

TOWARD A COSMOPOLITAN ETHIC IN DEBT RESTRUCTURING

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“There comes a time when one set of customs, wherever it may be found, grows to seem to you about as provincial as another; and then I suppose it may be said of you that you have become a cosmopolite.”¹

— Henry James

I

INTRODUCTION

Is there a culture, an ethic, a system, a legal architecture, a club, a tongue that characterizes sovereign debt restructuring? Many say there is, starting perhaps 150 years ago in the 1850s, with the Ottoman Empire’s accumulation of debt and its catastrophic default in 1875, which in turn resulted in the imposition of a European “system” to prevent future crises.² This “system” included European invasion of debtor countries—or so called “gunboat diplomacy”—which enforced creditor rights by real or threatened military force.³

As time went on, the legal and financial community developed less bellicose methods for sovereign debt restructuring, but drama, a high-profile stage and actors, polarization, and ethnocentric antagonisms have often remained part of the process. Because there is no international legal framework for sovereign debt restructuring, modern processes have been governed principally by custom, by the terms and provisions of debt instruments (which often provided for no collective action to ease the process of restructuring), and by the legal demands and constraints of the sovereign and its types of creditors.⁴ Each sovereign debt renegotiation acquires—in the absence of strict statutory rules and enforceable precedents regarding fairness, priority, and comity—its own

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1. HENRY JAMES, COLLECTED TRAVEL WRITINGS: THE CONTINENT: A LITTLE TOUR IN FRANCE/ITALIAN HOURS/OTHER TRAVELS 721 (1993).

2. See generally Eldhem Eldem, *Ottoman Financial Integration with Europe: Foreign Loans, the Ottoman Bank and the Ottoman Public Debt*, EUROPEAN REV. 431 (2005).

3. See, e.g., Enrique R. Carrasco & Randall Thomas, *Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis*, 34 COLUM. J. TRANSNAT’L L. 539, 547 (1996) (noting that Great Britain, Germany, and Italy blockaded Venezuela and threatened annexation in an attempt to force foreign debt negotiations).

4. See Robert Kenneth MacCallum, *Sovereign Debt Restructuring: The Rights and Duties of Commercial Banks Inter Sese*, 1987 COLUM. BUS. L. REV. 425, 427–28 (1987).

form and alchemy.⁵ To the extent that any one process departs or conforms with custom, it becomes, almost without fail, a subject of debate, sometimes stormy and heated debate.

As a “deal lawyer,” I am beholden to process and to the many inchoate cultural modalities, assumptions, prejudices, and ever-changing balances of power comprised within process. Process—or the series of actions, actors, and influences involved in a transaction—is rarely examined in law. But the dynamics of process and the unspoken codes that affect it are, nonetheless, key to complex transactions and sovereign debt restructuring.⁶ To the extent that process and custom remain unexamined, we miss the opportunity to reconsider tacit rules, ethics, and directions, or for that matter, to consider the ones we do follow. The purpose of this article is to discuss my experiences and observations of the sovereign debt restructuring process since I started practicing in 1990, first from a more objective perspective and then from a more personal level.

Are the oppositional ethics of sovereign debt restructuring inevitable and part of the course of nations, or are there ways to create fairer, more cosmopolitan processes? If credit defaults and renegotiations are, by their nature, contentious, must they also always bear the mark of gunboat diplomacy? Those questions exceed the scope of this article, which is meant as the beginning of an inquiry and a modest retelling, this time in very broad form, of tendencies I have noted during my career. My own biases: I am a deal lawyer, as I say above, and I have represented governments in debt renegotiations (so that my reflections reflect principally a sovereign perspective in the restructuring realm), although I have also represented other parties. Here, for the sake of increasing available perspectives, I take a sovereign’s viewpoint, although I try to avoid, as I advocate we all should, a solipsistic discourse.

II

ELEMENTS OF RECENT PROCESS

While there are many complicated elements affecting sovereign debt restructuring processes, a country confronting debt renegotiations is called to balance certain key considerations, principally: (1) consultation and negotiation with private creditors, both internationally and domestically; (2) negotiations with multilateral, official, and bilateral lenders and associations of lenders; and (3) management of its domestic political and economic context, and international communication and discourse to the larger world community and markets.

5. *Id.*

6. See generally Nouriel Roubini & Brad Setser, *Improving the Sovereign Debt Restructuring Process: Problems in Restructuring, Proposed Solutions, and a Roadmap for Reform*, INSTITUTE FOR INT’L ECON. (Mar. 1993).

