Policy Implication of *Poštová* Tribunal's Jurisdiction over Sovereign Bonds: Bankruptcy Cram-down and ICSID Arbitration

Yanying Li[1]

Abstract: In May 2013, several bondholders who refused to participate in the 2012 Greek debt restructuring initiated arbitration at ICSID against Greece under bilateral investment treaties. These bondholders contend that they were forced to exchange their bonds for new securities of substantially lesser value and that the forcible exchange was carried out through the newly adopted Greek Bondholder Act that retroactively and unilaterally amended the bond terms by inserting a so-called "Collective Action Clause" ("CAC') into outstanding Greek-law bonds. This Paper analyses the nature of the Greek Bondholder Act and explores the policy implication of the *Poštová* tribunal's jurisdiction over sovereign bonds. Importantly, it argues that what the Greek Bondholder Act introduced was not an ordinary CAC but something similar to cram-down procedures in bankruptcy law; as a result, in the absence of any bankruptcy rules for States and in order to ensure minimum creditor protection, ICSID arbitration should serve as the forum to develop a safeguard provision for cram-downs employed in sovereign debt restructuring similar to those in the U.S. municipality bankruptcy law.

[1] Yanying Li is a Ph.D candidate funded by the Netherlands Organization for Scientific Research (NWO) under the supervision of Professor Bob Wessels at the Leiden Law School, University of Leiden, The Netherlands, and Assistant Legal Counsel at the Permanent Court of Arbitration in The Hague. The opinions expressed in this paper are the personal views of the author.

I. Introduction

Following the Greek debt restructuring in spring 2012, *Poštová* Banka A.S. (a Slovak entity) and its shareholder Istrokapital S.E. (a Cypriot entity) initiated arbitration against Greece in May 2013 at the International Centre for Settlement of Investment Disputes ("ICSID"), pursuant to the bilateral investment treaties concluded between Greece and Slovakia as well as Greece and Cyprus.[2] The claimants contend that they purchased Greek bonds in 2010 and were forced to exchange their bonds for "new securities of substantially lesser value".[3] They allege that the forcible bond exchange was carried out through the newly adopted Greek Bondholder Act that "retroactively and unilaterally" amended the bond terms by inserting a so-called "Collective Action Clause" ("CAC') into outstanding Greek-law bonds.[4] According to the claimants, the CAC allows "the imposition of new terms upon bondholders against their consent if a supermajority of other bondholders consent."[5] This case is currently pending and the parties agreed to bifurcate jurisdiction from the merits.[6] They further agreed that a hearing on jurisdiction would take place in July 2014 and a decision would be issued by November 15, 2014.[7]

This paper explores the policy implication of the *Poštová* tribunal's jurisdiction over sovereign bonds. It should be mentioned at the outset that *Poštová* is not the first ICSID arbitration that involves sovereign bonds. Between 2006 and 2008, three groups of bondholders have brought arbitrations at ICSID against Argentina following the debt crisis.[8] All three cases are still pending and two of them (i.e. *Abaclat* and *Ambiente*) have

---

2 *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8), available at official website of the International Centre for Settlement of Investment Disputes, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPendin (last visited 26 Feb 2014).

3 Investment Arbitration Reporter on "Bondholders' claim against Greece is registered at ICSID, as mandatory wait-period expires on another threatened arbitration", available at http://www.iareporter.com/articles/20130530_2 (last visited 26 Feb 2014).

4 *Ibid.*

5 *Ibid.*

6 *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, Procedural Order No.1 dated 20 December 2013, para. 14.1.

7 *Ibid.*

8 *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5); *Giovanni Alemanni and others v. Argentine Republic* (ICSID Case No. ARB/07/8); and *Giordano Alpi and others v. Argentine Republic* (ICSID Case No. ARB/08/9). See ICSID official website, available at

come to the stage where the tribunal issued a decision on jurisdiction and admissibility upholding jurisdiction over the claims regarding sovereign bonds. Only one of these decisions (i.e. *Abaclat*) addressed the policy implication of ICSID tribunals' jurisdiction over sovereign bonds, as the respondent in the other case did not raise the issue.[9] In *Abaclat*, the majority found that policy reasons are for States to take into account when negotiating investment treaties but not for the tribunal to consider when deciding a case, stating that "[w]hether or not ICSID is the best way to deal with a dispute relating to these bonds and security entitlements in the context of foreign debt restructuring is irrelevant."[10] On the other hand, the dissenting opinion provides that "the present case raises, in an acute manner, an international public policy issue about the workability of future sovereign debt restructuring, should ICSID tribunals intervene in sovereign debt disputes."[11]

Interestingly, what happened during the Greek debt restructuring and the policy considerations facing the *Poštová* tribunal differ significantly from the situation in *Abaclat*. Given that there was no CAC in the Argentina bonds and the claimants in *Abaclat* simply refused to participate in the restructuring and were in no way forced to accept the offer, the unspoken policy choices for the *Abaclat* tribunal were either a result that potentially threatens the workability of future sovereign debt restructuring or a result that gives bondholders, who have the possibility to go to national courts, an addition channel for remedy, thereby ensuring better creditor protection.[12] By contrast, the policy

---

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPendin (last visited 26 Feb 2014).

9 *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility dated 8 February 2013.

10 *Abaclat and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility of 4 August 2011, para. 550.

11 *Abaclat and others v. Argentine Republic*, Georges Abi-Saab's Dissenting Opinion of 28 October 2011, para. 271.

12 Outside the courtroom, policy implications of investment treaty tribunals' jurisdiction over sovereign bonds have been discussed quite extensively. Arguments in favor of ICSID's involvement include a better creditor protection and a healthier sovereign debt market. Opposite views concern the degree of the involvement of creditor governments and international institutions at the time of crisis, the competence of any international tribunal to determine debt-related issues, as well as creditors' incentives to hold out thereby disrupting the debt restructuring negotiations. See E. Norton, "International Investment Arbitration and the European Debt Crisis", 13 Chi. J. Int'l L. 291 (2012), pp. 6-7; F. Suescun de Roa, "Investor-State Arbitration in Sovereign Debt Restructuring: The Role of Holdouts", Journal of International Arbitration, (Vol. 30 Issue 2, 2013) pp. 131 – 154; M. Waibel,

choices are different in the context of CACs. It has been argued that the fact that ICSID tribunals hear treaty claims concerning sovereign bonds despite the legitimate exercise of CACs would make CACs a must less effective tool in binding non-participating bondholders, thereby creating a significant legal gap in the international community's collective action policy.[13]

This paper addresses the same issue from the prospective of non-participating bondholders, and argues that, if the *Poštová* tribunal refuses to hear treaty claims concerning sovereign bonds, it would create a significant gap concerning creditor protection under the current regime of sovereign debt restructuring. The paper is structured as follows: Part II gives an overview of the Greek debt restructuring; Part III analyses the nature of the Greek Bondholder Act adopted by the Greek legislature in order to facilitate the restructuring process, and finds that what the Act introduced was not an ordinary CAC but something similar to cram-down procedures in bankruptcy law; Part IV describes the safeguard provision for cram-down procedures in bankruptcy law, which includes the prohibition of unfair discrimination and the fair and equitable treatment principle; and Part V argues that ICSID arbitration is the best forum to develop a safeguard provision for cram-downs in the context of sovereign debt restructuring, due to the similarities between the safeguard provision for cram-down procedures in bankruptcy law and the fair and equitable treatment principle under investment treaties. Part VI concludes this paper.

II. Greek Debt Restructuring

In February 2012, Greece announced a plan to restructure over €200 billion in privately held Greek bonds. The restructuring offer was directed at the holders of all sovereign bonds issued prior to 2012 (total face value of €195.7 billion) and 36

Sovereign Defaults Before International Courts and Tribunals (Cambridge 2011), pp. 317, 323, 326; K. Gallagher, "The New Vulture Culture: Sovereign Debt Restructuring and Trade and In- vestment Treaties", Working Paper No 02/2011 (International Development Economics Associates (IDEAs) 2011), p. 10; M. Waibel, "Opening Pandora's Box: Sovereign Bonds in International Arbitration", 101 Am J Intl L 711, 713 (2007); UNCTAD, "Sovereign Debt Restructuring and International Investment Agreements", IIA Issues Note No.2 of July 2011, p. 8.

[13] M. Waibel, "Opening Pandora's Box: Sovereign Bonds in International Arbitration", *supra* note 12, p. 736.

sovereign-guaranteed bonds issued by public enterprises (total face value of just under €10 billion).[14] These holders were offered a swap of their old bonds with a package of new ones comprised of (1) English-law bonds maturing between 2023 and 2042 issued by Greece with a face value equal to 31.5% of the face amount of the old bonds, (2) English-law EFSF (European Financial Stability Facility) notes with a maturity date of one or two year from the date of closure of the restructuring with a face value equal to 15% of the face amount of the old bonds, and (3) detachable GDP-linked securities issued by Greece under English law having a notional amount equal to the face amount of each holder's new bonds.[15]

Among all targeted bonds, nearly 91 % of the sovereign bonds had been issued under the Greek law, and the guarantee bonds were about evenly divided foreign and Greek law issues.[16] While the English-law bonds contain the Collective Action Clauses that enable a qualified majority to bind all holders in the same series to a change of the payment terms, the Greek-law sovereign bonds do not contain any CAC.[17] On 23 February 2012, the Greek legislature introduced a collective action procedure by passing the Greek Bondholder Act (4050/12), under which the proposed amendment of bond terms will bind holders of all Greek-law bonds, "if at least two thirds by face amount of a quorum of these bonds, voting collectively without distinction by series, approve the proposed amendments."[18] It further provides that "[o]ne half by face amount of all the Republic's bonds subject to the collective action procedure will constitute a quorum for these purposes."[19]

On 9 March 2012, the Greek Ministry of Finance announced that out of the €177.3 billion Greek-law bonds, €146.2 billion had accepted the exchange offer and proposed amendment, €5.9 billion had consented to the amendment without tendering

[14] J. Zettelmeyer, C. Trebesch and M. Gulati, "The Greek Debt Exchange: An Autopsy", Peterson Institute for International Economics Working Paper No. 2013-13-8, p.5, available at SSRN: http://ssrn.com/abstract=2144932 (last visited 26 Feb 2014).

