on Int'l Inv., 2012/02, 2012), https://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf (last visited Aug. 28, 2017) [https://perma.cc/H3TD-ZZ98] (archived Aug. 28, 2017) (noting that only 6.5% of sampled IIAs do not provide for international arbitration).

42. Scott J. Shackelford, Eric L. Richards, Anjanette H. Raymond & Amanda N. Craig, *Using BITs to Protect Bytes: Promoting Cyber Peace by Safeguarding Trade Secrets Through Bilateral Investment Treaties*, 52 AM. BUS. L. J. 1, 26 (2015); *see also*

directly protect their economic interests through private rights of action against host states.[43] This fundamental characteristic lies at the heart of its appeal to sovereign bondholders vis-à-vis litigation. In theory, creditors *qua* investors can seek a judgment from an arbitral tribunal that is not subject to substantive judicial review and effectively constitutes a final judgment.[44] Enforcement of awards arising out of investor–state arbitration is relatively favorable to creditors.[45] Further, investor–state arbitration enables a large number of bondholders to collectively pursue claims in a single mass action arbitration.[46]

Sovereign debt contracts rarely provide for international arbitration, instead stipulating national courts as the forum for resolving disputes.[47] Despite choice of forum provisions in sovereign debt contracts that expressly submit to the jurisdiction of foreign courts,[48] investor–state arbitration elevates alleged breaches of a bond contract to international treaty claims.[49] Protection is provided for a given investment, as defined by the IIA in force between home country investors and a host country government.[50] Therefore, a key threshold issue is whether a sovereign's payment obligations on outstanding bonds constitute a covered "investment" under the applicable IIA.[51] Many IIAs expressly include debt instruments as an investment, and a broad definition of investment that does not expressly exclude sovereign bonds (or similarly defined debt instruments) qualifies.[52]

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CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976).

43. Sourgens, *supra* note 38, at 355–56; *see also* Salacuse, *supra* note 11, at 462–63 (describing how investor–state arbitration relieves home country governments of the obligation to advocate for their nationals through diplomatic channels).

44. Waibel, *supra* note 6, at 715; *see also* ICSID Convention, *supra* note 42, art. 54 (providing that ICSID member states must recognize and enforce ICSID awards as if they were final judgments by their own respective domestic courts).

45. Cross, *Sovereign Arbitration*, *in* SOVEREIGN DEBT MANAGEMENT, *supra* note 19, para. 12.05 [hereinafter Cross, Sovereign Arbitration].

46. *See* Ryan McCarl, *ICSID Jurisdiction over International Mass Investment Arbitrations: Due Process and Default Rules*, 51 STAN. J INT'L L. 173, 174–75 (2015).

47. Weidemaier, *supra* note 34, at 335–36.

48. Waibel, *supra* note 6, at 734–36 (arguing that both exclusive and non-exclusive submission to jurisdiction in a sovereign bond contract should be viewed as on par with an investor–state settlement provision providing for arbitration in a BIT).

49. *Id.* at 717; *see also* Felipe Suescun de Roa, *Investor-State Arbitration in Sovereign Debt Restructuring: The Role of Holdouts*, 30 J. INT'L ARB. 131, 142 (2013) (explaining the variance in national laws regarding execution of arbitration awards).

50. *See* Sourgens, *supra* note 38, at 354 (noting the lack of traditional privity requirements for BITs).

51. *Compare* Beess und Chrostin, *supra* note 4, at 510–11 (describing the *Abaclat* "double-barreled" test), *with* Waibel, *supra* note 6, at 729–32 (arguing against an expansive definition of "investment" under Article 25 of the ICSID Convention).

52. *See* Suescun de Roa, *supra* note 49, at 144–45.

IIAs include numerous protections that provide potential recourse to sovereign bondholders. Such clauses include a prohibition against expropriation and discrimination in favor of home country investors (national treatment) or third country investors (most favored nation or MFN).[53] The transfers clause, which guarantees that investments be transferable freely and without delay, may be triggered by a sovereign bond default or during an ongoing restructuring.[54] The "umbrella" clause obligates states to respect their international obligations to investors, notwithstanding any conflicting contractual agreement between the parties.[55] Finally, most newer IIAs include a "fair and equitable treatment" (FET) clause, which provides broad-based procedural protections that could arguably be triggered by the implementation of a sovereign debt restructuring.[56] However, the applicability of these protections to sovereign debt contracts has not been addressed by an ICSID tribunal.[57]

The dramatic expansion of ISDS over the past decade has provoked strong reactions from both states and private parties.[58] Backlash has surfaced in domestic politics, treaty negotiations, and trade strategies.[59] An ISDS controversy nearly derailed the European Union-Canada Comprehensive Economic and Trade Agreement.[60] And concerns about ISDS were among several issues weighing on the Trans-Pacific Partnership.[61] ISDS concerns have also prompted some

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53. *See* Waibel, *supra* note 6, at 739–47.

54. *See generally* Kevin P. Gallagher, *Financial Crises and International Investment Agreements: The Case of Sovereign Debt Restructuring*, 3 GLOB. POL'Y. 362, 369–70 (2012) (analyzing how investment provisions in treaties may hinder the ability of nations and private creditors to comprehensively negotiate sovereign debt restructurings).

55. *See* José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 231–32 (2011) (describing comprehensive umbrella clauses in U.S. Model BITs).

56. *See generally* Waibel, *supra* note 6, at 751–54 (examining whether Argentina's initial bond exchange in 2005 could be viewed as a FET violation).

57. Cross, Sovereign Arbitration, *supra* note 45, ¶ 12.09.

58. *See* Sourgens, *supra* note 38, at 356 (noting the "academic and political backlash" caused by the rapid growth in BIT claims). Even popular press outlets have weighed in on ISDS. *See, e.g.*, *Secrets of a Global Super Court*, BUZZFEED https://www.buzzfeed.com/globalsupercourt (last visited June 2, 2017) [https://perma.cc/HAH4-EW85] (archived Aug. 29, 2017) (linking to special reports about ISDS).

59. *See generally* Alan Beattie, *Arbitration on Trial: The US and UK's Fear of the Supranational*, FIN. TIMES (May 2, 2017), https://www.ft.com/content/e607c6b2-28f5-11e7-bc4b-5528796fe35c (subscription required) [https://perma.cc/AH8Y-YXSE] (archived Aug. 29, 2017) (discussing political trends against supranational dispute resolution).

60. *See* Jessica Murphy, *Why the Canada-EU Trade Saga is Far From Over*, BBC NEWS (Nov. 3, 2016), http://www.bbc.com/news/world-us-canada-37826855 [https://perma.cc/V5BL-99UQ] (archived Aug. 29, 2017) (reporting on how ISDS became a stumbling block for the completion of the free trade agreement).

61. *See* Gary Clyde Hufbauer, *ISDS Controversy*, TRADE & INV. POL'Y WATCH – PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (May 13, 2015, 10:00 AM),

sovereigns—India in particular—to recalibrate their IIA strategies.[62] The Article now turns to Argentina's experience and responses, a flashpoint for ISDS and sovereign debt.

## III. ARGENTINA'S DEBT RESTRUCTURING AND INVESTOR–STATE DISPUTE SETTLEMENT

In the past fifteen years, Argentina has played a leading role in several key trends in sovereign debt, including: the employment of an aggressive strategy to debt restructuring (with drastic haircuts),[63] the issuance of growth-linked securities as an incentive to creditors to participate in restructurings,[64] engagement in dramatic asset skirmishes with creditors,[65] and participation as co-protagonists in *NML v. Argentina*, dubbed by the *Financial Times* as the "trial of the century" in sovereign debt.[66] Argentina's economic crisis in the early 2000s also triggered an unprecedented surge of investment arbitration claims, including the landmark *Abaclat* case. The following discussion provides context for those developments with an emphasis on Argentina's experience with ISDS and its responses to ISDS as a new forum for sovereign debt disputes.

### A. *Argentina's Historic Default and Debt Restructuring*

Argentina's recent past in sovereign debt is singular and exceptional, yet also emblematic. While exceptional across the board, Argentina's ability to push the limits of sovereign power at the margins of the law was enabled by governance gaps in the global

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https://piie.com/blogs/trade-investment-policy-watch/isds-controversy [https://perma.cc/K3F6-P4HH] (archived Aug. 29, 2017) ("Thanks to the battle over the Trans-Pacific Partnership (TPP), ISDS has now become a blogosphere term.").

62. *See* Kavaljit Singh, *Letters to the Editor: ISDS is Unsuited to Meet Today's Global Challenges*, FIN. TIMES (May 7, 2017), https://www.ft.com/content/ed08cd0c-2fea-11e7-9555-23ef563ecf9a (subscription required) [https://perma.cc/Y7TU-ENCC] (archived Aug. 29, 2017) (describing India's recalibration of treaty practices in response to ISDS concerns).