A. Consultation and Negotiation With Private Creditors

During the Brady debt restructurings, the prevalent structure for negotiation consisted of creditor committees composed of representatives of major creditors and observers from the official community.⁷ Sovereign nations negotiated with members of the committee and shared critical information with them about their debt repayment capacity, among other matters.⁸ Upon reaching an agreement with the members of the committee, the sovereign would obtain an endorsement from the International Monetary Fund (IMF) and, in some cases, other multilateral and official sector entities.⁹ Committee members and others would then assist the sovereign in explaining and obtaining the consent of other creditors to the terms of the debt restructuring.¹⁰

Committee membership was a coveted and prestigious role. Members were men, with few exceptions, who held elevated positions within their own institutions and in the financial world. Multilateral and official sector overseers of the process were also privileged with special knowledge and expertise. The sovereign debt restructuring committee members were often denominated to form a “club” and, in many ways, they operated as such.¹¹ Members had access to each other and to connections and information. In the international sovereign financial community, gripped by the long struggle to resolve debt matters, committees and their members took centerstage.

Brady restructurings resulted in countries issuing Brady bonds in exchange for commercial bank debt.¹² This began a fundamental change in the nature of financing for many countries, which would also, ultimately, result in changes in the consultation and negotiation process as the private creditor base turned from one consisting principally of commercial banks to a more varied base.¹³

Following the Brady era, countries turned to capital market financing in varying degrees. Some countries issued bonds occasionally, or of one type or principally in one market to institutional investors, while others issued a variety of bonds in numerous markets to both institutional and retail investors, and everything in between. Even countries that issued solely to institutional investors or issued Brady bonds but later relied principally on other forms of

7. See Philip J. Power, *Sovereign Debt: The Rise of the Secondary Market and Its Implications for Future Restructurings*, 64 *FORDHAM L. REV.* 2701, 2711–12 (1996) (discussing the role of committees in debt restructurings).

8. *Id.*

9. See *id.* at 2712–13 (discussing the role of the IMF and debtor country governments in debt restructurings).

10. See *id.*

11. See, e.g., Barry Eichengreen, *Bailing in the Private Sector: Burden Sharing in International Financial Crisis Management*, 23 *FLETCHER F. WORLD AFF.* 57, 70 (1999).

12. Ronald J. Silverman & Mark W. Devino, *Distressed Sovereign Debt: A Creditor's Perspective*, 11 *AM. BANKR. INST. L. REV.* 179, 182–83 (2003).

13. *Id.* at 183–84; see also Alan Cibils & Rubin Lo Vuolo, *Case Studies on Neoliberal Economic Reforms: At Debt's Door: What Can We Learn from Argentina's Recent Debt Crisis and Restructuring?*, 5 *SEATTLE J. SOC. JUST.* 755, 758 (2007).

financing, might have found that their creditor base later grew to include small investors and others, as bonds traded in the market.

For countries without significant capital-markets debt, the “committee” structure, which was prevalent in Brady restructurings, continued to be the dominant form of debt renegotiation.¹⁴ For countries with significant capital-markets debt, a “road show” model for investor consultation and for marketing a deal became the norm (although some included “consultation groups” that conducted similar, but non-binding dialogue with the country). The shift from a committee model to a road show model of consultation produced debate and dislocation in the sovereign debt restructuring community, which I discuss as part of my experiences.

B. Negotiations With Creditors

In both the Brady era and subsequently, negotiations and consultations with private creditors were often followed or accompanied by programs with the IMF and debt renegotiations with the Paris Club and London Club.¹⁵ At the same time that countries address private commercial creditors,¹⁶ they must also consider the demands and expectations of official-sector entities and others who form part of the traditional system.¹⁷ This can make for difficult balances.

14. See Lee C. Buchheit, *Advisory Committees: What's in a Name?*, INT'L FIN. L. REV., Jan. 1991, at 9, 9–10 (describing the role, expectations, and criticism of advisory committees in sovereign restructurings).

15. The Paris Club, which met for the first time in 1956, is an informal group of sovereign creditors whose role is to coordinate and restructure bilateral debt owed to member countries. The London Club appeared after the Paris Club, as a result of the first cases of sovereign defaults to private banks. The London Club provides a negotiating forum in which a defaulting country can reschedule or reduce its commercial bank debt. See Mashaalah Rahnama-Moghadam, David A. Dilts & Hedayah Samavati, *International Dispute Resolution in Financial Markets: The Clubs of London & Paris*, 53 DISP. RESOL. J. 71, 71–72 (Nov. 1998) (describing origins of the London and Paris Clubs).

16. See, e.g., Policy Dev. and Review and Legal Departments of the Int'l Monetary Fund, *Involving the Private Sector in the Regulation of Financial Crises—Restructuring International Sovereign Bonds*, 25 (Jan. 11, 2001), available at <http://www.imf.org/external/pubs/ft/series/03/IPS.pdf> (describing restructuring processes for Pakistan, Ukraine, and Ecuador, discussing implication of Council of Foreign Relations-proposed creditor-sovereign best practices principles on a sovereign's relations with the Paris Club and IMF, and stating that such principles “do not address questions concerning the relative treatment of the claims of Paris Club and private creditors” and “request that the [IMF] support their application through its lending-into-arrears policy”); see also Jull E. Fisch & Caroline M. Gentile, *Vultures or Vanguard?*; *The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043, 1070 (2004) (comparing the recent restructuring of sovereign bonds by Pakistan, Uruguay, Ukraine, and Ecuador: “While all of these restructurings involved exchange offers, Pakistan and Uruguay relied on ad hoc consultations with bondholders to apprise them of the terms of the offer and to encourage them to accept the offer, the Ukraine engaged in an extensive effort to contact bondholders, and Ecuador essentially declined to speak with bondholders.”); Javier Díaz-Cassou, Aitor Erce-Domínguez & Juan J. Vázquez-Zamora, *Recent Episodes of Sovereign Debt Restructurings, A Case-Study Approach* 64 (Banco de España, Occasional Paper No. 0804, 2008) (“From the outset, the [Uruguay] authorities insisted on the market-friendly nature of the debt workout and international creditors were actively involved in the design of the restructuring offer through a series of road shows and consultations in the major financial centres.”).

