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"Official" Bondholder: A New Holdout Creature in Sovereign Debt Restructuring After Vulture Funds?

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"OFFICIAL" BONDHOLDER: A NEW HOLDOUT CREATURE IN SOVEREIGN DEBT RESTRUCTURING AFTER VULTURE FUNDS?

For years, holdout litigations have posed a threat to the successful restructuring of sovereign bonds. Among these holdout creditors, the vulture funds have been particularly deft in manipulating the system. To prevent holdout litigation, sovereign debtors and creditors use various contractual devices—some of which have proven to be successful. During the recent Ukraine-Russia sovereign bond dispute, a new type of holdout creditor immerged—one that is potentially immune from these contractual arrangements. This note will begin by presenting an overview of the process of sovereign debt restructuring. It will then explore the problem of holdout litigation in bond restructuring and the solutions currently available. Finally, the dispute between Ukraine and Russia will be examined as it has brought a new dimension to this already complicated problem.

I. INTRODUCTION TO SOVEREIGN DEBT RESTRUCTURING

Typically, when a creditor and debtor sign a loan agreement, the creditor delivers the proceeds to the debtor and is repaid the debt over a number of subsequent months or years.[1] A default takes place when the debtor fails to meet its obligations under the agreement.[2] Such default usually triggers an acceleration clause in the debt agreement; this clause allows a creditor to accelerate the entire debt and collect any amounts outstanding.[3] Sovereign debt is the debt issued or guaranteed by the government of a sovereign state.[4] When a debtor country defaults on the debt,[5] it will seek a "restructuring" of the debt. This restructuring is

1. ALEXIS RIEFFEL, RESTRUCTURING SOVEREIGN DEBT: THE CASE FOR AD HOC MACHINERY 11 (2003).
2. *Id.* The main event of default is missing a scheduled payment of principal or interest. *Id.*
3. *Id.*
4. Udaibir S. Das, Michael G. Papaioannou & Christoph Trebesch, *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts* 7 (Int'l Monetary Fund, Working Paper No. 12/203, 2012), https://www.imf.org/external/pubs/ft/wp/2012/wp12203.pdf.
5. In the context of sovereign debt, a default occurs when the government fails to make the payment on due time. *Id.* at 8. The default can be a result of a liquidity problem; when a government generates insufficient revenue to meet the scheduled payment of interest or principal. RIEFFEL, *supra* note 1, at 14. Alternatively, the government may face a solvency problem when it incurs an unsustainable amount of debt so that some reduction of the principal or the interest payment is warranted to restore its creditworthiness. *Id.*

conducted though a legal process and involves "an exchange of outstanding debt instruments . . . for new debt instruments or cash."[6]

A sovereign debtor is different from a private debtor for several reasons. Most notably, the possibility of liquidation[7] is "out of consideration" for a national sovereign.[8] The sovereign debtors are also regarded as "too big to fail,"[9] since a default on sovereign debt could trigger an economic domino effect—such as a currency collapse, bank runs, trade disruptions, and macroeconomic contraction.[10] Concerns over these spillovers have facilitated a belief that sovereign countries must be bailed out by public funds.[11] This expectation of official bailout in turn causes a moral hazard as it creates an incentive for the sovereign debtors to adopt a less prudent economic course.[12]

While the value of domestic debt is inherently built upon the "framework of laws and institutions that support them,"[13] creditors of sovereign debt enjoy less protection as their enforcement mechanisms are limited.[14] First, as a practical matter, few sovereign assets are located in

6. Das et al., *supra* note 4. Debt restructuring can be in the form of a debt rescheduling (a lengthening of maturities of the old debt), a debt reduction (reducing the face value of the old instruments), a debt buyback (an exchange of debt into cash at a discount), a debt refinancing (the conversion of the old debt including arrears into a new instrument), or a conversion (the exchange of debt for a non-debt liability, such as equity). *Id.*; *see also* RIEFFEL, *supra* note 1, at 23. Of course, it is not necessary for debt restructuring to occur after a default. In some instances, the debtor countries will seek a debt exchange that occurs prior to the default. The purpose of such "preemptive debt restructuring" is to prevent the otherwise inevitable defaults. *See* Das et al., *supra* note 4, at 8.

7. Liquidation can be defined as "[t]he act or process of converting assets into cash, esp. to settle debts." *Liquidation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. Jeffrey D. Sachs, *Do We Need an International Lender of Last Resort?* COLUMBIA UNIVERSITY ACADEMIC COMMONS 8 (1995), http://hdl.handle.net/10022/AC:P:8279. It is also rare, if not impossible, for municipalities and other sub-sovereign entities. On the other hand, private debtors can be liquidated under bankruptcy law in the states. A good example is Chapter 7 of the United States Bankruptcy Code. *Id.* at 7.

9. Anna Gelpern, Commentary, *A Skeptic's Case for Sovereign Bankruptcy*, 50 HOUS. L. REV. 1095, 1113-14 (2013).

10. Das et al., *supra* note 4, at 66.

11. Steven L. Schwarcz, *Facing the Debt Challenge of Countries That Are "Too Big To Fail*," *in* SOVEREIGN DEBT: FROM SAFETY TO DEFAULT 2 (Robert W. Kolb, ed. 2011). The word "bailout" is normally used to describe "financing provided by official agencies to defaulting countries as a misappropriation of scarce taxpayer resources for the benefit of private sector creditors." *See* Rieffel, *supra* note 1, at 53.

12. Schwarcz, *supra* note 11, at 2. The word "moral hazard" is often referred to a situation where the insurance may "reduce incentives for prudent behavior by lowering expected losses." NOURIEL ROUBINI & BRAD SETSER, BAILOUTS OR BAIL-INS? RESPONDING TO FINANCIAL CRISES IN EMERGING ECONOMIES 74 (2004). In the sovereign debt context, moral hazard describes a situation in which a sovereign borrower, relying on official lenders (such as IMF) as a last resort, "take[s] out a loan that it has no intention of repaying." *Id.* This is in stark contrast with private debtors who usually enjoy no such "insurance" by official sectors. The exceptions are commercial banks, which are also regarded as "too big to fail" because of the potential economic spillovers they may cause in the event of default. *See* Schwarcz, *supra* note 11, at 2.

13. RIEFFEL, *supra* note 1, at 11.

14. Ugo Panizza, Federico Sturzenegger & Jeromin Zettelmeyer, *The Economics and Law of Sovereign Debt and Default*, 47 JOURNAL OF ECONOMIC LITERATURE 651, 653 (2009).

foreign jurisdictions creditors are able to reach.[15] Second, sovereign debtors have various special formal defenses available to them to avoid repayment. The sovereign could assert sovereign immunity from suit and execution.[16] It could also resort to the principle of international comity, which recognizes that one country may, “out of international duty and convenience,” voluntarily enforce the laws of another country.[17] Another legal defense is the act of state doctrine.[18] Unlike the comity defense which limits the court’s jurisdiction, the act of state doctrine allows the court to determine whether judicial interference runs the risk of embarrassing the executive branch.[19]

Finally, a special defense may arise when the debtor state inherits a debt incurred by the predecessor government. In that case, the debtor could use the “odious debt” argument to repudiate the agreement.[20] Two types of odious debt have been recognized by the international

15. *Id.* Thus, even if a creditor successfully obtains judgment against the debtor in its own jurisdiction, it is questionable whether the debtor country will honor the judgment by handing over the assets located within its borders. *Id.*

16. Jonathan I. Blackman & Rahul Mukhi, *The Evolution Of Modern Sovereign Debt Litigation: Vultures, Alter Egos, And Other Legal Fauna*, 73 LAW & CONTEMPORARY PROBLEMS 47, 48 (2010). However, many jurisdictions have carved out numerous exceptions to foreign state’s immunity. *Id.* For example, the United States enacted Foreign Sovereign Immunities Act (FSIA) in 1976, which allows a private party to sue a foreign government in U.S. courts if the complaint relates to commercial activity. *See* Panizza et al., *supra* note 14, at 653. As a result, it is no longer an absolute shield for sovereign debtors. *Id.* at 654.

17. *Hilton v. Guyot*, 159 U.S. 113, 143 (1895). In English courts and civil-law courts, the doctrine is limited to the questions of sovereignty or public international law, such as diplomatic immunity. *See* Joe R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 44 (1991). In United States, the doctrine is broader: international comity precludes the court’s jurisdiction over the lawsuits if the “debtor’s actions could be viewed broadly justified in light of U.S. policies on how international debt crisis ought to be resolved.” *See* Panizza et al., *supra* note 14, at 654-55.

18. Christopher C. Wheeler & Amir Attaran. Note, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 STAN. J. INT’L L. 253, 255 (2003).