63. *See infra* Part III.A.

64. *See* Park & Samples, *supra* note 2, at 267–70 (discussing the terms and structure of Argentina's GDP-linked warrants).

65. *See* Stephen Kim Park & Tim R Samples, *Puerto Rico's Debt Dilemma and Pathways Toward Sovereign Solvency*, 54 AM. BUS. L. J. 9, 29–30 (2017) (noting attempts by creditors to seize Argentine government assets overseas).

66. The NML litigation attracted a great deal of attention in the media and academic literature. *See generally* W. Mark C. Weidemaier, Sovereign Debt After NML v. Argentina, 8 CAP. MKTS. L. J. 123 (2013) (discussing the historical context of NML and potential consequences for sovereign debt markets); Joseph Cotterill, *Argentine Roulette*, FIN. TIMES ALPHAVILLE, http://ftalphaville.ft.com/tag/pari-passu-saga/ (last visited June 2, 2017) [https://perma.cc/NC8Z-PKNN] (archived Aug. 29, 2017) (discussing effects of reopening Argentina's debt restructuring).

sovereign debt market.[67] In fact, the conditions that led to Argentina's historic standoff are endemic to sovereign debt.[68] Likewise, in their aggressive and relentless pursuit of Argentina, holdout creditors tested the sovereign debt system, establishing new paths of conduct within those margins. The paucity of globally enforceable legal rules enabled rogue behavior by Argentina, its opportunistic creditors, and an exasperated court.[69]

At US$81.3 billion, Argentina's default in 2001 was as large as it was complex, with over a half-million creditors holding 150 debt instruments that were denominated in six currencies and subject to the laws of eight countries.[70] Negotiations with creditors were unusually contentious and haircuts borne by creditors were harsh.[71] Creditor participation in the restructuring was remarkably low: holdout rates were about 23 percent after the 2005 exchange and 7 percent after the 2010 exchange.[72] Argentina's debt crisis was also extraordinary at the dispute phase in terms of volume, legal strategies, and outcomes. Argentina accounted for nearly half of all sovereign debt litigation worldwide between 1976 and 2010.[73]

Argentina also faced an unprecedented wave of investor–state arbitration claims in the wake of the default. As shown in Table 1, since the inception of ICSID, Argentina has been a respondent in fifty-nine investment disputes, ranking number one by this measure.[74] Argentina's legal avalanche resulted from an unfortunate

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67. *See, e.g.*, Tim R Samples, Rogue Trends in *Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law*, 35 NW. J. INT'L L. & BUS. 49, 63–74 (2014) (documenting Argentina's debt crisis).

68. *See* Gelpern, Now What?, *supra* note 27, at 72–73.

69. *See* Pottow, *supra* note 31, at 227 ("Judges are nevertheless asked to make important policy decisions in one-off interventions that occur every few years, a task to which they are poorly suited. The litigiousness of vulture funds exacerbates this problem."); W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. ON REG. 189, 211–12 (2014) (describing Argentina's record and stated intent to defy court orders as a source of exasperation for the NML court).

70. *See A Victory by Default?*, ECONOMIST (Mar. 3, 2005), http://www.economist.com/node/3715779 [https://perma.cc/N3PB-LHCB] (archived Aug. 29, 2017).

71. *See* Juan J. Cruces & Christoph Trebesch, *Sovereign Defaults: The Price of Haircuts*, 5 AM. ECON. J.: MACROECONOMICS 85, 94–97 (2013) (finding that the average haircut in sovereign restructurings is 37% and that the haircut in Argentina's 2005 exchange offer was over 75%).

72. *See* Juan J. Cruces & Tim R Samples, *Settling Sovereign Debt's "Trial of the Century"*, 31 EMORY INT'L L. REV. 5, 15–18 (2016) (illustrating bond-by-bond holdout rates and analyzing the seven most litigated debt instruments in Argentina's default).

73. *See* Julian Schumacher et al., Sovereign Defaults in Court 11 (May 6, 2014) (unpublished manuscript), http://ssrn.com/abstract=2189997 [https://perma.cc/9PJW-NCTC] (archived Aug. 29, 2017) (noting that Argentina accounts for 41 creditor lawsuits out of 108 during this period).

74. Many claims stemmed from emergency measures taken by the Argentine government during the economic crisis. Most of the claims were filed at ICSID. *See Investment Dispute Settlement Navigator*, UNCTAD, http://investmentpolicyhub.

perfect storm for investment disputes. During the 1990s, Argentina aggressively liberalized its economy, undertaking large-scale privatizations and embracing foreign investment.[75] In parallel, Argentina entered into nearly sixty BITs between 1990 and 2001.[76] Together, these factors set the stage for Argentina's record-setting investment dispute experience when the country plunged into a deep economic crisis in the early 2000s.

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unctad.org/ISDS/FilterByCountry (last visited June 2, 2017) [https://perma.cc/5Q7D-BSR9] (archived Aug. 29, 2017).

75. *See, e.g.*, Press Release, World Trade Organization, Argentina Realizes Gains from Economic Reforms But Could Gain Even More from Multilateral Liberalization (Jan. 13, 1998), https://www.wto.org/english/tratop_e/tpr_e/tp100_e.htm [https://perma.cc/NA4J-WSKA] (archived Aug. 29, 2017) (discussing growth in Argentina's economy as a result of economic reforms and restructuring programs); *see also* PAUL BLUSTEIN, AND THE MONEY KEPT ROLLING IN (AND OUT) 4 (2006) (noting Argentina's policies of deregulation, privatization, anti-inflationary measures, and trade liberalization).

76. Among Latin American countries, only Cuba has signed more BITs than Argentina. However, only 40 of Cuba's 59 BITs are in force, compared to 52 Argentine BITs that are in force. All the 56 total BITs signed by Argentina were signed between 1990 and 2001 except one (with Qatar in 2016). In addition, Argentina has another 16 trade agreements with investment provisions. *See International Investment Agreements Navigator*, UNCTAD, http://investmentpolicyhub.unctad.org/ IIA/CountryBits/8 (last visited June 2, 2017) [https://perma.cc/BH88-XCZK] (archived Aug. 29, 2017).

Table 1. Investment Disputes by Country[77]

| *Country* | *Cases as Respondent State* | *Cases as Home State of Claimant*[78] |
|---|---|---|
| Argentina | 59 | 3 |
| Venezuela | 41 | 1 |
| Spain | 34 | 38 |
| Czech Republic | 34 | 4 |
| Egypt | 28 | 3 |
| Canada | 26 | 44 |
| Mexico | 25 | 2 |
| Russia | 24 | 14 |
| Poland | 23 | 6 |
| Ecuador | 23 | 0 |
| India | 21 | 4 |
| Ukraine | 21 | 10 |
| Kazakhstan | 17 | 4 |
| United States | 16 | 148 |

**Source: UNCTAD, International Investment Agreements Navigator**

Domestically, the 2001 economic crisis crushed Argentine living standards.[79] Even for a society that has endured a great deal of

77. Data on investment treaty disputes is incomplete. *See generally* Kevin P. Gallagher & Elen Shrestha, Investment Treaty Arbitration and Developing Countries: A Re-Appraisal (Global Development and Environmental Institute, Working Paper No. 11-01, 2011) (explaining problems inherent in investment arbitration datasets).

78. Perhaps not surprisingly, several of the sovereigns with a large number of cases as a respondent state, relative to cases as the home state of the claimant, have grown weary of ISDS. Argentina, Venezuela, Ecuador, and India, all of which have high respondent home-state ratios, are among the most vocal and active countries in the movement away from ISDS. *See, e.g.*, *Come and Get Me*, ECONOMIST (Feb. 18, 2012), http://www.economist.com/node/21547836 [https://perma.cc/M6YU-JDCD] (archived Aug. 29, 2017) (reporting on backlash against ICSID in South America); Singh, *supra* note 62 (describing India's turn away from ISDS).

79. *See* Larry Rohter, *Once Secure, Argentines Now Lack Food and Hope*, N.Y. TIMES (Mar. 2, 2003), http://www.nytimes.com/2003/03/02/world/once-secure-

economic turbulence, this crisis was arguably *la peor de todas*, the worst of all.[80] Internally, the circumstances of Argentina's default set the stage for a political backlash against international institutions and foreign creditors.[81] Holdout creditors—particularly the *buitres* or "vulture" funds—became notorious in Argentine political culture, spawning everything from protests to video games.[82] Although to a lesser extent than the widely despised vultures, ICSID disputes became politically charged as well.[83]

Argentina's debt disputes dragged sovereign debt into uncharted territory. Lacking enforcement powers over an unwilling sovereign defendant, the *NML* court relied on a drastic remedy: broad injunctions applicable to third parties.[84] The broad scope of the *NML* injunctions included many innocent third parties, such as exchange bondholders and financial service providers.[85] By targeting parties more likely to comply with court orders than Argentina, these injunctions succeeded in freezing Argentina's payments to exchange bondholders, effectively imposing an international financial blockade on Argentina.[86] The *NML* injunctions even blocked an issuance of

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argentines-now-lack-food-and-hope.html (subscription required) [https://perma.cc/JPY5-TMXB] (archived Aug. 29, 2017).