17. See Lee C. Buchheit, *Use of Creditor Committees in Sovereign Debt Workouts*, 10 BUS. L. INT'L 205, 208–12 (Sept. 2009) (describing parties with interests in maintaining committee approach to

Multilateral creditors have traditionally been considered “preferred lenders” even if debt contracts do not establish them as such.¹⁸ Because they lend even under dire circumstances,¹⁹ they expect to be paid and to set conditions for a country’s overall economic plans that often include economic austerity programs and legal reforms.²⁰ Bilateral creditors who form part of the Paris Club may adhere to principles of strict equal treatment, and may push countries to delay payments on bonds or renegotiate debt with capital-markets creditors if the country enters into arrears or defaults on payments to its members.²¹ While a delay on payments on bonds (in order to bring bondholders in line with delays Paris Club members have suffered) comports with a theory of equal treatment,²² it also may cause a deterioration in bond prices and foreclose access to the markets for new money when a sovereign most needs liquidity. Multilateral entities may demand a “market-friendly” reprofiling, but they will struggle to fulfill policies against so-called “moral hazard,” or the peril that lies in lending in a way that appears to “bail out” bondholders.²³ The Paris Club and the IMF do not always act in concert, and institutions may themselves proffer contradictory messages.²⁴

negotiation, including benefits and drawbacks to continuing to use such an approach and the recent examples of Iraq’s multitude of competing committees and Belize’s single committee); *see also* Lee C. Buchheit, *The Role of the Official Sector in Sovereign Debt Workouts*, 6 CHI. J. INT’L L. 333 (Summer 2005) (describing the evolution and variations of official sector involvement in sovereign restructurings).

18. *See* Anna Gelpern, *Building a Better Seating Chart for Sovereign Restructuring*, 53 EMORY L.J. 1115, 1130 (2004) (discussing the preferential treatment multilateral creditors receive in debt restructurings).

19. *See, e.g.*, *How the IMF Helps to Resolve Balance of Payments Difficulties*, INT’L MONETARY FUND (Oct. 2008), <http://imf.org/external/np/exr/facts/crises.htm> (noting that the IMF assists countries in restoring stability after crises).

20. *See* Gelpern, *supra* note 18, at 1148–49 (noting that senior creditors seek to maximize repayment capacity and have greater leverage over government policy); *see also* INT’L MONETARY FUND, *supra* note 19 (stating that “[b]efore a member country can receive a loan [from the IMF], the country’s authorities and the IMF must agree on a program of economic policies”); INTERNATIONAL MONETARY FUND, REPORT OF THE EXECUTIVE BOARD TO THE INTERIM COMMITTEE OF THE BOARD OF GOVERNORS ON OVERDUE FINANCIAL OBLIGATIONS TO THE FUND 3 (Sept. 9, 1988) (discussing the need for all parties to sovereign debt restructurings to “treat the Fund as a preferred creditor”).

21. *See* Alon Seveg, *When Countries Go Bust: Proposals for Debtor and Creditor Resolution*, 3 ASPER REV. INT’L BUS. & TRADE L. 25, 40–41 (2003) (reviewing the Paris Club’s “comparability treatment assumption,” which stipulates that a debtor seeking to restructure must do so on at least as favorable terms as it has with non-Club members).

22. *See* Gelpern, *supra* note 18, at 1128–29 (stating that in 1999, in the context of Pakistan’s restructuring of its debt, the Paris Club required Pakistan to also restructure its Eurobonds).

23. *See* NOURIEL ROUBINI & BRAD SETSER, BAILOUTS OR BAIL-INS? RESPONDING TO FINANCIAL CRISES IN EMERGING ECONOMIES 99–108 (2004) (discussing risks and empirical evidence of moral hazard in lending from official entities).

24. *See* Lee C. Buchheit, *The Search for Intercreditor Parity*, 8 LAW & BUS. REV. AMS. 73, 78–80 (2002) (outlining the IMF’s dominant role in intercreditor debates and noting the tension that such position creates with creditor groups).