19. *Id.* Specifically, courts would refrain from scrutiny of the foreign act when a judgment against a foreign government might complicate foreign relations, a territory in which the executive branch is conceived to have sole power. *See* Paul, *supra* note 17, at 67. Unfortunately, because sovereign default in international jurisdiction is not considered to be an act of state, the defense is equally toothless in sovereign debt litigation. *Id.*

20. RIEFFEL, *supra* note 1, at 52. In general, public international law requires a successor state to inherit the debts of their predecessors. This norm is sometimes called the “doctrine of state succession.” Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1202 (2007). The odious debt argument attempts to qualify the rule. It goes as such: when the debt was incurred for “odious” purposes, the successor state is not expected to honor the obligations associated with that debt. *See* RIEFFEL, *supra* note 1, at 52. In a classic formulation by Alexander Sack in 1927, the sovereign debt is presumptively odious when “the debt is contracted by a despotic power, for a purpose that is not in the general interests or needs of the state, and the lender knows that the proceeds of the debt will not benefit the nation as a whole.” Buchheit et al., *supra*, at 1218 (*citing* ALEXANDER N. SACK, “LES EFFETS DES TRANSFORMATIONS DES ETATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIERES” [THE EFFECTS OF STATE TRANSFORMATIONS ON THEIR PUBLIC DEBTS AND OTHER FINANCIAL OBLIGATIONS] 157 (1927).

community: war debts and hostile debts.[21] A third type of odious debt—which emerged in the early twentieth century—is broader.[22] This type of debt is called "regime debt"[23] and is incurred by a lender for illegitimate purposes and often treated as a personal loan.[24] This debt is usually only repaid out of state funds if the ruler remains in power.[25] An example of regime debt is the debt incurred during President Tinoco's reign of Costa Rica.[26] The doctrine is also used in *World Duty Free v. Kenya*, a famous arbitration that occurred in 2006.[27] In that case, the tribunal ruled the contractual obligation was incurred because of a bribe and was void for international public policy reasons.[28] Though the defenses of war debt and hostile debt have been generally accepted, the regime debt argument remains controversial.[29]

21. *See* Buchheit et al., *supra* note 20, at 1228 n. 85 (finding that the war debt and the hostile debt have probably been recognized as formal exceptions to the state succession rule)."War debt" is raised by a government "to finance the conduct of hostilities against a force, foreign or domestic, that eventually succeeds in overthrowing the contracting government." *Id.* at 1212. The "hostile debt" is incurred "to fund conquest, colonization, war, or suppressing secessionist attempts." Andrew Yianni & David Tinkler, *Is There a Recognized Legal Doctrine of Odious Debts* 32 N.C. J. INT'L L. & COM. REG. 749, 757 (2006). Scholars also use "subjugation debt" to convey essentially the same meaning. Jeff A. King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. INT'L L. & COM. REG. 605, 630 (2006). A classic example is the Cuban debt. Before the Spanish war, the Spanish government raised debt to be serviced and repaid from Cuban revenues. Buchheit et al., *supra* note 20, at 1214. Following the Spanish-American war of 1898, Spain ceded Cuban to United States. *Id.* The U.S. government refused to assume the Cuban debt, arguing that the loans were not made for the benefit of Cuban or consented by Cuban people. *Id.* at 1214-15. It also argued that the creditors, knowing that the debt was incurred to suppress people fighting for independence from Spanish rule, assumed the risk that the debt would not be repaid by the rebels. *Id.*

22. Buchheit et al., *supra* note 20, at 1216.

23. King, *supra* note 21, at 630.

24. Buchheit et al., *supra* note 20, at 1216.

25. *Id.*

26. Yianni & Tinkler, *supra* note 21, at 762. Before the Tinoco government fell in 1919, it managed to borrow money from the Royal Bank of Canada. Buchheit et al., *supra* note 20, at 1216. In a subsequent arbitration between Costa Rica and Great Britain, then Chief Justice William Taft, sitting as the sole arbitrator, found Costa Rica was not required to assume the debt obligation. *Id.* Taft reasoned the bank failed to prove the money loaned to the Tinoco government was for legitimate use rather than for Tinoco's personal support after he took over the country. *Id.* at 1217. Taft also explicitly stated the invalidation of the loan obligation had nothing to do with the legitimacy of the Tinoco government. *Id.* Thus, Taft rejected the argument as inconsistent with the doctrine of state succession. *Id.*

27. *World Free Duty Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7 Award, http://ita.law.uvic.ca/documents/WDFv.KenyaAward.pdf. The arbitration was brought before the International Centre for Settlement of Investment Disputes, or ICSID.

28. *Id.* ¶156. The dispute arose out of a contract signed between World Duty Free (WDF) and the Kenyan government in 1989 which WDF claimed Kenya had breached. *Id.* ¶74. The Republic of Kenya responded, among other things, that the contract was unenforceable because it was procured by paying a bribe of $2 million to the then President of Kenya, which is criminal conduct according to Kenyan law. *Id.* ¶105. Upon examination of the evidence, the tribunal concluded the payments must be regarded as a bribe and the contract was void. *Id.* ¶156. The tribunal also noted that bribery is traditionally abhorred in common law and is more "odious than theft." *Id.* ¶173. Because the case is decided in the specific context of bribery, some scholars insist that a fourth category of odious debt be carved out to include debt procured through corruption. King, *supra* note 21, at 652.

29. Indeed, scholars have found that, unlike war debts and hostile debts, regime debt is not a customary rule of international law. *See* Yianni & Tinkler, *supra* note 21, at 766-68*; see also* Anna

A. The International Regime for Sovereign Debt Restructuring

A typical restructuring process starts with the sovereign debtor initiating a "negotiation or preparation phase."[30] The debtor country, assisted by the staff of the International Monetary Fund (hereinafter "IMF"), will verify the total debt claims; this includes all loans, bonds and other debt instruments. They will then conduct a "detailed debt sustainability analysis."[31] The goal of the country is to secure an "economic reform and interim financing program" from the IMF.[32]

The interim financing program, however, is only temporary. The debtor will then negotiate with its creditors for a long-term restructuring plan.[33] Among the various creditors, the debts owed to international financial institutions—such as the IMF, World Bank, and other multilateral development banks—are respected by the debtor.[34] Their de facto priority is generally accepted because the sovereign desires to "maintain its future access to emergency financing and a good working relationship with other governments"; for the IMF in particular, financing to the debtor country is tied to the country's policy changes.[35]

The debts owed to the national governments or bilateral lending agencies will be restructured under the Paris Club framework.[36] The Paris Club is an "informal group of creditors and ad hoc negotiation forum, consisting of the governments of "nineteen of the largest world economies plus additional creditor governments on a case by case basis."[37] The

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Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT'L L. 391 (2005) ("As it happens, no national or international tribunal has ever cited Odious Debt as grounds for invalidating a sovereign obligation."); *but see* King, *supra* note 21, at 648 (arguing that the failure of the courts to recognize the doctrine is not surprising because litigating against sovereign states in domestic courts becomes possible only after the erosion of sovereign immunity and is thus a relatively recent phenomenon.) The U.S. courts have never officially adopted this doctrine in any published opinion. *See Mortimer Off Shore Services, Ltd. v. Federal Republic of Germany*, 615 F.3d 97, 109 (2d. Cir. 2010) (the court declined to reach the issue of successor state liability because the plaintiff failed to plead jurisdiction based upon a commercial activity under FSIA, although the Court, as evidenced in n.12, is fully aware of the academic debate about the odious debt doctrine). *See also Morris v. People's Republic of China*, 478 F. Supp. 2d 561 (S.D.N.Y. 2007) and *Jackson v. People's Republic of China*, 794 F.2d 1490 (8th Cir. 1986). In both cases, P.R.C. alleged the bonds issued by its predecessor governments were odious debts and thus P.R.C. bore no responsibility for such bonds. The courts ruled in favor of P.R.C. but never specifically addressed the odious debt argument.

30. Das et al., *supra* note 4, at 12 (internal citations omitted). This preparation phase can take months or even years. *Id.*

31. *Id.*

32. Gelpern, *supra* note 9, at 1105.

33. Das et al., *supra* note 4, at 12.

34. ROUBINI & SETSER, *supra* note 12, at 252-53.

35. *Id.*

36. RIEFFEL, *supra* note 1, at 35.

37. Das et al., *supra* note 4, at 14.

government creditors will agree to grant relief according to their preset reduction formulas and obtain the debtor's "commitment to get 'comparability of treatment' from other public and private creditors."[38] Commercial banks loans are restructured via the London Club—a "term that loosely describes the case-by-case restructuring routine developed between Western banks and developing countries in the late 1970s."[39] In the London Club process, the debtor country will negotiate with the Bank Advisory Committee acting as the representatives of the creditor banks.[40] This process is preferred because commercial banks usually use a "syndicated loan"[41] to spread risk among themselves.[42]

The last category of sovereign debt creditors is private creditors other than commercial banks, which typically consists of bondholders.[43] There is "a general impression that bonds are senior to bank loans"; one reason is that the investors expect the borrowing country to restructure its bank loans first before it seeks recourse in bond restructuring.[44] Sovereign bonds are in general restructured with "exchange offers."[45] After it negotiates with each of these categories of creditors, the debtor country will present the restructuring offer to all creditors.[46] A successful exchange usually requires a "certain minimum threshold of acceptance by creditors" within each category.[47] Once the offer is accepted, the restructuring is completed.[48]

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38. Gelpern, *supra* note 9, at 1105. "Comparability of treatment" means that the debtor country "seek[s]from non-multilateral creditors, in particular other official bilateral creditor countries that are not members of the Paris Club and private creditors (mainly banks, bondholders and suppliers), a treatment on comparable terms to those granted in the Agreed Minutes." *See* Club de Paris, *What Does Comparability of Treatment Mean?*, http://www.clubdeparis.org/en/communications /page/what-does-comparability-of-treatment-mean (last visited Feb. 6, 2016) (explaining how the "comparability of treatment" test works). In reality, obtaining comparability of treatment test can be difficult for various reasons, including the difficulty in determining comparability, the predictability of the restructuring terms, and the need to minimize budgetary costs which results in an institutional preference for the equivalent of the par option and low interest rates. *See* ROUBINI & SETSER, *supra* note 12, at 258-59. Scholars have found that the Paris Club debt could be treated effectively as junior debt by the debtor country since the government creditors rarely litigate to recover payment. *Id.* at 259.

