

Putting your Faith in Good Faith: A Principled Strategy for Smoother Sovereign Debt Workouts

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I. GOOD FAITH AS PART OF AN INCREMENTAL APPROACH TO SOVEREIGN DEBT WORKOUTS

This Article considers the potential of good faith as a general principle of law for sovereign debt workouts. This endeavor takes inspiration from, and contributes to, an incremental approach to sovereign debt restructuring.¹ The incremental approach aims for a third way between statutory and contractual avenues for improving the legal framework governing sovereign debt workouts. There is a pressing need for such a third approach given the dysfunction of the current system: sovereign debt workouts often are too little in volume, and they frequently come too late, allowing the debt problem to worsen unnecessarily.² What is more, holdout creditors try to extract profits from the lack of a

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1. Cf. Juan Pablo Bohoslavsky & Matthias Goldmann, *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law*, 41 YALE J. INT'L L. ONLINE, 475 (2016), in this issue.

2. UNCTAD, *Sovereign Debt Workouts: Going Forward. Roadmap and Guide* (April 2015), available at <http://www.unctad.info/en/Debt-Portal/>; Lee C. Buchheit, et al., *Revisiting Sovereign Bankruptcy* (Brookings Committee on International Economic Policy and Reform, 2013), available at http://www.brookings.edu/~media/research/files/reports/2013/10/sovereign-bankruptcy/ciepr_2013_revisitingsovereignbankruptcyreport.pdf.

compulsory sovereign debt restructuring mechanism by suing debtor states for the repayment of sovereign debt instruments at nominal value – which they may have purchased at a considerable discount.³ Statutory solutions like a new international treaty might be the most effective means, and proposals for such mechanisms abound.⁴ But the sovereignty costs of statutory solutions make important states and stakeholders inclined to promote innovative contractual solutions such as more robust collective action clauses.⁵ While collective action clauses have some practical advantages, they also have their limitations. They take time to implement, and holdout creditors have shown that they can often acquire blocking minorities.⁶ Most importantly, even the best collective action clauses would not help in the face of debtor-induced delays in sovereign debt workouts, exaggerated growth expectations, or problems concerning the fair distribution of the economic and financial burden of debt crises.⁷

In light of these challenges, this special issue explores a third, complementary strategy that seeks the incremental improvement of the current framework through legal principles.⁸ Principles in international law, whether general principles of law or principles of international law,⁹ have an important ordering function due to their general and abstract character.¹⁰ On the one hand, they have a descriptive character, revealing the basic structures of the existing legal framework. On the other hand, their normative potential reaches beyond the *status quo*. It allows for a distinction between progressive and non-progressive practices within the present legal framework. In other words, it separates practices that are fully in line with principles from those that are not.¹¹ The idea behind the incremental approach is to deploy this potential for improving current debt workout practice.

This Article examines the potential of the good faith principle for the

3. Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L. J. 1043 (2004); Bohoslavsky & Goldmann, *supra* note 1.

4. Overview: Kenneth Rogoff & Jeromin Zettelmeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976–2001*, 49 IMF STAFF PAPERS 470 (2002).

5. E.g. International Monetary Fund, *Sovereign Debt Restructuring - Recent Developments and Implications for the Fund's Legal and Policy Framework*, IMF Policy Paper (April 26, 2013); International Monetary Fund, *Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring*, IMF Policy Paper (October 1, 2014); International Capital Markets Association, *Standard Aggregated Collective Action Clauses ("CACs") for the Terms and Conditions of Sovereign Notes* (Aug 2014), available at <http://www.icmagroup.org/resources/Sovereign-Debt-Information>.

6. International Monetary Fund, *Sovereign Debt Restructuring - Recent Developments and Implications for the Fund's Legal and Policy Framework*, IMF Policy Paper 28 (April 26, 2013).

7. UNCTAD, *supra* note 2.

8. For an earlier, tentative proposal in this direction see HOLGER SCHIER, TOWARDS A REORGANISATION SYSTEM FOR SOVEREIGN DEBT AN INTERNATIONAL LAW PERSPECTIVE 109 et seq. (2007).

9. On the different types of principles: Rüdiger Wolfrum, *General International Law (Principles, Rules, and Standards)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2010).

10. On the function of principles in legal orders see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1977); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS. CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY ch. 5.1.3 and 5.2.1 (Repr. ed. 2008).

11. Cf. Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 9 GERMAN LAW JOURNAL 1909 (2008); Markus Patberg, *Supranational constitutional politics and the method of rational reconstruction*, 40 PHILOSOPHY & SOCIAL CRITICISM 501 (2014).

incremental approach. It has both a methodological and a doctrinal objective. Methodologically, it shows how principles, especially general principles of law, may be used to advance a particular area of international law. Doctrinally, it argues that the good faith principle has the potential to smoothen debt workouts by establishing a duty to negotiate, to exercise voting rights in good faith, and to refrain from abusive holdout strategies. The Article begins with an inquiry into the nature and formation of general principles of law. Principles reveal basic structures of a legal order. They are not merely discovered, but rather constructed in a hermeneutic process which one might describe as “doctrinal constructivism.”¹² The Article next aims to carve out the basic ideas characterizing the respective legal order. Good faith is an established general principle of law embodying the idea of fairness in legal relationships.¹³ Because the good faith principle is rather general, this Article contextualizes it in order to concretize its meaning. To this end, the Article identifies the basic ideas underlying the current legal framework for sovereign debt workouts. The Article shows that, as a consequence of a paradigm shift over the last decades, sovereign debt workouts are now geared towards debt sustainability.¹⁴ This idea should guide the application of the good faith principle to sovereign debt workouts. In doing so, the Article identifies four possible concretizations of the good faith principle in the context of debt restructurings: a duty to participate in debt workout negotiations, a duty to stipulate equitable restructuring terms, a duty not to jeopardize the result of good faith negotiations by a negative vote, and a standstill of holdout litigation seeking to extract a preferential treatment.¹⁵ Since this concretization of the broad concept of good faith is fraught with some uncertainty, this Article argues that soft legal instruments and domestic legislation would increase the effectiveness of the incremental approach.¹⁶

II. GOOD FAITH AS A GENERAL PRINCIPLE OF LAW

A. The Nature and Formation of General Principles of Law

General principles of law are a proper source of international law.¹⁷ They have been widely recognized since their incorporation in Article 38(3) of the Statute of the Permanent Court of International Justice in 1920, which became Article 38(1)(c) of the International Court of Justice (ICJ) Statute in 1945. Before 1920, the legal status of general principles was heavily disputed,¹⁸

12. *Infra*, part II.A.

13. *Infra*, part II.B.

14. *Infra*, part III.

15. *Infra*, part IV.

16. *Infra*, part V.

17. This is why Koskenniemi designates them as “normative” general principles, see Martti Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, in *SOURCES OF INTERNATIONAL LAW* 360-402, 364-5 (Martti Koskenniemi ed. 2000).

18. Alfred Verdross, *Les principes généraux de droit dans le système des sources du droit international public*, in *RECUEIL D'ETUDES DE DROIT INTERNRATIONAL EN HOMMAGE A PAUL GUGGENHEIM* 521-30 (Faculté de droit Université de Genève ed. 1968).

although arbitral tribunals frequently referred to them.¹⁹ Unlike *principles of international law*,²⁰ which are distilled from other international legal rules, *general principles of law* constitute extrapolations from domestic legal orders by means of analogical and comparative reasoning.²¹ Based on a proposal by Alain Pellet,²² one can define a general principle as:

an unwritten legal rule of wide-ranging character. Principles should be distinguished from moral rules. They are just another form of legal rules, although of a more abstract and general character.²³ They usually express the ratio of more specific rules and serve as guidelines for their interpretation and application.²⁴ But it is also possible to base an argument about the legality of a certain act on its conformity with a specific general principle;

recognized in the municipal laws of States. Most legal orders should be familiar with a principle considered to be a general principle, but not necessarily all,²⁵

transferable to the international level. The principle needs to be meaningful on the international level. Principles that are contingent upon specific features of domestic legal orders may not be considered general principles.²⁶ By contrast, it is a clear sign of the transferability of a principle and hence of its existence if international legal practice already reflects that principle.

International courts use general principles of law to fill lacunae²⁷ and to avoid decisions that would contradict basic principles of justice if the existence of a customary rule cannot be proven.²⁸ General principles thus presuppose that international law is not just a chaotic array of rules, but represents a form of order that transcends the sum of its rules and comprises fundamental ideas of justice.²⁹ This idea of order is what Wolfgang Friedmann has described as the law of cooperation.³⁰ This idea of order is embedded in legal practice and

19. Alain Pellet, *Article 38, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* marginal no. 247 (Andreas Zimmermann, et al. eds., 2006); Vladimir D. Degan, *General Principles of Law (A Source of General International Law)*, 3 FINNISH YEARBOOK OF INTERNATIONAL LAW 1, 22 et seq. (1992).