Domestic creditors often include the country's banks and other participants in its financial system.²⁵ How those creditors negotiate and what types of concerns they raise for the country and its stability depend on the particular facts and circumstances. Balancing equitable concerns among domestic and international creditors is always a challenge.²⁶ The polarization that often results between the domestic and international realms usually casts domestic and international creditors on opposing sides.²⁷ The reality may be that each part of the creditor base may be asked to make concessions and that a country must heed different needs and imperatives. If the local financial system is in danger of collapse or severe dysfunction, a country faces not merely a debt renegotiation with these creditors, but delicate concerns about the impact on the country's people and institutions.²⁸ It must also heed the equitable concerns of external creditors and try to maintain a reasonable dialogue with them. None of this is helped by the traditional rhetoric of factionalism.²⁹

C. Domestic Political Context and International Perception

There is an inevitable tension between the domestic political pressures and needs which a government must heed to preserve confidence and creditor demands. The populations of countries in crisis often react adversely to prescriptions for further belt-tightening and austerity, which are frequent conditions for assistance by the IMF and other official and bilateral sector agencies and which private creditors may also want prior to future lending.³⁰ Aside from political fall-out, countries may find that the fiscal belt-tightening demanded by creditors in exchange for debt relief and assistance provokes further economic deterioration rather than improvement.³¹ Domestic political confidence and creditor confidence may be so in tension that a country risks one for the other, and yet each has enormous impact on the country's economy and health.

Governments aim to maintain the confidence of their constituents during a crisis because this confidence is key to economic improvement and stability and to their own self-preservation. At the same time, if they depend on international lenders—and most countries do to one extent or another—they must also maintain their confidence.³² Different countries strike the balance

25. See Roubini & Setser, *supra* note 6, at 28 (noting that domestic debt is often held primarily by the domestic banking system).

26. *Id.* at 5–6.

27. See Anna Gelpern, *Sovereign Debt Crisis: Creditor's Rights vs. Development: Beyond Balancing the Interests of Creditors and Developing States*, ASIL Proceedings 222 (2003).

28. See Alfred Seymour Hopkins, *Duhalde's Dilemma*, WORLD PRESS REV., Mar. 8, 2002.

29. See, e.g., George Soros, *The Crisis & the Euro*, THE N.Y. REV. OF BOOKS, Aug. 19, 2010.

30. See, e.g., John Carr & Joanna Sugden, *Three Killed as Greek Austerity Protest Turns Violent*, THE TIMES OF LONDON, May 5, 2010 (describing Greek protests to national austerity measures).

31. Paul Krugman, *Self-Defeating Austerity*, N.Y. TIMES, July 7, 2010.

32. Without such confidence, a country's cost of borrowing on the bond market is driven up to the point where it may be forced to seek international aid, as was the case with Greece in 2010. *Greece Rules Out Any Debt Restructuring*, THE MANILA TIMES, Sept. 14, 2010, available at <http://www.manila>

differently.³³ Unfortunately, this tension is often posed in black and white terms on both sides, when it is usually an extremely complex issue.

How a country's debt renegotiation is perceived abroad in a broader political context depends on numerous factors, but undoubtedly it is affected by political polarities, national interests, and how media and other commentators construe and communicate the situation. International sympathies usually run more radically in favor of international creditors, who may be severely affected and are constituents of countries which may be called to lend and assist the country in crisis. International financial media usually deepen the chasm as most commentators argue, often in bombastic and untempered terms, that countries that have debt problems have mishandled their economies and failed to negotiate their debt appropriately.³⁴

While the criticisms of any country's handling of its economy and debt in the international financial press, such as the Wall Street Journal or The Economist (which often bear the distinct influence of neoliberal economic concepts), may or may not be tenable, debt problems are often construed in radically different ways domestically than internationally. Depending on the situation—and some countries do manage to avoid the brink—there may be a radicalization of positions and alignments which are not helpful to an eventual resolution.

III

MY PERSONAL EXPERIENCE OF PROCESS

“The despotism of custom is everywhere the standing hindrance to human advancement.”³⁵

— John Stuart Mill

“The world of our experience consists at all times of two parts, an objective and a subjective part, of which the former may be incalculably more extensive than the latter, and yet the latter can never be omitted or suppressed.”³⁶

— William James

times.net/index.php/business-columns/25826-greece-rules-out-any-debt-restructuring (last visited Sept. 26, 2010).

33. Compare Soros, *supra* note 29 (noting the German government's reluctance to implement publicly unpopular but economically beneficial policies), with Carr & Sugden, *supra* note 30 (describing the Greek government's adherence to IMF strictures despite violent public riots).

34. See, e.g., *Ecuador's Default*, THE FINANCIAL TIMES, Dec. 17, 2008 (referring to Ecuador's policies that led to its 2008 sovereign debt default as “foolishness” and to other defaulting countries in the region as “deadbeats”).

35. JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 70 (Stefan Collini ed., Cambridge Univ. Press 1989) (1851).

36. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 489 (1902).