[15] Hellenic Republic Ministry of Finance, Press Release dated 24 Feb 2012.

[16] J. Zettelmeyer, C. Trebesch and M. Gulati, *supra* note 14.

[17] J. Zettelmeyer, C. Trebesch and M. Gulati, *supra* note 14, pp.6-7.

[18] Hellenic Republic Ministry of Finance, *supra* note 15.

[19] *Ibid.*

their bonds, and €9.3 billion had voted against the amendment.[20] Thus, the quorum and voting thresholds for amending the Greek-law bonds under the Greek Bondholder Act were easily met. Through the implementation of the Act, the proposed amendment became binding on all holders of Greek-law bonds.[21] While €6.4 out of €6.7 billion in Greek-law guaranteed debt was tendered for exchange, only €13.1 out of €21.6 billion foreign-law bonds had accepted the offer and consented to the proposed amendment.[22] Overall, Greece restructured approximately €199 billion (96.9%) of the total face amount of bonds eligible to participant in the exchange.[23]

III. Hidden Nature of the Greek Bondholder Act

This section analyses the nature of the Greek Bondholder Act, which, according to the claimants in *Poštová*, has retroactively and unilaterally amended the bond terms by inserting a CAC into outstanding Greek bonds. Is the Act in fact a CAC, an aggregated CAC or something else?

Article 4 of the Greek Bondholder Act (Law No. 4050/2012) provides as follows:

> "A Bondholder's participation in the procedure is made with the whole or part of the principal amount outstanding of eligible titles it holds, as specified in the invitation. For the modification of the eligible titles, it is required the participation in the procedure (quorum) of at least one half (1/2) of the aggregate principle amount outstanding of all eligible titles that are specified in the relevant invitation ("participating principal amount") and a qualified majority in favour of the modification of at least two thirds (2/3) of the participating capital."[24]

A. Greek Bondholder Act = CAC?

As the name suggests, the CAC enables a qualified majority of bondholders to bind all holders of the same bond issuance to a change of the contract terms, including

20 Hellenic Republic Ministry of Finance, Press Release dated 9 Mar 2012.

21 *Ibid.*

22 *Ibid.*

23 Hellenic Republic Ministry of Finance, Press Release dated 25 Apr 2012.

24 An unofficial English translation of Law No. 4050/2012 is available at http://www.iiiglobal.org/component/jdownloads/finish/625/5899.html (last visited 26 Feb 2014).

the maturity date as well as the amount of interest and principal.[25] It began to appear in bonds governed by English law in the 1980s.[26] In the wake of the Mexican crisis in 1995 and the Argentine default in 2001, the IMF began pushing for the adoption of CACs in sovereign bonds governed by New York law to facilitate the restructuring of sovereign bonds held by numerous and largely anonymous creditors.[27] Countries such as Mexico, Brazil, Belize, Guatemala, Venezuela, Uruguay were among the first group to include CAC in their New York law bonds.[28]

In 2004, following on the shift to CACs in the New York market, the International Primary Market Association (IPMA) promulgated a set of recommended CACs for sovereign bonds issued under English-law.[29] Paragraph (e) of the recommended CACs provides that:

> "*Modifications*: Subject as provided in paragraph (d) (*Matters requiring unanimity*), any modification of any provision of these Conditions may be made if approved by an Extraordinary Resolution or a Written Resolution. In these Conditions, "**Extraordinary Resolution**" means a resolution passed at a meeting of Noteholders duly convened and held in accordance with the Fiscal Agency Agreement by a majority of at least:

---

25 Strictly speaking, the term CACs include two types of clauses: (1) "majority restructuring" provisions, which enable a qualified majority of bondholders to bind all holders to the same bond issuance to the financial terms of a restructuring; and (2) "majority enforcement" provisions, which allows a qualified majority of bondholders to limit the ability of a minority bondholders to enforce their rights following a default. The former type, "majority restructuring" provisions, is most frequently employed in practice. See IMF, "Collective Action Clauses in Sovereign Bond Contracts –Encouraging Greater Use" (Prepared by the Policy Development and Review, International Capital Markets and Legal Departments), Jun. 2002, available at http://www.imf.org/external/np/psi/2002/eng/060602a.htm (last visited 26 Feb 2014). The typical threshold for a qualified majority is 75 %. See M. Bradley & M. Gulati, "Collective Action Clauses for the Eurozone: An Empirical Analysis", March 2013, p. 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948534 (last visited 26 Feb 2014).

26 M. Weidemaier & M. Gulati, "How Markets Work: The Lawyer's Version", July 2011, pp. 5, 16-17. For a discussion of old English CACs, see A. Gelpem & M. Gulati, "Foreword: Of Lawyers, Leaders, and Returning Riddles in Sovereign Debt", in: A Modern Legal History of Sovereign Debt, Law and Contemporary Problems, Vol.73, No. 4, Fall 2010, at viii-ix.

27 IMF, *supra* note 25; M. Bradley & M. Gulati, *supra* note 25, pp. 6 & 10; M. Weidemaier & M. Gulati, "A People's History of Collective Action Clauses" (2014), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5387&context=faculty_scholarship (last visited 26 Feb 2014).

28 A. Haldane, A. Penalver, V. Saporta & H. S. Shin, "Optimal Collective Action Clause Thresholds", Bank of England Working Paper No. 249, 2005, pp. 7 & 9.

29 International Primary Market Association, "Standard Collective Action Clauses (CACs) for the Terms and Conditions of Sovereign Notes", (2004). The name has since been changed to the International Credit Market Association, available at https://www.icmagroup.org/ICMAGroup/files/3c/3cc80d90-da99-4562-8ef2- f604a8e5963e.PDF (last visited 26 Feb 2014).

> (i) in the case of a Reserved Matter, 75 per cent. of the aggregate principal amount of the outstanding Notes; or
> (ii) in the case of a matter other than a Reserved Matter, 66 2/3 per cent. of the aggregate principal amount of the outstanding Notes which are represented at that meeting.
>
> Any Extraordinary Resolution duly passed at any such meeting shall be binding on all the Noteholders, whether present or not and whether they voted in favour or not, and all Couponholders."[30]

As stated in the recommended CAC, the decision of a qualified majority binds "all the Noteholders" of the same bond series under such a collective action mechanism. To phrase it in another way, ordinary CACs bind non-participating bondholders only on a series-by-series basis.[31] Accordingly, the author argues that this collective action mechanism differs from the Greek Bondholder Act, in that the operation of the latter involves the voting rights of holders of "all eligible titles" and requires a qualified majority of "the aggregate principle amount outstanding of all eligible titles"[32] to trigger the collective action mechanism. In case of any doubt concerning the interpretation of the Greek Bondholder Act, the press release issued by the Greek Ministry of Finance unambiguously stated that the proposed amendment of bond terms will bind holders of all Greek-law bonds, "if at least two thirds by face amount of a quorum of these bonds, voting collectively without distinction by series, approve the proposed amendments."[33] It is clear from the term "collectively without distinction by series" that the collective action mechanism under the Act does not operate on a series-by-series basis.

30 *Ibid.*, pp.2-3.

31 Lee Buchheit et al., "Sovereign Bonds and the Collective Will," 51 Emory L. J. 1317 (Fall 2002), p.22; C. Schmerler, "Restructuring Sovereign Debt", in: The Law of International Insolvencies and Debt Restructuring (2006), pp. 461-462.

32 Greek Bondholder Act Article 4, *supra* note 24.

33 Hellenic Republic Ministry of Finance, *supra* note 15.

B. Greek Bondholder Act = Aggregated CAC?

In light of the fact that the term "aggregate principle amount" has been employed in Article 4 of the Greek Bondholder Act, it would not be unreasonable to assume that the Act is in fact an aggregated CAC, that is, a CAC with an aggregation clause.

To date, four countries have included aggregation clauses in their sovereign bonds —Argentina, the Dominican Republic, Greece and Uruguay.[34] These aggregation clauses contain a two-tier voting system: (1) 75 (Greece) or 85 (Argentina, the Dominican Republic and Uruguay) percent of the aggregated outstanding principal of *all* series to be affected, and (2) $66^{2/3}$ percent of the outstanding principal of *each* individual series to be affected.[35] To give an example, the aggregated CAC contained in the Uruguay Prospectus Supplement- Offer to Exchange dated April 10, 2003 provides as follows:

> "If Uruguay proposes any reserve matter modification to the terms and conditions of the debt securities of two or more series, or to the indenture insofar as it affects the debt securities of two or more series, in either case as part of a single transaction, Uruguay may elect to proceed pursuant to provisions of the indenture providing that such modifications may be made, and future compliance therewith may be waived, for each affected series if made with the consent of Uruguay and
>
> - the holders of not less than 85 % in aggregate principal amount of the outstanding debt securities of *all* series affected by that modification (taken in aggregate), and
> - the holders of not less than $66^{2/3}$ % in aggregate principal amount of the outstanding debt securities of *that* series (taken individually)."[36]

More recently, the Treaty Establishing the European Stability Mechanism ("ESM") also forced the inclusion of CACs, as of 1 January 2013, in all euro-area

[34] IMF, "Sovereign Debt Restructuring –Recent Developments and Implications for the Fund's Legal and Policy Framework", 26 April 2013, para. 40, available at http://www.imf.org/external/np/pp/eng/2013/042613.pdf (last visited 26 Feb 2014); Cleary Gottlieb Steen & Hamilton LLP, "Collective Action Clauses with Aggregation Mechanisms", 02/11/2011.