20. Cf. Bohoslavsky and Goldmann, *supra* note 1, part B.

21. HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 67 et seq. (Repr. ed. 1970) – From this type of general principle of law, one needs to distinguish general principles of international law, cf. Giorgio Gaja, *General Principles, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* marginal no. 17 et seq. (Rüdiger Wolfrum ed. 2007). The latter have no relevance for this study.

22. Pellet, *supra* note 19, marginal no. 249.

23. On the theoretical debate surrounding the distinction between rules and principles see Dworkin, *supra* note 10; Habermas, *supra* note 10.

24. Robert Kolb, *General Principles of Procedural Law, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE* marginal no. 2 (Andreas Zimmermann, et al. eds., 2006).

25. According to Gaja, *supra* note 21, marginal no. 16, the International Court of Justice is reluctant to recognize general principles when it would require controversial discussions of comparative law.

26. VLADIMIR DURO DEGAN, *SOURCES OF INTERNATIONAL LAW* 103 (1997).

27. Pellet, *supra* note 19, marginal no. 245.

28. Lauterpacht, *supra* note 21, 60-63.

29. ROBERT KOLB, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC. CONTRIBUTION A L'ETUDE DES PRINCIPES GENERAUX DE DROIT* 24-5, 45 et seq. (2000); Degan, *supra* note 26, 58 et seq.

30. WOLFGANG G. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 60 et seq. (1964).

wholly conforms to basic tenets of legal positivism, rather than natural law.³¹

General principles of law are developed and specified through a process of conceptual reasoning which some have called “doctrinal constructivism.”³² Doctrinal constructivism proceeds in a dialectical fashion that departs, on the one hand, from current practice (in case of general principles, that would normally be domestic practice), and on the other hand, from the ideas characterizing the current international order. These ideas provide selection criteria for the identification and concretization of principles, informing the distinction between relevant and less relevant practices and possible interpretations.³³ They need to reflect the present state of international law. Examples comprise the ideas of sovereignty and cooperation,³⁴ and increasingly also the ideas of human rights, the rule of law, and legitimacy.³⁵ For more specific legal regimes, doctrinal constructivism requires a grasp of their underlying ideas.³⁶

Doctrinal constructivism thus takes place through a dialogue between scholarship and practice, especially that of courts. To be sure, the ICJ Statute stipulates that scholarship and court decisions are merely subsidiary means for the recognition of the law.³⁷ But it would be a deception to assume that this process of “recognition” amounts to a purely deductive exercise. Rather, the evolution of our understanding of language brought about by what is commonly referred to as the “linguistic turn,” has shattered the assumption of a strict separation between law-making and interpretation. Accordingly, the meaning of legal rules is not only indeterminate, but also context-sensitive to the extent that it only emerges in the practice of their interpretation and application. Each interpretation of the law is tantamount to its further development.³⁸ In other words, the practice of courts and legal scholarship always contributes to the further development of the law. This is especially acute in international law, a relatively young and developing field of law characterized by decentralized institutions, cases, and practices.³⁹ For example, the contemporary definition of international treaties emerged in legal

31. For postmodern concepts of unity of the international legal order, see MARIO PROST, *THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW* (2012).

32. Armin von Bogdandy, *The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe*, 7 *INT’L J. CONST. L.* 364 (2009); with a view to international law: Anne Peters, *Realizing Utopia as a Scholarly Endeavour*, 24 *EUR. J. INT’L L.* 533, 545-6 (2013).

33. Matthias Goldmann, *Dogmatik als rationale Rekonstruktion: Versuch einer Metatheorie am Beispiel völkerrechtlicher Prinzipien*, 53 *DER STAAT* 373 (2014).

34. Cf. Friedmann, *supra* note 30.

35. Mattias Kumm et al., *How large is the world of global constitutionalism?*, 3 *GLOBAL CONSTITUTIONALISM* 1 (2014); Armin von Bogdandy, *Common principles for a plurality of orders: A study on public authority in the European legal area*, 12 *INT’L J. CONST. L.* 980 (2014).

36. See *infra* section III. in respect of sovereign debt workouts.

37. Art. 38(1)(d) ICJ Statute.

38. Seminal on the concept of language advocated by the linguistic turn: LUDWIG WITGENSTEIN, *PHILOSOPHISCHE UNTERSUCHUNGEN* 262 (sec. 43) (16th ed. 2004). On the significance of the linguistic turn for international law, see JEAN D’ASPROMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW - A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* 196 et seq. (Oxford University Press. 2011).

39. Peters, *supra* note 32, 533, 537; Fernando Tesón, *International Law*, in *THE ROLE OF ACADEMICS IN THE LEGAL SYSTEM* 941 (Mark Tushnet, et al. eds., 2005).

scholarship during the period spanning from the end of the 19th century to the First World War.⁴⁰ However, this does not mean that “anything goes” and that doctrinal constructivism can skirt ordinary law-making procedures. Rather, the decisive difference between law-making and doctrinal constructivism lies in the way in which scholars, courts, and lawmakers argue, or rather, need to argue. Scholars need to *argue* that a certain rule exists or has this or that content. As soon as their *argument* is that a rule does not exist yet but that there are pertinent reasons why this rule should exist, they are making a political statement, not a doctrinal one.⁴¹ The requirements of legal reasoning thus provide for argumentative constraints that discipline doctrinal constructivism. An example for these constraints is the odious debt doctrine, to which I will revert later.⁴² Broadly speaking, it addresses the question whether sovereign debt that was not incurred in the public interest (e.g. in case of corruption) needs to be repaid. Many scholars argue that international law does not recognize this doctrine at present, as there is little practice supporting it, but that political or moral reasons militate for its adoption.⁴³

B. Good Faith as a General Principle of Law

The concept of good faith seems to reflect almost universally shared ethical principles. Philosophical works have long recognized good faith as a principle closely related to notions of equity and justice.⁴⁴ Good faith appears as an indispensable requirement for social interactions,⁴⁵ which has guaranteed it a place in virtually any theory of international law since early modernity.⁴⁶ Natural law theories associate good faith with the idea of reason.⁴⁷ In Confucianist thought, the principle of “chengshi xinyong”, which stands for trustworthiness and honesty, has an equivalent function.⁴⁸ Modern theories of justice like that of John Rawls are built around the idea of fairness, closely related to good faith.⁴⁹

Given its widely shared ethical significance, it is not surprising that good faith is today widely accepted as a general principle of law. Most domestic legal orders recognize its coordinative function for private law relationships: It is particularly widespread in the civil law tradition. A famous manifestation of

40. MILOŠ VEC, RECHT UND NORMIERUNG IN DER INDUSTRIELLEN REVOLUTION 112 et seq. (2006).

41. Habermas, *supra* note 10, 146-7, 397.

42. *Infra* IV.B.

43. *Id.*

44. Cf. the Aristotelian concept of equity: SARAH BROADIE & CHRISTOPHER ROWE, ARISTOTLE: NICOMACHEAN ETHICS: TRANSLATION introduction, book 5, ch. 10 (2011).

45. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, IN THREE BOOKS WHEREIN ARE EXPLAINED, THE LAW OF NATURE AND NATIONS, AND THE PRINCIPAL POINTS RELATING TO GOVERNMENT vol. 3, ch. 25 (Jean Barbeyrac transl. 2015 (1625)).

46. JOSEPH F. O’CONNOR, GOOD FAITH IN INTERNATIONAL LAW 45-79 (1991).

47. Kolb, *supra* note 29, 86-92.

48. Markus Kotzur, *Good faith (Bona fide)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW marginal no. 6 (Rüdiger Wolfrum ed. 2009).

49. John Rawls, *Justice as fairness: political not metaphysical*, 14 PHILOSOPHY & PUBLIC AFFAIRS 223 (1985).

good faith is Article 1134 of the French Code Civil.⁵⁰ Other private law codifications contain comparable provisions.⁵¹ By contrast, the concept of good faith entered into English law at a relatively late stage.⁵² An exception from the 18th century is Lord Mansfield's famous claim that good faith constituted a "governing principle . . . applicable to all contracts and dealings."⁵³ Despite the hesitation in adopting the concept of good faith in the common law,⁵⁴ English law recognizes principles such as estoppel,⁵⁵ which constitutes a concrete manifestation of good faith in civil law jurisdictions.⁵⁶ In addition, one might consider equity as such as being built on an equivalent of the idea of good faith.⁵⁷ Be that as it may, the breakthrough for the concept of good faith in the common law came with the adoption of Section 1-304 of the Uniform Commercial Code, which recognizes good faith as a principle governing the performance and enforcement of contractual obligations.⁵⁸ Good faith has since found recognition as a principle underlying any contract under United States federal law,⁵⁹ as well as in international codifications of contract law, such as Article 7 of the United Nations Convention on the International Sale of Goods⁶⁰ and Art. 1.7 of the UNIDROIT Principles of International Commercial Contracts.⁶¹ Good faith also plays a crucial role in international commercial arbitration.⁶²

In international law, the principle of good faith manifests itself in almost every international legal regime.⁶³ Thus, the Friendly Relations Declaration attributes to good faith the status of an overarching principle for the conduct of

50. CODE CIVIL [C. CIV.] art. 1134 (Fr.).

51. E.g., Sec. 242 German BGB, Art. 422 Brazilian Civil Code. Overview: Ole Lando, *Good Faith in the Legal Systems of the European Union and in the Principles of European Contract Law*, in AEQUITAS AND EQUITY. EQUITY IN CIVIL LAW AND MIXED JURISDICTIONS 332 (Alfredo Mordechai Rabello ed. 1997).

