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RESTRUCTURING SOVEREIGN DEBT UNDER LOCAL LAW: ARE RETROFIT COLLECTIVE ACTION CLAUSES EXPROPRIATORY?

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The European sovereign debt crisis has generated a number of controversial restructuring proposals that would have seemed appropriate only for emerging markets just a few years ago, but now are among the few options available to sustain the Eurozone. The leading proposal involves legislation that would mandate collective action clauses in untendered bonds governed under local law. This Note evaluates whether enacting this legislation and utilizing it in a debt restructuring would engender successful investor claims of invalid expropriation against the sovereign in American courts, and concludes that a successful claim of invalid expropriation is unlikely.

INTRODUCTION

On April 23, 2010, Prime Minister of Greece George Papandreou called his country's economy a "sinking ship" and requested an international bailout package.[1] If he had revisited the maritime analogy two years later, Papandreou likely would have described Greece's economy in early 2012 as resting upon a fragile life raft. Despite receiving two separate bailout packages and implementing austerity measures, Greece has been unable to get its deficit under control.[2] This sovereign debt crisis is not unique to Greece,[3] and many believe that the solution to the Eurozone's economic woes must

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[1] Niki Kitsantonis & Matthew Saltmarsh, *Greece, Out of Ideas, Requests Global Aid*, N.Y. TIMES, Apr. 23, 2010, http://www.nytimes.com/2010/04/24/business/global/24drachma.html.

[2] *Q&A: Greek Debt Crisis*, BBC NEWS, Nov. 10, 2011, http://www.bbc.co.uk/news/business-13798000.

[3] *See generally Euro in Crisis*, FIN. TIMES, http://www.ft.com/indepth/euro-in-crisis (last visited May 6, 2012).

involve persuading bond investors to accept less than the obligation owed to them.[4] Sovereigns could use a number of different methods to achieve this result, all with varying levels of state coercion.[5] One such method is examined below.

Greece will be used as a case study in this paper, but the analysis presented here is by no means limited to Greek bonds. Indeed, a surprising number of Eurozone periphery countries have significant amounts of local-law debt.[6] Therefore, the applicability of the analysis presented below should be far-reaching in the Eurozone crisis, as the outcome in Greece may establish a template for future Eurozone restructurings.[7] As one insider acknowledged, "It is not about Greece. It is not about the money. Most banks have written down their Greek bonds. It is about a precedent for the rest of Europe and how the rules will be set going ahead."[8]

I. BACKGROUND

After much media speculation throughout January 2012,[9] the Greek Parliament

[4] *See* Douwe Miedema, *Europe Might Force Greek Deal on Creditors – Source*, REUTERS, Nov. 2, 2011, http://www.reuters.com/article/2011/11/02/idUSL5E7M23PA20111102.

[5] *Id.*

[6] *Unilateral Action Threatened by Greece Is Also Available to Other Sovereigns*, WEEKLY CREDIT OUTLOOK (Moody's Investors Service, London), February 6, 2012, at 2 (noting that local law governs 88%–100% of the outstanding sovereign debt of eleven Eurozone member states); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Pricing Terms in Sovereign Debt Contracts: A Greek Case Study with Implications for the European Crisis Resolution Mechanism* 3 (The Chicago Working Paper Series Index, John M. Olin Law & Economics Working Paper No. 541, 2010), *available at* http://www.law.uchicago.edu/files/file/541-eap-Greek.pdf ("[R]eports suggest that a similar pattern [in local-law governed bonds] emerged with a number of the other Eurozone periphery countries that are in crisis today, including Spain, Portugal and Ireland." (citation omitted)). *See generally* Jens Nordvig, *Currency Risk in the Eurozone: Accounting for breakup and redenomination risk*, NOMURA SECURITIES INTERNATIONAL (Jan. 2012).

[7] Richard Milne, *Deal Over Greek Bonds to Set Template*, FIN. TIMES, Nov. 21, 2011, http://www.ft.com/cms/s/0/ff8b3d14-1463-11e1-85c7-00144feabdc0.html#ixzz1gS4gtsVP.

[8] *Id.* (internal quotation marks omitted).

[9] *See* Matina Stevis, *Greece to Introduce Retroactive Collective Action Clauses to Bonds – Troika Source*, WALL ST. J., Jan. 9, 2012, http://online.wsj.com/article/BT-CO-20120109-704688.html ("The Greek government will retroactively introduce collective-action clauses (CACs) to its existing bonds, a source from the troika of Greece's creditors—the International Monetary Fund, the European Central Bank and the European Union—told Dow Jones Newswires Monday."); Patrick Jenkins & Richard Milne, *Greek Bondholders Poised to Accept Higher Losses*, FIN. TIMES, Jan. 8, 2012, http://www.ft.com/intl/cms/s/0/acaa7900-3891-11e1-9ae1-00144feabdc0.html#axzz1ipczGdVy ("Collective action clauses are likely to be introduced into Greek bonds by the PSI deal . . . ."); Yiannis Papadoyiannis, *PSI Agreement Draws Ever Closer*, KATHIMERINI, Dec. 20, 2011, http://www.ekathimerini.com/4dcgi/_w_articles_wsite2_1_20/12/2011_419381 ("There already are some alternative solutions on the table in case the private sector participation rate is limited. One of these options . . . is the forced participation of the minority that wanted to abstain from the PSI through a collective

approved Law 4050/2012 on February 23, 2012.[10] This law, known as the Greek Bondholder Act,[11] closely mirrors the model outlined in a 2010 paper by Lee C. Buchheit and G. Mitu Gulati.[12] This similarity is unsurprising, for Buchheit is the head of the legal team retained by Greece to navigate the restructuring.[13] Because the Greek government has not yet released an official English translation of the Greek Bondholder Act,[14] this Note will reference the issues presented in the Buchheit and Gulati model along with its so-called "Mopping-Up Law."[15]

A. Relevant Aspects of Greek Bonds

The critical aspect of Greek bonds for the purposes of this analysis is the governing law. "Local law" governs an estimated 90% of these bonds.[16] Generally, investors are wary of bonds with local-law clauses because they present the possibility for the sovereign to change its law to facilitate a restructuring of its own debt.[17] In the past, these doubts predominantly have been associated with bonds in emerging markets; investors have not had similar misgivings with bonds issued under local law in industrial markets because the reputational sanctions that inevitably would result have offered sufficient deterrence.[18]

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action clause (CAC)."). *See also* John Dizard, *Greek Debt Crisis No Nearer Resolution*, FIN. TIMES, Dec. 11, 2011, http://www.ft.com/intl/cms/s/0/4b931eec-1f5a-11e1-ab49-00144feabdc0.html#axzz1hHvrJOY5 ("I've been suggesting for over a year that the only way to make sure that over 90 per cent of the existing bondholders are pushed into making the exchange will be through the passage through the Greek parliament of a 'retrofit collective action clause' covering the roughly 93 per cent of Greek debt that is governed by Greek law.").

[10] *Greek Government's Terms for Bond Swap with Creditors: Statement*, BLOOMBERG, Feb. 24, 2012, http://www.businessweek.com/news/2012-02-27/greek-government-s-terms-for-bond-swap-with-creditors-statement.html.

[11] Rules for the amendment of securities, issued or guaranteed by the Greek Government by consent of the Bondholders (36 A'/23.02.2012) (Gr.) *available at* http://www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/k-omolog-pap.pdf.