[35] IMF, *supra* note 34.

[36] Cleary Gottlieb Steen & Hamilton LLP, *supra* note 34.

government securities with maturity above one year.[37] The model CAC prepared by the EU Economic and Financial Committee Sub-Committee on EU Sovereign Debt Markets includes an aggregation feature—referred to as cross-series modification—that permits changes to bind more than one series of bonds.[38] Compared with the Uruguay aggregated CAC, the Eurozone model adopts a lower threshold (i.e. 75%) to calculate the affirmative vote of the aggregate principle amount of the outstanding debt securities of *all* the series that would be affected by the proposed modification.[39]

What is exactly an aggregated CAC or a cross-series modification? The EU Committee on EU Sovereign Debt Markets explains that a cross-series modification can be understood as a CAC that works at the series level, in that the decision of a specified majority binds all holders of all affected series, "with the important further protection that holders of any individual series of affected bonds will not be bound by the decision of the group as a whole unless they also vote in favour of the proposed modification".[40] In other words, from a sovereign debtor's prospective, the cross-series modification clause has one key limitation— it still enables a creditor or a group of creditors to obtain a blocking position in a particular series.[41]

By contrast, the Greek Bondholder Act does not permit a creditor or a group of creditors to obtain a blocking position in a particular series, because the voting process only takes place at the series level. To quote the terms of the Act, "[f]or the modification

[37] Article 12 (3) of the Treaty provides that "Collective action clauses shall be included in all new euro area government securities, with maturity above one year, from July 2013, in a standardised manner which ensures that their legal impact is identical." See Treaty establishing the European Stability Mechanism, available at http://ec.europa.eu/economy_finance/articles/financial_operations/2011-07-11-esm-treaty_en.htm (last visited 26 Feb 2014).

[38] The model clause is available at http://europa.eu/efc/sub_committee/cac/index_en.htm (last viewed 13 Dec. 2012). See Cliffford Chance newsletter, "Euro area member states take collective action to facilitate sovereign debt restructuring", Dec. 2012, available at http://www.cliffordchance.com/publicationviews/publications/2012/12/euro_area_memberstatestakecollectiveactiont.html (last visited 26 Feb 2014).

[39] "Common Terms of Reference" of the Eurozone Model CAC (17/02/2012), para. 2.2, available at http://europa.eu/efc/sub_committee/pdf/cac_-_text_model_cac.pdf (last visited 26 Feb 2014).

[40] EFC Sub-Committee on EU Sovereign Debt Markets, "Model Collective Action Clause Supplemental Explanatory Note", 26 March 2012, pp. 3-4, available at http://europa.eu/efc/sub_committee/pdf/supplemental_explanatory_note_on_the_model_cac_-_26_march_2012.pdf (last visited 26 Feb 2014).

[41] IMF, "Sovereign Debt Restructuring –Recent Developments and Implications for the Fund's Legal and Policy Framework", *supra* note 34, para. 41.

of the eligible titles, it is required the participation in the procedure (quorum) of at least one half (1/2) of the aggregate principle amount outstanding of all eligible titles that are specified in the relevant invitation ("participating principal amount") and a qualified majority in favour of the modification of at least two thirds (2/3) of the participating capital." Phrased in this fashion, clearly the Act does not envisage any voting to take place within *each* individual series. The collective action mechanism is activated simply when a qualified majority of the aggregate principle amount outstanding of all eligible titles is reached. This interpretation is confirmed by the language of the press release issued by the Greek Ministry of Finance, which provides that the proposed amendment of bond terms will bind holders of all Greek-law bonds, "if at least two thirds by face amount of a quorum of these bonds, voting collectively without distinction by series, approve the proposed amendments."[42] Thus, the author argues that the Greek Bondholder Act also differs from the aggregated CACs.

C. Greek Bondholder Act = Cram-down in Bankruptcy Law

Having dismissed the assumptions that the Greek Bondholder Act resembles an ordinary CAC or aggregated CAC, the following paragraphs explore the similarity between the Greek Bondholder Act and the cram-down procedure in domestic bankruptcy law systems, for ease of reference, the law system of the U.S. It should be stated at the outset that the cram-down procedures exist in U.S. bankruptcy law designed for all kinds of debtors, including consumers, companies and municipalities. Among these debtors, the status of municipalities is most similar to that of States.[43] As a result, the most well-known bankruptcy law for municipalities— the U.S. Code Chapter 9 on municipality bankruptcy[44] — will be used as an example for our discussion on cram down procedures.

---

[42] Hellenic Republic Ministry of Finance, *supra* note 15.

[43] A municipality's insolvency is determined on the basis of a cash-flow analysis, not budget deficiency analysis; a municipality is insolvent when it is unable to pay its debts as they become due. *In re Hamilton Creek Metropolitan District*, 143 F.3d 1381 (10th Cir. 1998); *In Re City of Bridgeport*, 129 B.R. 332 (Bankr. D. Conn, 1991).

[44] The U.S. Bankruptcy Code defines a "municipality" as a "political subdivision or public agency or instrumentality of a state." It includes cities and towns, villages, counties, taxing districts, municipal utilities, and school districts. A municipality may be a debtor in a Chapter 9 case if (a) it has been

Under Chapter 9 municipality bankruptcy, a restructuring plan is deemed to be accepted by *a* class of creditors if creditors holding at least two-thirds in amount and more than one-half in number of all claims in that class accept the plan.[45] With respect to all classes of creditors, a reorganization plan can be confirmed if *each* class of claims or interests "has accepted the plan" or "is not impaired under the plan".[46] In the event of the failure of an impaired class to accept the plan, the plan can still be confirmed under the cram-down procedure in Section 1129(b)(1):

> "the court, on request of the proponent of the plan, shall confirm the plan… if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[47]

It appears from the above text that the purpose of the cram-down is to force an impaired class to accept a proposed plan. In the context of the Greek debt restructuring, does the Greek Bondholder Act force an impaired class to accept a proposed plan? To answer this question, closer attention should be paid to the wording of the Act, which provides for one voting procedure at the level of the "aggregate principle amount outstanding of all eligible titles". In other words, the Act enables a qualified majority of bondholders to bind all holders of the affected domestic debt to the restructured terms even where the needed majority of creditors for the restructuring would not be attained

"specifically authorized" to be a Chapter 9 debtor, b) is "insolvent" and (c) has either (i) obtained majority approval of creditors in each class for the proposed plan of reorganization, or (ii) negotiated in "good faith" with creditors and failed to obtain such a majority, or (iii) is unable to negotiate with creditors because such negotiations are "impracticable." See 11 U.S.C. §101(40), United States Courts: Chapter 9 Municipality Bankruptcy, available at http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter9.aspx (last visited 26 Feb 2014); Z. Clement et al., "Important Issues in a Chapter 9 Case for a Municipality", 24 October 2011, available at http://www.nortonrosefulbright.com/knowledge/publications/94035/important-issues-in-a-chapter-9-case-for-a-municipality (last visited 26 Feb 2014).

45 The U.S. Code Title 11 Section 943(b) sets out the conditions when the court shall confirm the plan, which include that the plan complies with the provisions of this title made applicable by Section 901. Section 901(a) explicitly makes Sections 1126(c) dealing with the bankruptcy of companies applicable for municipalities, which provides that a class of claims has accepted a plan if such plan has been accepted by creditors "that hold at least two-thirds in amount and more than one-half in number" of all allowed claims. See 11 U.S.C. §§943(b), 901(a) and 1126(c).

46 11 U.S.C. §1129(a)(8). It should be noted that Section 901(a) explicitly makes Section 1129(a)(8) dealing with the bankruptcy of companies applicable for municipalities.

47 11 U.S.C. §1129(b)(1). It should be noted that Section 901(a) explicitly makes Section 1129(b)(1) dealing with the bankruptcy of companies applicable for municipalities.

within a single bond issue.[48] Importantly, the Act eliminates the power of a creditor or a group of creditors to obtain a blocking position in an individual issuance.[49]

However, the elimination of the power of a creditor to obtain a blocking position in an individual issuance does not necessarily resemble the craw-down procedure. As the victim of the cram-down procedure is an impaired class of creditors, the Act has to eliminate the power of an impaired class to be qualified as a cram down procedure. Thus, the key issue at stake concerns claim classification—whether claims of an individual issuance differ from that of other issuances so that it constitutes a particular class by themselves?

The UNCITRAL Legislative Guide on Insolvency Law provides some useful guidance on class classification. The purpose of classification of claims is to "satisfy the requirements to provide fair and equitable treatment to creditors, treating similarly situated claims in the same manner and ensuring that all creditors in a particular class are offered the same menu of terms by the reorganization plan".[50] Although the general rule is to put secured creditors in one class and unsecured creditors in another, the Legislative Guide mentions that ordinary unsecured creditors can be divided into "different classes based upon their varying economic interests."[51] In determining commonality of interest, the relevant criteria may include "the nature of debts giving rise to the claims".[52]

To apply these criteria to the Greek debt restructuring, it can be argued that the nature of an individual issuance differs from that of other issuances with different maturities. Due to the fact that the exchange offer was extended by Greece in a pre-default context, all claims will not yet have become due and payable as a result of the operation of the acceleration clause in the event of default.[53] As a result, Greece's eligible

---

48 IMF, "Sovereign Debt Restructuring –Recent Developments and Implications for the Fund's Legal and Policy Framework", *supra* note 34, para. 38.