Over half of Argentina's population fell below the poverty line. *See* Leonardo Gasparini, Poverty and Inequality in Argentina: Methodological Issues and a Literature Review, CEDLAS-WORLD BANK 35 (Jan. 20, 2004), http://www.depeco.econo.unlp.edu.ar/cedlas/monitoreo/pdfs/review_argentina.pdf [https://perma.cc/7D8P-XBLX] (archived Aug. 29, 2017).

80. *See* Jorge Oviedo, *Crisis, la peor de todas*, LA NACIÓN (July 14, 2002), http://www.lanacion.com.ar/413669-crisis-la-peor-de-todas [https://perma.cc/A6MM-JQRP] (archived Aug. 29, 2017).

81. *See* Samples, *supra* note 67, at 68–70 (connecting the "crisis of legitimacy" of Argentina's external debt obligations with the government's response to creditor claims).

82. *See, e.g., Forget Angry Birds. This Video Game Targets Angry Investors*, BLOOMBERG (July 26, 2015, 7:00 PM), https://www.bloomberg.com/news/articles/2015-07-26/forget-angry-birds-this-video-game-takes-aim-at-angry-investors. (subscription required) [https://perma.cc/C4ZN-QYST] (archived Aug. 29, 2017).

83. *See* ECONOMIST, *supra* note 78 (reporting on ICSID controversies in Argentina, Bolivia, Ecuador, and Venezuela).

84. The injunctions ordered Argentina to pay holdout creditors in full before exchange bondholders could receive any payments and ultimately prompted a secondary default in 2014. Order, NML Capital, Ltd. v. Argentina, No. 1:09-CV-01707 (S.D.N.Y. Feb. 23, 2012).

85. *See* Cross, Extraterritorial Reach, *supra* note 24, at 136 (discussing the extraterritorial dimensions of NML injunctions for third parties); Weidemaier & Gelpern, supra note 69, at 213–17 (explaining NML injunctions and collateral costs for third parties).

86. *See* Benedict Mander & Robin Wigglesworth, *"Holdout" Slams Argentine Debt Offer to End Financial Blockade*, FIN. TIMES (Feb. 12, 2016), https://www.ft.com/content/d17fb6b4-d1a3-11e5-986a-62c79fcbcead (subscription required) [https://perma.cc/DB4W-DHSM] (archived Aug. 29, 2017) (reporting on Argentina's request to have the injunctions lifted in light of efforts to settle with holdout creditors).

bonds by Argentina in Buenos Aires under Argentine law.[87] As Argentina's payments to exchange bondholders remained frozen, the *NML* injunctions effectively prompted a secondary default by Argentina—thirteen years after the original default in 2001.[88]

*NML* renewed doubts about the stability and viability of current practices for sovereign debt restructuring.[89] Ironically, for a case that hinged on the *pari passu* or "equal treatment" clause, inequity among creditors was dramatic.[90] Further, *NML* raised doubts about creditor incentives for participation in sovereign debt restructurings.[91]

### B. *The* Abaclat *Case and its Progeny*

Argentina's debt disputes at ICSID have been groundbreaking and controversial. Prior to the 2001 default, Argentine debt was held by tens of thousands of bondholders in Italy, many of which were individual retail investors.[92] Following the default, the Italian bondholders organized under the collective representation of the *Associazione per la Tutela Degli Investitori in Titoli Argentini* (Task

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87. *See* NML Capital v. Argentina, No. 08 Civ. 6978, 2015 WL 7087488 (S.D.N.Y. Mar. 12, 2015).

88. *See* Benedict Mander, *Cristina Fernández Holds Out for Victory in Debt Battle*, FIN. TIMES (Mar. 30, 2015), https://www.ft.com/content/830ed41e-d475-11e4-8be8-00144feab7de (subscription required) [https://perma.cc/K496-N8V5] (archived Aug. 29, 2017) (reporting on the consequences of Argentina's defiance of U.S. court rulings and resulting default in 2014).

89. *See* Gelpern, Now What?, *supra* note 27, at 69–73 (arguing that Argentina's debt saga cast doubts about the sovereign debt restructuring regime); see also Staff Report & Press Release from Yan Liu, et al., Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring 8–15 (Sept. 2, 2014) https://www.imf.org/external/np/pp/eng/2014/090214.pdf [https://perma.cc/AF5M-NB2Y] (archived Aug. 29, 2017) (examining the implications of NML).

90. *See* Gelpern, Seating Chart, *supra* note 18, at 1136 (describing pari passu enforcement in courts as a "blunt, unpredictable, and generally inadequate weapon to enforce intercreditor equity"); *see also* Charles Blitzer, *Guest Post: Argentina's Debt Offer—Don't Pop the Champagne Just Yet*, FIN. TIMES ALPHAVILLE (Feb. 12, 2016), http://ftalphaville.ft.com/2016/02/12/2153239/guest-post-argentinas-debt-offer-dont-pop-the-champagne-just-yet/ (subscription required) [https://perma.cc/H7XK-BL8B] (archived Aug. 29, 2017) (describing dramatic differences in haircuts among creditors in Argentina's initial settlement offer); Matt Levine, *Argentina's Bond Fight Comes Down to Its Worst Bonds*, BLOOMBERG (Feb. 8, 2016), http://www.bloombergview.com/articles/2016-02-08/argentina-s-bond-fight-comes-down-to-its-worst-bonds [https://perma.cc/A2EA-2BRE] (archived Aug. 29, 2017) (highlighting dramatic disparities among creditors); Martín Guzman, An Analysis of Argentina's 2001 Default Resolution (Ctr. for Int'l Governance Innovation, Paper No. 110, Oct. 2016), https://www.cigionline.org/sites/default/files/documents/CIGI%20Paper%20No.110WEB_0.pdf [https://perma.cc/BQ2A-BE8L] (archived Aug. 29, 2017) (analyzing holdout incentives in light of intercreditor inequities).

91. *See* Guzman, *supra* note 90, at 2; Schumacher, *supra* note 8, at 146.

92. *Abaclat, supra* note 4, ¶ 64.

Force Argentina or TFA).[93] In 2004, TFA then joined several other creditor committees to negotiate with Argentina under the collective representation of the Global Committee of Argentine Bondholders (GCAB).[94] In 2005, when Argentina launched the first of two exchange offers, GCAB rejected the restructuring offer.[95] The following year, TFA filed a mass claim against Argentina at ICSID on behalf of 180,000 Italian bondholders.[96] The number of claimants dropped to 60,000 after many of the Italian bondholders participated in Argentina's second debt restructuring in 2010.[97]

In permitting bondholders to challenge the terms of a restructuring before ICSID, *Abaclat* broke new ground in sovereign debt. Several holdings are particularly crucial. First, the *Abaclat* tribunal found that ICSID had jurisdiction to hear claims of the entire group of sixty thousand bondholders.[98] Lacking an established ICSID framework for such claims, the *Abaclat* tribunal developed a novel and controversial approach for "mass claims proceedings" that enabled such large-scale claim arbitration.[99] S.I. Strong has characterized this use of ISDS as "regulatory arbitration"—that is, a form of international lawmaking akin to a class action lawsuit.[100] Similarly, Gus Van Harten and Martin Loughlin have described ISDS as a "comprehensive form of global administrative law."[101]

Similarly controversial was the finding that Argentina's sovereign bonds should be considered an investment under the

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93. TFA should not be confused with the America Task Force Argentina, a lobbying entity funded by distressed debt hedge funds in the United States. *Compare Abaclat*, ¶¶ 65–67 (explaining the origins and mandate of TFA), *with* Ianthe Jeanne Dugan, *Argentine Lobby Mystifies "Members"*, WALL ST. J. (Oct. 15, 2012, 12:33 PM), https://www.wsj.com/articles/SB10000872396390444657804578050923796499176 (subscription required) [https://perma.cc/LT68-P78F] (archived Aug. 29, 2017) (reporting on the mysterious membership of America Task Force Argentina).

94. Press Release, Task Force Argentina, The Global Committee of Argentina Bondholders Was Formally Established Today in Rome (Jan. 12, 2004), http://www.tfargentina.it/download/GCAB-press-release120104.pdf [https://perma.cc/A5AU-PZPW] (archived Aug. 29, 2017).

95. The offer involved a deep haircut: 35 cents on the dollar plus a GDP-linked warrant. *See* Cruces & Samples, *supra* note 72, at 28–30 (discussing investor returns on participation in Argentina's 2005 exchange).