[12] Lee C. Buchheit & G. Mitu Gulati, *How to Restructure Greek Debt* (Duke Law Working Papers, Paper No. 47, 2010), *available at* http://scholarship.law.duke.edu/working_papers/47. This paper was published under a slightly different name in the International Financial Law Review (*Restructuring a Nation's Debt*, 29 INT'L FIN. L. REV. 46 (2010-2011)). However, because the current volume is available only to IFLR subscribers, this Note will cite to the Duke Law Working Papers version that is readily available to all online.

[13] John Dizard, Opinion, *In an Ideal World, Kafka Would Restructure Greece*, FIN. TIMES, July 31, 2011, http://www.ft.com/intl/cms/s/0/da876352-b9c9-11e0-8171-00144feabdc0.html#axzz1hHvrJOY5.

[14] *See* Rules for the amendment of securities, issued or guaranteed by the Greek Government by consent of the Bondholders (36 A'/23.02.2012) (Gr.) *available at* http://www.hellenicparliament.gr/UserFiles/bcc26661-143b-4f2d-8916-0e0e66ba4c50/k-omolog-pap.pdf.

[15] Buchheit & Gulati, *supra* note 12, at 12.

[16] *Id.* at 2.

[17] *Id.* at 5–6.

[18] *See id.* at 10–11 ("[I]ndustrialized countries are less likely than some of their emerging market

Even with the threat of reputational sanctions, however, countries have restructured under local law,[19] but in none of these instances were the stakes as high as those in the Greek restructuring.[20] In fact, according to Buchheit and Gulati, "No other debtor country in modern history has been in a position significantly to affect the outcome of a sovereign debt restructuring by changing some feature of the law by which the vast majority of the instruments are governed."[21]

Additionally, the bonds governed under Greek law were not drafted with a collective action clause ("CAC").[22] CACs are clauses in loan agreements that provide a supermajority of investors with the power to modify essential payment terms of the agreement.[23] Because this provision was absent from the original local-law bonds, Greece was not given the power to amass a supermajority of investors to facilitate a debt restructuring for these particular bonds.

B. Overview of the Mopping-Up Law

The Greek restructuring proposed by Buchheit and Gulati is a bond exchange offer with a state-mandated collective action clause. It likely drew inspiration from a bond exchange offer with exit consents, so a brief explanation of exit consent restructuring is helpful.[24] In a bond-exchange offer with exit consents, the debtor offers investors the option to swap their bonds with bonds having more flexible payment terms.[25] To encourage other bondholders to take part in the exchange, the sovereign will require consenting bondholders to waive certain protections in the old bond that do not require unanimity for amendment.[26] In this way, holdout bondholders could be left with bonds

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brethren to risk eroding future investor confidence by opportunistically changing their own law in order to reduce government debt service burdens.").

[19] Russia and Uruguay, for example, both restructured local-law bonds. *Id.* at 6.

[20] *See id.* ("In each of these prior cases, however, the local law bonds were also denominated in local currency and formed only part of the overall stock of the debt being restructured. While the Euro is certainly now the local currency of Greece, it is a good deal more besides that.").

[21] *Id.*

[22] *Id.* at 2.

[23] Steven L. Schwarcz, *"Idiot's Guide" to Sovereign Debt Restructuring*, 53 EMORY L.J. 1189, 1190 n.5 (2004).

[24] Katz v. Oak Industries Inc., 508 A.2d 873 (Del. Ch. 1986), is the first U.S. case in which exit consents were recognized and validated in commercial bonds. Exit consents have also been used in sovereign debt restructurings, such as those in Ecuador and Uruguay. Dr. Rodrigo Olivares-Caminal, *To Rank Pari Passu or Not to Rank Pari Passu: That Is the Question in Sovereign Bonds After the Latest Episode of the Argentine Saga*, 15 L. & BUS. REV. AM. 745, 765 (2009).

[25] *See* Lee C. Buchheit & G. Mitu Gulati, *Exit Consents in Sovereign Bond Exchanges*, 48 UCLA L. REV. 59, 71 (2000) (describing the *Katz v. Oak Industries* exchange offer with exit consents).

[26] *Id.*

lacking certain contractual protections.[27] Unfortunately, because the Greek local-law bonds disallow amending the terms of the bonds after issuance,[28] restructuring via traditional exit consents is unworkable in this instance.[29]

Thus enters the Mopping-Up Law. Instead of directly modifying contractual language, the Mopping-Up Law would change local law to effectively incorporate a collective action clause in all untendered local-law bonds.[30] Buchheit and Gulati suggest that the law could work as follows:

> [L]ocal law would be changed to say that if the overall exchange offer is supported by a supermajority of affected debtholders (say, 75%, to use the conventional CAC threshold), then the terms of any untendered local law bonds would automatically be amended so that their payment terms (maturity profile and interest rate) match those of one of the new instruments being issued in the exchange.[31]

The incorporation of this clause via the contract's governing law does not result in the sovereign directly taking tangible assets from investors. Instead, it leaves the dirty work to the consenting bondholders.[32] In this way, it is comparable to an exit consent restructuring.[33] Similarly, the sovereign is still tasked with convincing a supermajority of investors to support the overall exchange offer. This is "consistent with the fundamental principle that a sovereign debtor bears the burden of persuading its creditors that a debt restructuring is essential, that the terms of the restructuring are proportional to the debtor's needs, and that the sovereign is implementing economic policies designed to restore

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[27] *Id.*

[28] Buchheit & Gulati, *supra* note 12, at 2.

[29] *But see* Gulati & Zettelmeyer, *Making a Voluntary Greek Debt Exchange Work* (Duke Law Faculty Scholarship, Paper No. 2481, 2011), at 10, *available at* http://scholarship.law.duke.edu/faculty_scholarship/2481/ ("In the Greek case, all that needs to be done is for the bondholders in the exchange to be given *better* terms. If the exchanging bondholders are given new contracts that provide the comforting warmth of strong contract protections . . . then that will make it perilous to remain out in the cold with a contract that provides no protection."). Therefore, while a traditional exit consent structure is infeasible for these local-law bonds, a "reverse engineered Exit Exchange offer" effectively could provide similar benefits within the bonds' limited parameters. *Id.* at 9–10.

[30] Buchheit & Gulati, *supra* note 12, at 11.

[31] *Id.*

[32] *See id.* at 12 ("Once the supermajority of creditors is persuaded to support an amendment to the payment terms of the instrument, their decision automatically binds any dissident minority.").

[33] *See id.* ("Viewed another way, the Mopping-Up Law would merely replicate at the level of the sovereign borrower the same protection enjoyed by corporate borrowers in many countries, including Greece. For example, we understand that in corporate reorganization proceedings under Greek bankruptcy law, if a plan of reorganization is accepted by two thirds of the affected creditors[,] . . . it will . . . bind all creditors.").

financial health."[34] The central question is whether the sovereign must convince all investors or just a supermajority.[35]

C. Scope of This Inquiry

The scope of this Note is narrow. It examines whether American courts would find the Mopping-Up Law to be an invalid expropriation under international law. This is certainly not the extent of a general inquiry into the Mopping-Up Law—other questions of international law will remain, such as those raised under Article 17 of the Greek Constitution, the European Convention on Human Rights and its Protocols, and unfair or inequitable treatment[36]—but addressing this particular element is far more manageable for one short paper.

Moreover, the American legal system is among the most protective systems in the world with regard to private property rights.[37] Therefore, "[W]hile a U.S. court's interpretation of the international law of expropriation may not be representative of the views of all or even most countries, a U.S. court's interpretation does represent a kind of floor for assessing the legality of government action under international law."[38] Assuming that U.S. courts are highly protective of bondholder rights, this analysis presents a perspective of what government actions are "clearly permissible" within the context of international law.[39]

II. POTENTIAL SOVEREIGN IMMUNITY

Before embarking on an expropriation analysis, courts must address the threshold issue of sovereign immunity. Sovereign immunity stems from two sources in U.S. law: the Foreign Sovereign Immunities Act and the act of state doctrine.

