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Andrew Kelly

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*Andrew Kelly**

INTRODUCTION

> The typical *modus operandi* of a vulture investor is to purchase . . . debt . . . or other securities at a discount from the face amount, and often to purchase sufficient voting power to enable the vulture investor to block confirmation of any plan of reorganization proposed for the debtor that the vulture investor does not like.[1]

In keeping with this definition, vulture investors are frequently criticized for the practice of "picking over the bones" of distressed companies.[2] Yet while some may find this practice as unsavory as the

* B.S. Economics 2013, Florida State University; J.D. 2018, University of Florida Levin College of Law. Andrew Kelly is an associate and member of the real estate practice group at the law firm of Lowndes, Drosdick, Doster, Kantor, & Reed, P.A. in Orlando, FL. Andrew previously worked as an alternative investment wholesaler for CNL Securities Corp. in Orlando, Florida, and as a law clerk for PODS Enterprises in Clearwater, Florida. While attending law school, Andrew served as Executive Vice President of the Investment and Finance Law Association at Stetson College of Law and as a member of the Environmental Moot Court Team at the University of Florida Levin College of Law. Special thanks to Professor Wentong Zheng for his suggestions and advice.

1. *In re* Papercraft Corp., 187 B.R. 486 (Bankr. W.D. Pa. 1995) (quoting Richard Lieb, *Vultures Beware: Risks of Purchasing Claims Against a Chapter 11 Debtor*, 48 BUS. LAW. 915, 924 (May 1993)).

2. Jennifer Roberts, *A Worthy Alternative to Bonds for Income Seekers: Private Debt*, GLOBE & MAIL (Feb. 14, 2017), https://www.theglobeandmail.com/globe-investor/a-worthy-

feeding tactics of the California Condor, perhaps vulture investors sometimes provide a similar metaphorical benefit by clearing up the financial decay of over-leveraged entities and facilitating the "transfer of capital from dying companies to ones that have growth potential."[3]

This Article will examine the impact of international vulture investors, also referred to as "holdout" investors in certain contexts, on the restructuring of Argentinian sovereign debt in the wake of the countries 2001 default.[4] With the gift of hindsight, this Article will discuss if measures could have been taken at the time of debt issuance in order to better cope with vulture investors should a default situation occur. This Article will then analyze the restructuring approach taken by Argentina, focusing on the failure of the Argentinian government to follow established best practices for a default situation. Finally, this Article will evaluate the ability of private investors to bring legal action against a sovereign, highlighting two cases brought by vulture investor NML against Argentina and the effectiveness of those suits in light of NML's end goal.[5]

While national courts and arbitration pursuant to Bilateral Investment Treaties may provide avenues for private lenders and institutions to resolve disputes with foreign nations, these forums often provide judgments of limited enforceability when ruling against a sovereign.[6] However, vulture investors that purchased post-default Argentinian bonds did successfully impede the resolution of a full restructure by initiating suits in U.S. federal court, receiving a significant return on investment when an agreement was reached between Argentina and these investors in 2016.[7]

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alternative-to-bonds-private-debt/article33998548/; *The Vulture Funds Picking over the Bones of the Economic Crisis*, MONEYWEEK (Feb. 14, 2013), https://moneyweek.com/the-vulture-funds-picking-over-the-bones-of-the-economic-crisis-62728/.

3. *What is a Vulture Investor? Definition and Meaning*, MKT. BUS. NEWS, http://marketbusinessnews.com/financial-glossary/vulture-investor/; *A Career as a "Vulture Investor" is Great, Says this Hedge Fund Manager*, EFINANCIALCAREERS, https://news.efinancialcareers.com/us-en/267606/hedge-fund-founder-defends-career-in-vulture-investing.

4. Arturo C. Porzecanski, *The Origins of Argentina's Litigation and Arbitration Saga, 2002–2014*, 40 FORDHAM INT'L L.J. 41, 59–64 (2016)

5. Porzecanski, *supra* note 4, at 42 ("For the most part, these cases have been heard in the federal courts of the United States, or else in arbitral proceedings hosted by ICSID, the International Centre for Settlement of Investment Disputes").

6. Anoosha Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards against the Republic of Argentina: Obstacles That Transnational Corporations May Face*, 17 N.Y. INT'L L. REV. 53, 55 (2004).