96. Initially, the mass claim was registered as Giovanna A Beccara and others v. The Argentine Republic before it was renamed as Abaclat et al. v. The Argentine Republic. *Abaclat*, ¶ 641.

97. *Abaclat*, *supra* note 4, ¶ 216.

98. *Id.* ¶ 551.

99. *See id.*

100. *See* S.I. Strong, *Mass Procedures as a Form of "Regulatory Arbitration"—* Abaclat v. Argentine Republic *and the International Investment Regime*, 38 J. CORP. L. 259, 263–65 (2013) (defining regulatory arbitration).

101. *See* Guz Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 123 (2006) (arguing that the "synergistic quality of the arrangement" between autonomous internationally organized mechanisms and domestic systems, characterize the regime as global administrative law).

Argentina-Italy BIT and the ICSID Convention.[102] Serious doubts exist about whether sovereign debt should have been considered a protected investment.[103] Finally, the *Abaclat* tribunal found that the default and restructuring may amount to a treaty claim—as opposed to a pure contract claim, which would not trigger ICSID jurisdiction.[104] Although the claims involved the breach of a debt contract, the tribunal found that the default stemmed from Argentina's exercise of sovereign powers.[105] Together, these holdings provoke controversial questions about the relationship between public international obligations (set forth in a treaty) and private contractual obligations (set forth in the terms and conditions of bonds).

*Abaclat* was followed by similar claims against Argentina. In two separate cases, *Ambiente Ufficio* filed in 2013 and *Alemanni* filed in 2014, groups of Italian bondholders convinced ICSID tribunals to accept multi-party claims. However, there were significant differences in scale between *Abaclat* and the other Italian bondholder cases. Both *Ambiente Ufficio* and *Alemanni* involved about one hundred claimants each, a far cry from the tens of thousands in *Abaclat*.[106] Recognizing that asymmetry, the *Ambiente Ufficio* tribunal distinguished their approach from the mass claims approach of *Abaclat*.[107] Likewise, the *Alemanni* tribunal distinguished its decision from *Abaclat* on the question of volume and consolidation.[108] To this day, *Abaclat* remains the only indisputably mass claims decision in sovereign debt ISDS.[109]

The ISDS trend in sovereign debt enforcement that gained steam with *Abaclat* has expanded beyond Argentina. In 2012, the Greek

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102. *See Abaclat*, *supra* note 4, ¶¶ 356, 367 (concluding that Argentina's bonds fit within the definition of an "investment" under the Argentina-Italy BIT as well as Article 25 of the ICSID Convention).

103. *See Abaclat*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (Oct. 28, 2011) (Georges Abi-Saab dissenting) ¶ 276 (concluding that the tribunal lacks jurisdiction over sovereign debt instruments).

104. *See Abaclat*, *supra* note 4, ¶¶ 320–26 ("Consequently, the Tribunal considers that the claims brought forward by Claimants in the present arbitration are not pure contractual claims but treaty claims based on acts of a sovereign.").

105. *Id.* ¶¶ 323–26.

106. *See, e.g.*, Ambiente Ufficio, *supra* note 5, ¶ 113 (describing how the number of claimants dropped from 119 to 90 after Argentina's 2010 exchange offer).

107. *See id.*, ¶ 120 ("[T]he dimension of the Claimants in the case to be decided by the present Tribunal can in no way be compared to the *Abaclat* case, being merely one thousandth of the latter.").

108. *See* Alemanni, *supra* note 5, ¶ 267 (asserting that the number of claimants—somewhere between 74 and 183—does not fit the "mass" descriptor).

109. Though the terminology lacks precision and certainty, the Ambiente Ufficio and Alemanni tribunals vigorously avoided characterizing their decisions on jurisdiction and admissibility as "mass claims" or "class actions." *See* Ambiente Ufficio, ¶ 114 (declaring that the action should not be considered or referred to as a class action or mass claims/proceedings); Alemanni, ¶ 267 (rejecting the labels "mass claim" and "class action").

debt restructuring became the largest sovereign restructuring in history and the first by a Eurozone member state.[110] In *Poštová v. Greece*, a Slovak bank holding Greek bonds brought ICSID claims against Greece to challenge the restructuring.[111] In 2015, the *Poštová* tribunal dismissed the claims, finding that sovereign bonds were not investments under the Slovakia-Greece BIT.[112] In distinguishing the case from *Abaclat* and *Ambiente Ufficio*, the *Poštová* tribunal noted differences in the definition of investment in the applicable BITs.[113] The Slovakia-Greece BIT defines an investment as "shares in and stock and debentures of a company and any other form of participation in a company"[114] whereas the Argentina-Italy BIT contains a broader and quite vague definition of investment that includes "obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues."[115] These differences are especially notable in light of recent responses to tribunalization.[116]

An ongoing case, *Gramercy v. Peru*, illustrates the latest trends in the innovative use of ISDS in sovereign debt disputes. Peru issued land bonds as compensation in a 1969 agrarian land reform but stopped paying them in the 1980s and 1990s.[117] Gramercy, a distressed debt hedge fund, started buying the defaulted bonds in 2006.[118] In 2016, Gramercy brought a US$1.6 billion claim against Peru under UNCITRAL rules pursuant to the investment chapter of the United States-Peru Trade Promotion Agreement of 2009.[119] As

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110. *See* Jeromin Zettelmeyer, Christoph Trebesch & Mitu Gulati, The Greek Debt Restructuring: An Autopsy, at 24 (Peterson Inst. for Int'l Econ., Working Paper No. 13-8, 2013), http://www.piie.com/publications/wp/wp13-8.pdf [https://perma.cc/K3F6-P4HH] (archived Aug. 26, 2017).

111. *See* Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award of the Tribunal, ¶¶ 60–76 (Apr. 9, 2015) [hereinafter Poštová].

112. *Id.* ¶¶ 335, 379.

113. *See id.* ¶¶ 298–308.

114. *Id.* ¶ 333.

115. *Abaclat*, *supra* note 4, ¶ 352.

116. For example, the definition of investment in Argentina's most recent BIT (with Qatar in 2016) is very similar to the Slovakia-Greece BIT. *See infra* notes 147–150 and accompanying text.

117. *See* Karen Halverson Cross, *Using Investment Arbitration to Enforce Peruvian Agrarian Bonds*, KLUWER ARB. BLOG (Aug. 2, 2016), http://kluwerarbitrationblog.com/2016/08/02/using-investment-arbitration-to-enforce-peruvian-agrarian-bonds/ [https://perma.cc/U86S-GNKD] (archived Aug. 26, 2017).

118. *See* Davide Scigliuzzo, *Contentious Peru Bond Could Pay Off Handsomely for Gramercy Fund*, REUTERS (July 8, 2016, 12:43 PM), http://www.reuters.com/article/peru-bonds-gramercy-idUSL1N19T0SK [https://perma.cc/ZBQ3-FLR3] (archived Aug. 26, 2017) ("Gramercy bought over 9,700 land bonds from hundreds of individual bondholders between 2006 and 2008, accumulating a share of around 20% of the total outstanding during that time.").

119. *See* Cross, *supra* note 117 (discussing strategic dimensions of filing under UNCITRAL arbitration rules versus ICSID).

the product of a strategic secondary market investment by an experienced distressed sovereign debt investor, *Gramercy* represents a potentially significant market development.[120] The enforcement innovations in *Gramercy* continue a broader trend in which distressed debt hedge funds, which account for 90 percent of new cases, have driven sovereign debt disputes.[121]

### C. *Argentina's Responses to Tribunalization*

Argentina's debt disputes at ICSID ran concurrently with debt litigation but proceeded in separate fora and were ultimately resolved in separate settlement agreements.[122] A timeline of Argentina's debt disputes is illustrated in Annex 1. Following the 2005 exchange offer, filings escalated sharply at ICSID and in court systems alike.[123] While the *NML* litigation proceeded to a dramatic finale when injunctions essentially froze Argentina's financial operations, the *Abaclat* arbitral proceedings were suspended and then settled before the award was finalized.[124]

Argentina's responses to the tribunalization of sovereign debt disputes are still developing. In the early stages, ICSID claims remained unpaid along with other plaintiff holdouts.[125] But the two fronts were distinct. First, the ICSID claims had not yet resulted in final awards.[126] Second, the Argentine government distinguished between the Italian bondholders and the *NML* plaintiffs. The extraordinarily bitter tone in Argentina's conflict with the so-called vultures was not directed at the *Abaclat* claimants.[127] While the

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120. *See* Ellen Kelleher, *Hedge Fund Gentleman Wages Argentine War*, FIN. TIMES (Jan. 13, 2013), https://www.ft.com/content/72ad46a4-5a4d-11e2-bc93-00144feab49a (subscription required) [https://perma.cc/SMA9-FTCU] (archived Aug. 26, 2017) (profiling the managing partner and emerging market investment activities of Gramercy Funds Management).