[34] *Id.*
[35] *Id.*
[36] *Id.* at 12–13.
[37] *See generally* Harvey M. Jacobs, *U.S. Private Property Rights in International Perspective*, *in* PROPERTY RIGHTS AND LAND POLICIES 52 (Gregory K. Ingram & Yu-Hung Hong, eds., 2009).
[38] Peter Charles Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract*, 80 S. CAL. L. REV. 1, 6 (2006).
[39] *Id.* at 7.

A. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act ("FSIA")[40] provides the "sole basis" to bring claims in the United States against a foreign state.[41] Under the FSIA, foreign states are immune from the jurisdiction of U.S. courts, subject to certain exceptions.[42] Therefore, if a claim does not fall within a statutory exception, U.S. courts lack jurisdiction and will dismiss the claim.[43] These statutory exceptions range from waivers of immunity to terrorism.[44]

Most relevant to the immediate inquiry, a sovereign may be haled to U.S. court if its actions constitute an expropriation.[45] For this exception to apply, "rights in property" must be taken "in violation of international law," and that property must be related to "commercial activity" carried on in the United States by the sovereign.[46] In interpreting this particular provision, U.S. courts have attempted to square their interpretations with the law of expropriation under international law.[47] Unfortunately for investors, many courts have interpreted the term "property" in this provision to be tangible property only, not including contractual rights.[48] Part III provides an in-depth discussion of U.S. courts' expropriation analyses arising under the FSIA.

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[40] Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602–11 (2006).

[41] Argentine Republic v. Amerada Hess, 488 U.S. 428, 434 (1989).

[42] FSIA, 28 U.S.C. § 1604 (2006).

[43] *See Argentine Republic*, 488 U.S. at 434 ("Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is not entitled to immunity.").

[44] *See generally* FSIA, 28 U.S.C. §§ 1605–07 (2006).

[45] FSIA, 28 U.S.C. § 1605(a)(3) (2000) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state.").

[46] *Id.*

[47] *See, e.g.*, Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1294 (11th Cir. 1999) ("We may look to international law as a guide to the meaning of the FSIA's provisions."); Trajano v. Marcos, 978 F.2d 493, 497–98 (9th Cir. 1992) ("Congress intended the FSIA to be consistent with international law.").

[48] *See, e.g.*, Peterson v. Royal Kingdom of Saudi Arabia, 416 F.3d 83, 85 (D.C. Cir. 2005) ("[A]n expectation interest in payments[] does not qualify as a right in tangible property and the [FSIA] expropriation exception does not apply . . . ." (internal quotation marks omitted); Brewer v. Iraq, 890 F.2d 97, 101 (8th Cir. 1989) ("Defendants' breach of contract did not create 'rights in property.'"); Daventree Ltd. v. Republic of Azerbaijan, 349 F. Supp. 2d 736, 749–50 (S.D.N.Y. 2004) ("As numerous courts have held, for purpose of the expropriations exception to the FSIA, the property taken . . . means physical property and not the right to receive payment." (internal quotation marks omitted)).

B. Act of State Doctrine

If investors persuade the court that a FSIA exception applies, they still must overcome the act of state doctrine to proceed with their claims. Put simply, the act of state doctrine "provides . . . that United States courts will not judge the validity of official acts of a foreign government carried out within its own territory."[49] The Supreme Court articulated this doctrine in *Underhill v. Hernandez*[50]:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[51]

More recently, the Court has declared that the act of state doctrine applies when "the relief sought or the defense interposed would . . . require[] a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."[52] The foundation for this doctrine lies in the separation of powers inherent in the U.S. federal government.[53] To ensure harmony in conducting foreign affairs, decisions of the judicial branch cannot be in conflict with those of the executive branch.[54] Courts commonly fail to reach the merits of an expropriation claim because of the act of state doctrine.[55]

But there are exceptions to this broad doctrine. In 1964, Congress passed the Second Hickenlooper Amendment[56] in an effort to limit the application of the act of state doctrine in expropriation claims. It states, in relevant part:

> [N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other

[49] Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 1 (1998).

[50] 168 U.S. 250 (1897).

[51] *Id.* at 252.

[52] W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 405 (1990). The Court went on to conclude that the doctrine "requires that, in [courts'] process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id.* at 409.

[53] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[The act of state doctrine] arises out of the basic relationships between branches of government in a system of separation of powers.").

[54] *See id.* ("[The Judicial Branch's] engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.").

[55] *See* Ramsey, *supra* note 49, at 17 n.63 (citing a number of courts that found that the act of state doctrine applied in claims of expropriation of contract rights).

[56] 22 U.S.C. § 2370(e)(2) (2006).

> right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . . .[57]

This would suggest that claims of expropriation are within the purview of U.S. courts, without regard to the act of state doctrine. However, most courts have found the Second Hickenlooper Amendment to be a very narrow exception to the doctrine.[58]

One case that solidly supports a limited reach of the act of state doctrine is *Allied Bank International v. Banco Credito Agricola de Cartago*.[59] The facts of *Allied Bank* are somewhat analogous to the current events in Greece. In the midst of a financial crisis, the Central Bank of Costa Rica issued regulations that effectively suspended all external debt payments.[60] This constituted an event of default under the terms of the relevant notes, and investors sued for the full amount outstanding.[61] The district court had held that the act of state doctrine applied, noting that to hold otherwise would "put[] the judicial branch of the United States at odds with policies laid down by a foreign government on an issue deemed by that government to be of central importance."[62] On appeal, the Second Circuit first held that the actions of the Costa Rican government were "fully consistent with the law and policy of the United States,"[63] but on rehearing *en banc*, the court reversed its prior decision on policy grounds.[64] In arriving at this determination, the Second Circuit relied upon the policy outlined in the amicus brief proffered by the Department of Justice.[65] The government's brief noted that the court's prior interpretation of U.S. policy was incorrect,

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[57] *Id.*

[58] *See, e.g.*, Compania de Gas de Nuevo Laredo S.A. v. Entex Inc., 686 F.2d 322, 327 (5th Cir. 1982) ("Congress intended [the Amendment] to be limited to cases involving claims of title with respect to American owned property nationalized by a foreign government in violation of international law, when the property or its assets were subsequently located in the United States."); Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., Inc., 652 F.2d 231, 237 (2d Cir. 1981) ("[The Amendment] has been interpreted . . . as applying only to cases in which the expropriated property has found its way back into the United States."); Menendez v. Saks & Co., 485 F.2d 1355, 1372 (2d Cir. 1973) ("[T]he intent [of the Amendment] was to exclude all contract claims from the amendment."), *aff'd in part and rev'd in part on other grounds sub nom*. *See also* Ramsey, *supra* note 49, at 45 n.174 ("[The Amendment] . . . is problematic as a protection for contractual obligations . . . .").

[59] 757 F.2d 516 (2d Cir. 1985) (en banc).

[60] *Id.* at 519.

[61] *Id.*

[62] Allied Bank Int'l v. Banco Credito Agricola de Cartago, 566 F. Supp. 1440, 1444 (S.D.N.Y. 1983), *rev'd*, 757 F.2d 516 (2d Cir. 1985).

[63] *Allied Bank*, 757 F.2d at 519.

[64] *Id.* at 522.