7. *Argentina turns page on debt with first bond sale in 15 years*, GUARDIAN (Apr. 19, 2016), https://www.theguardian.com/world/2016/ apr/20/argentina-turns-page-on-debt-with-first-bond-sale-in-15-years.

Now that the dust has settled, it appears that the bargaining chip held by vulture investors that wish to influence the restructuring approach taken by a defaulting sovereign relates most to the investor's ability to impede the nation's access to international capital markets.[8] Therefore, even with the great strides that international plaintiffs have made in the past five decades, obtaining a judgment against a sovereign nation remains arguably less important than whether some ancillary or direct aspect of that ruling, or perhaps even the perpetuation of legal action itself, hinders that nation's access to capital.[9]

I. BACKGROUND

"In December 2001, in the midst of a financial crisis in Argentina, the Republic [of Argentina] announced a moratorium on its debt service payments."[10] This moratorium resulted in a mass default of approximately $155 billion of sovereign debt.[11] Over the next decade, many would refer to this event as "the largest and potentially most complex default the world has ever known."[12] To provide context for the scope of this default, the GDP of Greece in 2001 was approximately $150 billion ($5 billion less than the 2001 Argentina sovereign debt default).[13]

Several economic events and decisions by the Argentinian government culminated in the renown 2001 default.[14] First, the Argentinian government mandated an exchange rate that held a fixed one-to-one exchange ratio with the U.S. dollar.[15] Second, Argentina primarily

8. Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311, 314–16 (2005); *No Movement*, ECONOMIST, July 31, 2014, https://www.economist.com/news/americas/21610296-argentina-has-defaulted-again-deal-its-creditors-not-out-question-no (stating that "Argentina has been locked out of international capital markets for 13 years" as of 2014, and that the Argentinian government is aware that "[i]t needs to borrow to grow").

9. Porzecanski, *supra* note 4, at 329 ("The [International Monetary Fund], in particular, has had a policy of lending to a government in default of financial obligations to private creditors only when it is pursuing 'appropriate policies' and when it is making a 'good faith effort to reach a collaborative agreement with its creditors'.").

10. EM Ltd. v. Republic of Argentina, 473 F.3d 463, 466 (2d Cir. 2007); Porzecanski, *supra* note 4, at 55.

11. *A Decline Without Parallel,* ECONOMIST, Feb. 28, 2002, http://www.economist.com/node/1010911; Porzecanski, *supra* note 4, at 55 (citing Argentina Ministerio de Economía y Producción, Secretaría de Hacienda, Boletín Fiscal 4to Trim. 2001, available at http://www.mecon.gov.ar/onp/html/boletin/4totrim01/pdf/ fisc25.pdf (estimating the size of the default to potentially amount to $145 billion in public indebtedness, although stating that the default "would likely apply to less than $95 billion in obligations.")).

12. Porzecanski, *supra* note 4, at 317.

13. *Ranking of the World's Richest Countries by GDP (2001)*, CLASSORA, Apr. 12, 2016, http://en.classora.com/reports/t24369/ranking-of-the-worlds-richest-countries-by-gdp?edition=2001.

14. Porzecanski, *supra* note 4, at 311-12.

15. *Id.*

borrowed in U.S. dollars and currencies other than the Argentinian Peso when financing budgetary deficits.[16] This borrowing strategy was ill advised as Argentina's revenues were due and collected only in Argentinian pesos.[17] When forced to service debt in a currency other than the currency that a nation derives its revenue from, the difference in intrinsic value of the two currencies can greatly increase the expense of the debt.[18] Argentina failed to properly hedge the currency risk associated with this borrowing strategy.[19] Eventually, an "erosion of export competitiveness, aggravated by fiscal and political indiscipline" of the Argentinian government, led to a run on available U.S. dollars.[20] The Argentinian government then imposed capital controls restricting access to the U.S. dollar.[21] Following this "run on the bank" situation, the one-to-one exchange rate of Argentinian pesos to U.S. dollars could not be maintained, and the Argentinian peso was significantly devalued.[22] This devaluation of the Argentinian Peso rendered the Argentinian government insolvent as it was unable to service its obligations (payable in dollars) with the revenues it was taking in (collected in devalued Argentinian pesos).[23]