121. *See* Schumacher et al., *supra* note 73, at 7–12 (quantifying and outlining the impact of vulture funds on sovereign debt litigation).

122. Some Italian bondholders also filed in New York to preserve contractual claims, but those claims were stayed pending the results of ICSID arbitration. *See* Brief for The Clearing House Association, L.L.C. as Amici Curiae Supporting Plaintiffs-Appellees, NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d. Cir. Jan. 4, 2013) (No. 12-105-cv(L)) [hereinafter Brief of Amici Curiae Italian Holders].

123. *See* Schumacher, *supra* note 8, at 144 (illustrating the trajectory of sovereign debt claims filed against Argentina from 2002 to 2014).

124. *See* Procedural Details of Abaclat and others v. Argentina Republic, ICSID, (ICSID Case No. ARB/07/5), https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/5 (last visited June 2, 2017) [https://perma.cc/4PPV-WJXY] (archived Aug. 26, 2017). (indicating that the proceedings were suspended on March 21, 2016) [hereinafter Procedural Details].

125. *See* Brief of Amici Curiae Italian Holders, *supra* note 122, at 6–7 (describing Argentina's defiance of ICSID awards).

126. *See* Procedural Details, *supra* note 124.

127. *See* Bob Van Voris & Katia Porzecanski, *Argentina Debt Injunction to Be Lifted in Blow to Hedge Funds*, BLOOMBERG MKTS. (Feb. 19, 2016),

distressed debt hedge funds waged a bitter public relations campaign against the presidential administration of Cristina Fernández de Kirchner,[128] the Italian bondholders were a particularly sympathetic group of creditors.[129] Many of the Italian bondholders were individual retail investors with small holdings that were purchased before Argentina defaulted.[130] Finally, the Italian bondholders did not hold the keys to the injunction that blocked Argentina's financial channels and triggered the default in 2014.

Towards the end of the Fernández de Kirchner administration, important disputes—including Paris Club debts, Repsol claims for the YPF nationalization, and various ICSID claims—were settled as Argentina inched towards financial normalization.[131] But disputes with holdout creditors remained politically charged. A change in government finally made a settlement with the holdouts possible. Under the administration of Mauricio Macri, who took office in December 2015, Argentina quickly launched an international campaign to resolve the holdout problem and return to capital markets.[132] Before the end of January 2016, the Argentine government had reached a settlement agreement with the TFA, offering the Italian bondholders an amount equal to 150 percent of

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https://www.bloomberg.com/news/articles/2016-02-19/argentina-bonds-judge-says-he-will-lift-injunctions-on-debt-iku9ykz3 [https://perma.cc/8BPJ-MPAR] (archived Aug. 29, 2017) (reporting on Argentina's president Cristina Fernández de Kirchner calling debt holders "vultures" and Judge Thomas Griesa, the 85 year old jurist in the NML cases, a "senile judge").

128. *See, e.g.*, Nina Porzucki, *Argentine President Cristina Fernández May Have Dodged Criminal Charges, But the Conspiracy Theories Continue*, PRI THE WORLD (Apr, 23, 2015, 4:15 PM), https://www.pri.org/stories/2015-04-23/argentine-president-cristina-fern-ndez-may-have-dodged-criminal-charges [https://perma.cc/VY8T-4EUT ] (archived Aug. 26, 2017) (referencing smear campaign waged by hedge funds against Fernández de Kirchner).

129. *See* Benedict Mander, *Argentina to Pay Italian 'Holdout' Creditors*, FIN. TIMES (Feb. 2, 2016), https://www.ft.com/content/ee587988-c9e2-11e5-be0b-b7ece4e953a0 (subscription required) [https://perma.cc/SWF2-CG9U] (archived Aug. 29, 2017) ("TFA represents approximately 50,000 Italian retail investors, most of whom are retired and hold on average $25,000–$50,000 in bonds each.").

130. *Id.*

131. *See* J.P. Rathbone, Ed Stocker & Vivianne Rodrigues, *Argentina in Default as Contest with Holdouts Enters Endgame*, FIN. TIMES (June 29, 2014), https://www.ft.com/content/15c4c27e-fded-11e3-acf8-00144feab7de (subscription required) [https://perma.cc/BA6B-WFUC] (archived Aug. 29, 2017) (discussing Argentina's settlements with Repsol and the Paris Club in 2014); *Argentina settles five investment treaty awards*, ALLEN & OVERY (Nov. 7, 2013), http://www.allenovery.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx [https://perma.cc/NW3Q-VLRZ] (archived Aug. 29, 2017) (describing major ICSID settlements by Argentina in 2013).

132. *See* Alexandra Stevenson, *How Argentina Settled a Billion-Dollar Debt Dispute With Hedge Funds*, N.Y. TIMES (April 25, 2016), https://www.nytimes.com/2016/04/25/business/dealbook/how-argentina-settled-a-billion-dollar-debt-dispute-with-hedge-funds.html [https://perma.cc/3DY2-URUN] (archived Aug. 26, 2017) (discussing how even before being sworn in as Argentina's finance secretary, Luis Caputo, under instruction from Mauricio Macri, met with hedge fund leaders "leading to a momentous debt deal that has now allowed Argentina to rejoin the global finance markets").

the original principal amount of their bonds, plus an allowance for certain legal and administrative expenses.[133] About a month later, Argentina settled with the *NML* plaintiffs.[134]

Under Macri, Argentina has eagerly re-entered the global sovereign debt market, from which it had been effectively shut out during the *NML* and ICSID disputes. With a record-breaking USD 16.5 billion issuance in 2016, just months after the holdout settlements, Argentina returned to global debt markets in dramatic fashion.[135] Remarkably, the offering was four times oversubscribed.[136]

Considering the exceptional trauma of Argentina's sovereign debt disputes, its official response to tribunalization has been relatively tempered. As described below, Argentina's responses have been limited to minor modifications within existing frameworks. Arguably, this reflects the lack of exigency on the part of Argentina following the settlement of the ICSID claims and the country's re-entry in the global sovereign debt market. However, tribunalization now poses legal risks to Argentina and other sovereign debtors. Going forward, Argentina has several options to respond to tribunalization, which range from relatively simple and *ad hoc* to legally dramatic and politically fraught.

First and foremost among these options is modifying the terms of its bond contracts. Argentina could amend the terms of new bonds to explicitly exclude arbitration or *Abaclat*-style mass claim arbitration.[137] Consumer contracts in the United States often waive rights to jury trials, class actions, and mass claim arbitration.[138] But the ability to avoid arbitration with forum selection clauses in sovereign debt contracts is somewhat uncertain. Argentina, for

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133. The allowance for legal and administrative expenses amounted to approximated 5–6% of the total value amount of the bonds tendered in the settlement agreement. Accordingly, the settlement amounted to roughly 155% of the principal amount of the defaulted bonds. *See* Agreement in Principle, Republic of Argentina and Associazione per la Tutela degli Investitori in Titoli Argentini (Jan. 31, 2016) (on file with authors).

134. *See generally* Cruces & Samples, *supra* note 72 (analyzing various aspects of the settlement).

135. *See* Julie Wernau & Carolyn Cui, *Argentina Returns to Global Debt Markets With $16.5 Billion Bond Sale*, WALL ST. J. (April 19, 2016, 9:05 PM), https://www.wsj.com/articles/argentina-returns-to-global-debt-markets-with-16-5-billion-bond-sale-1461078033 [https://perma.cc/QHK2-VRXH] (archived Aug. 26, 2017).

136. *See* Hugh Bronstein & Sarah Marsh, *Argentina Returns to Global Debt Markets After 15-years*, REUTERS (Apr. 19, 2016, 6:49 PM), http://www.reuters.com/article/us-argentina-bonds-bids-idUSKCN0XG2W0 [https://perma.cc/KJY4-BJ4Q] (archived Aug. 26, 2017).

137. *See* Choi et al., *supra* note 34, at 140 (noting how sovereign bond contracts can specify choice of forum clauses).