*"I sent the club a wire stating, 'PLEASE ACCEPT MY RESIGNATION. I DON'T WANT TO BELONG TO ANY CLUB THAT WILL HAVE ME AS A MEMBER.'"*³⁷

— *Groucho Marx*

A. Learning the Ropes

I started at Cleary Gottlieb as a summer associate in 1989 after I graduated from law school and before I clerked for a judge, like all good students seemed to do in those days. I wanted to make a little money before entering the state of abject poverty of the judicial law clerk (similar to the financial state of the law student from which I had just emerged) and I wanted a taste of Cleary's famous Latin American practice.

Before I knew it, I was bitten by the sovereign bug. Sovereign work was everywhere at Cleary. There was the bankruptcy of Aeromexico, one of the principal Mexican airlines,³⁸ the visit of the Chilean government officials—one of whom peered at me smiling and asked "did you get good grades at Harvard?" And, beyond the work I did, I heard of other lawyers who were working on the Mexican Brady debt restructuring.³⁹ Every once in a while, I passed by conference rooms crowded with papers and people who looked like they had not slept in months.

By the time I came back to Cleary in 1990, Mexico was finishing its Brady debt restructuring, planning its first Yankee bond, and privatizing Telmex, the Mexican telephone company. Countries like Uruguay were beginning their own Brady processes.⁴⁰ In those days, I played little roles in lots of those huge deals. In retrospect, I realize that this was a key moment in Latin American history as many countries moved toward financial integration with the rest of the world and, inexorably, toward capital-markets access.⁴¹ And the global markets themselves were changing. After the crash of 1988 and other seismic market events, capital markets were growing again, becoming more accessible, more international, and hungrier for emerging-market securities.

When the Mexican government privatized Telmex, I watched in meetings as investor groups from the "developed" world trod cautiously, asked for reassurance, and hesitated.⁴² Yet within a short period of time, Telmex had been

37. MERRIAM-WEBSTER DICTIONARY OF QUOTATIONS 319 (1992).

38. See Alan Riding, *International Report*, N.Y. TIMES, May 9, 1988 (discussing Aeromexico's filing of bankruptcy in April 1988 "after years of losses").

39. See Ross P. Buckley, *The Facilitation of the Brady Plan: Emerging Markets Debt Trading From 1989 to 1993*, 21 FORDHAM INT'L L.J. 1802, 1804–13 (1998).

40. *Id.* at 1817.

41. See Anthony M. Vernava, *Latin American Finance: A Financial, Economic and Legal Synopsis of Debt Swaps, Privatizations, Foreign Direct Investment Law Revisions and International Securities Issues*, 15 WIS. INT'L L.J. 89, 92–97.

42. See generally Marcus Eyth, *The Telmex Saga Continues: Foreign Investor's Expectations and Realizations in the Struggle to Compete in the Mexican Telecommunications Market*, 14 PACE INT'L L. REV. 211 (2002) (providing context for the Telmex privatization).

privatized and then gone public to huge acclaim.⁴³ Shortly afterwards, its stock price boomed.⁴⁴ Today, Telmex is one of the most important companies in the world.⁴⁵ From my junior seat in the early 1990s I witnessed the transition from the Latin America that no one had believed in or trusted, to the Latin America that the markets adored.⁴⁶

B. The Early 1990 Actors

At the process level, how were things done in the early 1990s and who did them? Although there were some women bankers and lawyers, the show was run primarily by men. In the Brady restructuring, only some of the Wall Street financial and legal participants spoke Spanish or Portuguese. Most did not, and few were of Latin American ascendancy. The sovereign debt restructuring culture was characterized by aggressive negotiation, larger-than-life personalities, and what seemed like intellectual gladiator fights, full of drama and intensity. At least this is what I heard. I was too junior to actually witness much of those processes. I read the papers. I heard the more tangled tales of sovereign debt—the negotiators who paraded trophy girlfriends, the fights, the impasses—more than I saw them first-hand.

I heard about the characters and I knew that they belonged to a club, which at the time seemed almost impenetrable to me. The identity and culture of the club's members was of such primacy and importance that, paradoxically, it felt as if no one could speak of those things without breaching a taboo. Perhaps it was because saying that club members were mainly men, or white, or anything in particular was an implicit, intolerable challenge. We were afraid to offend. Or perhaps the culture was so centered on individuals that to call attention to gender, race, or ethnicity would have been deemed disrespectful. Or perhaps there was an implication that the club was private and never to be questioned.

And so it was that the noble policy that underlay Brady restructurings—to end Latin America's isolation and economic stagnancy resulting from unresolved debt default⁴⁷—was carried out in processes that seemed entrenched in dichotomies, in myths, in the personal narcissism of the gladiators, and in a certain amount of hostility. The politics seemed enmeshed in the perils of history, even if all agreed that Brady restructurings were positive.

43. *See id.* at 234–38 (discussing positive investor reaction to the Telmex privatization).

44. *Id.*

45. *See* Elisabeth Malkin, *Telmex: Mexico's 800-Pound Gorilla*, *BUSINESSWEEK*, June 18, 2001.

46. *See* Buckley, *supra* note 39, at 1820–22; *see also* Nathaniel Nash, *Loading Up on Latin American Debt*, *N.Y. TIMES*, Feb. 28, 1993.

