Sovereign Bond Disputes before ICSID Tribunals: Lessons from the Argentina Crisis

Joanna Simoes
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I. INTRODUCTION

In 1991, in order to contain the hyperinflation and reduce debt, the Argentinean government introduced a new economic plan, the “Convertibilidad.” The novel framework declared parity between the Argentinean peso and U.S. dollars.¹

The new regime not only reduced inflation, but experienced an initial period of high growth rates and a considerable incoming flow of capital. Notwithstanding, one of the side effects of the Convertibilidad was that it made the economy vulnerable to foreign crises. The Asian crisis caused capital to leave the country, and the trade deficit was worsened by the Brazilian devaluation. Consequently, as dollars were flowing out of the country, the recession worsened.²

In 2001, the public began to fear devaluation and a bank run started. It is reported that approximately one billion dollars were withdrawn daily.³ To sustain the Convertibilidad, the government imposed the corralito—harsh restrictions on capital movements and cash withdrawals from banks were set.⁴ These efforts, however, were not enough to contain the situation.

Therefore, on December 2001, Argentina announced that it could no longer service its outstanding external bond debt of over U.S. $100 billion

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³ Kregel, supra note 1.
to both Argentine and non-Argentine creditors. In January 2005, while recovering from the crisis, the Argentine government launched an exchange offer to swap the defaulted debt of approximately U.S. $82 billion in principal and U.S. $20 billion in past due interest for new debt instrument. In order to ensure that the bond exchange offer would be successful, the Argentine government promulgated Law n. 26017 which forbade the reopening of the exchange offer and any negotiations with creditors that refused to participate in the restructuring process, i.e., the holdout creditors.

In February 2005, the period to accept the exchange offer was terminated. Thus, in one of the largest and most difficult debt restructurings of all times, Argentina managed to effectively restructure 76.15% of all holdings. Notwithstanding the high degree of participation, the amount of outstanding debt held by the holdout creditors was still substantial: U.S. $25 billion.

The holdout creditors tried to enforce Argentina's obligations under the defaulted bonds in national courts. Even though some positive judgments have been obtained in U.S. federal courts, these individual creditors have had no success in locating and attaching any Argentine assets.

In light of these facts, in September 2006, a group of 195,000 Italian bondholders [hereinafter “Abaclat case”] coordinated by the Global Committee of Argentina Bondholders (“GCAB”) submitted a request for International Centre for Settlement of Investment Disputes (“ICSID”) arbitration against the Argentine Republic, relying not on a violation of Argentina's obligation under the bond contract, but on its obligation under the Italy-Argentina Bilateral Investment Treaty (“BIT”). Two other smaller groups of Italian bondholders also decided to pursue arbitration against Argentina under ICSID [hereinafter “Alpi

6. Id. ¶ 77.
8. Abaclat, ICSID Case No. ARB/07/5, ¶ 80.
10. Abaclat, ICSID Case No. ARB/07/5, ¶ 80.
12. Gelpern, supra note 9, at 21.
14. Abaclat, ICSID Case No. ARB/07/5, ¶ 51. In 2010 a large number of claimants accepted a new settlement offer proposed by the Argentine government and withdrew from the ICSID claim. The Abaclat case now involves approximately 60,000 claimants. L.E. Peterson, World Bank Arbitration Tribunal Upholds Jurisdiction
case’ and ‘Alemanni case’].

All requests were registered. The proceedings in the Alpi and Alemanni cases are still in the jurisdictional phase. On the other hand, a unique jurisdictional ruling in the Abaclat case was released to the parties on August 4, 2011 and upheld ICSID jurisdiction over the sovereign bonds claim.

Such request confirms a trend towards the filing of arbitration claims against the Argentine government. Since 2001, dozens of lawsuits have been filed under the system of international investment arbitration, provided for in the many BITs entered into by Argentina and major capital-exporting states of Western Europe and North America.

Despite the array of investment arbitration requests, ICSID arbitrations over sovereign bonds disputes are a new and bold proposal. It could represent a drastic change in the dynamics of sovereign debt restructurings and of the investment arbitration regime.

Therefore, in this moment of intensified anxiety of a Greek sovereign default, there are many pressing issues to be analyzed that are of concern, not only to Argentina, but to the international community as a whole. Prima facie, the development of borrowing through sovereign bonds and the problems faced by states in servicing their sovereign debt will be discussed. As countries’ debt burdens become unsustainable, there is a growing need for debt restructuring. The existing debt restructuring mechanisms will be analyzed.

Secondly, the possibility of submitting disputes arising under sovereign bonds debt to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) by alleging a breach of an international obligation set in a BIT will be assessed. Jurisdictional issues that may bar recourse to ICSID will be scrutinized.