39. Das et al., *supra* note 4, at 16.

40. *Id.*

41.

> A syndicated loan is made to a single borrower by two or more direct lending institutions, on similar terms and conditions, using common documentation and administered by a common agent bank or separate agent banks. Common documentation and direct lending are the crucial elements that hold the syndicate of lending banks together.

Joseph J. Norton, *International Syndicated Lending: The Legal Context for Economic Development in Latin America*, 2-SUM NAFTA: L. & BUS. REV. AM. 21, 24 (1996).

42. RIEFFEL, *supra* note 1, at 36.

43. ROUBINI & SETSER, *supra* note 12, at 251.

44. RIEFFEL, *supra* note 1, at 37.

45. Das et al., *supra* note 4, at 14.

46. *Id.* at 13.

47. *Id.*

48. *Id.* Of course, completion of the restructuring process does not mean that the exchange would guarantee debt sustainability in the future.

B. Sovereign Bonds: The Hotbed of Sovereign Debt Disputes

i. The Rise of Tradable Bonds in Credit Markets

In the 1980s, most of the sovereign debts were syndicated bank loans.[49] The London Club process was "heavily used" during this period when countries in the developing region defaulted on their debt.[50] Intra-creditor disputes were a major problem for bank debt, causing delays in implementing the deal.[51] In contrast with bank loans, sovereign bonds were in small scale and considerable defaults did not take place.[52] These bonds "escaped restructuring during the workouts" in the 1980s.[53]

A major policy change occurred in the late 1980s when the U.S. Treasury announced the Brady Plan, which allowed the countries in default to convert their bank loans into sovereign bonds.[54] Such "exchange of commercial bank loans for tradable bonds" created a "sustainable secondary market for developing country bonds at the beginning of the 1990s."[55] While banks became more "cautious about lending to the governments" after the bank crisis in 1980s and the write-offs associated with the debt exchange in 1990s, bond financing became the "dominant form of private lending."[56] As a result, the emerging markets witnessed "a new wave of capital inflows"[57]

49. Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299, 309 (2005).

50. RIEFFEL, *supra* note 1, at 130.

51. Das et al., *supra* note 4, at 17.

52. RIEFFEL, *supra* note 1, at 192.

53. *Id.*

54. Das et al., *supra* note 4, at 18. A bond is defined as "[a] written promise to pay money or do some act if certain circumstances occur or a certain time elapses." *Bond*, BLACK'S LAW DICTIONARY (10th ed. 2014). A "bond indenture" is a "contract between a bond issuer and a bondholder outlining a bond's face value, interest rate, maturity date, and other features." *Bond Indenture*, BLACK'S LAW DICTIONARY (10th ed. 2014). Compared to bank loans, bonds tend to mature in more than five years. RIEFFEL, *supra* note 1, at 37. This is because "bonds typically get repaid in a single bullet payment when they mature," rather than amortize. *Id.* at 38.

55. RIEFFEL, *supra* note 1, at 37. "Bonds are underwritten by investment banks and priced to sell immediately at issue to institutional and individual investors, thereby transferring all the default risk." *Id.* "They are designed to be resold easily in secondary markets." *Id.* at 38. The secondary market for bonds performs an important signaling function. "Virtually every emerging market bond issue is traded every day, thereby establishing a yield curve for any sovereign borrower that has floated a number of issues." *Id.* at 40.

56. *Id.* at 36.

57. Das et al., *supra* note 4, at 14. *See also* Steven L. Schwarcz, *Sovereign Debt Restructuring: a Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 960 (2000) ("States have shifted their borrowing source from banks to bond investors in the lower cost capital markets."); Anna Gelpern, *Domestic Bonds, Credit Derivatives, and the Next Transformation of Sovereign Debt*, 83, CHI.-KENT L. REV. 147, 151 (2008) (noticing that scholars have discussed the use of bonds

The shift from bank loans to tradable bonds in the lending market has caused the atomization of the creditor community and the dispersed debt situation.[58] The sovereign bonds are owned by bondholders with widely differing institutional characteristics.[59] Moreover, creditors can purchase sovereign bonds in the market at different prices.[60] Those who pay a price close to the face value of the bonds prefer restructuring plans which preserves the face value of the bonds, while those who purchase at a steep discount are more willing to accept a facial reduction.[61] As a result, coordination among bondholders becomes an issue in sovereign bond restructuring.[62]

ii. Holdout Litigation and Vulture Funds

Like bank loans, sovereign bonds can be restructured through a voluntary exchange offer.[63] This means the dissenting bondholders could opt out and sue the sovereign debtor in courts to obtain full payments.[64] These holdout litigations pose a classic case of free riding, impairing the economic welfare of all creditors by discouraging participation, and delaying the reaching of an agreement.[65] The practice of holdout litigation has increased significantly since the 1990s.[66] Holdout litigation is a risky

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denominated in foreign currency and governed by foreign law, "but have yet to engage with the rise of domestic bonds and credit derivatives").

58. Hagan, *supra* note 49, at 310.

59. Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043, 1070 (2004) Bondholders may include "large commercial banks, smaller commercial banks, local banks, investment banks, insurance companies, pension funds, mutual funds, retail funds, hedge funds, nonfinancial companies, and retail investors." *Id.*

60. *Id.* at 1072.

61. *Id.*

62. Hagan, *supra* note 49, at 310.

63. *See* Das et al., *supra* note 4, at 21. Note that an exchange offer is not necessarily voluntary in nature. For example, bond restructurings in early twenty-first century—such as those in Pakistan, Ukraine, and Ecuador—were largely non-consensual; the sovereigns unilaterally changed the terms of the old bonds as part of a comprehensive restructuring plan. RIEFFEL, *supra* note 1, at 211-213. *See also* Fisch & Gentile, *supra* note 59, at 1070 ("While all of these restructurings involved exchange offers, Pakistan and Uruguay relied on ad hoc consultations with bondholders to apprise them of the terms of the offer and to encourage them to accept the offer, the Ukraine engaged in an extensive effort to contact bondholders, and Ecuador essentially declined to speak with bondholders.") Such "forced" exchange, while avoiding bondholder coordination problems altogether, hardly satisfied bondholders, and to some extent precipitated holdout litigations. *See* RIEFFEL, *supra* note 1, at 263 (Bondholders might find that the restructuring was not necessary, or the countries were "pursuing weak reform programs," or the process was unfair due to lack of negotiation and "mutually agreeable terms.")

64. ROUBINI & SETSER, *supra* note 12, at 297. However, because the sovereign's assets are usually beyond their reach, the bondholders generally ask the courts to halt payments on the new debt arising out of the restructuring plan. *Id.*

65. *Id.*

66. Julian Schumacher, Christoph Trebesch & Henrik Enderlein, *Sovereign Defaults in Court* 3-7 (May 6, 2014) (working paper on file with the authors), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997. The study reveals that the likelihood that

strategy because of the potential sovereign immunity defenses[67] and the limits on recovery discussed above.[68] In addition, because this litigation is costly, the holdout creditors must give up liquidity and spend time and money in litigation.[69] Nevertheless, the cost may be overshadowed by the huge profits from a full recovery. Some creditors, known as “vulture creditors,” purchase sovereign bonds off the secondary debt market at substantial discounts and then sue debtor countries for the full repayment.[70]

Vulture funds are regarded as “particularly pernicious” types of holdout creditors for several reasons, the first being that vulture funds seek an immediate return in the investment.[71] Their natural propensity for quick returns enables them to aggressively litigate in court.[72] Second, vulture funds are not subject to “peer or regulatory pressure.”[73] They can easily dissolve and reconstitute themselves under a new identity.[74] Finally, as vulture funds march into the secondary market and purchase bonds from impoverished countries, their litigations exacerbate those countries’ financial situations, limiting the countries’ opportunities to develop their economies in the long term.[75]

iii. Successful Holdout Litigations and Arbitration

Elliott Associates (hereinafter “Elliot”) is “one of the most well-known vulture funds” in holdout litigations.[76] In May 1996, Elliot purchased Peruvian sovereign debt on the secondary market, and

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a debt crisis is accompanied by creditor litigation has increased from less than 10% in the 1980s to more than 40% in recent years. *Id.* at 10-11.

67. Anna Gelpern, *supra* note 9, at 1102.

68. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. REG. 189, 194-95 (2014). The authors found that sovereign immunity shields military, diplomatic, and central bank assets abroad. *Id.*

69. ROUBINI & SETSER, *supra* note 12, at 300.

70. Das et al., *supra* note 4, at 50.

71. Wheeler & Attaran, *supra* note 18, at 262.

72. *Id.* at 262. Vulture funds have filed nearly 75% of all sovereign debt cases since 2000. Compared to other types of creditors, “vulture” funds sue for longer periods of time, initiate more attachment attempts, and litigate for much larger amounts. *See* Schumacher et al., *supra* note 66, at 2. In contrast with vulture funds, banks and other institutional investors have interest in maintaining long-term relationships with sovereign debtors. Fisch & Gentile, *supra* note 59, at 1073-74.