[65] *See id.* at 520 ("In light of the government's elucidation of its position, we believe that our earlier interpretation of United States policy was wrong.").

and that the proper means for restructuring this debt was in an International Monetary Fund ("IMF")-approved economic adjustment program.[66] The brief then remarked that U.S. policy was "strongly supportive of this approach to resolve the current international debt problem."[67] Persuaded by the Justice Department's policy argument, the Second Circuit concluded that investors' "extinguished" right to receive interest payments constituted a "taking"[68] and therefore that the act of state doctrine was inapplicable.[69]

However, the Second Circuit's subsequent rulings caution against drawing broad conclusions about expropriation and the act of state doctrine from *Allied Bank*. Just a few months after deciding *Allied Bank*, the Second Circuit held that the act of state doctrine applied in another expropriation analysis.[70] Indicating that the doctrine was still strong in light of *Allied Bank*, the court noted that "each case [must] be analyzed individually to determine the need for a separation of powers."[71] Thus, absent an explicit request from the Executive Branch—which is especially unlikely for the immediate inquiry, as the IMF has signaled its approval of a retrofit collective action clause[72]—it seems clear that courts tend to err on the side of deference to the sovereign.

Although scholars have argued that courts' unwillingness to scrutinize expropriation claims is contrary to the plain language and congressional intent of the Second Hickenlooper Amendment,[73] courts continue to apply the act of state doctrine

[66] Brief for the United States as Amicus Curiae at 9, *Allied Bank*, 757 F.2d 516 (No. 83-7714), *available at* http://www.archive.org/details/AlliedBankInternationalV.BancoCreditoAgricolaDeCartago.

[67] *Id.* at 10.

[68] *Allied Bank*, 757 F.2d at 521 n.3.

[69] *Id.* at 522.

[70] *See* Braka v. Bancomer, S.N.C., 762 F.2d 222, 224 ("[T]he relevant considerations mitigate against judicial intervention.").

[71] *Id.* at 224.

[72] *See* International Monetary Fund, Country Report No. 11/351, *Greece: Fifth Review Under the Stand-By Arrangement, Rephasing and Request for Waivers of Nonobservance of Performance Criteria; Press Release on the Executive Board Discussion; and Statement by the Executive Director for Greece*, 31, 33 (Dec. 2011) *available at* http://www.imf.org/external/pubs/ft/scr/2011/cr11351.pdf ("A next key step now under consideration is the inducement(s) to use to ensure near-universal participation (including the possible legislation of CACs in domestic law bonds). The steps taken to date give confidence that the operation will be able to attract the needed level of creditor support and that it will go forward consistent with contemplated parameters. . . . [T]he Greek and European authorities are encouraged to consider tools to attain near-universal creditor participation.").

[73] *See* Choharis, *supra* note 38, at 48–49 ("Where there are sufficient links to the contested property to satisfy jurisdiction for purposes of due process, U.S. courts should not decline to hear cases based upon judicial squeamishness about judging the legality of foreign sovereign acts."). *See also* Malvina Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68, 70–71 (1985) ("While some lower courts have limited the Hickenlooper Amendment to property located in the United States, and there is legislative history to support the narrow construction adopted by the Restatement, there is also legislative history to the

frequently and with little regard to expropriation limitations.[74]

III. WOULD THE MOPPING-UP LAW BE AN EXPROPRIATION UNDER INTERNATIONAL LAW?

If investors manage to overcome sovereign immunity, the court would then move into an expropriation analysis. U.S. courts have not developed a consistent framework with which to analyze questions of expropriation.[75] In fact, as exemplified above within the Second Circuit, even the same courts vary in their analyses of expropriation claims.[76] Oftentimes, the facts of the case are more determinative of the ultimate result than the absence or presence of specific criteria.[77] However, courts have tended to focus on four key factors: the coerciveness of the state's action with regard to renegotiating or repudiating contracts, the underlying purpose of the action, whether the action was discriminatory, and the amount of loss to the claimant.[78] This Part will examine each of these factors in turn.

A. What Degree of Coercion in Repudiating or Renegotiating a Contract Warrants a Finding of Expropriation?

Most courts that have examined whether a repudiated contract is an expropriation under international law have determined that repudiation does not constitute expropriation.[79] The few courts that have held that breach of contract is an expropriation

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contrary.").

[74] *See, e.g.*, Ramsey, *supra* note 49, at 17 n.63 (citing a number courts that found that the act of state doctrine applied in expropriation claims).

[75] *See* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 329 (1994) ("[I]nternational law has not kept pace with the developments that have taken place in the last thirty years in foreign direct investment.").

[76] *Compare* Banco Nacional de Cuba v. Chem. Bank N.Y. Trust Co., 822 F.2d 230, 238 (2d Cir. 1987) ("In general, if a state merely expropriated a debtor's assets and treated all of its creditors alike, both foreign and domestic, the state would not be liable under principles of international law to foreign creditors for a taking of their property."), *with* First Fid. Bank, N.A. v. Ant. & Barb.—Permanent Mission, 877 F.2d 189, 193 (2d Cir. 1989) ("A breach of a commercial contract . . . is not a violation of international law unless the breach . . . occurs for governmental rather than commercial reasons and the state is not prepared to pay damages for the breach." (citation omitted)).

[77] *See, e.g.*, discussion in Part II.B *supra* regarding *Allied Bank*.

[78] Choharis, *supra* note 38, at 11.

[79] *See, e.g.*, Brewer v. Socialist People's Republic of Iraq, 890 F.2d 97, 101 (8th Cir. 1989) ("[P]laintiffs' contract rights were not expropriated—rather, the contract itself was repudiated by defendants. . . . [S]uch a repudiation is not equivalent to expropriation." (citation omitted); Verlinden B.V. v. Cent. Bank of Nig., 647 F.2d 320, 325 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983) ("[C]ommercial violations . . . do not constitute breaches of international law."); Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 215 (N.D. Ill. 1982) ("We cannot elevate our American-centered view of governmental taking of property without compensation into a rule that binds all civilized nations." (internal

have done so only upon finding that another prong of the expropriation analysis has been violated.[80] One exception to this general rule is the Ninth Circuit's finding in *West v. Multibanco Comermex, S.A.*[81] that contracts constitute property under international law, and the taking of contract rights alone constitutes an expropriation.[82] However, even with this broad finding, the Ninth Circuit held in favor of the defendants, concluding that "[a] state has a strong interest in its monetary policy" and that "[u]nder international law, the legislature generally is free to impose exchange controls."[83] This interest in regulating monetary policy is discussed further in Part IV.

The analysis is slightly different for a renegotiated contract. At what point does a coercive restructuring become expropriatory? The question of what constitutes a "voluntary" restructuring has been a major point of disagreement throughout the Greek crisis.[84] Although scholars differ on what "should" qualify as an expropriation,[85] the only consensus is that the threat or use of physical force in a renegotiation is expropriatory.[86]

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quotation marks omitted)); Daventree Ltd. v. Azerbaijan, 349 F. Supp. 2d 736, 751 (S.D.N.Y. 2004) ("[P]laintiffs' failure to privatize claims do not arise from the taking of tangible property without compensation, but instead from the Sovereign defendants' failure to honor an alleged contractual obligation to carry out an orderly privatization program. Therefore, because those claims pertain to contract rights or the right to receive payments, the expropriations exception does not apply . . . ." (internal quotation marks omitted)).

[80] *See supra* text accompanying note 76. *See also* Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 252 (2d Cir. 2000) ("[B]reach of a commercial contract alone does not constitute a taking pursuant to international law.").