The financial turmoil led to an immediate change in the political landscape of Argentina. In the same month that the default occurred in 2001, then Argentinian President Fernando de la Rua resigned and was succeeded by President Adolfo Rodriguez Saa.[24] After President Saa's short tenure, President Eduardo Duhalde was elected in 2002.[25] Argentina was then led by President Nestor Kirchner from 2003–2007, followed by President Cristina Fernandez de Kirchner from 2007–2015.[26] Argentina's current President, Mauricio Macri, took office in 2015.[27] Excluding

16. *Id.*

17. *Id.*

18. Dan Clarke, *Importance of Currency Hedging Foreign Investments*, EXPAT FINANCE, http://expatfinance.net/importance-of-currency-hedging-foreign-investments (last visited Apr. 3, 2018).

19. Porzecanski, *supra* note 4, at 311–12.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Presidents of Argentina Since 1900*, WORLD ATLAS, https://www.worldatlas.com/articles/presidents-of-argentina-in-the-20th-and-21st-centuries.html; Sarah Marsh & Brian Winter, *A Timeline of Argentina's Sordid History With Default*, BUS. INSIDER (July 30, 2014), http://www.businessinsider.com/a-timeline-of-argentinas-sordid-history-with-default-2014-7.

25. WORLD ATLAS, *supra* note 24.

26. *Id.*

27. Alexandra Stevenson, *How Argentina Settled a Billion-Dollar Debt Dispute With Hedge Funds*, N.Y. TIMES (Apr. 25, 2016), https://www.nytimes.com/2016/04/25/business/dealbook/how-argentina-settled-a-billion-dollar-debt-dispute-with-hedge-funds.html.

interim Presidents, Argentina has been led by six different Presidents from 2001 to present.[28]

In the three years following the default, Argentina did little to negotiate with creditors, instead calling for expansive debt forgiveness and eventually proposing a "take-it-or-leave-it" restructuring plan to creditors in early 2005.[29] The 2005 exchange offer "allowed . . . bondholders to exchange their defaulted bonds for new unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar."[30] This exchange offer closed with a participation rate of 76 percent in June 2005.[31]

Over the course of 2003–2005 however, Argentina experienced an economic rebound.[32] This economic turnaround fostered more hostility in the restructuring process, because by the time Argentina made its first exchange offer in 2005 creditors were less willing to agree to substantial amounts of debt relief.[33] From the perspective of creditors, Argentina's economic state had greatly improved by 2005 compared to the depleted Argentinian "coffers" of 2001.[34]

In 2010, Argentina initiated a second exchange offer "substantially identical to the 2005 offer."[35] Between the two exchange offers, Argentina was able to restructure "over 91% of the foreign debt on which it had defaulted in 2001."[36] However, a multitude of suits were brought in the courts of various countries by the remaining 9% of "holdout" investors.[37] These holdout investors either bought the Argentinian debt post-default and were attempting to profit from the maximum amount of recovery they could achieve above their purchase price (vulture investors), or simply were unwilling to take the significant haircut required under the terms of the exchange offers.[38] In addition to lawsuits filed in the United States and other national courts, many creditors initiated arbitration proceedings against Argentina before the

28. WORLD ATLAS, *supra* note 24.

29. Porzecanski, *supra* note 4, at 56–57.

30. NML Capital v. Republic of Argentina, 699 F.3d 246, 252 (2d Cir. 2012).

31. *Id.*

32. Porzecanski, *supra* note 4, at 58.

33. *Id.*

34. Porzecanski, supra note 4, at 58–59 ("The impression thus conveyed by the authorities was that Argentina was suffering from a case of unwillingness, more than inability, to pay.").

35. *NML Capital*, 699 F.3d at 252.

36. *Id.* at 253.

37. Porzecanski, *supra* note 4, at 64 (Present Particle A form 18-K Annual Report Filed by Argentina with the SEC in 2011 indicates over 150 individual lawsuits in the United States, and nearly 650 legal proceedings in Germany).

38. Samuel Oakford, *Talons Out: Argentina Desperately Fighting "Vulture Funds" Over Debt*, VICE NEWS (June 18, 2014), https://news.vice.com/article/talons-out-argentina-desperately-fighting-vulture-funds-over-debt.