52. Bernardo M Cremades, *Good Faith in International Arbitration*, 27 AM. U. INT'L L. REV. 761, 774-5 (2011).

53. *Carter v Boehm* (1766) 97 ER 1162, 1164 (Lord Mansfield).

54. Cf. Michael G. Bridge, *Does Anglo-Canadian Law Need a Doctrine of Good Faith?*, 9 CANADIAN BUSINESS LAW JOURNAL 385-426 (1984); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, 61 THE MODERN LAW REVIEW 11 (1998).

55. E.g. *McIlkenny v Chief Constable of the West Midlands*, [1980] 2 All ER 227 (Q.B.).

56. ANTOINE MARTIN, L'ESTOPPEL EN DROIT INTERNATIONAL PUBLIC: PRECEDE D'UN APERÇU DE LA THEORIE DE L'ESTOPPEL EN DROIT ANGLAIS 9-14 (1979).

57. Ralph A. Newman, *Renaissance of Good Faith in Contracting in Anglo-American Law*, 54 CORNELL L. REV. 553-565 (1968-1969).

58. E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT'L & COMP. L. 47, 51-54 (1995).

59. *K.M.C. Co. v. Irving Trust Co.*, US Court of Appeals, 6th Circuit, 757 F.2d 752 (1985). On the gap between recognition and enforcement, see Paul MacMahon, *Good faith and fair dealing as an underenforced legal norm*, 99 MINNESOTA L. REV. 2007 (2015).

60. United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3.

61. International Institute for the Unification of Private Law (Unidroit), *Principles of International Commercial Contracts*, 34 I.L.M. 1067 (1995).

62. Cremades, *supra* note 52, 765.

63. Overview on the manifestations of good faith in international economic law in Andreas R. Ziegler & Jurun Baumgartner, *Good Faith as a General Principle of (International) Law*, in GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 9 (Andrew D. Mitchell, et al. eds., 2015).

international affairs.⁶⁴ The Vienna Convention on the Law of Treaties (VCLT) notes in its preamble that “the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.”⁶⁵

The content and meaning of good faith as a general principle of law is necessarily broad and defies any precise definition. This is a consequence of the principle’s function: good faith plays an accessory,⁶⁶ supportive role in legal relationships that expose the parties to the influence and discretion of other parties. Hence, there is some uncertainty in these relationships about the exact scope of the rights and duties of either party. The good faith principle is meant to offset these risks by requiring mutual trust from the parties.⁶⁷ This role requires considerable vagueness from the good faith principle itself, as it needs to apply to a vastly array of divergent relationships and situations that are by definition unpredictable. The broad, general scope of good faith is thus simultaneously its virtue and its vice. For precisely this reason, courts are sometimes hesitant to apply it.⁶⁸

The challenge for legal scholarship is therefore to narrow down the meaning of good faith through a typology that is simultaneously precise enough to facilitate the application of the principle in practice and general enough to allow for its further development establishment of sufficient mutual trust among the parties to a legal relationship even in unforeseen situations. This endeavor is complicated by the fact that good faith has a bearing both upon the substantive content of rights and duties, and on the procedures by which they are exercised.⁶⁹ Thus, Anthony D’Amato summarizes the content of good faith as requirements to treat the other party fairly, represent one’s motives truthfully, and to refrain from taking unfair advantage of one’s counterparty.⁷⁰ Similarly, Robert Kolb understands the significance of good faith as being threefold: to protect legitimate expectations, to prohibit the abuse of rights, and to prevent unjustified advantage from unlawful acts.⁷¹ These descriptions are still rather categorical. A more granular typology might distinguish four stages in the life of a legal relationship: its creation, interpretation, the exercise and enforcement of the rights it creates, and the termination of those rights. Good faith has a particular bearing upon each of these stages:⁷²

1. Good faith facilitates the creation of legal relationships. Acquiescence

64. G.A. Res. 2625(XXV) (Oct 24, 1970).

65. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

66. On the accessory character of good faith, with evidence from the case law of the International Court of Justice: Ziegler & Baumgartner, *supra* note 63, 14-5. Disagreeing: Kolb, *supra* note 29, 157-8.

67. Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 404 (1964).

68. Ziegler & Baumgartner, *supra* note 63, 9; in the context of U.S. law: MacMahon, *supra* note 59.

69. *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 647 et seq. (Aug 4, 2011); Kotzur, *supra* note 48, margin nos. 22-24.

70. Anthony D’Amato, *Good faith*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, vol. 2, 599 (Rudolf Bernhardt ed. 1995).

71. Robert Kolb, *Principles as sources of international law (with special reference to good faith)*, 53 NETHERLANDS INTERNATIONAL LAW REVIEW 1, 17-8 (2006).

72. The following draws on the typology provided by Ziegler & Baumgartner, *supra* note 63, 17 et seq.

as a corollary of good faith might lead to the formation of treaty obligations.⁷³

2. Good faith is of paramount importance for the interpretation of treaties pursuant to VCLT Article 31(1),⁷⁴ and for the performance of treaty obligations by virtue of VCLT Article 26, which stipulates that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁷⁵ Several sub-categories can be distinguished:

First, good faith affords the protection of the parties’ *legitimate expectations*. As the life of a treaty or similar legal relationship can extend over a considerable period of time, some circumstances might change. In an investment context, states might therefore deem it necessary to adjust their regulation in ways that affect the investor.⁷⁶ The good faith duty to protect investors’ legitimate expectations defines the limits of possible regulatory changes.⁷⁷ While some tribunals have adopted a rather strict approach, barely allowing for regulatory changes, others have been more context-sensitive.⁷⁸ The WTO regime also protects states parties’ legitimate expectations, but the Appellate Body is cautious to use this term to go beyond explicitly agreed upon rights and duties.⁷⁹

In a similar way, the ICJ has used the good faith principle to contain the discretion of the United Nations with respect to decisions affecting the obligations of its current or future members.⁸⁰

Further, good faith entails duties of information and disclosure of the parties to a legal relationship. The failure of a state to provide due notification to another state might give rise to damages.⁸¹

3. Good faith also governs the exercise and enforcement of a right under international law. At this stage, the good faith principle concerns the way in which disputes are approached and which claims the parties may raise. Concerning the former, the 1982 Manila Declaration on the Peaceful Settlement of International Disputes calls upon states to seek in good faith an early and equitable settlement of all disputes.⁸² Concerning the latter, two concretizations of the good faith principle merit particular attention. One is the principle of *estoppel*, which bars a party to a dispute from contesting its own previous “clear and unequivocal representation.”⁸³ The other one is the prohibition of the *abuse of rights*, a proposition that enjoys overwhelming

73. E.g. Norwegian Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116, 136-7 (Dec 18).

74. *Supra* note 65.

75. *Supra* note 65.

76. Overview: UNCTAD, FAIR AND EQUITABLE TREATMENT. UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 63 et seq. (2012).

77. *Id.*

78. *Id.*

79. Appellate Body Report, *EC – Asbestos*, ¶ 185-6, WT/DS135/AB/R (March 12, 2001), with reference to Art. XXIII:1(b) of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

80. Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57 (May 28).

81. Kolb, *supra* note 71, 20.

82. G.A. Res. 37/10, ¶ 5 (Nov 15, 1982).

83. Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 143-4 (dissenting opinion of Judge Spender (June 15, 1962)).

acceptance in international law.⁸⁴ One might distinguish three sub-categories of potential abuses of right.⁸⁵

First, an abuse of right exists where a claim is being made and an alleged right is being enforced for the sole purpose of causing harm to another.⁸⁶

A second category of abuse of right prohibits the misuse of procedural instruments in ways that run against their purpose (for example, illegitimate forum shopping).⁸⁷ While courts have rarely held that such a situation existed in a given case, they have recognized this sub-category in the abstract.⁸⁸

Third, abuse of right also prohibits the abuse of a party's discretion. This exception relates both to the interpretation and the enforcement of international law. It has found support in the literature⁸⁹ and in case law.⁹⁰

4. Finally, good faith governs the conditions for the termination of a legal relationship. Most significantly in this respect is the *clausula rebus sic stantibus*, which stipulates that a fundamental change of circumstances might lead to a suspension or termination of treaty obligations.⁹¹

On the whole, this overview of the meaning of good faith leads to two conclusions. First, good faith sometimes overlaps with other principles. For example, estoppel could be considered a general principle of law of its own, or a specific example of good faith. *Pacta sunt servanda* is sometimes qualified as a principle deriving from and comprised within the idea of good faith.⁹² Good faith duties of information and consultation correspond to important elements of an (emerging) transparency principle.⁹³ Such overlaps flow from the necessary, inevitable normative openness of the good faith principle.