138. Such practices are controversial but has been reaffirmed by the Supreme Court. *See, e.g.*, DirectTV Inc. v. Imburgia 136 S. Ct. 463, 478 (2015) (holding that arbitration clause was invalid only if "law of your state").

instance, argued that bond contracts with forum selection clauses designating federal courts in New York precluded ICSID arbitration for contract claims.[139] But the *Abaclat* tribunal ruled the forum selection clause in Argentina's bonds irrelevant for determining ICSID jurisdiction.[140] Argentina's 2016 bonds included a forum selection clause with Argentina's submission to jurisdiction in any New York state court or US federal court sitting in Manhattan, as in previous issuances.[141] But, perhaps in response to *Abaclat*, the 2016 issuance saw the notable addition of "exclusive" to the clause.[142]

Second, Argentina may seek to proactively carve out sovereign debt in new future treaties, either by expressly excluding it from the definition of investment or adding provisions that subject it to special treatment.[143] For example, annexes to ISDS provisions in the United States-Uruguay BIT and US free trade agreements with Peru and Colombia prohibit ISDS claims on the basis of a "negotiated debt restructuring" in which a certain majority of bondholders have consented to a change in payment terms.[144] As part of a broad and extensive ISDS recalibration, India revised its model BIT to exclude sovereign debt.[145]

Generally speaking, Argentina's BITs provide for ICSID arbitration and contain relatively broad definitions of investment.[146] But all of Argentina's BITs—minus one—were entered into between 1990 and 2001.[147] Notably, Argentina's only BIT since *Abaclat*

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139. *Abaclat, supra* note 4, ¶ 379.

140. The *Abaclat* tribunal ruled that the bondholder claims were treaty claims, not contract claims. *Id.* ¶¶ 498–99 ("[T]he presence of forum selection clauses in the contractual bond documents is irrelevant for the assessment of the existence and/or validity of Argentina's consent to ICSID arbitration.").

141. *See, e.g.*, Prospectus 12, Republic of Argentina, June 24, 1999 (on file with authors); Prospectus Supplement to Prospectus Dated Dec. 27, 2004, Republic of Argentina (Jan. 10, 2005), https://www.sec.gov/Archives/edgar/data/914021/000095012305000302/y04567e424b5.htm [https://perma.cc/XV44-YCCN] (archived Aug. 29, 2017) [hereinafter Prospectus Supplement].

142. Offering Memorandum 209, Republic of Argentina (May 4, 2016) http://www.bvm.com.uy/documentos/Doc_43427145_ARGENT%206.25%2004%2022%2019%20Corp%20-%20USP04808AG92.pdf [https://perma.cc/5SQY-Y32R] (archived Aug. 29, 2017).

143. Cross, Sovereign Arbitration, *supra* note 45, ¶ 12.45.

144. These provisions, in effect, prevent holdout creditors from initiating ICSID arbitration when CACs have been triggered during a restructuring. *See* Gallagher, *supra* note 54, at 370–72.

145. *See* Model Text for the Indian Bilateral Investment Treaty § 1.7, Republic of India, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [https://perma.cc/P4UN-C4QX] (archived Aug. 29, 2017) (clarifying that investments do not include "any interest in debt securities issued by a government or government-owned or controlled enterprise, or loans to a government or government owned or controlled enterprise").

146. *See, e.g.*, note 115 and accompanying text.

147. *International Investment Agreements Navigator*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/CountryBits/8 (last visited June 2, 2017) [https://perma.cc/44E8-AZXQ] (archived Aug. 29, 2017).

contains a potentially significant revision to the definition of investment. Signed in 2016 with Qatar, this BIT departs from the old model used for the Argentina-Italy BIT and others.[148] The Argentina-Qatar BIT narrows the scope of investments significantly, providing that financial instruments include only "[s]hares in stocks, debentures or [sic] a company or any other similar forms of participation in a company."[149] This definition likely would be interpreted to exclude sovereign debt.[150]

Third, as a similar but retroactive strategy, Argentina could attempt to renegotiate its current BITs. As part of renegotiation or withdrawal strategies, sovereigns may allow investment treaties to expire or even to selectively terminate them.[151] Such strategies have become more common as countries respond to ISDS risks. Although much of the backlash against ISDS has been led by left-leaning governments in Latin America, others have joined the fray as well.[152] In 2011, for instance, Australia issued a policy against ISDS in bilateral and regional trade agreements.[153] The Australia-United States Free Trade Agreement expressly excludes ISDS.[154] India's broad shift away from ISDS—including the termination of existing BITs—stands out as particularly far-reaching and significant.[155] To

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148. *See* The Reciprocal Promotion and Protection of Investments between the Argentina Republic and the State of Qatar, Arg.-Qatar, art. 1, June 11, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5383 [https://perma.cc/ZHZ7-R73J] (archived Aug. 29, 2017) (using a stricter definition of investments).

149. *Id.* at art. 2(b).

150. The Poštová tribunal considered that nearly identical language in the Slovakia-Greece BIT excluded sovereign debt. *See* Poštová, *supra* note 111, ¶ 340 ("Again, the specific use of the term "debentures" only for debt issued by companies [...] together with the lack of reference to any sort of public indebtedness, leads the Tribunal to consider that the Parties to the treaty did not intend to treat government securities, such as the GGBs, as investments for purposes of the BIT.").

151. *See* Leon E. Trakman & David Musayelyan, *The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration*, 31 ICSID REV. 194, 199–203 (2015) (discussing Indonesia's announcement of plans to allow BITs to expire in order to renegotiate them under a revised model investment treaty with modified investor–state arbitration provisions as well as selective termination of BITs by Bolivia and South Africa); Diane Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 288–90 (2012) (evaluating the pros and cons of denouncing or amending BITs).

152. *See* Kyla Tienhaara & Patricia Ranald, *Australia's Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors*, INV. TREATY NEWS (July 12, 2011), http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/ [https://perma.cc/B4LC-A66C] (archived Aug. 29, 2017) (analyzing Australia's movement away from ISDS).

153. *Id.*

154. *Id.*

155. *See* Kavaljit Singh & Burghard Ilge, *India Overhauls Its Investment Treaty Regime*, FIN. TIMES (July 15, 2016), https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc (subscription required) [https://perma.cc/DP6P-SB27] (archived Aug. 29, 2017) (discussing India's moves towards terminating existing BITs or letting them expire).

date, Argentina has yet to engage in retroactive strategies to renegotiate or terminate treaties with ISDS provisions.

As a related strategy, Argentina can invoke necessity arguments to defend, excuse, or exempt investments from protections under a given BIT.[156] Most notably, non-precluded measures (NPM) provisions permit host governments to take actions otherwise inconsistent with the BIT to preserve essential security, public order, or public health, or in other exceptional circumstances.[157] Argentina can consider negotiating the inclusion of NPM clauses that expressly cover responses to economic crises, such as Argentina's restructuring of its external debt.[158] Again, India's most recent model BIT expanded sovereign rights with significant revisions to controversial investor rights, such as national treatment and fair and equitable treatment.[159]

Fourth, Argentina could implement domestic laws to preclude, impede, or delay ICSID arbitration. An ISDS provision may require that that an investor–state claim be filed in a domestic court before commencing international arbitration.[160] Domestic laws may affect the ability of foreign investors to execute an ICSID award against state-owned assets.[161] Controversy over this crucial procedural question surfaced in Argentina's ISDS disputes following the 2001 economic crisis. For several years, Argentina insisted that award creditors had to initiate proceedings in Argentine courts to enforce

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156. *See* Andrew D. Mitchell & Caroline Henckel, *Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law*, 14 CHI. J. INT'L L. 93, 108–09 (2013); *see also* Alan O. Sykes, *Economic "Necessity" in International Law*, 109 AM. J. INT'L L. 296 (2015) (outlining necessity arguments that may be made under treaty obligations or customary international law).

157. For example, the NPM provision in Article XI of the U.S.-Argentina BIT provides: "This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its essential security interests." Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, 31 I.L.M. 124 (1991).

158. *See* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 408 (2008).

159. *See* Prabhash Ranjan & Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. (forthcoming 2018), https://ssrn.com/abstract=2946041 [https://perma.cc/83K5-HXMF] (archived Aug. 28, 2017) (analyzing investor protections and sovereign authority in India's most recent model BIT).

160. This local litigation requirement was at issue in a recent U.S. Supreme Court case concerning the U.K.-Argentina BIT. *See* BG Group PLC v. Republic of Arg., 134 S. Ct. 1198 (2014) (holding that arbitrators, not courts, have the primary authority to determine arbitrability).

161. *See* Suescun de Roa, *supra* note 49, at 139–41 (describing several cases in which investors encountered difficulties in executing ICSID awards in national courts).

ICSID awards.[162] That policy stood in tension with Argentina's obligations under the ICSID Convention and, until recently, few ICSID award creditors decided to pursue claims in Argentine courts.[163] Ultimately, Argentina began settling with ICSID award creditors.[164] Argentine courts ruled on the enforcement of ICSID awards for the first time in 2016—however, uncertainty regarding enforceability still persists.[165]

Finally, the most drastic response to tribunalization is to withdraw from ICSID. Such backlash is not unheard of, especially in Latin America. Bolivia, Ecuador, and Venezuela withdrew from the ICSID Convention amid controversy that investor interests were unduly favored.[166] In 2013, Argentina raised the possibility of withdrawing from ICSID, but ultimately did not submit a notice of withdrawal.[167]

## IV. SYSTEMIC IMPLICATIONS OF TRIBUNALIZATION FOR SOVEREIGN DEBT FINANCE

Argentina's extended debt crisis exposed major flaws in the "non-system" for sovereign debt restructuring and dispute resolution.[168] Notwithstanding the calm waters that Argentina currently treads in the global sovereign debt market, the long term implications of Argentina's prolonged debt saga are still coming into focus.[169] While

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162. *See* ALLEN & OVERY, *supra* note 131 ("Argentina refused to voluntarily pay the amounts due in respect of the awards, insisting that the successful claimants would have to commence court proceedings in Argentina's federal courts in order to enforce their awards.").