47. *See generally* Silverman & Devino, *supra* note 12, at 180–83.

C. The Rolling 1990s

“Democratic theory, whether in its liberal or in its more radical form, is just as stupid in analyzing the relation between the national and the international community as in seeking a too simple harmony between the individual and the national community. Here, too, modern liberal culture exhibits few traces of moral cynicism. The morally autonomous modern national state does indeed arise, and it acknowledges no law beyond its interests.”⁴⁸

— Reinhold Niebuhr

In the first half of the 1990s, as countries passed from debt default to issuing debt in the capital markets and working with investment bankers, the culture of deals also changed. At first, investment bankers who worked with Latin America were, for the most part, an assortment of senior male “gringo” bankers and junior Latin American bankers. As in all things, there were exceptions—particularly some notable senior women bankers and people of diverse backgrounds. But the stage then was dominated by the phenomenon of the “gringo simpatico.” The gringo simpatico sometimes spoke Spanish, which delighted most Latin Americans; sometimes, he said he understood Spanish but did not really speak more than a few words. “Hola.” “¿Que tal?” “Si.” The gringo simpatico played amazingly well in the Latin America of the time because he seemed accessible but also a bridge to Wall Street and the venues of power in the United States and Europe. Many sovereigns felt privileged to have the attention and care of a gringo simpatico. There was an old colonial feel to the relationship of the gringo simpatico to people in debtor countries—as if even in emerging from colonial models, people retained a sense of the relative superiority of Americans and Europeans and felt privileged to have their attention.

At law firms, the gringo simpatico model held full sway. The head of sovereign work was almost always a man, a gringo simpatico—or sometimes, not so simpatico. I was taught much of what I know by terrific lawyers and mentors who probably qualified as a gringo simpaticos. I have no personal criticism to levy against any one actor per se, but note the phenomenon as a striking and notable aspect of practice back then (and which still continues in some markets). As Latin American countries transitioned from debt crisis to market access and private investment, however, the gringo simpatico relied increasingly on his younger colleagues who often spoke Spanish or Portuguese.

As the decade wore on, and as Latin American countries opened up further to investment, the junior Latin American bankers and lawyers began to grow in seniority and stature.⁴⁹ All over Wall Street, Latin American bankers began to

48. REINHOLD NIEBUHR, *THE CHILDREN OF THE LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE* 33 (1947).

49. From 1993 to 2002 the number of law firm partners of color rose from 2.55% to 3.71% while the number of women partners rose from 12.27% to 16.3%. *Presence of Women and Attorneys of Color in Large Law Firms Continues to Rise Slowly but Steadily*, 2002 NALP Directory of Legal Employers, available at <http://nalp.org/2002presenceofwomenandattorneyscolor> (last visited Sept. 24, 2010).

attain coveted Managing Director titles, and some lawyers of Hispanic ascendancy were made partners. I was sitting at lunch one day with a very senior acquaintance when he turned to me and said ruefully, with the surprise of someone caught off-guard, “My God, when did the Latins take over? They’re all over. It didn’t used to be that way.” He was not alone in his befuddlement. Others seemed to voice the same discontent, but without naming it outright, since that would have seemed incorrect. As for women, the banking world lamentably did not seem to admit them in the senior ranks (and some prominent women left their banks along the way), although the legal world seemed a bit more receptive to women.

Things had changed for me personally, as well. I was made a partner at Cleary Gottlieb, effective January 1, 1998.⁵⁰

In less than a decade, Latin America had coursed through crisis to investment, but never left crisis wholly behind. There were significant troubles along the way. Mexico experienced severe economic difficulties in 1994 and 1995, which had caused a “Tequila effect” that affected many other Latin American countries.⁵¹ The late 1990s brought currency devaluation and crisis in Brazil, Russia, and many Asian countries, which in turn provoked capital flight from all emerging countries.⁵² Emerging countries seemed at the mercy of capital inflows and sharp outflows at times of alarm.⁵³ A neo-liberal economic philosophy seemed pervasive at these times.⁵⁴ But things change, sometimes quickly.

D. The Millennium and After

The turn of the millennium found Latin American countries in diverse positions. While some countries had drunk deeply at the trough of capital markets, others were merely emerging, and others still were turning away from the neo-liberal model.⁵⁵ Latin American countries had also adopted diverse political and economic policies. Debt models and political alignments varied across the Latin American territory. Venezuela became an icon of left-leaning policies, while countries like Chile retained conservative economic policies.

50. Carmen Amalia Corrales Biography, *available at* <http://www.cgsh.com/ccorrales/> (last visited Sept. 24, 2010).

51. *See Latin America in the Fallout Zone*, THE ECONOMIST, Jan. 7, 1995, at 59; Floyd Norris, *Mexican Shadow Falls on Emerging Markets*, N.Y. TIMES, Feb. 1, 1995, at D1, col. 2.