Thirdly, considering that ICSID jurisdiction has been accepted, the next step would be to discuss whether the standards of protection set in the relevant BIT (which are determinant to create state responsibility over treaty breach) were violated. Therefore, section four analyzes two of the most frequently sought standards of protection: a) fair and equitable treatment, and b) expropriation.

Finally, the last section refers to past awards and recent claims against the Argentine government to address some of the main concerns against


Alemanni, ICSID Case No. ARB/07/8; Alpi, ICSID Case No. ARB/08/9.

Alemanni, ICSID Case No. ARB/07/8; Alpi v. Argentine Republic, ICSID Case No. ARB/08/9.

Abaclat, ICSID Case No. ARB/07/5, ¶ 242.

the use of investment arbitration to solve disputes that arise from a financial and economic crisis.

II. FINANCIAL CRISSES AND SOVEREIGN DEBT RESTRUCTURINGS

Debt has been one of the main financing mechanisms for states in the past few years. Thus, from the late 1970s to the present, where lending increased significantly as a result of the expansion of the Eurodollar market and the recycling of petro-dollars, sovereigns have come to depend deeply on private capital flows.\(^\text{20}\) By 2009, the total international indebtedness amounted to U.S. $24 trillion.\(^\text{21}\)

Amongst the vast array of instruments available to raise capital, bonds have held a central role in the public finance by becoming one of the largest domestic and international sources of financing for sovereigns. The issuance of new sovereign bonds surpasses U.S. $80 billion per year.\(^\text{22}\)

Bonds can be defined as any interest-bearing or discounted government or corporate security in which the issuer has the obligation to pay the bondholder a specific sum of money, at a definite time, with a fixed interest.\(^\text{23}\) The bonds issued by governments, i.e., sovereign bonds, usually have the same characteristics as the bonds issued by corporations, with the difference that they are usually denominated in a foreign currency.

In particular, after the 1982 crises of Latin America, Argentina started issuing bonds in order to raise funds. From 1991 to 2001, Argentina issued over U.S. $186.7 billion in sovereign bonds in both domestic and international capital markets.\(^\text{24}\)

Notwithstanding the possibility of a positive impact of lending to the economic and social development of states, it is unquestionable that this debt expansion creates repayment problems and thus increases risk of default, especially in a country with considerable economic vulnerabilities. Thus, as Argentina built up untenable debt obligations, there was an increasing need to restructure its debt.\(^\text{25}\)

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22. McGovern, supra note 20, at 76.
23. JOHN DOWNES & JORDAN ELLIOT GOODMAN, DICTIONARY OF FINANCE AND INVESTMENT TERMS 59 (8th ed. 2010).
25. On a side note, it is important to consider that even though countries can argue that the debt has been raised for the public good and that there are no other alternatives to borrowing, there are always means to reduce public borrowing. Unless borrowing problem is tackled, there will constantly be a risk of a sovereign debt crisis taking place.
Sovereign debt restructuring ("SDR") concerns the diverse ways in which countries that are encountering financial distress change the original payment terms of their debt. The modification in the debt contract usually entails a reduction in the face value of the debt, or an exchange of the old bonds for new ones with lower interest rates and longer maturity.26 Bond exchanges are currently amongst the few viable solutions for the reorganization of sovereign debt. Therefore, the need for an effective debt restructuring mechanism is latent. Thus, such path was chosen by the Argentine government after the substantial devaluation of the peso and the default on the external bond debt.

While there is an extensive consensus for the need of an effective restructuring regime for countries holding untenable debt, conflicts have continuously surrounded the development of such process.27 Many proposals have been put forth, including a statutory approach proposed by the IMF: the Sovereign Debt Restructuring Mechanism ("SDRM").28 But, such proposal did not receive enough support to be implemented.29 Currently, the international community has been focusing on a contractual approach to aid the debt restructuring procedure and is advocating the use of the Collective Action Clauses ("CACs").

A. The Contractual Approach: Collective Action Clauses ("CACs")

In 1995, during the beginning of the economic crisis in Mexico, a working group of Ministers and Governors of the G-10 countries was instituted in order to discuss alternatives to sovereign debt crises.30 The group concluded that the sovereign debt restructuring process could be improved by including CACs in the bond contracts which would provide for: a) collective representation of debt holders in a restructuring, b) a majority restructuring, where a qualified majority of bondholders would be allowed to alter the terms and conditions of bond contracts over the