Second, while the aforementioned categories narrow the meaning of good faith to some extent, its full meaning cannot really be explored in the abstract. It is characteristic of the good faith principle that it is amenable to specific contexts and gains its full significance only in respect of a specific context, such as a specific international regime which the good faith principle is supposed to keep operative and bring in line with basic fairness requirements.⁹⁴

84. Ziegler & Baumgartner, *supra* note 63, 30 et seq.; Kolb, *supra* note 29, 463; Michael Byers, *Abuse of rights: an old principle, a new age*, 47 MCGILL L. J. 389 (2001).

85. Cf. Alexandre Kiss, *Abuse of Rights*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW marginal nos. 4-6 (Rüdiger Wolfrum ed. 2006).

86. A treaty law example of this sub-category which procedurally secures the protection of the states parties' legitimate expectations would be Art. 26.1 of the Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

87. E. De Brabandere, 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims, 3 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 609, 619-20, 630 et seq. (2012); Kiss, *supra* note 85, marginal nos. 12-13.

88. *Id.*

89. Kolb, *supra* note 29, 464-5;

90. Appellate Body Report, *US – Shrimps*, ¶ 158-9, WT/DS58/AB/R (Oct 12, 1998): the abuse of rights doctrine bars states from overreaching in respect of measures for which they claim an exception under Art. XX GATT 1994 (*supra* note 79).

91. Art. 62, VCLT, *supra* note 65. For an early assessment see ERICH KAUFMANN, DAS WESEN DES VÖLKERRECHTS UND DIE CLAUSULA REBUS SIC STANTIBUS (1911).

92. O'Connor, *supra* note 46, 119; Ziegler & Baumgartner, *supra* note 63, 19.

93. Anne Peters, *Transparency as a Global Norm*, in TRANSPARENCY IN INTERNATIONAL LAW 534 (Anne Peters and Andrea Bianchi eds., 2013).

94. Kolb, *supra* note 71, 26-7; MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF

This is why the subsequent part looks at sovereign debt workouts and what it means to keep this regime running.

III. CONTEXT: THE CURRENT LEGAL FRAMEWORK FOR SOVEREIGN DEBT WORKOUTS

In order to concretize the significance of good faith for sovereign debt workouts, an analysis of the ideas underlying the present framework for sovereign debt workouts seems apposite. Broadly speaking, the current legal framework for sovereign debt workouts reflects a recent paradigm change from a private law to a public law understanding of sovereign debt workouts.⁹⁵ For much of the history of the last two centuries, sovereign debt workouts were considered as a matter to be decided only between the debtor and its creditors.⁹⁶ Accordingly, creditors and their debtor state negotiated in a horizontally structured setting, pursuing only their own interests. The solution of debt crises did not appear to be a concern to the international community of states. After the end of the First World War, this paradigm began to shift towards a public law paradigm, which has become effective since about the 1990s.⁹⁷ The new paradigm is characterized by a common global interest in sovereign debt sustainability, which transcends the individual self-interests of creditors and their debtors.⁹⁸

This trend began after the First World War with the efforts of the League of Nations to help countries regain market access.⁹⁹ After the Second World War, sovereign debt workouts began to be negotiated in an increasingly coordinated network of international fora including the International Monetary Fund (IMF), the Paris Club and the London Club, as well as other venues for private creditors.¹⁰⁰ In substance, the workouts facilitated by these institutions pursue a common global interest revolving around the notion of debt sustainability: the IMF defines debt sustainability as a situation where the

THE WTO 23 (2006).

95. For the full story, see Bohoslavsky & Goldmann, *supra* note 1, Part C.

96. HORST FELDMANN, INTERNATIONALE UMSCHULDUNGEN IM 19. UND 20. JAHRHUNDERT. EINE ANALYSE IHRER URSACHEN, TECHNIKEN UND GRUNDPRINZIPIEN 20 et seq., 317 et seq. (1991).

97. On the public law paradigm in global governance, see generally Benedict Kingsbury, et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, in FROM BILATERALISM TO COMMUNITY INTEREST 79 (Ulrich Fastenrath et al. eds., 2011); Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN LAW JOURNAL 1375 (2008); JAN KLABBERS ET AL., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009).

98. On the paradigm change in sovereign debt workouts, see Robert Howse, *Concluding Remarks in the Light of International Law*, in SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING 385-89 (Carlos Espósito et al. eds., 2013); ODETTE LIENAU, RETHINKING SOVEREIGN DEBT. POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE (2014); Armin von Bogdandy & Matthias Goldmann, *Sovereign Debt Restructurings as Exercises of Public Authority: Towards a Decentralized Sovereign Insolvency Law*, in RESPONSIBLE SOVEREIGN LENDING AND BORROWING: THE SEARCH FOR COMMON PRINCIPLES 39-70 (Carlos Espósito et al. eds., 2012).

99. Juan H. Florez & Yann Decorzant, *Public borrowing in harsh times: The League of Nations Loans revisited*, (University of Geneva, Working Paper Series No. 12091, 2012).

100. For ample illustration, see International Monetary Fund, *Sovereign Debt Restructuring - Recent Developments and Implications for the Fund's Legal and Policy Framework*, IMF Policy Paper (April 26, 2013).

capacity of a state allows it with high probability to roll over or reduce its debt in the foreseeable future without a major correction in the balance of income and expenditure.¹⁰¹ This shift has been manifested in many important policy changes since the late 1980s. For example, the IMF initiated a policy of “lending into arrears,” where it provides financial breathing space to states in default of their privately-held bonded debt while they organize a restructuring.¹⁰² In order to promote economic development in debtor states, the Paris Club began granting debt relief with the introduction of its Toronto terms in 1988.¹⁰³ The Brady initiative exchanged nonperforming loans for performing bonds.¹⁰⁴ As such steps turned out to be insufficient, the IMF and the World Bank set up the Heavily Indebted Poor Countries Initiative (HIPC Initiative), which provides for nearly full relief of bilateral and private debt upon the fulfillment of certain conditions.¹⁰⁵ Important international declarations like the Monterrey Consensus epitomize the conviction that debt sustainability is a requirement for development.¹⁰⁶

The global financial meltdown of 2008 and its aftermath have intensified the focus on debt sustainability. This is evident from the recalibration of the IMF’s lending programs,¹⁰⁷ as well as new efforts geared towards the prevention of future debt crises such as the IMF’s fiscal monitor or the UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing (UNCTAD Principles).¹⁰⁸ Beyond the concern for economic development, increasing attention has been drawn to the human rights aspects debt workouts, especially to the effects of adjustment programs.¹⁰⁹ In 2012, the United Nations Human Rights Council adopted principles for bringing adjustment programs in conformity with human rights.¹¹⁰

Arguably, the Sovereign Debt Workout Principles proposed by UNCTAD¹¹¹ and the “Basic Principles on Sovereign Debt Restructuring

101. International Monetary Fund, *Assessing Sustainability*, IMF Policy Paper 4 (May 28, 2002).

102. International Monetary Fund, *IMF Policy on Lending into Arrears to Private Creditors*, IMF Policy Paper (June 14, 1999); International Monetary Fund, *Fund Policy on Lending into Arrears to Private Creditors—Further Consideration of the Good Faith Criterion*, IMF Policy Paper (July 30, 2002).

103. Paris Club, *Toronto Terms* (April 20, 2016, 10:40 AM), <http://www.clubdeparis.org/en/communications/page/toronto-terms>.

104. Manuel Monteagudo, *The Debt Problem: The Baker Plan and the Brady Initiative: A Latin American Perspective*, 28 THE INTERNATIONAL LAWYER 59 (1994).

105. LEONIE F. GUDER, THE ADMINISTRATION OF DEBT RELIEF BY THE INTERNATIONAL FINANCIAL INSTITUTIONS 30 et seq. (2009).

106. Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002, UN Doc. A/CONF.198/11.

107. International Monetary Fund, *To Help Countries Face Crisis, IMF Revamps Its Lending*, IMF SURVEY, March 24, 2009, available at <http://www.imf.org/external/pubs/ft/survey/so/2009/NEW032409A.htm>.

108. UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing (Jan 10, 2012), available at http://unctad.org/en/PublicationsLibrary/gdsddf2012misc1_en.pdf.

109. Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNATIONAL L. AND CONTEMP. PROBS. 47 (1996).

110. Human Rights Council, The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN Doc. A/HRC/RES/20/10 (July 18, 2012).