49 *Ibid.*

50 See UNCITRAL Legislative Guide on Insolvency Law (2004), p. 218, available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (last visited 26 Feb 2014).

51 *Ibid.*, p. 222.

52 *Ibid.*

53 Bonds issued in the international markets by emerging market sovereigns typically require a vote of 25% of the outstanding bonds in order to accelerate unmatured principal following an event of default. It should be pointed out that pre-default bond restructuring happens very often. Among the 13 debt

debt instruments enjoy enormous diversity, particularly with respect to residual maturities, ranging from almost zero to 45 years.[54] Logically speaking, the nature of bonds with short-term maturity and those with long-term maturity are totally different, because the former are legally entitled to get paid before the latter.

As far as the outcome of the restructuring is concerned, due to different residual maturities involved, the same restructuring term extended to all bondholders implies large differences in the present value haircut across the existing bonds. According to Zettelmeyer and others, the present value haircut declines with maturity, with large haircuts at the short end (in excess of 75 per cent for bonds maturing within a year) and smaller haircuts at the long end (less than 50 per cent for old bonds coming due in 2025 and beyond).[55] Such large differences confirm that the nature of an individual issuance differs from that of other issuances with different maturities, although they are all ordinary unsecured claims. As a result of these differences, claims of an individual issuance constitute a particular class by themselves. The author therefore argues that what the Greek Bondholder Act introduced was not an ordinary CAC or aggregated CAC but something similar to cram-down procedures in bankruptcy law.

IV. Safeguard Provision for Cram-down in U.S. Municipality Bankruptcy Law

Given that the Greek Bondholder Act resembles cram-down procedures in bankruptcy law, an analysis of the policy implication of the *Poštová* tribunal's jurisdiction over sovereign bonds would require a closer look at how cram-down procedures are regulated.

A second reading of Section 1129(b)(1) reveals that it provides not only the cram-down procedure but also a safeguard provision to ensure that each impaired dissent class

restructurings announced between 2003 and 2013, 8 restructurings were conducted in a pre-default context. These 8 debt restructurings were announced by Dominican Republic (2004), Grenada (2004), Belize (2006), Jamaica (2010), St. Kitts and Nevis (2011), Greece (2011), Belize (2012) and Jamaica (2013). See IMF, "Sovereign Debt Restructuring –Recent Developments and Implications for the Fund's Legal and Policy Framework", *supra* note 34, p. 22; IMF, "The Restructuring of Sovereign Debt –Assessing the Benefits, Risks and Feasibility of Aggregating Claims", 3 September 2003, p. 5; L. Buchheit et al., *supra* note 31, p.10;

[54] J. Zettelmeyer, C. Trebesch and M. Gulati, *supra* note 14, p.16.

[55] *Ibid.*

receives minimum protection. To quote the language of Section 1129(b)(1), the court shall confirm the plan under the cram down procedure "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[56] In the view of the author, Section 1129(b)(1) provides minimum protection for each impaired dissent class from two distinctive aspects. It first addresses the interests of each impaired dissent class and other creditor classes by prohibiting unfair discrimination, and then maintains a balance between the interests of each impaired dissent class and that of the debtor with the fair and equitable treatment standard. The following paragraphs will discuss them in turn.

A. Prohibition of Unfair Discrimination

Although Section 1129(b) does not provide a definition of unfair discrimination, the case law from U.S. bankruptcy courts on this issue is quite straightforward, which indicates that the prohibition again unfair discrimination requires equal treatment of similarly situated creditors.[57] In *re Barney & Carey Co*., the court stated, "the unfair discrimination language of section 1129(b)(1) prohibits a debtor from proposing unreasonably different treatment between classes of similar claims."[58] The court continued that "[t]he burden is on the Debtor to show that unequal treatment between classes having the same priority does not constitute unfair discrimination."[59] In re *Tucson Self-Storage, Inc*., the court found that "[a] plan discriminates unfairly if it singles out the holder of some claim or interest for a particular treatment."[60] Similarly, the court in *re Johns-Manville Corp*. ruled that "a plan proponent may not segregate two similar claims

[56] 11 U.S.C. §§901(a), 1129(b)(1).

[57] D. Kupetz, "Municipal Debt Adjustment Under the Bankruptcy Code", 27 Urb. Law. 531 (1995), p. 18, citing *In re Orfa Corp. of Philadelphia*, 129 B.R. 404, 416 (Bankr.E.D.Pa.1991) and *In re AOV Indus., Inc.*, 792 F.2d 1140, 1150 (D.C.Cir.1986).

[58] *Ibid.*, citing In re Barney & Carey Co., 170 B.R. 17, 25 (Bankr.D.Mass.1994).

[59] *Ibid.*

[60] *Ibid.*, n. 292, citing *Oxford Life Ins. Co. v. Tucson Self-Storage, Inc.*, 166 B.R. 892, 898 (Bankr.9th Cir.1994).

or groups of claims into separate classes and provide disparate treatment for those classes."[61]

B. Fair and Equitable Standard

As regards the fair and equitable standard, Section 1129(b)(2) sets out certain specified requirements for a plan to be fair and equitable but leaves the substance of the term "fair and equitable" open to interpretation.[62] In Chapter 11 cases involving the bankruptcy of corporates, the phrase "fair and equitable" has been interpreted to require that unsecured creditors be paid in full first before junior equity holders can be paid.[63] This interpretation is, however, not applicable in a Chapter 9 context, as a municipality does not have any equity holder. By contrast, US bankruptcy courts have construed that a Chapter 9 plan is fair and equitable if it is balanced and the debtor has taken reasonable steps to increase revenue and cut costs before proposing debt renegotiation.[64] In applying this standard, courts analyze whether the amount to be received by dissenting creditors under the plan is "all that they can reasonably expect in the circumstances."[65]

When interpreting the meaning of "all that [dissenting creditors] can reasonably expect in the circumstances", some courts have required the debtor to exercise its taxing

---

[61] *Ibid*., citing *In re Johns-Manville Corp*., 68 B.R. 618, 636 (Bankr.S.D.N.Y.1986), aff'd, 78 B.R. 407 (Bankr.S.D.N.Y.1987), aff'd, 843 F.2d 636 (2d Cir.1988).

[62] Section 1129(b)(2)(A) provides that secured claims may be treated fairly and equitably if the plan, (a) allows the secured creditor to retain its lien and to receive cash payments over time which have a present value equal to the value of its collateral as of the effective date of the plan; (b) provides for a sale of the secured creditor's collateral at which it can credit bid or (c) provides the secured creditor with the indubitable equivalent of its claim, including, among other things, returning the creditor's collateral to it. Section 1129(b)(2)(B) provides that unsecured creditors who are not paid in full are still treated fairly and equitably under a plan as long as any claim or interest that is junior will not receive or retain under the plan or on account of such junior claim or interest any property. See 11 U.S.C. §1129(b)(2).

[63] See *Case v. Los Angeles Lumber Products*, 308 U.S. 106 (1939).

[64] B. Chandler & M. Kaufman, "Maybe Taxes Aren't So Certain: What is "Fair and Equitable" in a Chapter 9 Plan?", American Bankruptcy Institute Journal, February 2013, p. 2, available at http://www.mckennalong.com/media/resource/1984_American%20Bankruptcy%20Institute%20Journal.pdf (last visited 26 Feb 2014).

[65] See *Lorber v. Vista Irrigation Dist.*, 127 F.2d 628, 639 (9th Cir. 1942); *West Coast Life Insurance Company et al. v. Merced Irrigation District*, 114 F.2d 654 (9th Cir. 1940); *Moody v. James Irrigation District*, 114 F.2d 685 (9th Cir. 1940); *Bekins v. Lindsay-Strathmore Irrigation District*, 114 F.2d 680 (9th Cir. 1940), *Jordan v. Palo Verde Irrigation District*, 114 F.2d 691 (9th Cir. 1940).

power to a greater extent in the facts of the case presented.[66] Other courts have held that it is not necessary that all taxes collected go to the payment of creditors and that taxes be increased where evidence indicates that this would not be feasible.[67] Indeed, while raising taxes could help the municipality to pay back its debt, it might be detrimental to attract new residents and corporations and thus would adversely affect the municipality's long-term revenues.[68] The limited body of case law suggests that to what extent the debtor shall impose new or increased taxes should be determined on a case-by-case basis.[69] Besides raising taxes, other reasonable steps the debtor shall take to increase revenue and reduce costs include (1) checking existing contracts to look for inefficiencies; (2) negotiating modifications to collective-bargaining agreements and retiree benefits; (3) cutting labor costs; (4) selling or leasing municipal assets; (5) privatizing or outsourcing certain services; and (6) securing financial support.[70]

V. ICSID Arbitration as the Best Forum to Develop a Safeguard Provision for Cram-down

An overview of the safeguard provision for cram-down procedures under the U.S. municipality bankruptcy law tells us that the current legal regime of sovereign debt

[66] In *Fano v. Newport Heights Irr. Dist.*, the court denied the proposed plan and stated that "we are unable to find any reason why the tax rate should not have been increased sufficiently to meet the District's obligations or why it can be said that the plan is 'equitable' and 'fair' and for the 'best interest of the creditors' with no sufficient showing that the taxing power was inadequate to raise the taxes to pay them". See *Fano v. Newport Heights Irr. Dist.*,114 F.2d 563 (9th Cir. 1940).