73. Wheeler & Attaran, *supra* note 18, at 262.

74. *Id.* at 263.

75. *See Id.*

76. Robert Auray, *In Bonds We Trustee: A New Contractual Mechanism to Improve Sovereign Bond Restructurings*, 82 FORDHAM L. REV. 889, 914 (2013).

subsequently refused to participate in Peru's Brady Plan, instead requesting repayment from Peru.[77] When Peru refused to pay the full value of the debt, Elliot initiated an action in New York and obtained a favorable judgment.[78] Peru then sought to use the Euroclear Bank in Brussels to make the payments.[79] The Court of Appeals of Brussels issued an injunction in favor of Elliott.[80] In its resolution, the Brussels Court relied on the *Pari Passu* clause in the debt contract, finding that "debt should be paid down equally towards all creditors in proportion to their claim."[81]

Elliott recently secured another victory over Argentina. In 2001, Argentina defaulted on its debt securities under a fiscal agency agreement.[82] The agreement contains *Pari Passu* provisions that purport to protect purchasers of the bonds from subordination.[83] Argentina undertook two debt exchanges in 2005 and 2010.[84] In the meantime, Argentina also passed "the Lock Law" which prohibited the state from "conducting any type of in-court, out-of-court, or private settlement with respect to the bonds."[85] In 2011, a group of holdout creditors filed a lawsuit against Argentina, asking the U.S. District Court to grant specific performance under the *Pari Passu* Clause.[86] The District Court found in favor of the creditors and invalidated the Lock Law.[87] On appeal, the Second Circuit affirmed the lower court's decision and found that Argentina violated the *Pari Passu* clause by failing to make payments to the plaintiffs while

77. Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.3d 363, 367-68 (2d Cir. 1999).

78. Elliott initiated the action in district court, seeking a prejudgment attachment to U.S. Treasury Bonds as the collateral for the Brady Bonds. *Id.*, at 368. The District Court dismissed the complaint because Elliott purchased the Peruvian debt with the intent and purpose to sue, thus violating Section 489 of the New York Judiciary Law. *Id.* The Second Circuit reversed, holding that Section 489 is not violated because Elliot's primary goal is to satisfy a valid debt. *Id.* at 372. The district court heard the case on remand and entered judgments in favor of Elliott. Elliott Assocs., L.P. v. Banco De La Nacion, No. 96 CIV. 7916 RWS, 2000 WL 1449862 (S.D.N.Y. Sept. 29, 2000). The attachment and restraint orders prevented the fiscal agent under Peru's Brady Plan from making payments to bondholders; consequently, Peru was unable to make an $80 million coupon payment on its newly restructured Brady debt, triggering a thirty-day grace period prior to formal default. Wheeler & Attaran, *supra* note 18, at 257.

79. Wheeler & Attaran, *supra* note 18, at 257.

80. Specifically, Elliot filed an ex parte motion to the President of the Brussels Commercial Court seeking to enjoin payments to Peru's Brady bondholders. *Id.*

81. Rodrigo Olivares-Caminal, *The Pari Passu Clause in Sovereign Debt Instruments: Development in Recent Litigation* 124 (University of London, BIS Paper No. 72u, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2473988. As a result of the injunction, Peru settled with Elliot and paid off the debt in the total amount of $58.45 million. *Id.* It represented a nearly 500% return on Elliot's initial investment. Wheeler & Attaran, *supra* note 18, at 258.

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

83. *Id.* at 251. The Pari Passu clauses require that the debtor treat the bonds "at least equally with all its other present and future unsecured and unsubordinated External Indebtedness." *Id.*

84. *Id.* at 250.

85. *Id.* at 252.

86. IMF, *Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring* at 8, Staff Report (Oct. 2014), http://www.imf.org/external/pp/ppindex.aspx.

87. *Id.*

satisfying obligations to holders of new exchange bonds, and by enacting the Lock Law.[88]

The Argentina debt dispute also precipitated arbitration before the International Centre for Settlement of Investment Disputes (ICSID).[89] In *Abaclat v. Argentine Republic*, a group of creditors challenged Argentina's defaults on the sovereign bonds based on the Argentina-Italy Bilateral Investment Treaty (BIT).[90] After resolving the jurisdiction issue,[91] the tribunal held that when countries act unilaterally as sovereigns to restructure debt in a way that allegedly violates BIT provisions, this gives rise to a treaty claim, which is independent of any contract claim.[92] *Abaclat* opens a door for creditors to assert a treaty-based claim in arbitration forum.[93]

iv. Legal Solutions to SovereignBond Restructuring

88. NML Capital Ltd., 699 F.3d at 260. The order approved by the district court prohibits Argentina from making payment on restructured bonds without paying the plaintiffs in full. *Id.*

89. *See* Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 344 (2006). The ICSID is a neutral tribunal established by the World Bank in the 1960s to resolve disputes among sovereign states. *Id.* Its jurisdiction is limited to "any legal dispute arising directly out of an investment between the Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national from another Contracting State." *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

90. *Abaclat and Others v Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No ARB/07/5 ¶8 (Aug. 4, 2011). "BITs are bilateral treaties between two governments created with the goal of mutually protecting private foreign investment." *See* Christian Hofmann, *A Legal Analysis of the Euro Zone Crisis*, 18 FORDHAM J. CORP. & FIN. L. 519, 556 (2013).

91. In response to Argentina's challenge of the tribunal's jurisdiction, the ICSID first found that sovereign debt constituted an investment for purposes of BIT. *See* ICSID Case No ARB/07/5 ¶ 707(Aug. 4, 2011). The tribunal then allowed the aggregation of tens of thousands of individual claims into a single "mass claim," despite lacking any precedent and admitting that this consolidation would necessarily lead to decreased procedural rights for individual claimants. *Id.* at ¶¶ 294-96.

92. *Id.* ¶¶ 311-326.

93. Compared to litigation, arbitration is still "relatively unusual." *See* Cross, *supra* note 89, at 336 (finding that sovereign debt agreements typically provide that the borrower will submit to the jurisdiction of New York or London courts, but not in any arbitration forum); *cf.* W. Mark C. Weidemaier, *Contracting for State Intervention: The Origins of Sovereign Debt Arbitration*, 73 LAW & CONTEMPORARY PROBLEMS 335, 335 (Fall 2010) (tracing the use of arbitration clauses in the early twentieth century sovereign debt contracts). Indeed, the arbitration between Argentina and Italian bondholders is based on the arbitration clause in the BIT, not in the bond agreement. To rely on the BIT, the bondholders may argue that non-payments of the bonds constitute expropriation for which they are entitled to compensation. *See* Hofmann, *supra* note 90, at 68; They can also rely on the non-discrimination clauses which purportedly ensure equality among the investors. *See* Ellie Norton, *International Investment Arbitration and the European Debt Crisis*, 13 CHI. J. INT'L L. 291, 293 (2012). For foreign investors, BITs generally designate a specific international arbitration forum, usually the ICSID, as the means for settling disputes. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT'L L.J. 67, 71 (2005).

In light of the collective action problem[94] and its adverse effects on economic recovery of the debtor country,[95] the international community pursues two distinct approaches to solve the problem: the contractual approach and the statutory approach.[96]

a) Contractual Devices – The Perceived Panacea

Debtor countries can reduce holdout litigation by including clauses that generate incentives for participation.[97] A common type of clause is the exit consent clause, which "enable[s] a majority of bondholders participating in an exchange offer to alter important nonpayment terms of the old bonds in such a way as to reduce their value, thus encouraging participation in the exchange."[98]

Another useful contractual device is the collective action clause (CAC). Unlike exit consent clauses, CACs address the relationship among the creditors in bond renegotiation.[99] When sovereign states issue bonds to the markets, these bonds are usually governed by the laws of "a financial center such as New York, London, or Tokyo."[100] Bonds issued under New York law and English law are by far the most popular ones.[101] By custom, New York law bonds require unanimous consent of bondholders to change the terms of payment and make new binding terms.[102] In contrast, bonds issued under English law contain clauses allowing a majority of the holders to make changes that are binding on minority holders.[103] Since

94. In other words, if the perceived holdout risk is significant, creditors who would otherwise have agreed to participate in a restructuring may be unwilling to do so. *See supra* notes 64-65 and accompanying text.

95. *See supra* note 75 and accompanying text (explaining how holdout litigation may impede economic development in impoverished countries).

96. ROUBINI & SETSER, *supra* note 12, at 308.

97. Das et al., *supra* note 4, at 22.

98. Wheeler & Attaran, *supra* note 18, at 265. Most bonds contain provisions that ensure their legal enforcement, including waiver of sovereign immunity and cross-default provisions. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 131, 139-140 (2012). Cross-default provisions provide that if the sovereign defaults on some of its debt, that action constitutes a default on other debt even though the sovereign is current on that debt. *Id.* at 140. These clauses thus can be used to prevent opportunistic defaults on the part of the debtor countries. Exit-consent clauses, therefore, would allow a simple majority of bondholders to remove these litigation-friendly clauses, leaving a bond with unattractive legal features and a low secondary market value. *See* Das et al., *supra* note 4, at 46; *cf.* Wheeler & Attaran, *supra* note 18, at 265 ("[A]s an empirical matter, it is unclear whether the reduction in value of the old debt is sufficient to counteract the buoying up effect."