52. *See* Timothy A. Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 14 AM. U. INT’L L. REV. 1571, 1597–1601 (1999).

53. *See generally id.*

54. *Id.* at 1598.

55. *See* Ines Bustillo and Helvia Velloso, *Bond Markets for Latin American Debt in the 1990s*, 18 CEPAL Serie: Temas de Coyuntura (2000).

Argentina, a country which I had loved since childhood and which I had the privilege to work with for many years, began to traverse an unprecedented economic and debt crisis shortly as we passed the millennium mark.⁵⁶

Argentina declared a moratorium on its external debt at the end of December 2001, in the midst of the worst economic crisis in its history.⁵⁷ Its restructuring would put to the test many of the tenets of the old model. I will not comment on the substantive aspects of the Argentine debt restructuring, but use it only to illustrate certain key process issues and how the Argentine restructuring reworked the old polarities.

I found that the discourse and the perception of Argentina's default varied radically depending, literally, on where one was standing. As many in the financial world and the press railed against Argentina, I sometimes took the long overnight flight to Buenos Aires and was struck and deeply affected by what I saw when I arrived. Buenos Aires, always a beguiling and proud city, seemed full of discontent in the years of crisis.⁵⁸ The poor collected trash at the end of the day.⁵⁹ Children begged on the streets.⁶⁰ Piqueteros—Argentina's road-blocking protesters—waved banners and shook sticks against their hands impatiently.⁶¹ Cash machines no longer worked and people could not withdraw more than a limited amount from bank accounts.⁶² The Argentine populace demanded economic policies which addressed their needs foremost, above matters of debt.⁶³ Standing in Buenos Aires, the world looked very different than it did in Washington, D.C. or in New York. If creditors naturally rued their losses, the prevailing rhetoric seemed extreme and sometimes unfortunate.

From a practical and legal perspective, with hundreds of thousands of creditors worldwide and more than a hundred series of bonds, Argentina could no longer proceed in the old "committee" form.⁶⁴ It could no longer share information selectively with a small group, and could no longer expect a small group to be able to help solve everything. The old club would not be

56. The Argentine crisis has been described as the "worst-case scenario" in eight centuries of financial crises throughout the world. See Carmen M. Reinhart & Kenneth S. Rogoff, *This Time is Different: A Panoramic View of Eight Centuries of Financial Crises* (2008), available at http://www.economics.harvard.edu/files/faculty/51_This_Time_Is_Different.pdf (last visited May 28, 2010).

57. See Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 INT'L LAW 1189, 1196 (2009) (describing Argentina's economic collapse and default on external debt).

58. See generally Hopkins, *supra* note 28.

59. *Accommodating an Army of Garbage Pickers*, CNN.COM (Mar. 26, 2003), <http://www.cnn.com/2003/WORLD/americas/03/26/argentina.train.reut/>.

60. See Sue Branford, *Buenos Aires Rallies Against the Bankers*, THE GUARDIAN, Aug. 13, 2001.

61. See Hopkins, *supra* note 28.

62. See *id.* (withdrawal limits); *Train Collision Kills Two, Injures Hundreds; Explosions Detected Near Arafat Compound*, Transcript of Lou Dobbs Moneyline (Apr. 23, 2002), available at <http://edition.cnn.com/TRANSCRIPTS/0204/23/mlld.00.html> (empty ATMs).

63. See Hopkins, *supra* note 28.

64. See Cibils & Vuolo, *supra* note 13, at 758 (discussing the "atomization" of Argentina's creditors from a few commercial banks to hundreds of thousands or millions of bondholders).

reconvened; among other things, it was truly ill-suited to the capital-markets context.

This shift provoked huge anger among many in the creditor community, including those who supported the committee form of negotiation. While all countries face challenges in their communications abroad, the vitriol and negative rhetoric in this instance seemed unusually heightened. Part of the rage seemed to me a kind of displacement of other concerns. The world was changing. The “club” was being challenged and no longer seemed to have a clear place, never mind a central place.

On the heels of the Argentine default and the subsequent restructuring (and among reprofiling and restructurings by many countries), the G-20 adopted in 2004 a code establishing the principal tenets for debt renegotiation:

1. Transparency and timely flow of information;
2. Close debtor-creditor dialogue and cooperation to avoid restructuring;
3. Good-faith actions, including
 - a. Voluntary, good-faith processes when restructuring becomes inevitable;
 - b. Sanctity of contracts;
 - c. Vehicles of restructuring, involving the appropriate format and role of negotiation;
 - d. Creditor committee policies and practices;
 - e. Constructive debtor and creditor actions during restructuring such as, to the extent feasible, partial debt service, maintenance of trade credit lines, and constructive dialogue that leads to achieving “a critical mass of support” for a restructuring; and
4. Fair treatment, or avoiding unfair discrimination among affected creditors and fairness of voting of bonds and loans.⁶⁵

These principles were self-evidently reasonable. But, very often, the focus of creditor ire depends not so much on adherence to a code, but on the severity of the haircut that a country finally determines is appropriate. The larger the haircut, the greater the ire, no matter how closely a country may adhere to reasonable principles. And, even then, other factors, including the moment, the mood, and the political and economic orthodoxy of the time, affect how each of the foregoing factors may be construed and portrayed.