111. UNCTAD, *supra* note 2.

Processes” adopted by the UN General Assembly in 2015¹¹² epitomize the new paradigm in respect of debt restructuring. The two sets of principles show a remarkable degree of overlap. Both of them consider as determinative the principles of sustainability, transparency, impartiality, legitimacy, and – good faith.¹¹³ The General Assembly added the principles of sovereignty, immunity, equitable treatment, and majority restructuring.¹¹⁴ While sovereignty and immunity are well-entrenched principles of international law, the latter two (equitable treatment and majority restructuring) follow from a combination of good faith and sustainability in the taxonomy proposed by the UNCTAD Sovereign Debt Workout Principles. Thus, the public law approach to sovereign debt workouts assigns a central role to the good faith principle, which one needs to understand in the context of debt sustainability as an objective. The following section spells out this reading.

IV. CONTENT: GOOD FAITH IN SOVEREIGN DEBT WORKOUTS

Good faith has a bearing upon contemporary sovereign debt workouts in at least four respects. This section examines them in chronological order, starting with the beginning of workout negotiations and concluding with holdout litigation. It does not consider whether good faith has any relevance for debtors or creditors when states incur debt.¹¹⁵ The first respect in which good faith facilitates sustainable sovereign debt workouts is the duty to negotiate.¹¹⁶ This is the most obvious candidate since the Basic Principles of the General Assembly mention it explicitly as an emanation of good faith.¹¹⁷ Another respect is the need for the debtor to treat all creditors equitably. It resonates with the good faith duty to protect legitimate expectations.¹¹⁸ The exercise of voting rights¹¹⁹ and the imposition of a standstill on holdout litigation¹²⁰ are constrained by estoppel and, most importantly, the abuse of rights doctrine.¹²¹

In each of these respects, the application of good faith draws on the idea of debt sustainability and the general normative thrust of the public law approach. At the same time, doctrinal constructivism demands that each concretization of the good faith principle finds at least some degree of support in domestic or international practice. From a methodological viewpoint, the concretization of the good faith principle in the context of sovereign debt is therefore not much different from the establishment of a new principle.

112. G.A. Res. 69/319 (Sept 10, 2015).

113. UNCTAD, *supra* note 2, 22-23; UNCTAD, *supra* note 108, principle no. 7.

114. *Supra* note 112.

115. In that respect, one might also speak of fiduciary relationships, see José R. Oyola & Marie Sudreau, *Fiduciary Relations: Legal Framework and Implications for Responsible Sovereign Debt Management*, in SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING 213 (Carlos Espósito, et al. eds., 2013).

116. *Infra*, IV.A.

117. *Supra* note 112.

118. *Infra* IV.B. On the duty to protect legitimate expectations, see *supra* notes 76 to 79 and accompanying text.

119. *Infra* IV.C.

120. *Infra* IV.D.

121. On estoppel and abuse of rights, see *supra* notes 83 to 90.

A. Duty to Negotiate

Good faith imposes a duty on sovereign debtors and their creditors to enter into negotiations once the debt of a state has become unsustainable. In this respect, the Basic Principles on Sovereign Debt Restructuring Processes stipulate that:

[g]ood faith by both the sovereign debtor and all its creditors would entail their engagement in constructive sovereign debt restructuring workout negotiations and other stages of the process with the aim of a prompt and durable re-establishment of debt sustainability and debt servicing, as well as achieving the support of a critical mass of creditors through a constructive dialogue regarding the restructuring terms.¹²²

Similarly, Principle 7 of the UNCTAD Principles establishes the obligation of lenders to engage in good faith negotiations with borrowing states in case their debt becomes unsustainable.¹²³

This concretization of the good faith principle finds confirmation in international and domestic practice. Most notably, since 1999, the IMF has made access to its “lending into arrears” policy conditional upon the debtor state’s good faith efforts to reach a restructuring agreement with its private creditors.¹²⁴ The meaning of good faith in this context was spelled out in a policy paper of 2002.¹²⁵ Accordingly, debtor states need to seek an early dialogue with their private creditors, ideally before they default. They also need to share information on their financial situation and on the restructuring plan, especially on how it would re-establish medium-term debt sustainability, and on the treatment proposed for different kinds of debt. The modalities of such good faith efforts will depend on the complexity and urgency of the case, as well as on the behavior of creditors (in particular on the establishment of representative creditors’ committees).¹²⁶ In 2015, this policy was extended to arrears with official creditors in light of the case of Ukraine.¹²⁷ It refers to the definition of good faith proposed in the 2002 policy paper. Debtors may approach their creditors unilaterally or through multilateral institutions like the Paris Club.¹²⁸ As a consequence, the IMF regime now obliges debtor states to good faith negotiations with any of their creditors.

A similar duty might arise for private creditors as a consequence of the spread of Collective Action Clauses (CACs) in the terms applicable to sovereign bonds. One could characterize the function of CACs as that of an ersatz debt restructuring mechanisms. At the time of their comprehensive introduction, CACs were considered as a less costly, easier to implement, but

122. *Supra* note 112, ¶ 2.

123. *Supra* note 108.

124. International Monetary Fund, *IMF Policy on Lending into Arrears to Private Creditors*, IMF Policy Paper 1 (June 14, 1999).

125. International Monetary Fund, *Fund Policy on Lending into Arrears to Private Creditors—Further Consideration of the Good Faith Criterion*, IMF Policy Paper 9 et seq. (July 30, 2002).

126. *Id.*

127. International Monetary Fund, *Reforming the Fund’s Policy on Non-tolerance of Arrears to Official Creditors*, IMF Policy Paper, Annex I: Description of Proposed Policy (Oct 15, 2015).

128. *Id.*

functionally equivalent alternative to a treaty-based sovereign debt restructuring mechanism.¹²⁹ One might argue that it defeats the purpose of CACs to refuse to participate in debt workout negotiations which have the purpose of finding agreement on terms of treatment that a vote that find the support of the majority. In this respect, it is important to note that in international arbitration, the parties to a dispute have a duty to negotiate before they submit a case to a tribunal.¹³⁰ Similarly, trade law imposes a duty on states to negotiate before imposing unilateral trade restrictions.¹³¹

Several developments on the domestic level corroborate this conclusion. Domestic bankruptcy laws usually oblige the parties to participate in debt restructurings.¹³² Parties need to respect the applicable law and the decisions of competent authorities, which may modify or cancel promissory or property rights.¹³³ Even though these duties are not explicitly considered as an aspect of good faith, they have an analogous function to good faith duties on the international level.¹³⁴ Conversely, the obligatory character of domestic debt restructuring mechanisms supports the view that creditors and debtors have at least a good faith duty to use available international mechanisms.¹³⁵

Further, a duty to negotiate is an important step towards greater sovereign debt sustainability. Sovereign debt sustainability requires smooth workouts.¹³⁶ As there is currently no obligatory insolvency mechanism for states with the possibility of a cram-down on creditors' claims, the only way to achieve a workout is by negotiating a restructuring. Hence, one might conclude debt sustainability corroborates a good faith duty for both creditors and debtors to negotiate a restructuring when sustainability is at risk. Debtor states may not unilaterally repudiate their debt, while creditors need to ensure adequate representation.

A crucial question is whether the foregoing concretization of good faith is precise enough to smoothen debt workout practice.¹³⁷ The following issues seem to require further clarification, which might be achieved through the adoption of soft or hard legal rules:

1. Trigger: What are the triggering factors for the duty to negotiate?

129. Randall Quarles, *Herding Cats: Collective-Action Clauses in Sovereign Debt - The Genesis of the Project to Change the Market Practice in 2001 through 2003*, 73 LAW & CONTEMP. PROBS. 29 (2010).

130. Michael Waibel, *The Diplomatic Channel*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 1093 (James Crawford et al. eds., 2010).

131. Panizzon, *supra* note 94, 81-84.

132. Matthias Goldmann, *Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions. A Comparative Survey* (UNCTAD, Working Paper 39 et seq., Feb 2012), available at http://unctad.org/en/PublicationsLibrary/gdsddf2012misc3_en.pdf.

133. *Id.*

134. On analogous reasoning in the context of the establishment of general principles, see *supra* note 21.

135. von Bogdandy & Goldmann, *supra* note 98, 57.

136. UNCTAD, *supra* note 111, 24.

137. von Bogdandy & Goldmann, *supra* note 98, 57; for the opposite view: Christian Tietje & Matthias Lehmann, *Legal Opinion concerning several points of law relating to public and private international law in connection with enforcing von [sic] claims arising from Argentine sovereign bonds in Germany* 16 (manuscript, on file with the author, 2013).

Certainly, it is up to the debtor state to initiate negotiations.¹³⁸ But what are the requirements? One might consider an IMF Debt Sustainability Analysis sufficient or require an independent assessment.¹³⁹

2. Forum: There are informal negotiating structures generated by practice, such as traditional creditors' committees, or inter-state fora like the Paris Club.¹⁴⁰ One might argue that there is a good faith duty to use them if possible.

3. Who is obliged to make a good faith effort to negotiate? Should this duty be incumbent upon every creditor individually? For practical reasons, retail investors might only be obliged to select representatives. What criteria should be applied for representation?¹⁴¹ Should the debtor be obliged to negotiate with any creditor committee? It would be more in line with good faith to require committees to be representative.¹⁴²

4. Under which conditions may one of them legitimately terminate ongoing negotiations? How much time, how many resources and efforts are creditors or debtors obliged to invest? One might argue that the timeframe should depend on the debtor state's liquidity needs, the dimension and complexity of the debt crisis.