163. *Id.*

164. *Id.*

165. Leandro Javier Caputo & Ignacio J. Minorini Lima, *First Argentine Court Judgment on the Recognition of an ICSID Award*, KLUWER ARB. BLOG (Mar. 15, 2016), http://kluwerarbitrationblog.com/2016/03/15/first-argentine-court-judgment-on-the-recognition-of-an-icsid-award/ [https://perma.cc/D4ZS-833A] (archived Aug. 29, 2017) (analyzing recent developments in Argentine case law on the enforcement of ICSID awards).

166. ECONOMIST, *supra* note 78 ("Argentina sees ICSID as too business-friendly, with some justification.").

167. *See* William B. McElhiney, III, *Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the ICSID Convention*, 49 TEX. INT'L L. J. 601, 602 (2014).

168. *See* Anna Gelpern, *Hard, Soft, and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing*, *in* SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING 357 (Carlos Espósito, Yuefen Li & Juan Pablo Bohoslavsky eds., 2013) (referring to the ad hoc system for sovereign debt restructuring as a "non-system").

169. *See, e.g.*, INT'L MONETARY FUND, SOVEREIGN DEBT RESTRUCTURING—RECENT DEVELOPMENTS AND IMPLICATIONS FOR THE FUND'S LEGAL AND POLICY

certain issues are unique to Argentina, others are indicative of broader deficiencies that plague sovereign debt.[170] Problems emerging from Argentina's extraordinary debt crisis are symptomatic of an inherently imperfect system that fails to comprehensively resolve sovereign debt crises and equitably enforce creditor rights.

As this Article shows, *Abaclat* and its progeny may be viewed as a logical means to resolve a uniquely protracted and costly restructuring.[171] Without a doubt, *Abaclat* and its progeny represent an innovative new wrinkle in sovereign debt enforcement.[172] At first glance, tribunalization has appeal as a new mode for managing the relationship between sovereign debtors and their private creditors. Its proponents argue that ISDS offers a powerful tool to hold rogue debtors such as Argentina to account, thereby deterring prolonged standoffs with holdout creditors and decreasing the likelihood of failed restructurings.[173]

ISDS—at least in its current form—is not a silver bullet. In fact, ISDS may even exacerbate existing weaknesses in the sovereign debt system. First, ISDS does not dramatically enhance creditor rights. While the mass claim aggregation seen in *Abaclat* simplified the procedure for large numbers of Italian bondholders, it does not represent a drastic improvement over existing mechanisms such as class actions.[174] Nor does ISDS resolve the challenge of enforcing awards against a recalcitrant sovereign. While ICSID theoretically

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FRAMEWORK 31 (2013), http://www.imf.org/external/np/pp/eng/2013/042613.pdf (expressing concerns about systemic problems that emerged in Argentina's debt saga); Lee C. Buchheit & G. Mitu Gulati, Restructuring Sovereign Debt After NML v. Argentina (Jan. 28, 2017) (unpublished manuscript), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6342&context=faculty_scholarship [https://perma.cc/QKJ3-7PBH] (archived Aug. 29, 2017) (noting observations for sovereign debt restructuring that emerged from Argentina's debt litigation).

170. Other sovereign debt crises have exhibited similar problems with intercreditor inequity, holdout complications, "too little, too late" restructurings, "bad law" precedents, etc. *See* Park & Samples, *supra* note 2, at 249–54 (observing that rogue trends in sovereign debt have exacerbated an already deeply imperfect system).

171. *See* Arturo C. Porzecanski, *The Origins of Argentina's Litigation and Arbitration Saga, 2002-2016*, 40 FORDHAM INT'L L. J. 41, 76 (2016) (concluding that the origins of Argentina's extraordinary sovereign debt disputes are rooted in rogue behavior, particularly between 2002 and 2005).

172. This innovation in enforcement strategies has continued with Gramercy's strategic investment and ISDS complaint against Peru. *See supra* notes 117–121 and accompanying text.

173. *See* Strong, *supra* note 10, at 1142 ("If investment arbitration is accepted as a regulatory mechanism similar to regulatory litigation, then investors may have found a workable solution to the problem of sovereign default.") (citations omitted); *see also* Porzecanski, *supra* note 171, at 77 (identifying "major judicial and arbitral precedents" as benefits of Argentina's sovereign debt saga).

174. Class actions have been widely used to aggregate claims in sovereign debt disputes, including litigation against Argentina. *See, e.g.*, Prospectus Supplement, *supra* note 141, at 27 (discussing sovereign debt litigation, including numerous class actions, filed against Argentina between 2002 and 2005).

offers a solution to enforceability,[175] the unique nature of sovereign debt suggests that enthusiasm should be curbed.[176] Nor did ISDS fundamentally change the game for Argentina's other non-ISDS award creditors.[177] Like any other creditor, the Italian bondholders had opportunities to participate in the 2005 and 2010 exchanges. And, just like Argentina's other holdouts, the Italian bondholders were sidelined and unpaid until the Macri government normalized Argentina's financial situation in 2016.[178] Ultimately, the greatest spoils in Argentina's debt disputes went to the most uncompromising, sophisticated, and litigious creditors.[179] The benefits of ISDS for creditor rights are likely to be similarly concentrated.

Second, ISDS may needlessly hamper the restructuring and recovery process by increasing creditor fragmentation and undermining the flexibility for sovereigns attempting to negotiate settlements in good faith.[180] Tribunalization exacerbates creditor fragmentation, which already creates serious problems for sovereign debt restructuring.[181] Claimants need specific treaty-based rights to bring sovereign debt claims in ISDS. But treaties giving rise to these rights are far from comprehensive; they are jurisdiction-specific (i.e., the Italy-Argentina BIT only addressed claims by Italian nationals) and vary in material ways (e.g., the scope of covered investments).[182] Claims by Italian bondholders against Argentina were heard in three separate ICSID arbitration proceedings and did not address claims by

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175. *See* Gregory R. Day, *Private Solutions to Global Crises*, 89 ST. JOHN'S L. REV. 1097, 1105–06 (2015) (noting the advantages of ICSID for enforcement of judgments against multinational corporations).

176. *See, e.g.*, Come and Get Me, *supra* note 78 (discussing setbacks and limitations in the enforcement of ICSID awards).

177. For instance, a small group of non-ISDS holdout creditors—mostly from Germany and acting through funds based in Luxembourg and the British Virgin Islands—settled with Argentina in May 2017 on the same terms as the famous February 2016 settlement agreements. *See* Daniel Bases, *Argentina Settles with More Holdout Creditors - Mediator*, REUTERS (May 31, 2017, 1:13 PM), https://www.reuters.com/article/argentina-debt-idUSL1N1IX19T [https://perma.cc/EJ5C-7UXK] (archived Aug. 28, 2017).

178. *See supra* notes 132–133 and accompanying text (detailing the timeline for settlement with the Italian bondholders).

179. The most successful creditors also happened to be sophisticated and well-funded professional plaintiffs. *See* Samples & Cruces, *supra* note 72, at 37 (underscoring disparities among returns for creditors in the NML settlement); *see also* Gelpern, Now What?, *supra* note 27 at 73 (observing that "debt settlements favor the most aggressive litigants").

180. *See* Dania Thomas, *Sovereign Debt as a Commodity: A Contract Law Perspective*, 54 OSGOODE HALL L. J. 419 (2017) (criticizing overly narrow and rigid judicial approaches to resolving sovereign debt disputes).

181. *See* William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 20–22 (2004) (explaining the problematic consequences of increasing fragmentation among sovereign creditors).

182. *See supra* notes 110–116 (discussing distinctions in the scope of covered investments among various BITs emerging from ICSID cases and recent developments in Argentina's BIT practices).

bondholders in other jurisdictions.[183] Further, the ICSID disputes ran parallel to litigation in national courts and were settled separately.[184]

Finally, faith in ISDS fails to acknowledge its political ramifications.[185] This is evident in sovereign debt restructurings, which are often politically fragile compromises among various domestic constituencies. Backlash against external creditors can be toxic for debtor–creditor relations, thereby limiting opportunities for coordination and productive negotiations.[186] Argentina's crisis, for instance, generated deep resentment of the International Monetary Fund (IMF) and foreign creditors for their roles in exacerbating the country's economic woes.[187] Amid the perceived illegitimacy of external debt, Argentina's political system was galvanized against creditors from the beginning, providing overwhelming domestic support for the Argentine government's aggressiveness in its dealings with international institutions and foreign creditors.[188] In these politically sensitive situations, ISDS may undermine the flexibility necessary for sovereigns to mediate the competing demands of foreign creditors and the welfare of its own citizens.[189] For example, a sovereign may need to prioritize debt held by domestic creditors over foreign creditors in order to preserve the stability of its domestic financial system.[190] However, this may violate national treatment

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183. *See supra* Part III.B (discussing the various claims at ICSID by Italian bondholders against Argentina).