[67] In *Lorber v. Vista Irr. Dist*., the court analyzed the debtor's situation and found that "55 cents on the dollar was the maximum that the District could reasonably pay on outstanding bonds." See *Lorber v. Vista Irrigation Dist.*, 143 F.2d 282 (9th Cir. 1944). In *re Corcoran Hosp. Dist.*, the court "looked at the insolvency of the debtor and whether the debtor could, in fact, raise taxes sufficient to pay the bondholders in full" and concluded that "the debtor Hospital District could not raise taxes sufficient to pay more to Class 5". See *In re Corcoran Hosp. Dist.*, 233 B.R. 449, 459-60 (Bankr. E.D. Cal. 1999). In *Newhouse v. Corcoran Irr. Dist.*, the court stated that "[t]he bankruptcy of a public entity, however, is very different from that of a private person or concern. The operative assets of an irrigation district and the value of the land of the District, of course, have their evidentiary value as to the amount of money the District can reasonably raise to meet its indebtedness." See *Newhouse v. Corcoran Irr. Dist.*, 114 F. 2d 690 (9th Cir. 1940).

[68] B. Chandler & M. Kaufman, *supra* note 64.

[69] Main factors to take into account when deciding whether a debtor shall impose new or increased taxes include (1) the tax rates of neighboring municipalities; (2) the employment market; (3) the local population and the potential impact of increased tax burden; (4) prospects for attracting new business with increased tax burden; and (5) any new financial needs of the municipality. See *Ibid.*

[70] *Ibid.*

restructuring is seriously flawed with respect to creditor protection. In the absence of any bankruptcy rules for States, the author argues, ICSID arbitration could serve as the best forum to develop a safeguard provision for cram-downs employed in sovereign debt restructuring similar to those in the U.S. municipality bankruptcy law. This section discusses, in turn, the possible safeguard principles in sovereign debt litigations and that under investment treaties.

A. Possible Safeguard Principles in Sovereign Debt Litigations

Historically, since the doctrine of "absolute" sovereign immunity did not permit States be sued in foreign domestic courts without their express consent, disappointed private lenders to foreign States had very few options other than to seek the help of their own governments, known as "diplomatic protection".[71] These governments have pressured the sovereign debtor into payment or settlement or brought the dispute to international courts and tribunals.[72] However, persuading governments to take up their nationals' claims has never been an easy undertaking, and its success depends largely on governments' economic and political objectives. Since the 1970s, many countries have adopted the doctrine of "restrictive" sovereign immunity on jurisdiction, which permits sovereign States to be sued for their private acts.[73] Consequently, bondholders are entitled to sue the sovereign debtor directly in foreign domestic courts.[74]

---

71 L. Buchheit, "The Role of the Official Sector in Sovereign Debt Workouts", 6 Chi J Intl L 333, 2005, p. 335.

72 Examples are *French Company of Venezuelan Railroads Case* (1905); *Canavero Claim* (Italy v. Peru, PCA, 1912); *French Claims Against Peru* (PCA, 1921); *Payment of Various Serbian Loans Issued in France* (PCIJ, 1929); *Payment in Gold of Brazilian Federal Loans Contracted in France* (PCIJ, 1929); *Societe Commerciale De Belgique* (Belgium v. Greece, PCIJ, 1939); *Certain Norwegian Loans* (ICJ, France v. Norway, 1957). See generally M. Waibel, Sovereign Defaults Before International Courts and Tribunals, *supra* note 12, p. 22.

73 Examples include the Sovereign Immunities Acts of the United States. (1976), United Kingdom (1978), Singapore (1979), Pakistan (1981), South Africa (1981), Canada (1982), and Australia (1985). See generally H. Fox, The Law of State Immunity (2008, Oxford).

74 Schumacher recently conducted empirical research concerning sovereign debt litigation filed against debtor governments in the US and UK courts between 1976 and 2010. This research shows that 108 cases were filed in the US and the UK by foreign banks, bondholders and other commercial creditors during this period, and that these cases relate to 29 of the 180 sovereign debt restructurings with private creditors (16%). It further reveals that 27 out of 69 debtor governments have been sued. See Schumacher et al., "Sovereign Defaults in Court: The Rise of Creditor Litigation 1976-2010", p.8, available at http://dx.doi.org/10.2139/ssrn.2189997 (last visited 26 Feb 2014).

Traditionally, sovereign debt claims in foreign domestic courts have been exclusively based on an allegation of the debtor's failure to perform the contract. Given that the contract terms in respect of performance are generally unambiguous, the dispute in such debt claims mainly concerns the issue of sovereign immunity, that is, to what extent the restrictive sovereign immunity principle applies. On most occasions, legal battles over sovereign immunity have been extremely challenging for creditors. First, such battles often last many years and most bondholders do not have the financial recourses to fight until the end. Second, even if creditors obtain a favorable judgment in the end, they are not yet winners until they are able to enforce it. Often attempts to enforce the judgment and attach property in the sovereign debtor's territory may face objections based on public policy, efforts to enforce it abroad may fail due to the sovereign's lack of attachable assets in foreign countries and the principle that certain assets located abroad cannot be attached due to their special characteristics (i.e. diplomatic missions, central bank reserves, military assets etc.).[75] Furthermore, the legal framework concerning the recognition and enforcement of foreign court judgments does not provide much help either. As of today, the *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* concluded under the framework of the Hague Conference on Private International Law only has five contracting States.[76]

Over the past decade, various creditors in different jurisdictions have made attempts to circumvent the enforcement problem by arguing that, as a result of the *pari passu* clause, sovereign debtors are prevented from making payments to other creditors without paying the litigating creditors on a *pro rata* basis.[77] A *pari passu* clause is a

[75] R. Olivares-Caminal, Legal Aspects of Sovereign Debt Restructuring (2009, Sweet & Maxwell), paras. 2-001, 2-002, 2-004.

[76] The five contracting States are Albania, Cyprus, the Netherlands, Portugal and Kuwait. See HccH official website, status table, available at http://www.hcch.net/index_en.php?act=conventions.status&cid=78.

[77] See *Elliott Assocs. LP*, unreported September 26, 2000, General Docket No. 2000/QR/92, Court of Appeal of Brussels, 8th Chamber; *Red Mountain Finance Inc v. Democratic Republic of Congo*, No. CV 00-0164 R (C.D. Cal. 29 May 2001); *Republique Du Nicaragua v. INC invs. LLC No.2003/KR/334*, p. 2 (Ct. App. Brussels, 9th Chamber, 2004); *Macrotenic International Corp v. Republic of Argentina and EM Ltd v. Republic of Argentina* (S.D.N.Y. January 12, 2004) (No.02 CV 5932 (TPG), No. 03 CV 2507 (TPG)); *NML Capital, Ltd. v. Republic of Argentina,* No. 12-105-(L) (2d Cir. 26 Oct. 2012). See generally M. Gulati and R. Scott, "The Three and a Half Minute Transaction: Boilerplate and the Limits

standard clause included in public or private international unsecured debt obligations, which often provides that "[Country X] shall ensure that its obligations hereunder shall rank pari passu among themselves and with all of its other present and future unsecured and unsubordinated Public Debt."[78] In September 2000, a Brussels Court of Appeals issued a restraining order in *Elliott* prohibiting a fiscal agent and a payment settlement system from paying interest on Peru's Brady Plan Bonds.[79] In response to this decision, INC Belgian Law 4765 (C-2004/03482) was passed in November 2004 to prohibit attachment of cash accounts held with Belgium clearing systems.[80] Moving to the U.S. courts, a New York trial court in January 2014 was asked to consider whether the *pari passu* clause in Argentina's bonds could not be used by judgment creditors as a legal basis to interfere with Argentina's payment of its other indebtedness.[81] The court did not answer the core question but issued a discovery order asking Argentina to divulge information about government property outside the country that is used for commercial purposes.[82] More recently, in October 2012, the United States Court of Appeals for the Second Circuit in *NML Capital Ltd. v. Republic of Argentina* affirmed the trial court's decision to issue injunctions designed to remedy Argentina's breach of the *pari passu* clause in certain bond indentures, on the grounds that Argentina had issued new debt pursuant to exchange offers in 2005 and 2010 and was making the required payments on

of Contract Design" (October 5, 2011), Columbia Law and Economics Working Paper No. 407; R. Olivares-Caminal, Legal Aspects of Sovereign Debt Restructuring, *supra* note 75; L. Buchheit & J. Pam, "The Pari Passu Clause in Sovereign Debt Instruments", 53 Emory L.J. 913 (2004).

78 R. Olivares-Caminal, Legal Aspects of Sovereign Debt Restructuring, *supra* note 75, p. 84; Offering Memorandum of the Government of Belize dated December 18, 2006, for the exchange of US Dollar Bonds due 2029, p. 142.

79 M. Gulati and R. Scott, *supra* note 77, pp. 23-24, citing Elliott Assocs. LP, unreported September 26, 2000, General Docket No. 2000/QR/92, Court of Appeal of Brussels, 8th Chamber.

80 R. Olivares-Caminal, "The Pari Passu Interpretation in the Elliott Case: A Brilliant Strategy But An Awful (Mid-Long Term) Outcome", Hofstra Law Review, vol 40, no 39. p. 52 (2012), citing MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Dec. 28, 2004, 85,854, http://www.ejustice.just.fgov.be/mopdf/2004/12/28_1.pdf.

81 R. Olivares-Caminal,"To Rank Pari Passu or Not to Rank Pari Passu: That is The Question in Sovereign Bonds After the Latest Episode of the Argentine Saga", Law & Business Review of the Americas, vol 15, no 4, p. 753 (2009), citing *Macrotenic International Corp v. Republic of Argentina and EM Ltd v. Republic of Argentina* (S.D.N.Y. January 12, 2004) (No.02 CV 5932 (TPG), No. 03 CV 2507 (TPG)).