International Centre for Settlement of Investment Disputes (ICSID).[39] "Most claimants would allege that the emergency measures taken [by the Argentinian government] in 2001-2002 were inconsistent with the fair and equitable treatment standards set forth in various bilateral investment treaties to which Argentina was a party."[40]

This Article will primarily focus on the actions brought by one vulture investor, NML Capital, Ltd. (NML), a Cayman Islands-based investment firm that is the offshore subsidiary of Paul Singer's Elliott Management Corporation.[41] In the case of NML, *Bloomberg* reported that the company initially purchased just $182 million in Argentinian bonds at roughly 20-30 cents on the dollar, with the second circuit noting that "hedge funds and distressed asset investors" purchased defaulted Argentinian bonds all the way up to 2010.[42]

By February 2016, the Argentinian government would reach a deal to pay four "vulture" investors (NML, Aurelius, Davidson Kempner, and Bracebridge) a combined $4.65 billion to satisfy the principle and interest on their bonds.[43] Following this settlement, in spring 2016 Argentina participated in its first international bond issue since its 2001 default for a total of $16.5 billion.[44] Argentina utilized $9.3 billion of this capital to satisfy all debt still held by the holdout bondholders (primarily composed of vulture funds), thus finally bringing to an end Argentina's long and tedious post 2001 restructuring process.[45]

II. PREVENTATIVE MEASURES

While all bonds inherently contain some risk of default, investing in the sovereign debt of well-established and economically stable nations is commonplace, and sovereign debt is frequently issued across the globe.[46] This sovereign debt, similar to other bonds, is issued with both

39. Porzecanski, *supra* note 4, at 73.

40. *Id.*

41. *See* Georgina Hurst, *New Argentina Debt Crisis Spells Trouble for Custodian Banks*, INSTITUTIONAL INVESTOR (Sept. 23, 2014), http://www.institutionalinvestor.com/article/3383263/banking-and-capital-markets-emerging-markets/new-argentinadebt-crisis-spells-trouble-for-custodian-banks.html#.VJb4Af97AA.

42. Peter Eavis, *Banks Fear Court Ruling in Argentina Bond Debt*, N.Y. TIMES (Feb. 25, 2013), https://dealbook.nytimes.com/2013/02/25/banks-fear-court-ruling-in-argentina-bond-deb/?_r=0; Jake Johnston, *Vulture Turns to Pirate: Blocks Argentine Ship from Leaving Ghana*, CENTER FOR ECONOMIC AND POLICY RESEARCH (Oct. 11, 2012), http://cepr.net/blogs/the-americas-blog/vulture-turns-to-pirate-blocks-argentine-ship-from-leaving-ghana; *NML Capital*, 699 F.3d at 251.

43. *How Argentina Settled a Billion-Dollar Debt Dispute with Hedge Funds*, *supra* note 28.

44. *Id.*

45. *Id.*

46. Dion Rabouin, *Total global debt tops 325 pct of GDP as government debt jumps: IIF*, REUTERS (Jan. 4, 2017), https://www.reuters.com/article/us-global-debt-iif/total-global-debt-tops-325-pct-of-gdp-as-government-debt-jumps-iif-idUSKBN14O1PQ.

"boilerplate" bond covenants, as well as specific covenants that are tailored more closely to the specific debt issuance.[47] In *NML v. Argentina*, NML brought suit because Argentina "had been paying creditors which had agreed to its punishing restructuring terms, but had not paid anything to its lawful restructuring holdouts [such as NML]."[48] This suit was made possible due to several provisions in the bond covenants.[49]

First, the covenants contained a waiver of sovereign immunity, meaning that Argentina could be sued in a U.S. court by NML.[50] Second, the covenants provided a "creditor-friendly version" of the *pari passu* clause that essentially "promised [NML] the same treatment and payment priority as it would afford its other bondholders."[51]

A sovereign issuer could potentially prevent disputes with future holdout investors by removing either or both of these clauses from its bond covenants. However, while a country may dictate the terms of its own debt issuance, the terms are typically influenced by what investors are looking for in light of other comparable debt on the market.[52] If other nations are issuing debt on more creditor favorable terms, a nation may face difficulty raising capital if it fails to offer the like.[53] Furthermore, a country may not be as concerned with contractual terms of a bond issuance protecting against vulture investors because it foresees minimal risk of default or believes the enforceability of the covenants by foreign investors is somewhat limited.[54]