B. Equitable Restructuring Terms

Good faith guarantees creditors' legitimate expectations. While it is in the nature of a sovereign debt workout that creditors will suffer an economic loss of the quantity necessary for reaching sustainable debt levels, creditors can legitimately expect not to be discriminated against in that process or suffer disproportionate losses.¹⁴³ Good faith therefore requires that the debtor treats all creditors equitably and that no group of creditors extracts excessive advantages to the detriment of other groups. Everything else would constitute a disincentive for creditors, making debt workouts more difficult and debt sustainability harder to regain. However, equitable treatment does not amount to identical treatment. There is a wide range of creditors and debt instruments with vastly different risk profiles.¹⁴⁴ It might thus be justified to treat certain creditors differently, like multinational institutions providing interim finance after a certain cut-off date. Short-term trade credits might also be exempted in order to ensure a continuous provision of essential services on the part of the debtor state.¹⁴⁵

These considerations find support in current sovereign debt restructuring practice. A fundamental principle of the Paris Club is that it requires the debtor state to ensure the "comparability of treatment" of all groups of creditors in a

138. UNCTAD, *supra* note 111, 31.

139. On the problems related to indicators of sustainability, see Michael Riegner, *Legal frameworks and general principles for indicators in sovereign debt restructuring*, 41 YALE J. INT'L L. ONLINE, in this issue (2016).

140. Udaibir S. Das, et al. *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts* (International Monetary Fund, Working Paper WP/12/203, 2012).

141. Cf. von Bogdandy & Goldmann, *supra* note 98, 59.

142. Cf. *infra* D.II.

143. On legitimate expectations, see *supra* notes 76 to 79 and accompanying text.

144. Anna Gelpern, *Sovereign Debt. Now What?*, in this issue, part II.

145. UNCTAD, *supra* note 111, 39.

restructuring.¹⁴⁶ As other creditor groups require the same, comparability of treatment becomes a mutual requirement.¹⁴⁷ However, “comparability of treatment” is an imprecise standard that is highly context-specific. The best way to ensure the comparability of treatment might be fair and inclusive negotiations.

Another potential good faith issue is whether and when debt incurred in bad faith should be repudiated. However, despite the remarkable theoretical support which the “odious debt” doctrine has received over time from various angles,¹⁴⁸ in practice it has yet to yield many tangible results.¹⁴⁹ Iraq’s debt is a case in point. After the United States’ 2003 invasion, Iraq received a generous debt restructuring.¹⁵⁰ But the United States and other participating states meticulously avoided recognizing the odious character of the debt concerned.¹⁵¹ This shows that potentially odious debt is normally not excluded *a priori* from workout negotiations. Exceptions are instances of gross corruption or cronyism like the *Tinoco* case, where a British bank deliberately made payments due under a concession agreement to the Costa Rican ruler’s and his brother’s personal accounts, not to the state.¹⁵² Other than that, one should handle the odious debt doctrine with care. Instead, questions related to the odious character of sovereign debt might have an indirect impact on the terms of the debt workout agreement.¹⁵³

C. Exercise of Voting Rights

Good faith does not oblige creditors to cast their vote in favor of a negotiated draft workout or even to accept a majority decision as binding, whether or not the applicable bond includes a collective action clause.¹⁵⁴ Governments and courts have repeatedly emphasized the consensual nature of debt restructurings.¹⁵⁵ Absent this consensual nature, the stipulation of CACs

146. Paris Club, *What Does Comparability of Treatment Mean?* (April 20, 2016, 10:41 AM), <http://www.clubdeparis.org/en/communications/page/what-does-comparability-of-treatment-mean>.

147. Gelpert, *supra* note 144, part I: “cross-conditionality”.

148. Pathbreaking: ALEXANDER N. SACK, *LES EFFETS DES TRANSFORMATIONS DES ETATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIERES* 157 (Sirey. 1927); *see also* Anna Gelpert, *Odious, Not Debt*, 70 *LAW & CONTEMP. PROBS.* 101 (2007); Human Rights Council, *Financial complicity: lending to States engaged in gross human rights violations*, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, U.N. Doc. A/HRC/28/59 (Dec. 22, 2014).

149. Cf. Tai-Heng Cheng, *Renegotiating the odious debt doctrine*, 70 *LAW & CONTEMP. PROBS.* 7, 14 et seq. (2007); SABINE MICHALOWSKI, *UNCONSTITUTIONAL REGIMES AND THE VALIDITY OF SOVEREIGN DEBT* 37 (2007).

150. Christoph G. Paulus, *Debts*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* marginal no. 28 (Rüdiger Wolfrum ed. 2013).

151. *Id.*

152. *Aguilar-Amory and Royal Bank of Canada Claims, U.K. v. Costa Rica*, 18 *AM. J. INT’L L.* 147 (1924).

153. Cf. Robert Howse, *The Concept of Odious Debt in Public International Law*, UNCTAD Discussion Paper 8-9 (2007), *available at* http://unctad.org/en/Docs/osgdp20074_en.pdf, who demonstrates that the concept of odiousness has played an important role in past negotiations.

154. In this sense, however, Tietje & Lehmann, *supra* note 137.

155. Cf. *NML v. Republic of Argentina*, Brief for the United States of America as Amicus Curiae in Support of Reversal, 6 et seq., case 12-105-cv(L) (2nd Cir.) (April 4, 2012).

comprising majority-voting clauses – which appear in many variations regarding the voting procedure, the majorities required, or the lists of “reserved matters” to which the majority voting requirements apply – would be pointless. Thus, there is no general duty to accept majority decisions unless provided for in applicable CACs. Good faith exceptions to the unfettered exercise of contractual voting rights must not lightly be presumed.

In this respect, debtors have been largely unsuccessful in invoking the *clausula rebus sic stantibus* in order to impose a restructuring agreement on creditors. This concretization of good faith implies that fundamental changes of the circumstances which the parties to a contract or a treaty assumed to prevail at the conclusion of the contract or treaty might give rise to a termination or adjustment of contractual duties.¹⁵⁶ However, in almost all major jurisdictions, the *clausula* does not apply to cases of economic necessity, no matter whether the debtor is a state or a private person.¹⁵⁷ Debt crises are not considered as unforeseen, but as the result of the behavior of one or both contracting parties for which they have to bear responsibility.¹⁵⁸ Only unexpected circumstances like war or natural disasters might give rise to a right to adjust the terms of a contract or treaty under the *clausula*.¹⁵⁹

However, it has been argued that good faith does oblige creditors and debtors to contribute to an equitable debt workout and not to frustrate it without legitimate reason.¹⁶⁰ This has three repercussions for the exercise of voting rights. First, conflicts of interest might bar the exercise of voting rights as a matter of good faith. Such conflicts of interest might arise when states buy back some of their bonds either directly or through intermediaries under their control. In the corporate context, treasury stock (or treasury shares) is usually excluded from voting since it is only legally part of capital, not in an economic sense. The European Central Bank (ECB) might face a different conflict of interest when restructuring debt by Eurozone members, as this might be qualified as a circumvention of the prohibition of monetary financing.¹⁶¹ However, one might also consider the participation of the ECB in sovereign debt restructurings as a necessary aspect of its monetary policy: lending money to commercial banks against collateral always involves the risk that the collateral might lose some of its value. Therefore, the ECB should not generally exclude to vote in favor of a sovereign debt restructuring of a Eurozone member.¹⁶²

Second, creditors might be estopped from voting against a restructuring if they did not negotiate in good faith. For example, one might think of creditors

156. *Supra* note 91 and accompanying text.

157. Goldmann, *supra* note 132, 37-8 (based on a sample of 15 jurisdictions from all regions of the world).

158. August Reinisch, *Debt Restructuring and State Responsibility*, in LA DETTE EXTÉRIEURE 537, 570 (Dominique Carreau & Malcolm N. Shaw eds., 1995).

159. Goldmann, *supra* note 132, 37-8.

160. *Supra* D.II.

161. Consolidated Version of the Treaty on the Functioning of the European Union Art. 123, May 9, 2008, 2008 O.J. (C115) 47.

162. *But see* Case C-62/14, Gauweiler et al. v. Deutscher Bundestag, Opinion of Advocate General Cruz Villalón, ¶ 235, 2015 EUR-Lex 62014CJ0062 (Jan. 14, 2015).

making specific representations during the negotiations which tilt the draft workout agreement in a certain way. It seems fair to argue that they should be estopped from voting against the agreement for reasons that contradict their earlier representations, unless the rejection is due to a change in circumstances which it did not and could not foresee doing the negotiations. By contrast, it would be a legitimate reason for a bilateral creditor to reject a negotiated agreement if it cannot get the necessary consent of domestic institutions like the parliament and if it has been made clear during the negotiations that such consent is required.