In addition, these principles, while good, suffered from certain flaws, both inherent and extraneous. They reflected a bias in favor of committees, which do not work as well in the capital-markets context as they did in the commercial debt context. They were vague while sounding definite. And at the end of the

65. Principles Consultative Group, *Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets: Report on Implementation by the Principles Consultative Group*, Oct. 2009; INT’L MONETARY FUND, PROGRESS REPORT TO THE INTERNATIONAL MONETARY AND FINANCIAL COMMITTEE ON CRISIS RESOLUTION 11–17 (Apr. 12, 2005).

day, they were subject to the interpretation of deeply partisan creditors. This is not to find fault with the principles per se, but to observe that in an acrimonious context, opposing parties will find conflicting interpretations of vague principles, reducing the utility of such principles in guiding the process.

During this time, the IMF proposed a system for sovereign debt restructuring (the “SDRM”), which floundered and failed as a result of opposition from the market and from many countries.⁶⁶ The market and countries turned instead from SDRM to the incorporation of collective action clauses in New York law bonds, which would permit more orderly sovereign debt restructurings in the future.⁶⁷

In a more successful push to future orderly processes, the U.S. market accepted inclusion of standard collective action clauses.⁶⁸ Bonds governed by New York law had previously contained provisions which required the consent of each holder in order to restructure debt.⁶⁹ This left the power to disrupt debt restructuring if even a minority of holders held out.⁷⁰

In terms of process, many countries have continued adding to the history of sovereign debt restructuring.⁷¹ Each seems particular, depending on the nature of its debt, its creditors, and its political context.⁷² The old polarities and resentments endure, in each case striking a new mark. It is like a game played over and over and again, but always differently, with evolving casts and the enduring resentments, myths, and folklore, which make it exciting, but also more dramatic, fascinating, and sometimes unfortunate.

It is true that credit renegotiations lend themselves to battle and sovereign renegotiation perhaps even more so. Nevertheless, the epic battles do not always appear entirely rational or destined to lead to the best resolution. In this light, it is perhaps naïve, but important to ask: How do we create a more open, cosmopolitan attitude toward debtor nations and a fairer process going forward for all participants?

66. See generally Anne O. Kreuger, Int'l Monetary Fund, *A New Approach to Sovereign Debt Restructuring* (2002) (discussing the IMF's proposed sovereign workout mechanism); John B. Taylor, Under Sec'y of Treasury for Int'l Affairs, *Sovereign Debt Restructuring: A U.S. Perspective*, Remarks at the Institute for the International Economics Conference: Sovereign Debt Workouts: Hopes and Hazards? (Apr. 2, 2002), <http://www.ustreas.gov/press/releases/po2056.htm> (opposing the SDRM approach in favor of the decentralized market-oriented approach); Anne O. Kreuger & Sean Hagan, *Sovereign Workouts: An IMF Perspective*, 6 CHI. J. INT'L L. 203 (2005); William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1 (Jan. 2004) (analysis of SDRM and collective action clauses and their effects on sovereign lending).

67. See Sergio J. Galvis & Angel L. Saad, *Sovereign Exchange Offers in 2010*, 6 CHI. J. INT'L L. 219, 223–28 (describing increased use and benefits of collective action clauses).

68. See Buckley, *supra* note 57, at 1209.

69. *Id.*

70. *Id.*

71. See generally Aitor Erce & Javier Díaz-Cassou, *Creditor Discrimination During Sovereign Debt Restructurings* (Banco de España, Working Paper No. 1027, 2010) (reviewing ten recent debt restructurings occurring during or after 1998, including Argentina, Belize, Dominica, the Dominican Republic, Ecuador, Pakistan, Russia, Ukraine, and Uruguay).

72. See *id.*

I hope, perhaps in vain, for a more cosmopolitan ethic in sovereign debt transactions—that is, an ethic centered on persuasion and diplomatic exchange and in which the complex character of the situation is acknowledged and appreciated. The battles may be fairly cast as involving money and legal concepts. They should not be cast as fights between good and evil or between those who are admitted as part of a club and those who are not. We seemed to have started moving beyond the sentimentalized ideal that there is but one way to carry out sovereign debt restructuring, and that only certain people know how to do it. In truth, there is a diversity of situations, a coexistence of realities which cannot be denied, and many tools that can be used in good faith to arrive at solutions.

The emerging world is changing. The developed world also changes. There is no longer, arguably, even a primacy of one over the other as countries like China and Brazil gain economic force, and countries like the United States and others in Europe experience serious economic challenges. With those changes and changes in the way business is transacted, there remains a high demand for intelligence and cultural affinity. This demand has led to a more diverse group of players today and may lead ultimately, although it is far from certain, to a cosmopolitan ethic to replace, at least in part, the old “imperial” model.