99. Choi et al., *supra* note 98, at 140-41.

100. Das et al., *supra* note 4, at 41.

101. *Id.*

102. RIEFFEL, *supra* note 1, at 265.

103. *Id.*

2003, having CACs in bonds issued under New York law has become a norm.[104] A voting threshold of 75 percent is recommended in the CACs.[105]

The debtor countries can further strengthen CACs by introducing aggregation clauses, which bind not only bondholders within the same issue but all bondholders across other bond issuances and even syndicated bank loans.[106] An aggregation clause is powerful because it makes it harder for dissenting creditors to veto amendments.[107] Nonetheless, such an aggregation clause has not been widely used in sovereign debt workout.[108] Recently, the IMF suggested the introduction of a "single limb" voting procedure—that is, a procedure that "requires only a single vote calculated on an aggregated basis across all affected bond series"– into the sovereign bonds but cautioned that such "single limb" procedure is advisable only when "it offered all affected bondholders the same instrument or an identical menu of instruments."[109] Other variants of CACs focus on limiting the minority's ability to enforce the bond agreement.[110] These limitations can also be achieved through a trust structure.[111]

The more controversial contractual device is the *Pari Passu* clause, which "is a standard clause in public or private international unsecured

104. *Id.* at 44. *See also* Lee C. Buchheit & G. Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 EMORY L.J. 1317, 1320 (2002).

105. *See* ROUBINI & SETSER, *supra* note 12, at 311. In determining the voting threshold in the CACs, the issuers must balance two countervailing concerns. First, allowing a simple majority to amend the bond's financial terms might fail to offer creditors enough protection. Second, setting the threshold too high might fail to offer sufficient protection against holdouts since investors like vulture funds can easily purchase enough shares on the secondary market to obtain a blocking position. *Id.* at 312-13. A typical debt contracts with CACs also include disenfranchisement clauses, which prohibits a country from voting based on its holding of its own debt to avoid debtor's opportunistic behaviors. *See* Choi et al., *supra* note 98, at 142.

106. IMF, *supra* note 86, at 18-19. This aggregation clause resembles the bankruptcy system in domestic law and typically allows amendment upon some level of approval in each class and some (lower or higher) level of approval in the aggregate, also known as a "two limb" voting structure. *See Id.* at 19; Das et al., *supra* note 4, at 48.

107. *Id. See also* ROUBINI & SETSER, *supra* note 12, at 317 ("An aggregated vote avoids the risk of a holdout obtaining a large enough position in an individual instrument to block any amendment of the bond's terms.")

108. Das et al., *supra* note 4, at 48. The problems with aggregation clauses are obvious: it is difficult to determine which instruments should participate in the aggregated vote. It also creates the risk that one class of creditors refusing the restructuring terms would block the whole restructuring plan. *See* ROUBINI & SETSER, *supra* note 12, at 320.

109. IMF, *supra* note 86, at 20-21.

110. Das et. al, *supra* note 4, at 43. By requiring a qualified majority to accelerate the debts and initiate an action against a debtor country, the majority enforcement provisions limit the ability of a minority of bondholders to enforce its rights. *Id.*

111. Elizabeth Broomfield, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUM. BUS. L. REV. 473, 499 (2010). Under a trust deed or a trust agreement, the right to initiate litigation is effectively delegated to the trustee who has power to exercise the right, but only if a minimum percentage of the bondholders request it. *See* Das et al., *supra* note 4, at 43.

debt obligation," including bonds and bank loans.[112] *Pari Passu* literally means that "with equal step."[113] There are three types of *Pari Passu* clauses: 1) a clause that makes all bonds rank equally with all other unsecured sovereign debt; 2) a clause that makes all bonds rank equally in priority of payment; and 3) a clause that makes all bonds rank equally and will be payable on a pro rata basis.[114] Despite its purported goal of reducing competition among creditors, a *Pari Passu* clause turns out to be a powerful weapon for vulture funds in holdout litigation.[115] The Second Circuit in *NML Capital Ltd. v. Republic of Argentina*, for example, chose the third version of the clause.[116] In the aftermath of this ruling, some sovereign debtors have already undertaken measures to modify the clauses in new issuances to exclude such ratable payment interpretation.[117] Overall, the international community treats the CAC as an effective measure to curb holdout litigation.[118] Although there are various limitations to the use of CACs,[119] creative contractual clauses could be designed to further shield against holdout litigation.

b) The Statutory Proposal – A Miscarriage

In 2001, the IMF proposed the Sovereign Debt Restructuring Mechanism (SDRM), which aimed at creating a regime to "protect a sovereign debtor from holdout litigation."[120] The SDRM contains several features tailored to reducing holdout litigation. First, it would stay creditor enforcement when the debtor countries activate the mechanism.[121] Second,

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112. Rodrigo Olivares-Caminal, *supra* note 81, at 121.

113. *Id.*

114. Choi et al., *supra* note 98, at 146.

115. *See supra* notes 84-90 and accompanying text.

116. *See* NML Capital Ltd., 669 F.3d 246, 260 (2d Cir. 2012); NML Capital Ltd., No. 08 CIV. 6978 TPG, 2012 WL 5895786, at *1-2 (S.D.N.Y. Nov. 12, 2012); *see also supra* note 88 and accompanying text.

117. IMF, *supra* note 86, at 14.

118. *See Id*; *see also* IMF, *Sovereign Debt Restructuring–Recent Developments and Implications for the Fund's Legal and Policy Framework* (Apr. 2013), https://www.imf.org/external/np/pp/eng/2013/042613.pdf.

119. For further discussion about CAC's disadvantages, *see* Buchheit & Gulati, *supra* note 104, at 1344-45.

120. ROUBINI & SETSER, *supra* note 12, at 316.

121. Hagan, *supra* note 49, at 365. Activation can only occur when the debtor country concludes that its eligible debt was unsustainable. *Id.* at 361. The stay would come into force after its approval by a supermajority (75 percent) of creditors. RIEFFEL, *supra* note 1, at 268. Originally, the IMF considered allowing an automatic stay. But it eventually concluded that this would be undesirable because the sovereign debtors would not be required to stop payments. *See* ROUBINI & SETSER, *supra* note 12, at 317. Another problem with an automatic stay is that no existing institution could provide powerful oversight for the stay. *Id.*at 316. Giving IMF such an overseeing role would inevitably expand its power in the restructuring process. Moreover, IMF's own exposure to the sovereign's debt crisis would make it an interested party. On the other hand, establishing a new institution would be both politically and economically difficult. *Id.* The Dispute Resolution Forum established under the proposal would arguably certify the stay to bind creditors and debtors by prohibiting challenge against

it would aggregate claims for voting purposes.[122] As previously discussed, the aggregation idea can be accomplished in a purely contractual way.[123] Third, the SDRM would create a dispute resolution forum to ensure "the independence, competence, diversity, and impartiality" of the restructuring process.[124] The legal effect of the forum's actions is truly the "lynchpin of the SDRM proposal." [125] In theory, the forum would eliminate the possibility of holdout litigation because the creditors would have no other forums available to litigate. The implementation of the SDRM faced practical difficulties. [126] In particular, it would be a daunting task to persuade countries to sign a treaty that overrides their national laws.[127] Not surprisingly, the international community eventually abandoned the SDRM proposal in favor of a collective action clauses solution in 2003.[128]

C. Holdout Saga Continues: Background on the Recent Ukraine Bond Restructuring

The Ukraine debt crisis arose out of the country's high-profile political dispute. During the Orange Revolution in 2004, protestors challenged the

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the stay in domestic courts. *See* Hagan, *supra* note 49, at 386. Yet the Forum would not stop debtors from making the payments they wanted to make.

122. Under the clause, all creditors that appeared on the restructuring list would be bound to the restructuring terms that were agreed upon by creditors whose holdings comprised of at least 75 percent of the outstanding principal of registered and verified claims. Hagan, *supra* note 49, at 379. To avoid discrimination, SDRM would require all creditors to receive the same terms or the same choice among terms under the restructuring agreement. *Id.* Moreover, secured claims, domestic claims and official bilateral claims would all be excluded from the aggregation vote, largely because they differ in seniority from general unsecured claims. *Id.* The debtor would also be given the option to create "such classes where it concluded that the provision of differential treatment could increase the likelihood of a successful restructuring." *Id.* at 381.

123. *See supra* notes 106-109 and accompanying text; *see also* ROUBINI & SETSER, *supra* note 12, at 324 ("SDRM-like proposals that do little more than create the legal authority to allow an aggregated supermajority vote hardly seem worth the trouble.")

124. RIEFFEL, *supra* note 1, at 269. The Forum will be funded by the IMF. *Id.*

125. Hagan, *supra* note 49, at 385. Due to the strong opposition against the forum's rule-making authority, the proposal carefully limits the forum's role to administrative functions, such as registration and verification of claims. *Id.* at 384. Nevertheless, once a restructuring agreement reached between the debtor country and creditors is certified by the Forum, the certification would be binding in all countries that have members of the IMF and could not be challenged in domestic courts. *Id.* at 385.

126. *See* ROUBINI & SETSER, *supra* note 12, at 333.