Therefore, while it is important for countries to understand the ramifications of their bond covenants, the average sovereign in need of capital likely will issue debt with terms similar to other market comps. Any derivation from other similar and readily available debt may prevent the issuer from raising its desired capital at its desired cost. For these reasons, customizing bond covenants to avoid or protect against holdout investors down the road may not be possible or practical. It is perhaps

47. Stephen J. Choi et al., *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 131, 134 (2012).

48. Porzecanski, *supra* note 4, at 45 (citing NML Capital, Ltd. v. Republic of Argentina, No. 12-105(L) (2d Cir. 2013), *available at* http://www.shearman.com/~/media/Files/Services/Argentine-Sovereign-Debt/2013/Arg33_NML_Second_Circuit_Decision. pdf).

49. *Id.*

50. *Id.*

51. *Id.*

52. Anna Gelpern & G. Mitu Gulati, *Innovation after the Revolution: Foreign Sovereign Bond Contracts Since 2003*, 4 CAPITAL MARKETS L.J. 85, 86 (2009); Porzecanski, *supra* note 4, at 314 ("After all, the international capital markets are exceedingly transparent and competitive when compared with most other markets for goods and services.")

53. Smith, *supra* note 5.

54. Choi et al., *supra* note 47, at 136.

more important to follow a number of other established best practices in sovereign wealth management and sovereign debt restructuring.[55]

III. ARGENTINA'S RESTRUCTURING APPROACH

A country's approach to restructuring may be even more essential in managing the impact of vulture investors than taking preventative measures at the time of sovereign debt issuance. For example, failure to promptly begin negotiating with creditors may provide vulture investors more time to develop their investment strategy and amass more bonds, thereby increasing the amount a country must spend in order to reach an agreement retiring this debt.[56]

The most productive steps taken by Argentina in regards to restructuring took place with bond exchanges in 2005 and 2010.[57] In these exchanges bondholders traded "defaulted bonds for new unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar."[58] Critics of the way the restructuring was handled note that Argentina's failure to take action sooner, combined with the "coercive and aggressive way the authorities in that country went about managing, defaulting, and restructuring their debt obligations" resulted in much litigation and ICSID arbitration that could have been avoided.[59]

In a similar situation in 2012, Greece defaulted on approximately $265 billion of sovereign debt, a default which was much larger in scope than Argentina's.[60] However, the Greek default attracted far less litigation, even though the restructuring imposed heavier losses on bondholders.[61] One author suggests that this is because Argentina failed to abide by the following established principles of sovereign wealth management:

> •Engage in regular dialogue with creditors on key economic and financial policies.
>
> •Consult with creditors on how to forestall debt-service problems before defaulting.
>
> •If a debt restructuring becomes inevitable, enter into timely, good-faith negotiations.
>
> •Stop incurring debt when already burdened by too much debt.

55. Porzecanski, *supra* note 4, at 53–54.
56. Porzecanski, *supra* note 4, at 56-57.
57. *Id.* at 64.
58. NML Capital v. Republic of Argentina, 699 F.3d 246, 252 (2d Cir. 2012).
59. Porzecanski, *supra* note 4, at 53.
60. Porzecanski, *supra* note 4, at 52–53.
61. *Id.*

> •Seek debt relief appropriate to the nature of the liquidity or solvency problem.
>
> •Recognize interest arrears, and treat them preferentially versus past-due principal.
>
> •Seek the financial support and endorsement of multilateral agencies.
>
> •Make a good-will, up-front cash payment – especially when circumstances permit.
>
> •Aim for 100% creditor participation, in order to minimize a holdout problem.[62]

By failing to abide by these best practices, Argentina not only availed itself to the threat of vulture investors, but also fostered the international perception of Argentina as a "Financial Rogue State".[63]

Rather than engaging in the best practice of negotiating with creditors in good faith following the defaults in 2001, Argentina simply stated in February 2002 that it was "making every effort" to develop a new economic program and had plans to "engage in fruitful dialogue with Argentina's external creditors."[64] However, no dialogue was initiated in 2002 nor 2003, and Argentina's largest creditor at the time, IMF (International Monetary Fund) "summarized the post-default situation" in this manner:

> [T]he authorities were expected to negotiate with creditor committees that were judged to be representative and formed in a timely manner. Although there were over thirty creditors' committees, the Fund assessed that the Global Committee of Argentina Bondholders (GCAB) represented about one-half of Argentina's external private debt, and was therefore representative for the purposes of [our] policy. In the end, however, no constructive dialogue was observed and the authorities presented a non-negotiated offer, which eventually led to a restructuring of eligible debt and past-due interest of about two-fifths of total debt, more than three years after the default.[65]

Had Argentina moved faster to begin its restructuring efforts, it may have had the opportunity to negotiate terms with creditors while the

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62. Porzecanski, *supra* note 4, at 54 (citing Lex Rieffel, Restructuring Sovereign Debt: The Case for Ad Hoc Machinery, 95 (2003)).

63. *Eighth Time Unlucky*, ECONOMIST (July 31, 2014), https://www.economist.com/news/leaders/21610263-cristina-fern-ndez-argues-her-countrys-latest-default-different-she-missing.

64. Porzecanski, *supra* note 4, at 56.

65. Porzecanski, *supra* note 4, at 56–57 (quoting IMF, *Sovereign Debt Restructuring: Recent Developments and Implications for the Fund's Legal and Policy Framework*, Apr. 26, 2013, 36, *available at* https://www.imf.org/external/np/pp/eng/2013/042613.pdf).

future of Argentina's recovery was uncertain and potentially bleak. In a situation where the goal is to repay lenders as little as possible, it behooves a defaulting debtor to negotiate repayment plans while it has little to offer. In Argentina's case, the country pushed off any restructuring until 2005 despite the moratorium on debt repayment occurring in 2001.[66] Had Argentina locked a plan in place prior to the economic rebound of 2003–2005 vulture investors may have had less interest in purchasing Argentinian debt because they would view their upside as limited. Promptly beginning negotiations with bondholders after a default or preemptively opening communication about an impending default may result in the creditors agreeing to more substantial relief. Therefore, even though the debtor may wish to stave off creditors for a time, if the economy of the nation improves then the debtor potentially risks missing its ideal window for negotiation.[67] Prompt, arms-length negotiation with creditors provides a debtor with a higher likelihood that the terms of a restructure will be accepted by 100% of the outstanding creditors.

IV. PRIVATE INVESTOR ACTIONS AGAINST SOVEREIGN NATIONS

Enforcement of judgments against a sovereign nation, whether in the context of a national court or ICSID arbitration, presents problems for private investors.[68] "ICSID itself has no formal role in the recognition and enforcement of an award under the ICSID Convention."[69] Furthermore "there is no bilateral or multilateral convention in force between the United States and any other country or reciprocal recognition and enforcement of judgments."[70] Therefore, even if a private party has standing to bring suit against a sovereign nation the judgment may provide no practical restitution to the plaintiff. Despite this plaintiff's predicament, it is important to note that individuals have taken a giant leap forward in the ability to bring an action against sovereigns in the past fifty years.[71]

Prior to 1972 there was no codified United States law that enabled a private individual to bring an action against a foreign nation. Therefore, there was no standing for a corporation, individual person, or group of

66. *See generally* Porzencanski, *supra* note 4.

67. *Id.*

68. *Id.*

69. *Recognition and Enforcement – ICSID Convention Arbitration*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (2017), https://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx.

70. *Enforcement of Judgments*, U.S. DEPARTMENT OF STATE – BUREAU OF CONSULAR AFFAIRS (2017), https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html.

71. 28 U.S.C. § 1605 (2017).

investors to bring suit to recover from a defaulting sovereign debtor.[72] In order to allow a more direct route to address grievances with foreign nations without directly involving the Department of State, the United States enacted the Foreign Sovereign Immunities Act of 1972 (FSIA).[73] The FSIA serves as the "sole basis for obtaining jurisdiction over a foreign state and its agencies and instrumentalities in a U.S. court."[74] The desired effect of the FSIA was to codify the "'restrictive theory' of foreign sovereign immunity, which grants immunity to a foreign sovereign unless one of the enumerated exceptions applies."[75] One such exception applies when a sovereign waives its right to immunity, either explicitly (such as in a bond covenant), or implicitly.[76]