82 R. Olivares-Caminal, Legal Aspects of Sovereign Debt Restructuring, *supra* note 75, p. 90.

this new debt, but had declared through legislation that it would make no payments to those still holding the old bonds.[83]

Based on the foregoing, the author argues that it is unlikely that legal battles at domestic courts would lead to the creation of safeguard principles for cram-down in sovereign debt restructuring in line with those in municipality bankruptcy law. Having noted that the legal basis for sovereign debt litigations has mainly been the debtor's failure to perform the contract, the author contends that none of these court decisions would touch upon the notion of unfair discrimination and fair and equitable treatment. In respect of the *pari passu* clause, the author maintains that the meaning of this clause is highly controversial and it is uncertain that other courts will follow the *NML Capital* decision.[84] In any event, the author argues that the *pari passu* clause only relates to the concept of equal treatment but not fair and equitable treatment.

Furthermore, in the author's view, it is beyond doubt that the exercise of CACs changes the contractual obligations under the sovereign bond and prevents non-participating bondholders from bringing the contractual dispute to domestic courts. Notably, the U.S. Court of Appeals for the Second Circuit explicitly stated in *NML Capital, Ltd. v. Republic of Argentina* that CACs "effectively eliminate the possibility of 'holdout' litigation" and "it is highly unlikely that in the future sovereigns will find

[83] The Second Circuit affirmed the injunctions issued by the trial court that requires Argentina to make ratable payments to plaintiffs concurrent with or in advance of its payments to holders of old bonds, and asked the trial court to further clarify how the payment formula in the injunction will operate. The trial court clarified, in a subsequent order issued on 21 November 2012, that the payment formula in the injunction is intended to operate as follows: whenever Argentina pays any amount due under the terms of the exchange bonds, it must concurrently or in advance pay plaintiffs the same *percentage* of the amount due to them. See *NML Capital, Ltd. v. Republic of Argentina,* No. 12-105-(L) (2d Cir. 26 Oct. 2012); *NML Capital, Ltd. v. Republic of Argentina*, 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG) (S.D.N.Y., 21 Nov. 2012), available at http://www.shearman.com/argentine-sovereign-debt/ (last visted 26 Feb 2014). For a discussion of this case, see Global Law Intelligence Unit, Allen & Overy LL.P, "The pari passu clause and the Argentine case", 27 Dec. 2012; W. Weidemaier, "Sovereign Debt After NML v. Argentina", Capital Markets Law Journal, available at http://ssrn.com/abstract=2199655 (last visited 26 Feb 2014); R. Zamour, "NML v. Argentina and the Ratable Payment Interpretation of the Pari Passu Clause", Yale Journal of International Law, Vol. 38 (Spring 2013).

[84] See Global Law Intelligence Unit, Allen & Overy LL.P, "The pari passu clause and the Argentine case"; M. Wright, "The Pari Passu Clause in Sovereign Bond Contracts: Evolution or Intelligent Design?", 1 Hofstra L. Rev. 40 (2011); B. Remy Chabot & M. Gulati, "Santa Anna and His Black Eagle: The Origins of the Pari Passu", 18 Feb 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397929 (last visited 26 Feb 2014).

themselves in Argentina's predicament" because CACs "have been included in 99% of the aggregate value of New York-law bonds issued since January 2005".[85]

B. Possible Safeguard Principles under Investment Treaties

Since 2006, four groups of foreign bondholders have brought arbitrations under bilateral investment treaties at ICSID against sovereign debtors following the debt crises.[86] Recourse to ICSID arbitration was mainly motivated by the enforcement regime under the ICSID Convention, which requires its 147 member States to recognize and enforce an arbitral award as if it were a final judgment of a court in that State.[87] Under most investment treaties, foreign investors are entitled to initiate arbitration against the host country directly for alleged breaches of treaty obligations through arbitration clauses, which often include fair and equitable treatment principle, full protection and security, no expropriation without prompt, adequate and effective compensation, as well as national and most favored nation treatment principle.[88] This section analyses the fair and equitable treatment principle and argues that such a principle could serve as a safeguard provision for cram-down in sovereign debt restructuring. Before engaging in the discussion, it should be recalled that the safeguard provision for cram-down under the U.S. municipality bankruptcy law provides that the plan shall not "discriminate unfairly" and shall be "fair and equitable" with respect to each impaired dissent class.

1. Overview of the FET Principle

The fair and equitable treatment principle is a well-established clause in the vast majority of investment agreements, and is often drafted in three ways: (1) combined with a reference to general international law, (2) combined with a reference to customary international law, and (3) combined with other investment guarantees, for instance, the

---

[85] See *NML Capital, Ltd. v. Republic of Argentina,* No. 12-105-(L), *supra* note 83, p. 27.

[86] *Abaclat and others v. Argentine Republic*, *Giovanni Alemanni and others v. Argentine Republic*, *Giordano Alpi and others v. Argentine Republic*, and *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*.

[87] ICSID Convention Art. 54(1), available at https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (last visited 26 Feb 2014).

[88] N. Blackaby et al., "Chapter 8. Arbitration Under Investment Treaties", in: Redfern and Hunter on International Arbitration, 5th ed, 2009, paras. 8.09, 8.58-8.112.

guarantee of protection and security and the obligations of most-favored-nation and national treatment.[89] According to some commentators, the issue of whether the FET is included in a separate clause or combined with other investment guarantees is not a substantive question but a stylistic one.[90] When the FET is combined with a reference to either general international law or customary international law, it generally provides that each contracting party shall accord to investments of investors of another party treatment in accordance with [international law][customary international law], including fair and equitable treatment and full protection and security.[91]

It is worth noting that a long-standing doctrinal debate exists with respect to the FET principle. Some argue that the FET is limited to the international minimum standard of customary international law, on the basis that the formulation of such a principle is vague and indeterminate and equating it with the international minimum standard could avoid the difficulties in addressing this norm.[92] They refer to the writings and decisions on international minimum standard to argue that there exists an established and well-known body of legal principles in customary international law.[93] On the contrary, other commentators suggest that the international minimum standard is as indeterminate as the FET principle.[94] They note that if the two concepts were intended to be interchangeable, states would have specified this expressly in their investment agreements; instead, the combination of the FET principle with a reference to international law indicates that international law only plays a complementary role.[95] Importantly, in the context of NAFTA, on 31 July 2001 the NAFTA Free Trade Commission issued a note of

89 R. Klager, "Fair and Equitable Treatment" in International Investment Law (Cambridge, 2011), pp.14-20.

90 *Ibid*., p.17.

91 *Ibid*., pp.17 & 19.

92 G. Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection, RdC 269 (1997), p. 341; R. Klager, *supra* note 89, p. 56.

93 *Ibid.*

94 *Ibid*., p. 58.

95 UNCTAD, "Fair and Equitable Treatment", UNCTAD/ITE/IIT/11 (Vol. III) (1999), p.13; R. Klager, *supra* note 89, p. 59.

interpretation, which shall be binding on arbitral tribunals and provides that the concept of FET does not go beyond the customary international law minimum standard.[96]

As far as case law is concerned, ICSID tribunals have adopted two main approaches dealing with the relation between FET and the international minimum standard in customary international law.[97] The first approach addresses FET as being equated with the minimum standard of treatment and was for example adopted by the *CMS* tribunal.[98] The second approach views FET as an autonomous concept, which is considered as higher standards than required by international law and more protective of investors' rights.[99] Between these two approaches, some tribunals chose not to decide on this issue. For instance, the *BG v. Argentina* tribunal stated that Argentina's actions fall below the minimum standard and it is consequently not necessary to examine the standard of protection under the Argentine-UK BIT.[100]

2. Interpretation of the FET Principle

Over the past decade, investment treaty tribunals have struggled unsuccessfully to define the obligation of the FET principle included in a vast majority of over 2,600 bilateral investment treaties.[101] Recent case law indicates that most tribunals find it unnecessary to engage in an extensive discussion of the definition of the FET standard, and only analyze the meaning of FET when it is applied to a set of specific facts. For instance, the tribunal in *Swisslion v. Macedonia* did not provide a precise definition of the FET standard and limited itself to subscribe "the view expressed by certain tribunals that the standard basically ensures that the foreign investor is not unjustly treated, with due

---

[96] R. Klager, *supra* note 89, pp. 70-71.

[97] *El Paso Energy International Company v. Argentina* (ICSID Case No. ARB/03/15), Award of 31 October 2011, para. 331; *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award of 21 June 2011, paras. 286-288.

[98] *GMS Gas Transportation Company v. Argentina* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 284; *SAUR International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, paras. 491-494.

[99] *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para. 361; *Deutsche Bank v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award of 31 October 2012, paras. 418-419.

[100] *BG Group Plc v. Argentina* (UNCITRAL), Award of 24 December 2007, para. 291.