127. *See Id.*

128. RIEFFEL, *supra* note 1, at 259. Notwithstanding the ambitious goals of SDRM, some critics argue that the SDRM concentrated on the creditors' coordination problem and the innovations are not with their political and institutional cost. Instead, they argue that a true legal mechanism should deal with various aspects of the sovereign debt problems, including the delay in negotiation, interim financing, debtor's moral hazard, overborrowing, and delayed defaults. *See generally* Ugo Panizza, *Do We Need a Mechanism for Solving Sovereign Debt Crises? A Rule-Based Discussion* 3 (Graduate Inst. Of Int'l Dev. Studies, Working Paper No. 03, 2013), http://repec.graduateinstitute.ch/pdfs/Working_papers/HEIDWP03-2013.pdf; *see* Gelpern, *supra* note 9.

outcome of the presidential election won by pro-Russian politician Viktor Yanukovych.[129] These protests led to Yanukovych's resignation.[130] In 2010, Yanukovych won the presidential election.[131] Protests broke out again in November 2013 after President Yanukovych reversed the country's effort to build trade ties with EU, seeking instead closer cooperation with Russia.[132]

On December 17, 2013, Russian President Vladimir Putin agreed to buy $15 billion of Ukraine bonds to assist President Yanukovych's regime.[133] The funds, however, did not prevent the fall of Yanukovych's reign in February 2014.[134] Pro-Russian military force, supported by President Putin, then took control of the Crimean capital, and after a secession referendum in March, Crimea became part of the Russian Federation.[135]

The political conflict caused a recession in Ukraine's economy.[136] In March 2015, the IMF agreed to provide a loan of $17.5 billion to Ukraine as part of a four-year bailout plan.[137] The aid package, however, requires Ukraine to secure relief on its foreign debt from its creditors.[138] On August 27, 2015, after months of negotiations, Ukraine and its main creditors agreed to restructure $18 billion of the sovereign bonds.[139] The exchange agreement included a 20 percent write-off of the country's debt.[140] The agreement was further amended in September to satisfy the demands of other creditors.[141] While more than 75 percent of creditors on each bond agreed to the restructuring, Russia—which held the $3 billion note in the $18 billion debt—refused to participate in any part of the

129. *Ukraine Crisis: Timeline*, BBC NEWS, Nov. 13, 2014, http://www.bbc.com/news/world-middle-east-26248275 (last visited Feb. 2, 2016).

130. *Id.* The opposition candidate Viktor Yushchenko was declared the winner of the election.

131. *Id.*

132. *Id.*

133. *Id.* The deal also included a reduction of Russian gas supplies by about a third.

134. *Id.*

135. *Id.*

136. Ukraine "has lost a fifth of its entire economic output, seen its debt pile rise to unsustainable levels and currency collapse by more than [sixty percent] against the [U.S.] dollar. *See* Mehreen Khan, *Ukraine debt crisis: Russia refuses to accept terms as Kiev finally secures debt write-off deal with creditors*, THE TELEGRAPH, Aug. 27, 2015, http://www.telegraph.co.uk/finance/economics/11827542/Ukraine-debt-crisis-Russia-refuses-to-accept-terms-as-Kiev-finally-secures-debt-write-off-deal-with-creditors.html.

137. *I.M.F. Plans $10 Billion in New Aid to Ukraine*, N.Y. TIMES, March 11, 2015, http://www.nytimes.com/2015/03/12/business/imf-approves-fast-acting-dollar17-5-billion-bailout-for-ukraine.html.

138. *See* Khan, *supra* note 136.

139. Andrew E. Kramer, *Ukraine and Top Creditors Agree to Restructure $18 Billion in Foreign Debt*, N.Y. TIMES, Aug. 27, 2015, http://www.nytimes.com/2015/08/28/business/international/ukraine-debt-restructuring.html.

140. *Id.*

141. Marton Eder & Natasha Doff, *Ukraine Isolates Russia With Sweeter Terms to Deter Holdouts*, BLOOMBERG, Sept. 24, 2015, http://www.bloomberg.com/news/articles/2015-09-24/ukraine-sweetens-debt-deal-for-holdouts-with-2019-note-offer.

process.[142] By mid-October, Russia had become the lone holdout creditor in the deal.[143]

Russia argues its debt should be treated as that of an official sovereign creditor.[144] Russia insists on its official status with the obvious purpose of blocking the bailout fund from the IMF which, under its initial policy, was prohibited from lending to countries that have defaulted on its debt obligation to sovereign creditors.[145] This goal was frustrated when the IMF replaced the absolute prohibition with a more flexible good-faith obligation of the debtor.[146] The IMF later decided the Russian bonds should be treated as official debt.[147] On December 20, 2015, Ukraine defaulted on the Russian bonds.[148] While the two countries continue to engage in an out-of-court settlement negotiation,[149] Russia has formally initiated a legal proceeding against Ukraine over the nonpayment in London's High Court in February 2016.[150] The Court heard the case in January 2017; in March 2017, the Court issued a ruling rejecting

142. Natalia Zinets, *UPDATE 3-Russia is lone holdout from Ukraine debt swap deal*, REUTERS, Oct. 15, 2015, http://www.reuters.com/article/ukraine-crisis-debt-idUSL8N12F1IF20151015.

143. *Id.*

144. Natasha Doff, *This Is What's at Stake for Putin, Ukraine as Bond Default Looms*, BLOOMBERG, Dec. 7, 2015, http://www.bloomberg.com/news/articles/2015-12-07/this-is-what-s-at-stake-for-putin-ukraine-as-bond-default-looms.

145. *Id.*

146. Andrew Mayeda & Natasha Doff, *IMF Policy Change Pushes Ukraine, Russia to Resolve Bond Dispute*, BLOOMBERG, Dec. 10, 2015, http://www.bloomberg.com/news/articles/2015-12-10/imf-policy-change-pushes-ukraine-russia-to-resolve-bond-dispute. Under the new policy, IMF will allow lending to countries that default on debts to sovereign creditors, provided that the debtor country makes "good faith" efforts to restructure the debt. *Id.* The total amount of bailout fund is $17.5 billion, of which $7.62 billion has been disbursed as of September 2016. *See* Emma Rumney, *Ukraine secures release of long-delayed €1bn IMF funding tranche*, PUB. FIN. INT'L, Sept. 15, 2016, http://www.publicfinanceinternational.org/news/2016/09/ukraine-secures-release-long-delayed-eu1bn-imf-funding-tranche.

147. Marton Eder & Andrew Mayeda, *Ukraine, Russia Harden Bond Stance as IMF Rules Debt Official*, BLOOMBERG, Dec. 16, 2015, http://www.bloomberg.com/news/articles/2015-12-17/imf-says-ukraine-bond-owned-by-russia-is-official-sovereign-debt.

148. Natasha Doff & Marton Eder, *After Default to Putin, What's Next for Ukraine-Russia Bond Row*, BLOOMBERG, Dec. 20, 2015, http://www.bloomberg.com/news/articles/2015-12-20/after-default-to-putin-what-s-next-for-ukraine-russia-bond-row.

149. Natasha Doff, *Ukraine Ready for Court Fight With Russia Over $3 Billion Bond*, BLOOMBERG, Jan. 4, 2016, http://www.bloomberg.com/news/articles/2016-01-04/ukraine-ready-for-court-fight-with-russia-over-3-billion-bond (last visited Feb. 6, 2016). Both countries said they remain open to out-of-court talks after the mediation conducted by Germany immediately after the default yielded no agreement. *Id*.

150. Anna Andrlanova & Natasha Doff, *Russia Sues Ukraine in London Court Over $3 Billion Default*, BLOOMBERG, Feb. 17, 2016, https://www.bloomberg.com/news/articles/2016-02-17/russia-files-suit-against-ukraine-in-london-over-3-billion-debt. The Russian bonds were drafted under English law and any claims must be submitted to a court in London. *See* Doff & Eder, *supra* note 148.

Ukraine's argument for a full trial due to Ukraine's lack of "justiciable defence" in a "claim for repayment of debt instruments."[151]

II. THE UKRAINE BOND DISPUTE POSES A NEW QUESTION: HOW SHOULD WE TREAT AN "OFFICIAL" HOLDOUT BONDHOLDER?

Sovereign bonds held by another sovereign state are highly unusual because the debt is private in form (bond) and official in substance (state-to-state lending).[152] Anna Gelpern, a renowned legal scholar in sovereign debt restructuring, praised Russia for their "beautiful position where they have the choice of being an official or a private creditor."[153] But to what extent would this hybrid status help a holdout bondholder such as Russia?

A. The "Official" Status of the Bondholder Does Not Justify Special Treatment

The "official" status of the bonds introduces a narrow legal question: Are official creditors holding sovereign bonds of another state nevertheless subject to the binding agreement between majority bondholders and the sovereign borrower? The question should be answered in the affirmative, because giving special treatment to "official" bondholders is at odds with the bond's anonymous nature, violates CACs and *Pari Passu* clauses, and results in collusion between vulture funds and official bondholders.

First, recognizing "official bondholders" as a distinctive category is inconsistent with the nature of a bond as an anonymous and atomized debt instrument. Creditors purchase bonds with no knowledge of the identity of their fellow bondholders.[154] Because bonds are anonymous, people expect bondholders to leave and enter the market constantly.[155] Accordingly, it will be contradictory to elevate a portion of bonds governed by the same debt instrument because of the identity of the bondholders.