[81] 807 F.2d 820 (9th Cir. 1987).

[82] *See id.* at 830 ("[A]lthough the certificates of deposit may be characterized as intangible property or contracts, they are 'property interests' that are protected under international law from expropriation.").

[83] *Id.* at 831.

[84] *See* Matt Levine, *Mandatory Greek CDS Post*, DEALBREAKER, Oct. 27, 2011, http://dealbreaker.com/2011/10/mandatory-greek-cds-post/ (discussing whether the Greek "pseudo-voluntary pseudo-default" exchange qualifies as a credit event for CDS purposes).

[85] *Compare* G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307, 338 (1962) ("Where a State compels an alien to sell his property for less than its true value either to the State or to a third party, a compensable claim arises"), *with* W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115, 121 (2004) ("[E]xpropriation must be analyzed in consequential rather than formal terms. What matters is the effect of governmental conduct—whether malfeasance, misfeasance, or nonfeasance, or some combination of the three—on foreign property rights or control over an investment, not whether the state promulgates a formal decree or otherwise expressly proclaims its intent to expropriate"), *and* Choharis, *supra* note 38, at 86 ("While the forced renegotiation of a contract is not as well-established, if the state uses its governmental powers to coerce more favorable contractual terms, this too would violate international law.").

[86] *See, e.g.*, Detlev F. Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AM. J.INT'L L. 17, 22 (1978) ("The leading cases [in the state-investor coercion field] come from national tribunals considering claims asserted under international law. . . . [A]bout all those cases seem to settle is the point, which one hopes is obvious, that raw physical pressure vitiates consent.").

Short of that, the law is hazy.[87] Therefore, because much of the inquiry would likely be fact-based,[88] the court probably would look to the other prongs of the expropriation analysis to determine whether a coercive—but nonviolent—restructuring would be an expropriation.

B. What Is the Purpose of the Mopping-Up Law?

When addressing a claim of expropriation against a sovereign, courts often focus on the purpose of the state's action to determine whether the taking is improper.[89] An important distinction to make here is whether the purpose inquiry is used as an affirmative defense[90] or as part of the analysis to determine whether an expropriation has occurred. The purpose analysis within an affirmative defense is discussed at length in Part IV; in this Section, the purpose analysis is limited to ascertaining whether an expropriation has occurred.

In determining whether an expropriation has occurred, courts tend to distinguish between commercial and governmental purposes in state action.[91] Typically, international law is not implicated if the state acts pursuant to a commercial purpose only, whereas international law may be implicated if the state acts pursuant to a governmental purpose.[92] At first, this may seem counterintuitive; one would think that the sovereign should be given more leeway when acting pursuant to a governmental purpose. However, because

[87] For example, Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985) is the only U.S. case to conclude that a forced but nonviolent renegotiation of a contract was expropriatory. As noted above in Part II.B, however, the precedential value of *Allied Bank* is questionable.

[88] *See, e.g.*, *supra* note 71 and accompanying text.

[89] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429 (1964) ("There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose."). *But see* Choharis, *supra* note 38, at 20 n.78 (noting that courts generally do not address the state's purpose when analyzing a forced renegotiation of a contract "because of the limited circumstances that courts and scholars argue warrant finding that such forced renegotiations may violate international law").

[90] In other words, an expropriation no doubt has occurred, but questions remain as to whether that expropriation was invalid.

[91] *See* Restatement (Third) of Foreign Relations Law of the United States § 712 rptrs' n.8 ("The prevailing view is that, in principle, international law is not implicated if a state repudiates or breaches a commercial contract with a foreign national for commercial reasons as a private contractor might, e.g., due to inability of the state to pay or otherwise perform, or because performance has become uneconomical . . . . It is a violation of international law if, in repudiating or breaching the contract, the state is acting essentially from governmental motives . . . rather than for commercial reasons, and fails to pay compensation or to accept an agreed dispute settlement procedure.").

[92] *Id.*

expropriation is a "quintessentially sovereign act,"[93] the state must "slip[] into its . . . sovereign shoes" to be liable to investors.[94] Therefore, if the state took only actions that a commercial entity could also take, then its breach would not be an expropriation under international law.[95] Because a retrofit CAC requires the sovereign to take legislative action, further inquiry into this point of the expropriation analysis is unnecessary: the Mopping-Up Law undoubtedly would be recognized as the state working within its governmental capacity, and therefore the sovereign would not be granted the "commercial activity" exception in this prong of the expropriation analysis.[96]

C. Would the Mopping-Up Law Be Discriminatory?

Some courts have concluded that a sovereign's action is expropriatory only if it is discriminatory.[97] Though not all courts adhere to this reasoning,[98] a court is more likely to find an expropriation if it senses some inherent unfairness in the way a sovereign is treating foreign nationals.[99] The Mopping-Up Law would not raise such questions of discrimination against foreign nationals. It would treat all investors holding local law bonds—including Greek investors—the same.[100] Therefore, if a court were to consider discrimination only to the extent of unfairness toward foreign nationals, then it is highly unlikely that it would find the Mopping-Up Law to be discriminatory; indeed, a court

[93] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

[94] Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 744 (2007).

[95] *See id.* at 745 ("Lack of performance does not amount to a treaty breach unless it is proven that the state has gone beyond its role as a mere party to the contract and has exercised the specific functions of a sovereign authority."). For a cogent analysis of the policy implications involved in this distinction between commercial and sovereign actions, see generally Choharis, *supra* note 38, at 27–29.

[96] "Commercial reasons" include those that a private contractor could proffer in breaching a contract. *See supra* note 92 and accompanying text; *see also* Waibel, *supra* note 94, at 745 ("Could a private corporation have successfully carried out a similar restructuring implemented by a country? In other words, did the government use specific regulatory, administrative, or governmental powers in its sovereign bond exchange? . . . A host state acting as a contractual party does not interfere with the normal exercise of the investors' rights, but rather fails to perform the contract.").

[97] *See First Fid. Bank*, 877 F.2d at 193 ("A breach of a commercial contract . . . is not a violation of international law unless the breach is discriminatory . . . .").

[98] *See, e.g.*, West v. Multibanco Comermex, S.A., 807 F.2d 820, 822–23 (9th Cir. 1987) (finding an expropriation even though Mexico did not distinguish between foreign nationals).

[99] *See, e.g.*, Banco Nacional de Cuba v. Chem. Bank N.Y. Trust Co., 822 F.2d 230, 237 (2d Cir. 1987) ("As a general principle of international law, a state is liable to a private person who is a national of another state if it takes the foreign national's property and the taking is 'discriminatory.' A taking pursuant to a program that excludes from compensation all aliens or all aliens of a particular nationality is discriminatory.").

[100] *See* Buchheit & Gulati, supra note 12, at 6 ("A significant percentage (perhaps more than 30 percent) of the bonds are believed to be owned by Greek institutional holders.").

might not even consider this particular factor in its analysis.