Without the standing provided today by the FSIA, vulture investors would have substantially less ability to derive return from distressed debt.[77] With no FSIA, investors who purchase bonds solely for the ability to bring suit based on the debt security would have contractual rights under the bonds, but no standing to bring suit in U.S. court based on those rights. Utilizing their rights under the FSIA, NML led a group of plaintiffs in two unique suits. The first action sought attachment of Argentinian assets in the United States as a way to satisfy the monetary obligations owed to them as bondholders.[78] The second action sought injunctive relief in the form of a court order enjoining Argentina from making payments to exchange bondholders without making comparable payments on the defaulted bonds held by NML.[79]

A. NML v. Banco de Argentina—*An Unsuccessful Attachment Action*

Unsurprisingly, one of NML's strategies to recover payments owed to them by Argentina was to go after Argentinian assets held in the United States. While a foreign nation may balk at an award of damages when the plaintiff has no way of making them pay up, NML specifically sought attachment of funds held in account of Argentina National Bank (BCRA) at the Federal Reserve Bank of New York (FRBNY).[80] If NML could successfully obtain a court order for attachment and execution of these funds, the judgment's enforceability would (hopefully) not be as problematic because it would not require Argentina to produce any form

72. Katherine Birmingham Wilmore & Douglas K. Mullen, *Foreign Sovereign Immunity and the Foreign Sovereign Immunities Act*, 36 INT'L LAW. 435, 435 (2002).

73. *Id.*

74. *Id.*

75. *Id.*

76. 28 U.S.C. § 1605(a)(1).

77. Wilmore & Mullen, *supra* note 72, at 436.

78. NML Capital v. Banco de la Republica Argentina, 652 F.3d 172, 197 (2d Cir. 2011).

79. NML Capital v. Republic of Argentina, 699 F.3d 246, 253 (2d Cir. 2012).

80. *Banco de la Republica Argentina*, 652 F.3d at 177.

of payment, but would simply give NML an interest in Argentinian assets already held in the United States.

The trial court held in favor of NML, stating that the funds were subject to attachment because they were considered the Republic of Argentina's property (not the property of BCRA "held for its own account") and that this property was "used for commercial activity".[81] NML's success at the District Court level was short-lived however, as the second circuit reversed on appeal. The appellate court stated that the Argentinian funds held at the Federal Reserve Bank of New York were actually property of BCRA "held for its own account."[82] While the appellate court noted that Argentina had explicitly waived its sovereign immunity, the bond covenants did not mention "'instrumentalities' of the Republic or BCRA in particular, much less BCRA's reserves at FRBNY."[83] Therefore, Argentina's sovereign immunity waiver was "worded broadly" and did not "appear to clearly and unambiguously waive BCRA's immunity from attachment, as it must do in order to be effective."[84] To summarize, the second circuit's decision hinged on the fact that the funds at the FRBNY were property of BCRA "held for its own account" and were deemed independent from the property of Argentina, therefore BCRA's immunity from suit as a central bank was not waived by Argentina's separate waiver of sovereign immunity in its bond covenants.[85] A takeaway from this suit is that when obtaining a waiver of sovereign immunity, it may behoove a cautious lender to require a waiver that references both the sovereign as well as any instrumentalities of that sovereign.[86]

B. NML v. Republic of Argentina—*The Injunctive Windfall*

In a more successful action, NML brought suit seeking an injunction to force specific performance of the bond covenants based on the presence of an "equal treatment" *pari passu* clause.[87] The clause provided:

> [t]he Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally

81. *Id.* at 183 ("the provisions of the FSIA when properly applied, permitted [the] attachment and restraint [of the Funds]"); 28 U.S.C. § 1605 (2017).

82. *Banco de la Republica Argentina*, 652 F.3d at 196.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *NML Capital*, 699 F.3d at 251.

> with all its other present and future unsecured and unsubordinated External Indebtedness . . . .[88]

NML successfully argued that Argentina was in violation of this "equal treatment provision" because the country was making payments to other bondholders who had accepted the restructuring terms offered in 2005 and 2010, but the country was making no such payment to the vulture investors.[89] Despite Argentina's desire to treat the holdout investors different from those who accepted the exchange terms, the district court held that holders of the same debt may not receive different repayment treatment in light of the *parri passu* bond covenant.[90]