28. In 2011, Anne Krueger, former deputy managing director of the International Monetary Fund (IMF), stressed the need for a practical and concrete method to deal with financial crises and proposed the Sovereign Debt Restructuring Mechanism (SDRM). The SDRM was intended to aid sovereign states with untenable debts. This mechanism would enable states to rearrange their finances while allowing a supermajority of creditors to decide upon the restructuring mechanism. See Anne Krueger, A New Approach to Sovereign Debt Restructuring, INT'l MONETARY FUND, 13-14 (Apr. 2002), available at http://www.imf.org/external/pubs/ft/exrp/sdrm/eng/sdrm.pdf.
29. Id.
objection of holdouts, and c) a minimum enforcement component which requires a minimum of 25 percent of creditors to allow litigation to take place.\(^{31}\)

At this point in time, CACs became widely used in sovereign bonds issued under English law. But, their inclusion in bonds issued under New York law was not a standard procedure.\(^ {32}\) In 2002 this prospect started to change. As an alternative to the IMF’s SDRM, the United States and other G-10 nations started circulating model collective action clauses. To the markets, they appeared far more appealing in contrast to the SDRM.\(^ {33}\)

In February 2003, Mexico incorporated majority action clauses in its sovereign bonds, thus becoming the first emerging market to issue a SEC-registered debt under New York law with CACs.\(^ {34}\) After Mexico’s issuance, other emerging markets have included CACs in their bonds, including amongst others, Brazil, Chile, Uruguay and Venezuela. Since then, most sovereigns’ bonds issued under New York law contain CACs.\(^ {35}\) This trend was followed by the new permanent crisis mechanism of the European Union, the European Stability Mechanism (‘ESM’).\(^ {36}\) By 2013, it will become mandatory to include CACs in all future sovereign bonds issued by European countries.\(^ {37}\)

With the inclusion of CACs in sovereign bond contracts, the collective action problems that can take place when there are hundreds, or even thousands, of scattered creditors are reduced.\(^ {38}\) By binding all bondholders to the decision of the majority, CACs will prevent holdout creditors, i.e., the small group of creditors that refuses to participate in a restructuring process, to file an individual suit against the sovereign debtor for the execution of a contract whose terms are currently under negotiation.\(^ {39}\)

Given this framework, the inclusion of CACs in sovereign bonds simplifies the restructuring mechanism and ascertains that the restructuring process is extended to all. Its effectiveness, however, is still being verified.\(^ {40}\)


\(^{32}\) Id. at 2.


\(^{34}\) Id. at 19.

\(^{35}\) Drage & Hovaguimian, supra note 31.

\(^{36}\) Id.


\(^{38}\) Dodd, supra note 27, at 3.


\(^{40}\) Id.
III. INSTITUTIONS AVAILABLE FOR THE INTERNATIONAL SETTLEMENT OF SOVEREIGN BOND DEBT

To the extent that countries continue to default, absent sovereign bankruptcy and a successful debt restructuring framework, creditors facing default are confronted with two possible outcomes while seeking to obtain payment on defaulted sovereign debt: either they (1) get bound to the exchange offer or (2) they resort to litigation in national courts, claiming a breach in the bond contract.

The legal remedies available in national courts to holdout creditors, however, are usually ineffective.\(^{41}\) Not only can enforcement of decisions from litigation in national courts be limited by sovereign immunity, but there are only a limited number of assets that can be attached abroad.\(^{42}\) As mentioned, creditors have been trying without success to enforce the decisions obtained against the Argentine government in U.S. Federal Courts.\(^{43}\)

Given these setbacks, another emerging option has come to light for non-participating sovereign bondholders in Argentina’s restructuring process: ICSID arbitration. Italian bondholders have claimed a breach in the international obligations of the government set in the Argentina-Italy BIT in order to obtain better financial terms than the one offered by the state.\(^{44}\)

ICSID arbitration would have many benefits as compared to litigation in national courts. First, because the enforcement structure of ICSID Convention is used, awards against sovereigns can become more widely enforceable than any other decision in the public law arena.\(^{45}\) Second, an award rendered by an ICSID tribunal is not subject to substantive review given that Article 54 of ICSID Convention states:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.\(^{46}\)


\(^{42}\) Judgments against sovereigns in national courts are almost impossible to enforce since there are no attachable assets outside the state’s territory. *See id.* at 156.


On the other hand, arbitrators would be empowered to review and discipline states, conveying an impression of how the state's authority influences ordinary people and the way in which they are governed.

The first step to analyze these questions, however, is to determine whether ICSID has jurisdiction to settle sovereign bond disputes.