However, it is possible that a court could view the Mopping-Up Law as discriminatory toward holdout creditors, regardless of nationality. Although U.S. courts have not yet extended the concept of discrimination to bondholder status, at least one scholar believes that it is within the realm of possibility—but unlikely—for international law to recognize this particular form of discrimination.[101] Interestingly, the actions of officials inside the Greek restructuring have not indicated any concern about violating this particular factor in the expropriation analysis. On February 17, 2012, the European Central Bank ("ECB") announced a swap of its Greek bond holdings for new bonds that are exempt from collective action clauses.[102] Other bondholders were not offered this option, prompting some to question whether the preferential treatment granted to the ECB—or, put less favorably, the subordination of the non-ECB bondholders—would trigger credit-default swaps.[103] While this factor is not dispositive in the expropriation analysis, officials guiding the Greek restructuring certainly are not helping their case.[104]

D. What Degree of Economic Loss Would Result from the Mopping-Up Law?

The final prong of the analysis concerns the degree of economic loss without compensation borne by the potential creditors.[105] As with the other factors in the expropriation analysis, this particular prong does not provide a clear framework for judicial scrutiny. Courts have recognized that a total deprivation of property would violate international law, but short of that, the law is unclear.[106]

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[101] *See* Waibel, *supra* note 94, at 747 ("Whether this particular form of discrimination violates international law depends on whether international law requires countries to treat all creditors equally. It is at least doubtful, however, that international law incorporates such a general equal treatment obligation, over and above an obligation not to discriminate against creditors by nationality.").

[102] Richard Barley, *ECB Teaches Bondholders Greek Lesson*, WALL ST. J., February 17, 2012, http://online.wsj.com/article/SB10001424052970204059804577229351454312864.html.

[103] Paul Dobson & Abigail Moses, *ECB Greek Plan May Hurt Bondholders While Triggering Debt Swaps*, BLOOMBERG BUSINESSWEEK, February 19, 2012, http://www.businessweek.com/news/2012-02-19/ecb-greek-plan-may-hurt-bondholders-while-triggering-debt-swaps.html.

[104] Commentators noted these concerns over a month before the ECB deal was made. For a thorough analysis, see Joseph Cotterill, *To ring-fence the ECB in Greece . . . or not*, FIN. TIMES ALPHAVILLE, January 10, 2012, http://ftalphaville.ft.com/blog/2012/01/10/823321/to-ring-fence-the-ecb-in-greece-or-not/.

[105] If the loss is compensated, it likely would be considered a valid expropriation. *See* Restatement (Third) of Foreign Relations Law of the United States §§ 712(1)-(2) (validating expropriation if compensation is "just" or "compensatory").

[106] *See* Choharis, *supra* note 38, at 34–35 ("[A]uthorities offer little additional guidance on what degree of loss is necessary to constitute an expropriation. Few courts have mentioned the issue of the degree of loss necessary to result in an expropriation, and they have done so only incidentally, usually quoting secondary sources. The only principle that can be distilled from these dicta is that total deprivation of

In analyzing this particular factor, the structure of the Mopping-Up Law is important to keep in mind: the effect of the law on investors would be to allow other bondholders to execute a "take" in the future.[107] There are two related points here. First, by enacting and utilizing the Mopping-Up Law, the sovereign itself would not be taking directly from investors—at least, not in the traditional sense. Instead, unwilling or uncooperative holdouts would be forced to participate in the bond exchange *only if* a requisite supermajority of investors willingly participated.[108] Second, questions would remain as to whether any rights had been "taken" at all.[109] The legislation is designed to work within the agreed-upon terms of the bonds to facilitate a restructuring.[110] Therefore, a claim that the Mopping-Up Law somehow removed valuable protections from the bonds is dubious, as those protections are not guaranteed in the first instance.[111]

If a court were to determine that the sovereign had taken action that resulted in economic loss, valuation of that loss would still be a problem for investors. Greek bonds have been downgraded to junk status,[112] and courts have taken into account the "acknowledged state of the [sovereign's] economy" when valuing a loss.[113] Therefore, if the bonds' value decreased as a result of a restructuring that took advantage of the Mopping-Up Law, any resulting economic loss might be measured against the bonds' junk status today.[114] Thus, it is possible that the investors' economic loss could be considered de minimis.

E. So . . . Would Courts Find the Mopping-Up Law To Be an Invalid Expropriation?

It is unclear whether a court would find the Mopping-Up Law to be an invalid expropriation, although the lack of physical force in the restructuring, the equal treatment of foreign nationals, and the junk status of the bonds weigh against potential creditors' claims. Moreover, courts often rely upon a fact-specific analysis,[115] so the apparent restraint of the Mopping-Up Law might sway the court in favor of the sovereign.[116]

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property violates international law. Short of that, the courts provide little or no guidance.").

[107] *See supra* note 32 and accompanying text.

[108] *See supra* notes 32, 34 and accompanying text.

[109] *See supra* note 33 and accompanying text.

[110] *See supra* note 30 and accompanying text.

[111] *See infra* notes 131–134 and accompanying text.

[112] *Greek Bonds Rated 'Junk' By Standard & Poor's*, BBC NEWS, Apr. 27, 2010, http://news.bbc.co.uk/2/hi/8647441.stm.

[113] Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 893 (2d Cir. 1981).

[114] *See* Restatement (Third) of Foreign Relations Law of the United States § 712 cmt. d, rptrs' n.3 (1987) (advocating compensation "based on value at the time of taking").

[115] *See, e.g.*, *supra* text accompanying note 71.

[116] *See supra* text accompanying note 34.

The most important point to stress here is that the critical aspects of the court's analysis are not in the expropriation test itself, but in determining whether sovereign immunity applies or an affirmative defense is available. The majority of expropriation claims are adjudicated at the threshold questions or the finding of an affirmative defense.[117]

IV. IS AN AFFIRMATIVE DEFENSE AVAILABLE?

If the court were to find for the investors in its expropriation analysis, Greece could still present an affirmative defense that would excuse an otherwise invalid expropriation: a compelling public need for action in light of a financial crisis.[118] Both U.S. courts and international tribunals have recognized that an attempt to mitigate a financial crisis serves an important public purpose and is a qualifying affirmative defense.

A. Precedent from U.S. Courts

The relevant precedent from U.S. courts is derived from both cases that interpret international sovereign actions and cases that interpret domestic sovereign actions.

1. Actions Concerning International Sovereigns

U.S. courts generally offer wide latitude to sovereigns dealing with fiscal crises.[119] For example, in *West v. Multibanco Comermex S.A.*,[120] the Ninth Circuit concluded that although Mexico's exchange control regulations were expropriatory[121] and therefore the claim could be adjudicated on its merits,[122] Mexico's strong public purpose rendered its

[117] *See, e.g.*, *supra* note 48 and accompanying text; *supra* note 58 and accompanying text; *infra* note 119 and accompanying text.

[118] *See* Waibel, *supra* note 94, at 739 ("[I]nternational law [is] underdeveloped in a central respect. Under the general principles of law found in many municipal systems, extraordinary circumstances may occasionally warrant a modification of contractual claims. The lack of payment capacity and the use of general regulatory powers in national economic emergencies are pertinent examples.").

[119] *See* Braka v. Bancomer, S.A., 589 F. Supp. 1465, 1472 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985) ("[Mexico exercised] the recognized governmental function of setting monetary policy. Mexico acted in response to a fiscal crisis and its mandate touched all foreign currency obligations, private as well as public"); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1116 (5th Cir. 1985) ("Were we to disregard the exchange regulations by enforcing the [plaintiffs'] certificates of deposit, we would render nugatory the attempts by Mexico to protect its foreign exchange reserves. While we are doubtful of our ability to foresee what will vex the peace of nations, we have no doubt that disregarding the Mexican regulations would be very vexing indeed.").

[120] 807 F.2d 820 (9th Cir. 1987).

[121] *Id.* at 830.