The second circuit upheld the lower court's ruling for NML in this suit, granting summary judgment for breach of the *pari passu* provision and "ordering Argentina to make 'ratable payments' to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt."[91] The court noted that injunctive relief was appropriate in this situation for a number of reasons.[92] First, NML was not limited to acceleration of the debt as the sole "contractually agreed upon remedy."[93] Furthermore, monetary damages would be "an ineffective remedy for the harm plaintiffs have suffered as a result of Argentina's breach" because "Argentina will simply refuse to pay any judgments."[94] The court noted that Argentina had essentially refused to pay any judgments by "closing the doors of its courts to judgment creditors."[95]

The unique tailoring of the courts relief in this case was also crafted to remain in compliance with FSIA Section 1609.[96] This section establishes that "the property in the United States of a foreign state shall be immune from attachment arrest and execution."[97] The relief granted by the court was not barred by Section 1609 because the judgment did not attach, arrest, or execute upon any property of Argentina.[98] The court explained that the injunction simply directs "Argentina to comply with its contractual obligations not to alter the rank of its payment obligations. [The injunctions] affect Argentina's property only incidentally to the

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 254.
92. *Id.* at 261.
93. *Id.* at 262 ("Under New York law the absence of the parties' express intention in the [bond covenants] to restrict the remedies available for breach of the agreement means that the full panoply of appropriate remedies remains available.").
94. *Id.*
95. *Id.*
96. *Id.*
97. 28 U.S.C. § 1609 (2017).
98. *NML Capital*, 699 F.3d at 262.

extent that the order prohibits Argentina from transferring money to some bondholders and not others."[99]

By practically assessing the enforceability of the relief available to them, NML was able to secure a judgment that did not result in the payment of court-mandated damages, but provided useful leverage to the investors in continuing to seek the maximum possible return in the restructuring process.[100] Because the judgment prevented Argentina from making payments to the exchange bondholders without paying the holdouts, the country was faced with the choice of defaulting again on the exchanged debt or reaching a settlement.[101]

Both of these actions by NML highlight how vulture investors utilize national court systems, albeit to varying degrees of success, in order to achieve the end goal of return on investment.[102] While the game is far from won simply because the plaintiff investors have standing or obtain a judgment, the vulture is successful if the judgment, whether practically enforceable or not, provides them a better chance of deriving value above their purchase price of the debt. The primary way in which legal action allows a vulture investor to derive this value is by directly or indirectly limiting the sovereign's access to international capital, thus forcing the sovereign to negotiate with the vultures in order to move forward. Although now it is possible for a plaintiff to more directly secure assets of a defaulting sovereign if those assets are held in the United States and the issuer has waived immunity (or another exception to immunity applies), the courts hesitancy to grant attachment of Argentinian assets to NML indicates that the chances of directly recovering damages from a sovereign are still remote.[103] Furthermore, if a defaulting sovereign anticipates a suit by creditors seeking attachment of its assets, the nation can simply take steps to move these assets outside the jurisdiction of the court.

CONCLUSION

To avoid the potential headache of prolonged disputes with holdout investors in the event of a default, sovereign nations should proactively establish a well-crafted set of sovereign wealth management best practices. If a nation is able to implement consistent guidelines across multiple administrations, vulture investors may be less incentivized to engage in drawn out disputes over the course of a restructuring. Specifically, addressing defaults in a good faith and expedient manner

99. *Id.*

100. *Id.*

101. *No Movement*, ECONOMIST (July 31, 2014), https://www.economist.com/news/americas/21610296-argentina-has-defaulted-again-deal-its-creditors-not-out-question-no.

102. *NML Capital*, 699 F.3d at 265; *Banco de la Republica Argentina*, 652 F.3d at 197.

103. *Banco de la Republica Argentina*, 652 F.3d at 177.

can reduce the impact of vulture investors. The longer a debtor waits to resolve a default and begin negotiating with creditors, the less likely a restructuring plan will be agreed upon by all creditors and the more likely a holdout situation will occur. Avoiding prompt negotiation with creditors may also deprive the debtor of the opportunity to negotiate for maximum debt relief, which creditors may only be willing to agree to at a time when the debtor is in its worst financial shape.

While following these practices may decrease the likelihood of vulture involvement, there is no doubt that these investors will continue to utilize all available legal tactics to derive a return from distressed debt. In this way, firms such as NML will help further shape the law regarding investment disputes with sovereign nations. After all, it can only be expected that when a vulture detects a carcass, it will try to find a way to eat.

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USA

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