Third, and most importantly, creditors may not abuse their voting rights in order to extract an advantage from the frustration of a workout. As stated in the implications to Principle 7 of the UNCTAD Principles, creditors who buy debt of troubled states for the purpose of extracting a preferential treatment act abusively. In the same vein, the *amicus curiae* brief submitted by the United States government in the recent *NML v. Argentina* case,¹⁶³ while formally insisting that debt workouts had to be voluntary, stressed that this should not allow individual creditors to thwart an entire workout.¹⁶⁴ The backlash against “vulture funds” shows that this conviction is widespread.¹⁶⁵ However, there is some uncertainty regarding the criteria that qualify the exercise of voting rights as abusive. The UNCTAD Principles refer to the “intent” of the buyer of such debt. This is a very subjective criterion that can hardly be proven unless it is corroborated by objective indiciae. In this respect, in order to establish that the acquisition of certain debt was abusive, one might take into account the following criteria proposed by UNCTAD,¹⁶⁶ some of which were included in the 2015 Belgian anti-vulture legislation:¹⁶⁷

1. the difference between the nominal and market price at the time of the acquisition;
2. the time of the acquisition (e.g. whether a multilateral institution had established an unsustainable level of debt before the purchase);
3. the volume acquired, especially if it amounts to a blocking minority under the applicable collective action clause;
4. most importantly, whether the creditor made a good faith effort to reach a debt workout. This is not the case with creditors whose business model consists in buying distressed debt at discounts in order to litigate for full repayment.

In principle, an abusive exercise of voting rights might not only exist where debt instruments were *acquired* for the sole purpose of extracting a preferential treatment, but also where a creditor buys the debt originally in good faith. The ratio underlying this concretization of the abuse of rights doctrine is the idea that free-riding violates good faith, no matter whether the debt was acquired in good or in bad faith. Even creditors who purchased debt

163. *NML Capital et al. v. Argentina*, 699 F.3d 246, 263 (2d Cir. 2012).

164. Brief for the United States of America, *supra* note 155, 17.

165. Extensively: Bohoslavsky & Goldmann, *supra* note 1, part E.III.

166. UNCTAD, *supra* note 2, 59.

167. Projet de loi relative à la lutte contre les activités des fonds vautours art. 2, Chambre des représentants de Belgique, Doc. 54 1057/005 (July 1, 2015).

instruments in good faith cannot expect sovereign debt to be a risk-free investment or to free-ride in case the risks inherent in these instruments materialize. But the acquisition of distressed debt is usually the best indication of bad faith. Legal certainty would benefit from further legislative clarification of the criteria for the identification of abusive creditor behavior, following the example of the Belgian anti-vulture legislation.

D. Standstill on Holdout Litigation

In line with the foregoing considerations, it can be argued that a general principle of law is emerging according to which the negotiation or implementation of a sovereign debt workout leads to a standstill on abusive holdout litigation.¹⁶⁸ One might consider such a standstill rule as a concretization of good faith, or as a general principle of law of its own.¹⁶⁹ The qualification depends on whether one places the emphasis on deductive or inductive aspects that speak in favor of such a rule. The difference has little practical significance.

Deductively, it seems rather straightforward that a standstill on holdout litigation protecting negotiated sovereign debt workouts would foster sovereign debt sustainability.¹⁷⁰ Inductively, the case for a standstill rule is getting stronger and stronger: in practically all domestic jurisdictions, bankruptcy filings of private entities trigger a stay on enforcement actions.¹⁷¹ Although domestic law might vary in some details from one legal order to the other, in particular as some jurisdictions require prior court approvals, on an abstract level there is a high degree of convergence: authoritative, centralized insolvency proceedings bar individual enforcement against the creditor in default.¹⁷² This rule originating in private sector insolvencies is increasingly applied to defaults of public entities at the sub-national level. Thus, under Chapter 9 of Title 11 of the U.S. Code, automatic stay is applicable in bankruptcy procedures against municipalities.¹⁷³ Other states that have enacted bankruptcy legislation for sub-national entities include Brazil, Bulgaria, Hungary, Romania, and South Africa.¹⁷⁴ It routinely includes some form of stay

168. In this sense: Rudolf Dolzer, *Staatliche Zahlungsunfähigkeit: Zum Begriff und zu den Rechtsfolgen im Völkerrecht*, in *DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG* (FESTSCHRIFT PARTSCH) 531, 546-7 (Jürgen Jekewitz et al. eds., 1989); recognizing standstill as a general principle of law *in statu nascendi*: Schier, *supra* note 8, 160, 163.

169. Cf. Matthias Goldmann, *Necessity and Feasibility of a Standstill Rule for Sovereign Debt Workouts*, UNCTAD Working Paper (Jan 23, 2014), available at http://unctad.org/en/PublicationsLibrary/gdsddf2014misc4_en.pdf.

170. *Id.*

171. International Law Association Sovereign Insolvency Study Group, *State Insolvency: Options for the Way Forward*, 23 (2010); Christopher G. Paulus, *A Statutory Procedure for Restructuring Debts of Sovereign States*, 49 *RECHT DER INTERNATIONALEN WIRTSCHAFT* 401, 404 (2003); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 *AM. J. INT'L L.* 711, 750 (2007).

172. Goldmann, *supra* note 132; this has been recognized by international tribunals, cf. *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct 12, 2005).

173. 11 U.S.C., §§ 901(a), 362.

174. Comprehensively: Lili Liu & Michael Waibel, *Subnational Insolvency: Cross-Country Experiences and Lessons* 26 (World Bank, Policy Research Working Paper No. 4496, 2008).

on enforcement.¹⁷⁵

Concerning sovereign default, there are encouraging signs in state practice for the recognition of a standstill rule in order to protect the integrity of a sovereign debt workout and related negotiations. An early example is a 1962 judgment of the German Federal Constitutional Court concerning Germany's post-war default, in which it recognized that sovereign defaults justified highly intrusive measures including the legislative cancellation of debt without compensation.¹⁷⁶ The court cited the high significance of the state for politics and the economy in general and the ensuing impossibility to liquidate all of the state's assets.¹⁷⁷ In 1984, the United States federal Court of Appeals for the Second Circuit ruled in favour of Costa Rica against a holdout creditor.¹⁷⁸ The court held that Costa Rica seemed to be negotiating in good faith at the time. When the restructuring later amounted to a rather unilateral suspension of payments, the first ruling was reversed.¹⁷⁹ A year later, the New York state Supreme Court recognized the principle that proceedings should be stayed during a workout in a suit against Venezuela, basing it on the duty of the plaintiff to respect creditor solidarity.¹⁸⁰

A more recent example for this line of reasoning is provided by the Second Circuit's 2005 summary order in *EM Ltd. v. Argentina* and *NML Capital v. Argentina*.¹⁸¹ Although this order formally lacks precedential value,¹⁸² it has been widely cited for the remarkable considerations of the court, which decided that "the District Court acted well within its authority to vacate the remedies in order to avoid a substantial risk to the successful conclusion of the debt restructuring. That restructuring is obviously of critical importance to the economic health of a nation."¹⁸³ At around the same time, the Italian Corte di Cassazione recognized that the need to safeguard essential public interests and human rights justified extending immunity over Argentina's emergency laws, even though it had waived its immunity for the bonds in dispute.¹⁸⁴ The underlying rationale is the same, even though the court presents it as a combination of arguments relating to necessity and immunity.¹⁸⁵

The Second Circuit's 2011 decision *CVI v. Argentina* seems to endorse the court's earlier line of reasoning, although only indirectly.¹⁸⁶ In this case, the court upheld the attachments received by CVI on Argentina's reversionary

175. *Id.*

176. Bundesverfassungsgericht [Federal Constitutional Court], Nov 14, 1962, 15 BVerfGE 126.

177. *Id.*, at 140-144.

178. *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 733 F.2d 23 (2d Cir. 1984).

179. *Allied Bank Int'l vs. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985); see also Rogoff & Zettelmeyer, *supra* note 4, 475.

180. *Crédit français S.A. v. Sociedad financiera de Comercio*, 490 N.Y.S.2d 670 (N.Y.S.C. 1985); Dolzer, *supra* note 168, 539.

181. *EM Ltd. v. Argentina; NML Capital v. Argentina*, 05-1525-cv et al., Summary Order (May 13, 2005), 2d Cir. R. 32.1.

182. *Id.*

183. *Id.*

184. Corte di Cassazione, Sezione Unite Civile, n. 11225 (May 27, 2005), 88 RIVISTA DI DIRITTO INTERNAZIONALE (2005) 856 (Ital.); see also Waibel, *supra* note 171, 757.