[122] *Id.* at 831.

actions lawful.[123] Because "Mexico's institution of exchange controls was an exercise of its basic authority to regulate its economic affairs,"[124] its actions did not "constitute takings under international law."[125] The Second Circuit came to a similar finding in *Braka v. Bancomer, S.A.*[126] on affirming the district court's dismissal on act of state grounds. The district court concluded, "Mexico's act in this instance cannot be construed as a simple repudiation of a government entity's commercial debt [because] the mechanisms used by Mexico are conventional devices of civilized nations faced with severe monetary crises, rather than the crude and total confiscation by force of a private person's assets."[127] The Mopping-Up Law not only would be enacted in response to a fiscal crisis, but in fact would be attempting to mitigate such a crisis.[128] Therefore, courts may afford the same deference to Greece that Mexico enjoyed in *West* and *Braka*.

Another important consideration for this prong of the analysis concerns the nature of the investment. If the investor was aware of the credit risk upon entering the investment and was receiving higher yields as a result, why should the court bail out potential creditors when the investment does not deliver as expected? As the Ninth Circuit observed, "The courts of this country should not operate as an international deposit insurance company . . . . The actions of the [sovereign] and the losses [it] occasioned were within the purview of the risks associated with those potentially extraordinary returns."[129] International tribunals have noted similar sentiments.[130] These comments are especially relevant for analysis of the Mopping-Up Law, as scholars have assessed the local-law Greek bonds to have higher yields than the Greek bonds governed by English law.[131] One particular study concluded, "[T]he markets seem to recognize the greater vulnerability of local-law governed bonds to debtor misbehavior as compared to bonds governed by foreign law. The evidence shows that Greek bonds governed by different laws were priced

[123] *Id.*

[124] *Id.* at 832.

[125] *Id.* at 831.

[126] 762 F.2d 222 (2d Cir. 1985).

[127] Braka v. Bancomer, S.A., 589 F. Supp. 1465, 1472 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985).

[128] *See* Papadoyiannis, *supra* note 9 ("Bank sources told Kathimerini that the efforts to find a solution have intensified in the last few days, emphasizing the absolute need for PSI+ to succeed. If that fails, given the country's loan requirements in the first quarter of 2012, Greece will find itself at a dead end with unpredictable consequences.").

[129] *West*, 807 F.2d at 833.

[130] *See, e.g.*, Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award, para. 64 (Nov. 13, 2000) ("[T]he Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments.").

[131] Choi, Gulati & Posner, *supra* note 6, at 24.

differently even prior to the crisis."[132] This study continues on to note that the pricing premiums likely reflected the price that investors were willing to pay for holdout protections.[133] Therefore, courts may be skeptical of investors' cries for fairness when the investors had assumed a greater risk when they had invested in local-law governed bonds.[134]

2. Actions Concerning Domestic Sovereigns

U.S. courts have shown similar deference to important public purposes in cases concerning domestic sovereign entities. The central case about the protection of public contracts from legislative interference is *United States Trust Co. v. New Jersey*.[135] The case arose when New York and New Jersey attempted to repeal a statutory covenant enacted a decade earlier to protect the holders of bonds issued by the Port Authority of New York.[136] The Supreme Court held that the repeal of the covenant was unconstitutional because it violated the Contract Clause,[137] but the critical aspect of the Court's decision for purposes of the present analysis lies in the test that *U.S. Trust* set forth.[138] The third step in the *U.S. Trust* test asks whether the legislative modification was "reasonable and necessary to serve an important public purpose."[139] This "important public purpose" test has validated legislation ranging from imposing price controls on intrastate gas markets[140] to legislatively reducing the annual salaries of state employees.[141]

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[132] *Id.*

[133] *Id.* at 25.

[134] *See id.* ("These purchasers took advantage of the higher yields on this risky debt. Other investors took lower yields in exchange for lower risk (or greater holdout rights).").

[135] 431 U.S. 1 (1977). The most favorable case to support the Mopping-Up Law is *Faitoute Iron and Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942), in which the Supreme Court upheld a state modification of a bond contract. However, because *Faitoute*'s broad holding was somewhat limited by *U.S. Trust*, a fair analysis of the present question should instead focus on the narrower (and less favorable) *U.S. Trust* test.

[136] *Id.* at 13.

[137] *Id.* at 32.

[138] *See* Michael L. Zigler, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 STAN. L. REV. 1447, 1455 (1984) ("The Court's opinion established a three-step test for determining whether a legislative action is an unconstitutional impairment of a public contract. To be a violation of the contract clause, the state action must (1) not be pursuant to its reserved powers; (2) constitute a substantial impairment of the contractual obligation; and (3) be neither necessary nor reasonable.").

[139] *United States Trust*, 431 U.S. at 25.

[140] *See* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 416–17 (1983) ("[T]he Kansas Act rests on, and is prompted by, significant and legitimate state interests . . . [in] protect[ing] consumers from the escalation of natural gas prices caused by deregulation . . . [and] in correcting the imbalance between the interstate and intrastate markets.").

[141] *See* Baltimore Teachers Union, Am. Fed'n of Teachers Local 340, AFL-CIO v. Mayor & City

Similarly, in the *Gold Clause Cases*,[142] the Supreme Court deferred to the federal government's interest in regulating the nation's monetary policy. In 1933, Congress passed a joint resolution declaring that all clauses that stipulated payment in gold in public and private contracts were against public policy.[143] This effectively forced all payments on contract obligations to be made in devalued currency, regardless of the terms of the contract.[144] The Court concluded that Congress's comprehensive power over monetary policy, especially in a financial crisis, outweighed any fairness concerns.[145] Most relevant to the immediate inquiry is the particular Gold Clause Case of *Perry v. United States*,[146] which concerned government bonds. The Court held that the joint resolution as it applied to government bonds was unconstitutional, as the government was impairing its own obligations.[147] However, in determining actual loss, the Court concluded that the nation's economic conditions must be taken into account.[148] Because the damages would be "nominal,"[149] the plaintiff "fail[ed] to show a cause of action for actual damages."[150] This would be similar to a court finding that the Mopping-Up Law was, in fact, expropriatory, but that any economic loss would be considered de minimis and therefore not recoverable.[151]

Granted, courts' overall analyses of actions by domestic sovereign entities are far from analogous with their analyses of actions by international sovereigns. Nevertheless, the examination of an important public purpose in domestic legislation lends credence to the notion that international sovereigns will be afforded similar deference if their actions further an important public purpose.

Council of Baltimore, 6 F.3d 1012, 1021 (4th Cir. 1993) ("We . . . conclude that the salary reductions were reasonable under the circumstances.").

[142] Norman v. Baltimore & Ohio Railroad Co., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); and Perry v. United States, 294 U.S. 330 (1935).

[143] *Norman*, 294 U.S. at 291–92.

[144] *Id.* at 292–93. For a modern analog, see *New Law Limits Claims by Vulture Funds*, REUTERS, Apr. 8, 2010, http://uk.reuters.com/article/2010/04/08/uk-britain-debt-idUKTRE63748920100408 (discussing how the U.K. enacted legislative measures—with no successful legal challenges—in placing restrictions on the recovery of heavily discounted debts).

[145] *Id.* at 316.

[146] 294 U.S. 330 (1935).

[147] *Id.* at 350–51 (1935) ("There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.").

[148] *Id.* at 355 (1935) ("The question of actual loss cannot fairly be determined without considering the economic situation at the time the government offered to pay . . . the face of his bond, in legal tender currency.").

[149] *Id.*

[150] *Id.* at 358.

[151] *See supra* note 114 and accompanying text.