[101] K. J. Vandevelde, "A Unified Theory of Fair and Equitable Treatment", New York University Journal of International Law and Politics (JILP), Vol. 43, No. 1, p. 43, 2010, p. 44.

regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors."[102]

Among those tribunals that made an attempt to define the FET standard, the tribunal in *Deutsche Bank v. Sri Lanka* confirmed the non-exhaustive definition of the FET standard offered by the *Waste Management* tribunal and listed a few components of the FET definition:

- "protection of legitimate and reasonable expectations which have been relied upon by the investor to make the investment;
- good faith conduct although bad faith on the part of the State is not required for its violation;
- conduct that is transparent, consistent and not discriminatory, that is, not based on unjustifiable distinctions or arbitrary;
- conduct that does not offend judicial propriety, that complies with due process and the right to be heard."[103]

In this connection the author submits that while the maximum scope of the FET principle remains unclear, its minimum reach seems rather clear-cut. The sub-sections below analyze two notions covered by the FET standard that are similar to the safeguard provision under municipality bankruptcy law: (a) prohibition of unfair discrimination, and (b) legitimate expectations and the obligation of proportionality.

a. Prohibition of Unfair Discrimination

The most relevant case law on unfair discrimination is *Saluka Investment BV v. Czech Republic*, which concerned the gradual privatization of the Czech banking sector.[104] In this case, the IPB bank that had been fully privatized could not participate in a government assistance program and subsequently collapsed, while three still mainly

[102] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/16), Award of July 6, 2012, para. 273, citing *PSEG Global, The North American Coal Corporation, and Konya Ingin Electrik ve Ticaret Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award of 19 January 2007, para. 239; *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No ARB/03/15), Award of 31 October 2011, para. 373.

[103] *Deutsche Bank v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award of 31 October 2012, para. 420; *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of 30 April 2004, para. 98.

[104] *Saluka Investment BV v. Czech Republic* (UNCITRAL), Partial Award of 17 March 2006.

stated-owned banks obtained assistance from that program.[105] In explaining the meaning of FET and non-discrimination, the tribunal stated "any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment."[106] The tribunal further developed a test for the determination of discriminatory conduct, which provides that a conduct is considered as discriminatory if similar cases are treated differently and without reasonable justification.[107]

b. Legitimate Expectations and the Obligation of Proportionality

Many tribunals have dealt with the concept of legitimate expectations in the context of the FET principle. For instance, in *Tecmed v. Mexico,* the tribunal stated that the FET principle requires contracting States to "provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[108] In explaining what are the basic expectations, the *Tecmed* tribunal continued that the host State is expected to "act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."[109] Similarly, the tribunal in *Saluka v. Czech Republic* also mentioned that a foreign investor may "properly expect that the [Government] implements its policies bona fide by conduct that is, as far as it affects the investor's investment, reasonably justifiable by public policies and that such conduct does not violate the requirements of consistency, transparency, even-handedness and non-discrimination."[110]

[105] R. Klager, *supra* note 89, p. 193.

[106] Saluka Investment BV v. Czech Republic, *supra* note 104, para. 307.

[107] *Ibid*., para. 313.

[108] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award of 29 May 2003, para. 154.

[109] *Ibid.*

[110] *Saluka Investments B.V. v. Czech Republic*, *supra* note 104, para. 307.

In the recent years, some tribunals have rejected a broad interpretation of the concept of legitimate expectations. For instance, the tribunal in *El Paso Energy v. Argentina* stated that the legitimate expectations are not solely the subjective expectations of investors but objective expectations under particular circumstances and with due regard to the rights of the State.[111] Importantly, several tribunals expressly associated the notion of legitimate expectations with "a promise of the administration on which the Claimants rely to assert a right that needs to be observed".[112] More recently, the tribunal in *Ulysseas v. Ecuador* also quoted with approval the holding of the tribunal in *EDF v. Romania* according to which, "[e]xcept where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework".[113] Similarly, the tribunal in *Toto v. Lebanon* noted that, in the absence of a stabilization clause or similar commitment, changes in the regulatory framework would be considered as violation of the FET principle "only in case of a drastic or discriminatory change in the essential features of the transaction."[114]

On the other hand, there are also several tribunals that found— "[w]hile specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable".[115] In clarifying this view, the *Electrabel v. Hungary* tribunal noted that:

> "While the investor is promised protection against unfair changes, it is well-established that that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement

---

[111] *El Paso Energy International Company v. Argentina*, *supra* note 97, para. 358.

[112] P*SEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, *supra* note 102, paras. 239-241; *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/5), Award on the Merits of 6 June 2008, para. 183.

[113] *Ulysseas, Inc. v. The Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012, para. 249 quoting *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award of 11 June 2012, para 217.

[114] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon* (ICSID Case No. ARB/07/12), Award of 7 June 2012, para. 244.

[115] *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability dated 30 November 2012, para. 7.78, citing *MTD v Chile* (ICSID Case No. ARB/01/7), Award of 25 May 2004; *GAMI Investments v Mexico* (UNCITRAL), Final Award of 15 November 2004; and *SD Myers v Canada* (UNCITRAL), Second Partial Award of 21 October 2002.

> of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment."[116]

More importantly, the FET principle has on several occasions been interpreted to import an obligation of proportionality. In *Tecmed v. Mexico*, the tribunal relied on case law from the European Court of Human Rights and stated that "[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[117] The tribunal in *Azurix v. Argentina* endorsed the reliance in *Tecmed* on case law from the European Court of Human Rights, and emphasized the need for proportionality between the means employed and the aim.[118]

More recently, in *Occidental v. Ecuador*, the tribunal also interpreted the FET principle as requiring an obligation of proportionality. Having noted that "the overriding principle of proportionality requires that any such administrative goal must be balanced against the Claimants' own interests and against the true nature and effect of the conduct being censured", the tribunal found that the price paid by the claimants was out of proportion to the wrongdoing.[119]

3. Necessity Defense

In nearly all investment arbitrations brought by foreign investors against Argentina after the 1999-2001 debt crisis, Argentina has invoked the defense that it should be excused from liability for damages to foreign investments, including a FET

[116] *Electrabel S.A. v. Republic of Hungary*, *supra* note 115, para. 7.77.

[117] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, *supra* note 108, para. 122. In support of this proposition, the tribunal cited several decisions of the European Court of Human Rights: In the case of *Mellacher and Others v. Austria*, Judgment of December 19, 1989, 48, p.24; In the case of *Pressos Compañía Naviera and Others v. Belgium*, Judgment of November 20, 1995, 38, p. 19.

[118] Azurix Corp. v. The Argentine Republic, *supra* note 99, para. 311.

[119] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award of 5 October 2012, para. 450.

breach, on the basis of the state of necessity during the crisis. This necessity defense was raised under both bilateral investment treaties[120] and customary international law.[121]

Up until now, these tribunals have interpreted the necessity defense claimed by Argentina in a very different manner, which makes it difficult to draw a meaningful conclusion. One good example to illustrate such difficulty is the four ICSID cases concerning investments in the Argentina's gas industry (i.e. CMS, LG & E, Enron, and Sempra).[122] The facts giving rise to these four disputes were practically identical.[123] In the early 1990s, Argentina adopted a regulatory framework for the gas sector containing specific guarantees to attract capital aboard, which included guarantees that tariffs would be calculated in US dollars and converted into pesos for billing purposes, and would not

[120] For example, Article XI of the Argentina-U.S. Bilateral Investment Treaty provides that: "The Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests". See Article XI of the Argentina-U.S. BIT, available at http://unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf (last visited 26 Feb 2014).

[121] Article 25 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts defines the customary international law defense of necessity as follows:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
>   (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
>   (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
>   (a) the international obligation in question excludes the possibility of invoking necessity; or
>
> (b) the State has contributed to the situation of necessity.

[122] *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic* (ICSID Case No. ARB/02/1); *Enron Creditors Recovery Corp. v. Argentine Republic* (ICSID Case No. ARB/01/3); and *Sempra Energy Int'l v. Argentine Republic* (ICSID Case No. ARB/02/16).

[123] E. A. Martinez, "Understanding the Debate over Necessity: Unanswered Questions and Future Implications of Annulments in the Argentine Gas Cases", Duke Journal of Comparatives & International Law, Vol. 23:149, p. 152.

be subject to freezing or price controls without compensation.[124] While three of these tribunals rejected Argentina's necessity defense, the fourth tribunal (i.e. LG & E) found in favor of Argentina.[125] Further complicating matters, two of the three decisions against Argentina (i.e. Enron, and Sempra) were subsequently annulled with respect to the issue of necessity defense.[126] Although the CMS decision was not annulled, the annulment committee recognized several "errors of law" in the part of the award on the necessity defense.[127] It is worth mentioning that ICSID awards may be annulled only in limited situations, such as manifest excess of powers or failure to state reasons on which it based its decision.[128] Overall, these original awards and annulment decisions differed as to the interpretation of the necessity defense both under the Argentina-United States bilateral investment treaty and customary international law.

More recently, in *EDF et al. v. Argentina*, the tribunal stated that "[n]ecessity must be construed strictly and objectively, not as an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult."[129] In *Continental Casualty Company v. Argentina*, the tribunal rejected the defense of necessity in respect of the restructuring of certain treasury bills and named three factors that influenced its decision. The tribunal pointed out that the debt restructuring was offered at late date when

---

124 *Enron Corp. and Ponderosa Assets LP v. Argentina* (ICSID Case No. ARB/01/3), Award of 22 May 2007, para. 264; R. Klager, *supra* note 89, p. 172.

125 *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para. 331; *Enron Corp. and Ponderosa Assets LP v. Argentina*, *supra* note 124, para. 313; *Sempra Energy Int'l v. Argentine Republic* (ICSID Case No. ARB/02/16), Award of 28 September 2007, para. 355; and *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 Oct 2006, paras. 239-240, 258-259.

126 *Sempra Energy Int'l v. Argentine Republic*, Decision on the Argentine Republic's Application for Annulment of the Award, paras. 222-23 (June 29, 2010); *Enron Creditors Recovery Corp. v. Argentine Republic*, Decision on the Application for Annulment of the Argentine Republic, para. 395 (July 30, 2010).

127 *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic dated 25 September 2007, para. 158-159.

128 Under Article 52 of the ICSID Convention, each Party may request annulment of an award on one or more of the following grounds: "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based." See *supra* note 87.