184. *See supra* notes 133–134 and accompanying text.

185. *See* Teitel & Howse, *supra* note 9, at 980 (observing that tribunalization of international investment law has politicized the impact of globalization); *see also* Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L. J. 321, 364 (2011) (noting how global governance through regulation prioritizes adjudication over political decision making).

186. Greece's debt crisis vividly illustrates the potential for domestic politics to turn against external creditors. *See, e.g.*, Jale Tosun, Anna Wetzel & Galina Zapryanova, *The EU in Crisis: Advancing the Debate*, 36 J. EUR. INTEGRATION 195, 196 (2014) (discussing political pressures and social unrest associated with fiscal transfers and austerity measures in Greece).

187. *See* Todd Benson, *Report Looks Harshly at I.M.F.'s Role in Argentine Debt Crisis*, N.Y. TIMES (July 30, 2004), http://www.nytimes.com/2004/07/30/business/report-looks-harshly-at-imf-s-role-in-argentine-debt-crisis.html (last visited Aug. 28, 2017) [https://perma.cc/N8W5-C78G] (archived Aug. 28, 2017) (describing a self-critical IMF report on its role in Argentina's debt crisis).

188. *Argentine Leader's Nationalism Popular, Risky*, CNN (Jan. 9, 2004), http://edition.cnn.com/2004/WORLD/americas/01/09/argentina.kirchner.reut/ (last visited Aug. 28, 2017) [https://perma.cc/LX7W-7FZP] (archived Aug. 28, 2017) ("A December poll gave Kirchner an 80 percent approval rating. The main reason was his IMF stance . . . ").

189. *See* Daniel D. Bradlow, *Can Parallel Lines Ever Meet? The Strange Case of the International Standards on Sovereign Debt and Business and Human Rights*, 41 YALE J. INT'L L. ONLINE 201, 229–30 (2016) (noting the challenge that sovereigns face in balancing the short-term social costs of a restructuring with its long-term benefits).

190. *See* Anna Gelpern & Brad Setser, *Domestic and External Debt: The Doomed Quest for Equal Treatment*, 35 GEO. J. INT'L L. 795 (2004) (arguing that sovereigns

under a BIT.[191] Arbitral tribunals are ill-equipped to properly analyze the public policy implications of such situations.[192] Without granting deference to sovereigns (in recognizing either opt-outs in bond contracts negotiated *ex ante* or good faith exceptions to BIT obligations asserted *ex post*), ISDS will hamper the ability of governments to balance creditor demands and regulatory objectives.[193]

## V. CONCLUSION

Argentina's debt default, restructuring, and disputes with holdout creditors were all historic. The legal innovations and norm-bending dimensions of Argentina's debt saga have provoked a variety of reflections, including both institutional responses and contractual reforms. As this Article has shown, tribunalization is yet another legacy that has already spurred responses by sovereigns and investors. From *Abaclat* to *Gramercy*, a new frontier in the already fragmented global sovereign debt market has been opened, presenting new challenges to sovereign autonomy in the global financial system.

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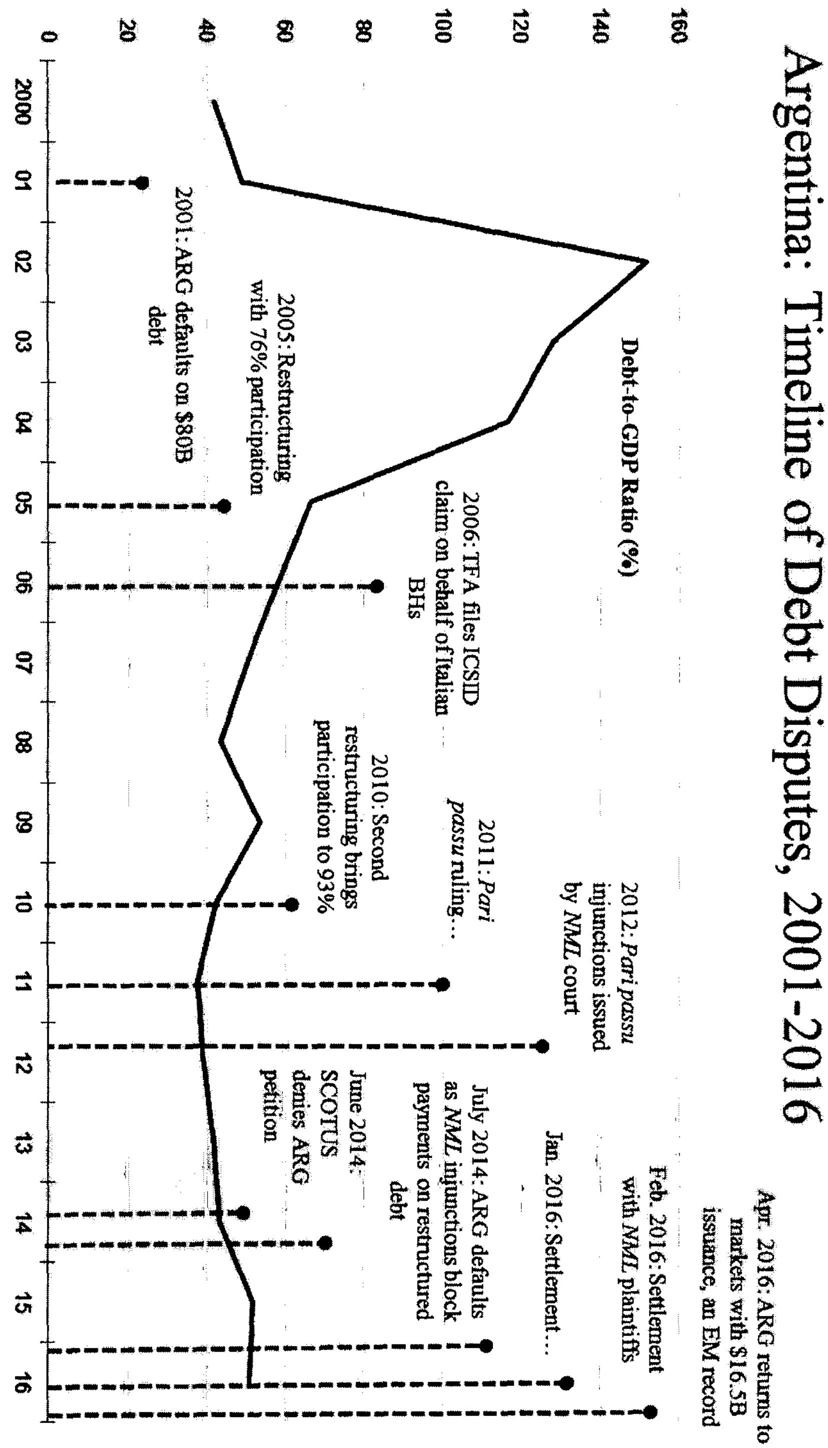
should be able to treat domestic and foreign creditors differently to respond to a financial crisis).

191. Gallagher, *supra* note 54, at 372.

192. *See* Vera Korzun, *The Right to Regulate in Investor–State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 360 (2017) (describing how ISDS rules may interfere with state regulation); *see also* Van Harten & Loughlin, *supra* note 101, at 146 (discussing the power of ISDS to limit and alter a sovereign's domestic public authority).

193. *See* Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L. J. 229, 287 (2015) (proposing greater scrutiny of FET clauses and other treaty-based investor protections).

## ANNEX


Argentina: Timeline of Debt Disputes, 2001-2016
Debt-to-GDP Ratio (%)
0
20
40
60
80
100
120
140
160
2000
01
02
03
04
05
06
07
08
09
10
11
12
13
14
15
16
2001: ARG defaults on $80B debt
2005: Restructuring with 76% participation
2006: TFA files ICSID claim on behalf of Italian BHs
2010: Second restructuring brings participation to 93%
2011: *Pari passu* ruling…
2012: *Pari passu* injunctions issued by *NML* court
June 2014: SCOTUS denies ARG petition
July 2014: ARG defaults as *NML* injunctions block payments on restructured debt
Jan. 2016: Settlement…
Feb. 2016: Settlement with *NML* plaintiffs
Apr. 2016: ARG returns to markets with $16.5B issuance, an EM record

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