B. Precedent from International Tribunals

Because U.S. courts often derive guidance from international law,[152] the reasoning in international tribunals and arbitral bodies can be illuminating. The International Centre for Settlement of Investment Disputes ("ICSID") provides arbitration for public debt disputes,[153] and in some cases has found that a compelling public need may trump the interests of a private entity or investor.[154] For example, in *Olguín v. Republic of Paraguay*,[155] the tribunal noted that the taking "occur[ed] within the broader context of a national financial crisis,"[156] and ultimately concluded—albeit on different grounds—that the sovereign default was not an expropriation.[157] In another international case, the Italian Corte di Cassazione focused only on whether the sovereign acted in response to a financial crisis, and—finding in the affirmative—consequently declined jurisdiction.[158]

A more recent example of public necessity trumping investors' rights is in Iceland. When Iceland's three largest banks collapsed in 2008, its legislature passed emergency legislation that put the interests of ordinary account holders ahead of the banks' bondholders.[159] The bondholders challenged the legislature's action, but Iceland's Supreme Court upheld the emergency law in light of the financial crisis that the legislation was intended to alleviate.[160] The Court concluded:

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[152] *See, e.g.*, West v. Multibanco Comermex, S.A., 807 F.2d 820, 831 n.10 (9th Cir. 1987) ("It is appropriate to look to international law when determining whether the institution of exchange control regulations constitutes a 'taking' for purposes of FSIA. We note, however, that in ascertaining the content of international law, we may look to various sources of law, including United States law.").

[153] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/Index.jsp (last visited May 2, 2012).

[154] *See* Waibel, *supra* note 94, at 745 ("[I]f the exercise of governmental powers is both in the public interest and non-discriminatory, the act in question would not be considered an expropriation [by the ICSID tribunal], with the consequence that no compensation was due on that basis. In national economic emergencies the legitimate scope of governmental measures in the public interest might be greater; hence, economic policy measures adopted in response to financial crises would need to rise to a higher level of intensity to constitute expropriation." (citation omitted)).

[155] Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award (July 26, 2001), 18 ICSID REV. 160 (2003) (unofficial English translation).

[156] *Id.*, para. 69.

[157] *Id.*, para. 84.

[158] Borri v. Argentina, 88 Rivista di diritto internazionale 856, paras. 4, 4.2, 5 (May 27, 2005) ("While the issuance of bonds is per se 'private', the Argentine legislative acts extending the payment term were undeniably *acta iure imperii* and thus exempt from domestic jurisdiction.").

[159] Tom Braithwaite, *Reykjavik Steps In with New Powers*, FIN. TIMES, Oct. 8, 2008, http://www.ft.com/intl/cms/s/0/64b062aa-94d3-11dd-953e-000077b07658.html#axzz1iRylBZol.

[160] Jim Pickard & Clare MacCarthy, *Icelandic Court Rules to Repay British and Dutch*, FIN. TIMES, Oct. 28, 2011, http://www.ft.com/intl/cms/s/0/18152320-018d-11e1-8e59-00144feabdc0.html#axzz1iRylBZol.

> [A] major threat was present to the whole society because of the catastrophic effect of the collapse of the largest commercial banks, which could end with the collapse of economic life in the country. The legislature, for these reasons, had not only a right but above all a constitutional duty to protect the welfare of the public.[161]

Ragnhildur Helgadóttir, Professor of Constitutional Law at Reykjavik University, was likely unsurprised at this ruling, as she concluded in an October 2011 presentation that a financial crisis could fall into the scope of emergency powers when "more than financial interest[s] [are] at stake," such as the consequences that inevitably would accompany a systemic economic collapse.[162] Similarly, Prime Minister of Iceland, Jóhanna Sigurðardóttir, said that there was "no other option" than to have the majority of the banking collapse borne by the bondholders.[163] Therefore, recent international precedent indicates that when a sovereign is left with few options, courts will not stand in the way of a proportional legislative response that infringes upon private investors' economic rights.

CONCLUSION

Decades ago, a prominent international law scholar concluded that sovereign bond default does not necessarily trigger international responsibility:

> [A]s international law stands today, a debtor state commits an international delinquency by annihilating a debt entirely through repudiation, confiscation, or virtual destruction (interference with the substance of the debt), but . . . international law has not yet reached the point where all lesser acts causing defaults and damage to creditors give rise to legal protests based on international law.[164]

International law has developed for nearly eighty years since Professor Feilchenfeld's

[161] Hæstiréttur Íslands (Icelandic Supreme Court), Case No. 340/2011, (Oct. 28, 2011) (unofficial English translation).

[162] Ragnhildur Helgadóttir, Professor, Reykjavik University School of Law, Constitutions and Government Responses to Financial Crises (Oct. 2011) ("If economic or financial crises are serious enough to warrant government intervention, let alone government intervention which may run afoul of the constitution and international obligations, the crisis will presumably affect other interests than financial."). For a more extensive analysis of the emergency powers, see Ragnhildur Helgadóttir, *Economic Crises and Emergency Powers in Europe*, 2 HARV. BUS. L. REV. ONLINE 130 (2012), http://www.hblr.org/?p=1981.

[163] Jóhanna Sigurðardóttir, Prime Minister of Iceland, International Conference at Reykjavik, Welcoming Remarks (Oct. 27, 2011) *available at* http://www.imf.org/external/np/seminars/eng/2011/isl/pdf/js.pdf ("In effect . . . the lion [sic] share of the banking collapse was borne by foreign creditors. There was no other way, there was no other option, considering that the banks' assets were ten times Iceland's GDP.").

[164] Ernst H. Feilchenfeld, *Rights and Remedies of Holders of Foreign Bonds*, in 2 BONDS AND BONDHOLDERS, RIGHTS AND REMEDIES 130, 170 (Silvester E. Quindry ed., 1934).

conclusion, and the law has, in fact, reached the point at which legal protests arise from sovereign actions that fall short of a complete taking; yet the success of such claims is still largely fact-specific and unpredictable. However, two conclusions from this Note's analysis are quite clear: U.S. courts are hesitant to take potentially controversial stands in foreign policy without unequivocal support from another government branch, and courts are deferential to sovereigns whose actions are proportional and in response to apparent crises.

Normative questions remain. Should courts grant immunity to a sovereign nation because the sovereign's actions precipitated a financial crisis? Why should private investors shoulder a disproportionate amount of a sovereign's debt burden? Greece is far from faultless in its role in the current debt crisis.[165] However, no one is likely to argue that Greece is getting off scot-free. It has implemented a series of severe austerity measures and is fighting simply to keep its head above water.[166] An exchange offer with a retrofit collective action clause would be painful, yes, but it also would be proportional and restrained in light of the crisis in the Eurozone. Courts likely will take note of this restraint, and so should investors.

[165] *See* Louise Story, Landon Thomas, Jr. & Nelson D. Schwartz, *Wall St. Helped to Mask Debt Fueling Europe's Crisis*, N.Y. TIMES. Feb. 13, 2010, http://www.nytimes.com/2010/02/14/business/global/14debt.html?pagewanted=1&hp ("[R]ecords and interviews show that with Wall Street's help, [Greece] engaged in a decade-long effort to skirt European debt limits.").

[166] *See* Ioannis Kokkoris, Rodrigo Olivares-Caminal & Kiriakos Papadakis, *The Greek Tragedy: is there a Deus ex Machina?*, *in* MANAGING RISK IN THE FINANCIAL SYSTEM 159–60 (John Raymond Labrosse, Rodrigo Olivares-Caminal, & Dalvinder Singh, eds., 2011) ("The biggest challenge that Greece is now facing is how to effectively implement the tough measures required in order to comply with IMF/EU requirements and more importantly to sustain these measures through the delicate situation of its economy.").