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151. *UK High Court rejects full trial in Ukraine-Russia bond spat*, FINANCIAL TIMES, Mar. 29, 2017, https://www.ft.com/content/eee0b5c4-4f6c-3fd8-9fda-ad69b2852b39. (During the January hearings, Ukraine argued that the debt was voidable because of "duress" as a result of Russia's political and military threats to Ukraine; Ukraine thus demanded a full trial for this case. The London's High Court rejected this argument on the ground that the defense was a matter of international law or treaties and thus was not justiciable.

152. Sujata Rao & Chris Spink, *London or Paris: Which is the Club for Russia's Ukraine Debt?*, REUTERS, Mar. 27, 2015, http://www.reuters.com/article/ukraine-russia-bonds-idUSL6N0W-R4J620150327 (last visited Feb. 6, 2016). Bonds are essentially a private debt vehicle. *See infra* notes 154-55 and accompanying text.

153. Rao & Spink, *supra* note 152.

154. Buchheit & Gulati, *supra* note 104, at 1320.

155. *Id.* at 155.

To be sure, there are reasons to treat "official" bondholders as categorically different from other bondholders. Bilateral borrowing between sovereigns is often motivated by non-commercial reasons. For example, a country may simply lend to another country for the primary purpose of providing financial aid.[156] Accordingly, bilateral creditors are less concerned about immediate economic return than preservation of the facial value of the debt. Stated differently, these creditors will not easily accept a write-off.[157] Such a distinction in creditors' motivations, however, does not justify a disparate treatment. If official creditors prefer to maintain the facial value of the debt, they could easily choose other debt vehicles such as direct intergovernmental loans. When they do elect to benefit from the liquidity of sovereign bonds, they must also, like all other private bondholders, accept the precondition of such benefit—the bonds' indifference to the identity of the holder.

Second, singling out official bondholders from the restructuring plan violates the mandates in the CACs.[158] There is no language in the CAC that differentiates official bondholders from private bondholders.[159] Thus,

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156. ROUBINI & SETSER, *supra* note 12, at 257.

157. *Id.* at 263.

158. The current regime for bond restructuring, as discussed above, is mostly contractually based. *See supra* notes 99-121 and accompanying text.

159. A typical CAC clause in English bond writes, in part:

> The Agency Agreement contains provisions for convening meetings of Noteholders to consider matters relating to the Notes, including the modification of any provision of these Conditions or the Deed of Covenant. Any such modification may be made if sanctioned by an Extraordinary Resolution (as defined below).
>
> The quorum at any such meeting for passing an Extraordinary Resolution shall be two or more persons holding or representing *a clear majority* of the principal amount of the Notes for the time being outstanding, or at any adjourned meeting two or more persons being or representing Noteholders whatever the principal amount of the Notes for the time being outstanding so held or represented, *except that at any meeting the business of which includes consideration of proposals*, *inter alia*, (i) to modify the maturity of the Notes or the dates on which interest is payable in respect of the Notes, (ii) to reduce or cancel the principal amount of, or interest on, the Notes, (iii) to change the currency of payment of the Notes, or (iv) to modify the provisions concerning the quorum required at any meeting of Noteholders or the majority required to pass an Extraordinary Resolution, the necessary quorum for passing an Extraordinary Resolution shall be two or more persons holding or representing *not less than 75 per cent*., or at any adjourned such meeting not less than 25 per cent., of the principal amount of the Notes for the time being outstanding.
>
> As used in this Condition 12, "Extraordinary Resolution" means a resolution passed at a meeting of the Noteholders duly convened and held in accordance with the provisions contained in these Conditions and the Agency Agreement by a majority consisting of *not less than 75 per cent.* of the persons voting thereat upon a show of hands or if a poll shall be duly demanded then by a majority consisting of not less than 75 per cent. of the votes given on the poll*. An*

under the four-corner rule of contractual interpretation,[160] the clause mandates that any restructuring plan passed by a majority of the bondholders would be binding on all bondholders. The IMF treatment of the debt as an official claim is irrelevant to the interpretation of the CAC; the Russia claim is regarded official only "for the purposes of the Fund's policy on arrears to official bilateral creditors."[161] It does not alter the binding force of the restructured plan. Indeed, given that CACs have demonstrated their power to ward off vulture funds in the Ukraine's bond restructuring process,[162] to exclude Russia might severely encroach on the legitimacy of the clauses.

Third, the disparate treatment between official and private bondholders also contradicts the principle embodied in the *Pari Passu* clause. Notwithstanding the Second Circuit's expansive reading of the clause in the Argentina case,[163] the clause means all bondholders will have the same priority among themselves and the debtor's other unsecured creditors.[164] If the debtor is obligated to negotiate with official bondholders with better terms, it formally subordinates the private bondholders to the official holdout creditors.[165] This would run afoul of the *Pari Passu* clause.

> *Extraordinary Resolution passed at any meeting of Noteholders will be binding on all Noteholders, whether or not they are present at the meeting.*

Buchheit & Gulati, *supra* note 104, Appendix A (emphasis added).

160. If possible, a contract should be interpreted as to "give effect to its general purpose as revealed within its four corners or in its entirety." 11 WILLISTON ON CONTRACTS § 32:5 (4th ed.).

161. Press Release, Executive Board, IMF Executive Board Takes Decision on the Status of Ukraine's Eurobond Held by the Russian Federation, IMF Press Release No. 15/570 (Dec. 16, 2015), https://www.imf.org/external/np/sec/pr/2015/pr15570.htm.

162. The old Ukraine bonds contained per series CACs. In each series, if 75% in value voted in favor of the agreement, all holders would be bound by it. *See Ukraine's Sovereign Restructuring: Why is this sovereign deal ground-breaking?*, WEIL GOTSHAL & MANGES LLP, http://www.weil.com/~/media/files/pdfs/2015/ukraine-sovereign-restructuring.pdf (Last visited Feb. 6, 2016). These CACs in the Ukraine bonds proved to be effective to deter holdout litigation. With the major bondholders at the negotiation table, vulture funds would find it difficult to stop the exchange agreement by obtaining a large block. *See* Natasha Doff, *Ukraine Shielded From Vultures by Templeton Has One Less Problem*, BLOOMBERG, Apr. 23, 2015, http://www.bloomberg.com/news/articles/2015-04-23/ukraine-shielded-from-vultures-by-templeton-has-one-less-problem (last visited Feb. 6, 2016). The new Ukraine bonds go one step further; they include CACs that adopt an aggregate voting feature. *See* Weil, *supra* (The CACs in the new notes "allow[] a super-majority across all series of New Notes to agree changes to bond terms that are then binding on all holders . . . [and] allow[] Ukraine to effectively treat all New Notes as a single group, removing the threat posed by holdouts.")

163. *See supra* notes 82-88 and accompanying text.

164. *See* Olivares-Caminal, *supra* note 81, at 123. It is likely that the English courts will adhere to this basic "equal rank" interpretation despite the fact that U.S. courts have adopted a more expansive view in the Argentina sovereign debt litigation. IMF, *supra* note 86, at 13.

165. An agreement between participating bondholders and a sovereign debtor can be discriminatory. Buchheit noted that "you can do pretty much whatever you want in discriminating among creditors (in terms of who gets paid and who does not) but do not try to justify your behavior by taking steps that purport to establish a legal basis for discrimination." Rodrigo Olivares-Caminal, *supra* note 81, at 125. IMF's requirement that Ukraine engage in good faith negotiations with Russia is a condition for the IMF's bailout package. *See* Mayeda & Doff, *supra* note 147. One can say that this good faith obligation legally elevates Russia's status as a bondholder.

Finally, the exclusion of official bondholders from the restructuring process may induce collusion between official bondholders and vulture funds. If an official bondholder were immune from the restructuring plan, sovereign debtors must exclude official bondholders from contractual clauses *ex ante* in order to prevent endless renegotiation.[166] The official bondholders, because of their immunity from the restructuring process, could continue to hold the bonds and seek full repayment of the debt; alternatively, they may choose to liquidate their interests in the secondary markets, attracting buyers such as vulture funds that are aggressively purchasing bonds in order to augment enough shares to block a restructuring plan. Such collusion, therefore, would cause CACs to be less effective in deterring holdout creditors.[167] Even the possibility of selling bonds to vulture funds would be detrimental to the restructuring process. For example, the official bondholders may threaten to sell their bonds to vulture funds, thus forcing the sovereign debtor to grant more favorable terms to official bondholders at the expense of other private bondholders' interests.[168]

B. If "Official" Bondholders are Given Special Treatment, Arbitration Would be the Most Suitable Resolution Mechanism

Assuming "official" bondholders will be treated differently, the Paris Club seems to be the proper venue for this dispute because of the bond's status.[169] The Paris Club's policies, however, may pose some obstacles. One potential problem arises out of the comparable treatment principle. This principle requires private creditors to match with official bilateral

166. For example, the new restructured Ukraine bonds include a *most favored creditor* clause that prohibits Ukraine from settling holdouts (including Russia) on more favorable terms than the new notes. *See* Weil, *supra* note 162 (The new bond agreement contains "Ukraine is prohibited from settling with holdouts (including Russia) on more favourable terms than the New Notes. If this clause is breached, it will trigger an Event of Default under the New Notes. Therefore, if Ukraine grants more favorable terms to Russia, such an agreement will inevitably trigger a default under the new notes and call for renegotiation with the private bondholders. *Id.*

167. CACs deter holdout by making it more difficult for holdout creditors to purchase blocking shares. *See supra* notes 99-109 and accompanying text.