185. Corte di Cassazione, *supra* note 184.

186. *Capital Ventures International v. Republic of Argentina*, 652 F.3d 266 (2d Cir. 2011).

interest in collateral pledged for Brady bonds (i.e. when exchanging Brady bonds, Argentina would receive the pledged collateral, which CVI would then have “confiscated” pursuant to the attachment orders).¹⁸⁷ However, the court based its decision primarily on the argument that the attachments concerned only a relatively small sum (USD 100m), while the volumes of the planned restructuring and thus of the expected reversionary interest were much larger.¹⁸⁸ Therefore, the court concluded that the attachment would not obstruct Argentina’s finances.¹⁸⁹ If one reverses this argument, attachments could principally be vacated in case they obstruct a sovereign debt workout.¹⁹⁰ In *NML v. Argentina*, the Second Circuit proved to be very creditor-friendly by upholding the District Court’s injunction obliging banks acting for Argentina to make ratable payments.¹⁹¹ But at the same time, it emphasized that this did not threaten the implementation of Argentina’s restructuring plan and would not trigger a new financial and economic crisis. At least in theory, the court seemed concerned that its decisions might obstruct sovereign debt workouts, a view is shared by the United States government: In its amicus brief submitted in that case, while formally insisting on the voluntary character of sovereign debt workouts, the government stressed that this should not allow individual creditors to thwart an entire workout.¹⁹² This represents a remarkable shift of opinion over the last years. In *Pravin Banker v. Banco Popular del Peru*, decided in 1997 while Peru was negotiating an exchange of defaulted sovereign debt into Brady bonds, the Second Circuit only declined to stay the case as a matter of comity because the United States government had considered participation in a Brady plan restructuring as a strictly voluntary matter.¹⁹³

Further, legislation like the Belgian Anti-vulture Act¹⁹⁴ or the 2010 United Kingdom Debt Relief (Developing Countries) Act¹⁹⁵ prevent holdout strategies. The latter reduces claims of private creditors against countries participating in the HIPC proportionate to the relief granted to them under the initiative.¹⁹⁶ Although it does not impose standstill in a technical sense, it serves the purpose of ensuring the orderly resolution of debt crises through international negotiations while preserving the equality of creditors.

The trend towards secure negotiated settlements and prevent judicial interference does not stop at the international level. Some modern bilateral

187. *Id.*

188. *Id.*

189. *Id.*

190. *See also* *Capital Ventures International v. Argentina*, 443 F.3d 214, 217 (2d Cir. 2006), regarding the risk that the order of attachment might create “confusion” among the creditors participating in the exchange offer (obiter dictum): “[W]e can conceive, perhaps, of a situation in which an order of attachment might be against the public interest for some reason not addressed in the CPLR (statute).”

191. *NML Capital et al. v. Argentina*, 699 F.3d 246, 263 (2d Cir. 2012).

192. *Supra* note 155.

193. *Pravin Banker v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997); *see also* Ugo Panizza, et al, *The Economics and Law of Sovereign Debt and Default*, 47 *JOURNAL OF ECONOMIC LITERATURE* 651, 659 (2009).

194. *Supra* note 167 and accompanying text.

195. United Kingdom Debt Relief (Developing Countries) Act, 2009-2010, H.C. Bill [22], available at <http://www.legislation.gov.uk/ukpga/2010/22/contents>.

196. *Id.*, sec. 3.

investment treaties (BITs) bar access to investment arbitration if a negotiated workout has received the required majority.¹⁹⁷ Even in the absence of such a clause in the relevant BIT, the arbitral tribunal in *Poštová banka* concluded that sovereign debt did not fall under the definition of investment contained in that BIT because of the social and political significance of sovereign debt.¹⁹⁸

Certainly, the mentioned developments represent only part of the picture. The trend is not uniform. Particularly infamous is the decision of a Belgian court in *Elliot Associates v. Peru*, the first decision recognizing a right of creditors to ratable payments.¹⁹⁹ U.S. judges have rendered dozens of judgments in favour of vulture funds attempting to reclaim the nominal amount of their debt against Argentina in which they did not recognize that Argentina had a legitimate interest to have the proceedings stayed until the conclusion of its restructuring.²⁰⁰ However, the cases against Argentina in essence seemed to rotate about diverging views as to whether Argentina itself had acted in good faith – which a state invoking good faith indeed should do.²⁰¹ In a recent case before the German Federal Court of Justice (FCJ), a standstill rule based on good faith was explicitly rejected.²⁰² In its decision, the FCJ relied entirely on a 2007 judgment of the German Federal Constitutional Court (FCC).²⁰³ The Court of Justice indeed claimed not to add anything to the latter judgment. Otherwise it would have had to submit the case to the FCC, the sole court competent for the ascertainment of general principles of law in Germany.²⁰⁴ However, the 2007 judgment did not even mention standstill or good faith as general principles of law. It was exclusively concerned with ascertaining whether Argentina could invoke necessity as a defence originating in customary international law. The FCJ got around this by overstating and taking out of context one particular sentence of the FCC's 2007 judgment which reiterated the obvious, namely that there was no (statutory) international regime for sovereign debt restructuring. A suit has been filed with the FCC for reasons of the FCJ's failure to submit the case to the FCC, but the outcome is uncertain given Argentina's attempts to reach a settlement of its remaining old debt.

197. E.g. Treaty Between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Annex G (Oct 25, 2004), 44 I.L.M. 268 (2005).

198. *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, ¶ 324 et seq. (April 9, 2015).

199. *Elliott Assocs., L.P.*, General Docket No. 2000/QR/92, Cour d'Appel [Court of Appeal] Bruxelles, 8ème ch., Sept. 26, 2000 (Belg.).

200. E.g. *EM Ltd. v. Argentina*, 720 F.Supp.2d 273 (S.D.N.Y. 2010); see also the list of judgments against Argentina, totalling more than \$500m, in *Aurelius Capital Partners et al. v. Argentina*, 07-Civ-2715(TPG), Restraining Order (Jan. 15, 2010). But see in this as well as 11 other cases the order of the same court lifting an earlier restraining order concerning funds of the Argentinean central bank held at the Federal Reserve Bank of New York in order to enforce judgments of a total worth of over \$2.2bn, see *EM Ltd. v. Argentina*, 865 F.Supp.2d 415 (S.D.N.Y. 2012).

201. On Argentina's efforts to find a negotiated settlement, see J. F. HORNBECK, CONG. RESEARCH SERV., R41029, *Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts"* (2010).

202. Bundesgerichtshof [Federal Court of Justice], Feb 2, 2015, *Neue Juristische Wochenschrift* 2328, 2015 (Ger.).

203. Bundesverfassungsgericht [Federal Constitutional Court], May 8, 2007, 118 BVerfGE 124 (Ger.).

204. Art. 100(2), Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [Basic Law], May 23, 1949, BGBl. I (Ger.).

For the above reasons, it seems possible to identify a – normatively well-founded – conviction across legal orders that sovereign debt workouts must not be jeopardized by holdout litigation. All requirements for the emergence of a general principle of law, whether as a concretization of good faith or a separate principle, seem to be met.²⁰⁵

V. SPECIFYING AND IMPLEMENTING GOOD FAITH THROUGH SOFT AND HARD LAW

This Article has revealed so far that good faith as a general principle of law has great potential for promoting sovereign debt sustainability and smoothening sovereign debt workouts. It therefore lends itself as another key principle of the incremental approach to sovereign debt restructuring, the subject of this special issue.

However, in order to make these principles operational, it might be advisable to set out some issues in further detail, possibly in the form of a soft law instrument. These issues include the conditions necessary for creditors and debtors to meet their good faith duty to negotiate, or the criteria which make holdout litigation an abuse of rights. In respect of the latter, the Belgian²⁰⁶ and UK²⁰⁷ legislation against holdout creditors provide highly relevant guidance that might inspire an international model law. The Basic Principles on Sovereign Debt Restructuring Processes adopted by the UN General Assembly²⁰⁸ also constitute a great step in that they provide a principled recognition of the concretizations of good faith that are the subject of this paper. However, they might lack the granularity that is desirable to ensure legal certainty. A soft law instrument proposing some more detailed rules might serve as a blueprint for domestic legislation.

Such legislation is also desirable because general principles of law are, first of all, sources of international law. States need to comply with them as a matter of international law. Their applicability in domestic legal orders depends on the status of international law in the latter. Some constitutions incorporate general principles into the domestic legal order, either directly by cross-referencing,²⁰⁹ or indirectly, e.g. as an aspect of comity.²¹⁰ Other countries need to enact appropriate legislation. The incremental approach is thus much more than a matter of general principles alone. It requires the combined efforts of various actors and diverse instruments on all levels of government.

205. According to the taxonomy proposed in Matthias Goldmann, *On the Comparative Foundations of Principles in International Law: The Move Towards Rules and Transparency in Fiscal Policy as Examples*, in SOVEREIGN FINANCING AND INTERNATIONAL LAW 113 (Carlos Espósito, et al. eds., 2013), this principle would be characterized as a guiding principle about to mature to a general principle, if not as an existing general principle.

206. *Supra* note 167.

207. *Supra* note 195.

208. *Supra* note 112.

209. E.g. Art. 25, Basic Law, *supra* note 204.

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