129 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, *supra* note 113, para. 1171.

Argentina's financial situation was moving towards normality.[130] It also considered the discounted value of the debt that Argentina unilaterally offered to recognize and the condition that any other rights, including the protection of BIT, would be waived.[131]

4. Safeguard Provision for Cram-down in the Sovereign Debt Restructuring

In the context of sovereign debt, States often borrow from one or more of the following sources: commercial banks, bondholders, governments and multilateral institutions such as the IMF and World Bank.[132] At present, there is no international insolvency regime governing sovereign debt crisis, and sovereign debt defaults are dealt with using an *ad hoc*, individual case-by-case approach. In practice, in order to avoid an eternal default, the sovereign debtor is compelled to seek debt relief from creditors before or shortly after the default, via an extension of maturity, and/or a reduction of the value of the claim. Such relief is obtained by renegotiating the relevant debt instruments with individual creditors, which is commonly referred to by the term "debt restructuring".

Renegotiations with multilateral creditors are often conducted in this *ad hoc* manner. Renegotiations with bilateral creditors who are members of the Paris Club are conducted through the Club's processes. The Paris Club is an informal group of official creditors with 19 permanent members and a small secretariat in Paris.[133] Countries that are not members of the Paris Club renegotiate with the sovereign debtor on an *ad hoc* basis. Renegotiations with commercial banks are either purely *ad hoc* or conducted through the London Club, an informal group of commercial banks with no fixed membership and no secretariat.[134] Renegotiations with bondholders are conducted

130 *Continental Casualty Company v. Argentina* (ICSID Case No. ARB/03/9), Award of 5 Sep 2008, para. 221.

131 *Ibid.*

132 A. Gelpern and M. Gulati, "Public Symbol in Private Contract: a Case Study", (2006) 84 Wash. U. L. Rev. 1627, pp. 1632-1633; L. Rieffel, "The Bank Advisory Committee Process", Chapter 6 in Restructuring Sovereign Debt: The Case for Ad Hoc Machinery (2003, Brookings), p. 96.

133 Paris Club official website, available at http://www.clubdeparis.org/sections/composition/membres-permanents-et/membres-permanents, (last visited 26 Feb 2014). See generally E. Cosio-Pascal, "The Emerging of a Multilateral Forum for Debt Restructuring: The Paris Club", UNCTAD/OSG/DP/2008/7, Discussion Papers No. 192, available at http://unctad.org/en/Docs/osgdp20087_en.pdf (last visited 26 Feb 2014).

134 L. Rieffel, "The Bank Advisory Committee Process", *supra* note 132, p. 103.

through exchange offers prepared by the sovereign debtor. Occasionally bondholder committees are formed on an *ad hoc* basis to facilitate the process.[135]

Under the current legal framework, one possible situation where the issue of unfair discrimination could arise is when similarly situated creditors are treated differently. For instance, Greece excluded the bond holdings of the Europe Central Bank and other central banks from restructuring by swapping them into a new series with identical payment terms and maturity dates right before the publication of the exchange offer.[136] As mentioned earlier in this Paper, municipal debtors in the U.S. enjoy the safeguard protection concerning unfair discrimination as a result of cram-downs under section 1129(b)(1), which has been interpreted by U.S. bankruptcy courts as prohibiting "a debtor from proposing unreasonably different treatment between classes of similar claims."[137] The author argues that a similar safeguard principle could be developed in the sovereign debt context at ICSID tribunals. Like the *Saluka* tribunal, the *Poštová* tribunal and other future ICSID tribunals may be asked to determine whether "similar cases are treated differently and without reasonable justification".[138] More specifically, whether the ECB and other holders of the same series of bonds are similarly situated creditors? Whether there are reasonable justifications for treating the ECB differently?

As regards the principles of legitimate expectations and proportionality, non-participating bondholders could possibly argue that the exchange offer frustrates their legitimate expectations and is not proportionate to the aim sought to be realized by the debt restructuring. In the case of Greek debt restructuring, bondholders were offered with a package of new securities with face values equal to 31.5% and 15 % of the face amount

[135] For a discussion of the use of creditors' committees in the Congo debt restructuring, see M. Richards, "The Republic of Congo's Debt Restructuring: Are Sovereign Creditors Getting Their Voice Back?", (2010) 73 Law & Contemp. Probs 273-299. Creditors' committees were also organized in the Greek debt restructuring, see J. Zettelmeyer, C. Trebesch and M. Gulati, *supra* note 14.

[136] As part of this swap arrangement, the ECB committed to return any profits made through its Greek government bond holdings to its shareholders. Hence, Greece received virtually no debt relief on these bonds, both because the bulk of the ECB's Greek bond holdings were bought during 2010 at relatively small discounts, and because of its small share in the ECB (about 2 per cent). See J. Zettelmeyer, C. Trebesch and M. Gulati, *supra* note 14, p. 5.

[137] D. Kupetz, *supra* note 57, citing *In re Barney & Carey Co*., 170 B.R. 17, 25 (Bankr.D.Mass.1994).

[138] *Saluka Investment BV v. Czech Republic*, *supra* note 104, para. 313.

of the old bonds.[139] As discussed above, if U.S bankruptcy courts were faced with a similar situation of municipalities, they would analyze whether the amount to be received by non-participating bondholders under the plan is "all that they can reasonably expect in the circumstances."[140] In the author's view, a similar safeguard principle could be developed in the sovereign debt context at ICSID tribunals. Like the tribunals in *Tecmed v. Mexico*, *Azurix v. Argentina*, and *Occidental v. Ecuador*, the *Poštová* tribunal and other future ICSID tribunals may be asked to determine whether there is "a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[141] These tribunals may also have to rule on whether the debt restructuring could be justified by a necessity defense. Notably, the *Continental Casualty* tribunal rejected the necessity defense in respect of the restructuring of certain treasury bills, noting, among others, that the debt restructuring was offered at late date when Argentina's financial situation was moving towards normality.[142]

As a result, the author argues that in the absence of any bankruptcy rules for States, ICSID arbitration could serve as the best forum to develop a safeguard provision for cram-downs employed in sovereign debt restructuring similar to those in the U.S. municipality bankruptcy law.

VI. Concluding Remarks

In light of the Greek debt restructuring in 2012 as well as ongoing litigations brought by Argentine bondholders, the IMF recently revisited sovereign debt restructuring and put forward potential reform ideas.[143] Notably, the IMF praised the

---

[139] Hellenic Republic Ministry of Finance, *supra* note 15.

[140] *Lorber v. Vista Irrigation Dist.*, 127 F.2d 628, 639 (9th Cir. 1942); *West Coast Life Insurance Company et al. v. Merced Irrigation District*, 114 F.2d 654 (9th Cir. 1940); *Moody v. James Irrigation District*, 114 F.2d 685 (9th Cir. 1940); *Bekins v. Lindsay-Strathmore Irrigation District*, 114 F.2d 680 (9th Cir. 1940), *Jordan v. Palo Verde Irrigation District*, 114 F.2d 691 (9th Cir. 1940).

[141] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, *supra* note 108, para. 122.

[142] *Continental Casualty Company v. Argentina*, *supra* note 103, para. 221.

[143] IMF Public Information Notice (PIN) No. 13/61, May 23, 2013, available at http://www.imf.org/external/np/sec/pn/2013/pn1361.htm (last visited 26 Feb 2014); IMF, "Sovereign Debt Restructuring –Recent Developments and Implications for the Fund's Legal and Policy Framework", supra note 34. For a discussion of the old reform proposal, see S. Hagan, "Designing a

effectiveness of the Greek Bondholder Act in facilitating sovereign debt restructuring and suggested that "a more robust form of aggregation clause" similar to the Greek Act should be designed and introduced into international sovereign bonds.[144] Before that reform idea is materialized, the author argues, more attention should be paid to the policy implication of the *Poštová* tribunal's jurisdiction over sovereign bonds to ensure that non-participating bondholders would receive minimum protection in the context of cram-downs. The author reiterates that, in the absence of any bankruptcy rules for States, ICSID arbitration could serve as the best forum to develop a safeguard provision for cram-downs employed in sovereign debt restructuring similar to those in the U.S. municipality bankruptcy law.

Last but not least, the author maintains that ICSID tribunals should be trusted to exercise their discretion and determine complex and delicate issues, such as whether the amount received by non-participating bondholders is all that they can reasonably expect in the circumstances or is proportionate to the aim sought to be realized by the debt restructuring. In this connection, it is worth emphasizing that one of the often-cited advantages of arbitration is the potential for choosing arbitrators with experience and expertise relevant to the dispute. As arbitration is merely a dispute resolution mechanism, it would be wrong to suggest that ICSID tribunals lack the expertise to play the role of a bankruptcy court.[145] In practice, the parties to a dispute can appoint whomever they want as arbitrator and they certainly can choose someone with sovereign debt or bankruptcy law background. Arguably, an increase in ICSID cases involving sovereign bonds would allow the development of legal principles for sovereign insolvency.[146] After all, a legal framework for sovereign insolvency can only arise if it can be built over time.[147]

*****

Legal Framework to Restructure Sovereign Debt", 36 Geo. J. Int'l L. 299 (2005); IMF, "The Design of the Sovereign Debt Restructuring Mechanism-Further Considerations", prepared by the Legal and Policy Department and Review Departments (Nov. 2002).

[144] IMF, "Sovereign Debt Restructuring –Recent Developments and Implications for the Fund's Legal and Policy Framework", *supra* note 34, paras. 38 & 42.

[145] M. Waibel, Sovereign Defaults Before International Courts and Tribunals, *supra* note 12, p. 323.

[146] E. Norton, *supra* note 12, at 8.

[147] *Ibid.*