168. One solution to such collusion might be to limit the liquidity of the sovereign bonds held by the official bondholders through bilateral treaties.

169. Public debts that fall within the realm of the Paris Club are defined as "credits and loans granted by Paris Club creditors' governments or relevant institutions, as well as commercial credits guaranteed by them." *See* Club de Paris, *Definition of Debt Treated*, http://www.clubdeparis.org/en/communications/page/definition-of-debt-treated (last visited Feb. 6, 2015). The Eurobond held by Russia squarely fits into this definition because the bonds were "acquired by Russia's [National Wealth Fund]" acting on behalf of the Russian government "pursuant to [its] decision . . . to provide assistance to Ukraine......" IMF Press Release, *supra* note 164.

lenders.[170] While in most cases the assessment is complicated, the bonds held by official creditors and those by private creditors are inherently of the same type and should be offered identical restructured terms.

This dilemma calls for a revisit of the meaning of "comparability." Giving creditors different treatment is not always "discriminatory"; rather, different treatment can simply reflect different preferences of the creditors."[171] Official bondholders can negotiate terms with no face value debt reduction with a lower yield rate that are still comparable to restructured bonds held by private creditors with a write-down and high yield.[172] This is consistent with the general policy of the Paris Club to grant debt reduction to sovereigns other than heavily indebted poor countries (HIPCs).[173] Thus, the fact that the private and official creditors hold the same debt instrument does not necessarily mean they must be given equal terms.[174]

Another technical problem is the distinction between flow treatment and stock treatments. The Paris Club primarily gives "[f]low treatment" to debtor countries to close its financing gap identified by the IMF.[175] The result is that only the payments coming due during the IMF program are treated.[176] Bond restructuring, instead, qualifies as "stock treatments," meaning that the treatments apply to the entire stock.[177] Since stock treatments are not granted "unless the country demonstrates a satisfactory track record with both the Paris Club and the IMF,"[178] the debtor has to wait for a few years before they can restructure the bond. In addition to the Paris Club, the official bondholder may also try to enforce the bond

170. Club de Paris, *supra* note 38. The Paris Club will usually look at a variety of factors to assess comparability, including "type of creditor," "changes in nominal debt services," etc. *Id.*

171. ROUBINI & SETSER, *supra* note 12, at 258.

172. *Id.*

173. RIEFFEL, *supra* note 1, at 84.

174. While the Paris Club might be a possible forum for future official holdout dispute, it is no longer an option for Ukraine and Russia. Neither of the two countries has sought help from the Paris Club. Olga Tanas & Ksenia Galouchko, *Russia Says Won't Modify Ukraine Bond It Deems Official Aid*, BLOOMBERG, Mar. 27, 2015, http://www.bloomberg.com/news/articles/2015-03-27/russia-says-won-t-restructure-ukraine-bond-it-deems-official-aid. One problem is that Ukraine is now stuck with the bond exchange agreement with its private creditors who have agreed a 20 percent write-off. *See supra* note 139 and accompanying text. Resorting to the Paris Club might be anachronistic, because the Paris Club process is conditioned upon its restructuring process preceding the restructuring of any other debts the debtor may have with private creditors. ROUBINI & SETSER, *supra* note 12, at 261. Moreover, because the exchange agreement contains the most favored creditor clause, starting a Paris Club process triggers an automatic default on the new bonds and initiates a new round of debt renegotiation with private creditors.

175. Club de Paris, *Flow and Stock Treatments*, http://www.clubdeparis.org/en/communications/page/flow-and-stock-treatments (last visited Feb. 6, 2016).

176. *Id.*

177. *Id.* Unlike the flow treatment, the purpose of covering the stock of debt "is to provide a country with a final Paris Club treatment called an exit treatment." *Id.*

178. *Id.* ("[S]tock treatments may be granted, on a case-by-case basis, for countries that have a satisfactory track record with both the Paris Club and the IMF and where there is sufficient confidence in the debtor country's ability to meet its obligations under the debt agreement.")

agreement in court. However, litigation is unlikely to bring about a satisfactory outcome. Undoubtedly, the official bondholder may benefit from the expansive reading of *Pari Passu* clause in the Argentina ruling.[179] Yet the plain meaning of the CACs (i.e. a majority or super-majority rule) may significantly weaken its position.[180] A more important reason to avoid litigation is the political impact of the dispute. Bilateral debt arrangements invariably involve political exchange.[181] Accordingly, the debtor country may seek to invalidate the entire debt for political reasons. For example, in the Russia-Ukraine sovereign bond dispute, Ukraine may invoke the odious debt doctrine, arguing that the debt was “odious” and should be void as against international public policy.[182] Like WDF in *World Duty Free v. Kenya*, Ukraine may bring evidence about any bribery or corruptive conducts on the part of the former President Yanukovych.[183] Such exposure unnecessarily disrupts the bilateral relationship the countries may attempt to maintain. It may also create a negative impression on the integrity of the Russian government.

Compared to the Paris Club process and litigation, arbitration may be particularly suitable for this type of dispute. Arbitration enjoys several advantages over litigation, including its neutrality, flexibility, and efficiency.[184] The rule of confidentiality prevents unnecessary exposure of politically sensitive information.[185] Unlike treaty-based claims such as

179. *See supra* note 88 and accompanying text. *But see* Lachlan Burn, *Pari passu clauses: English law after NML v Argentina*, 9 CAP. MARKET L J. 2, 9 (2014) (“There is almost no risk that English courts, faced with similar facts to NML v Argentina, would adopt the ‘payment’ interpretation.”)

180. *See supra* notes 104-09, 158-60 and the accompanying text.

181. For example, the then opposition leader of Ukraine in 2013 suspected that “Yanukovych had handed over Ukrainian firms and strategic assets in return for Russian help.” Yanukovych himself admitted his decision had been influenced by heavy pressure from Russia. *Russia offers Ukraine major economic assistance*, BBC, Dec. 17, 2013, http://www.bbc.com/news/world-europe-25411118.

182. *See supra* notes 20-29 and accompanying text.

183. Ukraine has publicly adopted this position. “This $3 billion was in reality a bribe from Russia so that President Viktor Yanukovych would stop the association agreement with the EU," announced by Prime Minister Arseniy Yatsenyuk. *See* Natasha Doff, *Putin Tests English Debt Law as Ukraine Feud Heads to London*, BLOOMBERG, Oct. 29, 2015, http://www.bloomberg.com/news/articles/2015-10-28/putin-tests-english-debt-law-as-ukraine-feud-heads-to-london. Evidence shows that the bond contains “a clause designed to prevent Ukraine from offsetting its debt due to damages inflicted by Russia, such as the annexation of Crimea, which President Petro Poroshenko plans to seek compensation for.” *Id.* This might create the impression that Russia granted the bond as a “bribe” to President Yanukovych in exchange for the latter’s cooperation on the Crimea issue. *Id.* During the January 2017 hearing in front the London’s High Court, Ukraine did take a similar position, claiming that the debt was “voidable” due to political pressure from Russia. *See supra* note 151 (Ukraine argued the bonds were “in reality a tool of oppression wielded by one sovereign state against another.”)

184. Cross, *supra* note 89, at 354.

185. Many arbitral institutions have formal confidentiality rules, such as the London Court of International Arbitration. *Id.* Article 30 provides:

> 30.1 The parties undertake as a general principle to keep confidential *all awards in the arbitration*, together with *all materials in the arbitration created*

those in the *Abaclat* arbitration, official bondholders' claims do not derive from bilateral treaties and are subject to no mandatory disclosure rule.[186] Also, because official bondholders are highly unusual,[187] the public interest in establishing a legal principle governing official holdout is very limited. Finally, while formal judgment in sovereign litigation may encounter enforcement problems,[188] foreign arbitral awards are more likely to be enforced than foreign judgments.[189]

III. CONCLUSION

For years, holdout litigations launched by ruthless vulture funds halted sovereign bond restructuring. The concern triggered the adoption of various contractual devices, especially the Collective Action Clause in the bond agreement, which have demonstrated the power to ward off private holdouts. The Ukraine bond dispute, however, introduced a new type of holdout monster that claims an "official" status and an absolute immunity from the contractual arrangement. Despite the official status of the sovereign bondholders, no immunity or privilege should be granted to an official holdout bondholder because concluding otherwise contradicts the private nature of the bonds and disrupts the entire contractual regime the international community has built. Furthermore, if special treatment is inevitable, the dispute between debtor and official bondholder should be dealt with in arbitration because the technicalities within the Paris Club

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> *for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain*, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. . . .
>
> 30.3 The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.

See London Court of International Arbitration, LCIA Arbitration Rules, art. 30 (2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article 30 (last visited Feb. 6, 2016) (emphasis added).

186. The UNCITRAL Arbitration Rules were formally amended in 2013 to require certain documents used in arbitrations to be released to the public. For example, Article 3 states, in part:

> [T]he following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

See United Nations Commission on International Trade Law, UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration, art. 3 (2014), http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

187. *See supra* notes 156-57 and accompanying text.

188. *See supra* notes 14-29 and accompanying text.

189. Cross, *supra* note 89, at 356-364.

and the potential exposure of political scandals in courts render both forums unappealing.

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