A. ICSID Jurisdiction over Sovereign Debt

In 1965, the World Bank sponsored the multilateral ICSID Convention, which created ICSID, a neutral forum for the resolution of investment disputes.47 Thus, BITs that include ICSID clauses provide for the submission of investor-state disputes to the ICSID Convention.48

Article 25 of the ICSID Convention defines the scope of the Centre's jurisdiction to legal disputes arising "directly out of an investment."49 But, no definition of this term is given.50 The Report of the Executive Directors on the Convention on this point stated:

No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 24 (4)).51

Even though such a statement is not absolutely accurate, the absence of a precise term is not seen as an obstacle to its use.52 The absence of a definition means that the parameters of what constitutes an investment shall be considered by the parties in the terms of the applicable BIT, which should contain their own definition of "investment," and by the tribunal concerned, which will ultimately settle this issue.53

Therefore, a dual examination to the term "investment" in the ICSID Convention, referred to as the 'double keyhole approach,' has become

48. Id.
49. I.C.S.I.D. Convention, supra note 46, art. 25.
50. Id.
52. RUDBERT DölZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 60 (2008).
53. Aron Broches, The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction, 5 COLUM. J. TRANSNAT'L L. 263, 273 (1966). Broches' account of these negotiations is relevant: "During the negotiations, several definitions of 'investment' were considered and rejected. It was felt in the end that a definition could be dispensed with 'given the essential requirement of consent by the parties'. This indicates that the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction. Presumably, the parties' agreement that a dispute is an 'investment dispute' will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling." Id.
Tribunals have to consider whether the case falls within the scope of investment as defined in Article 25 of ICSID Convention and in the BIT.\textsuperscript{55}

Notwithstanding, it is important to note that Article 25 places a limit upon the parties' discretion to decide upon the meaning of investment.\textsuperscript{56} Thus, even though the word 'investment' has a potentially wide scope, it is not without restrictions.\textsuperscript{57}

Following this rationale, the \textit{Joy Mining v. Egypt}\textsuperscript{58} tribunal stated:

The parties to a dispute cannot by contract or treaty define as investment, for the purposes of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.

Given this framework, a double keyhole assessment shall be made in order to determine the jurisdiction of sovereign bonds under the ICSID Convention.\textsuperscript{59} Thus, this next section shall assess whether there is an "investment" pursuant to Article 25 of the ICSID Convention. Subsequently, an analysis of relevant BIT will be carried through.

\section*{B. Sovereign Bonds as Investment Under Article 25 of ICSID Convention}

Defining "sovereign bonds" is essential to determine ICSID Jurisdiction. As previously highlighted, sovereign bonds are by definition "debt instruments" featuring "an obligation to pay a fixed sum of money, at a definite time, with a stated interest."\textsuperscript{60} In light of this definition, are sovereign bonds 'investments' under Article 25 of the ICSID Convention? Even though there once was much controversy towards the application of modern investment treaties to debt instruments, as Schreuer recently stated, pure financial instruments, e.g., loans and bonds, are already being accepted as investment.\textsuperscript{61} Such reasoning was confirmed by the recent jurisdictional decision in the \textit{Abaclat} case.\textsuperscript{62}

Prior to the \textit{Abaclat} case, there were two main cases—\textit{Fedax v. Vene-

\textsuperscript{54} Dolzer & Schreuer, \textit{supra} note 52, at 61-62.
\textsuperscript{55} \textit{Id.} at 62.
\textsuperscript{56} \textit{Id.} at 70.
\textsuperscript{57} CAMPIONELLI, McLACHLAN ET AL., \textit{INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES} 164 (Loukas Mistelis et al. eds., 2007).
\textsuperscript{59} Dolzer & Schreuer, \textit{supra} note 52, at 61-62.
\textsuperscript{60} \textit{BLACK'S LAW DICTIONARY} 200 (9th ed. 2009).
\textsuperscript{61} Christopher Schreuer, Lecture at the Arbitration Academy for International Law in Paris: The Development of Investment Arbitration (July 5, 2011).
\textsuperscript{62} See \textit{Abaclat}, ICSID Case No. ARB/07/5 (2011).
zuela\textsuperscript{63} and CSOB v. Slovak Republic\textsuperscript{64}—that applied BITs to debt claims. In these cases, debt owed by the government was considered to be an ‘investment.’\textsuperscript{65}

Fedax v. Venezuela was the first tribunal to decide on investment elements.\textsuperscript{66} It addressed the status of the promissory notes in three steps.\textsuperscript{67} First, under Article 25 of the ICSID Convention, it pointed out the intention of the drafters of the Convention.\textsuperscript{68} Taking into account that the travaux préparatoires (“preparatory work”) of the ICSID Convention listed loans, amongst other debt instruments, as possible objects of ICSID arbitration, the tribunal decided that the requirements of an ‘investment’ under Article 25 were met.\textsuperscript{69} Secondly, the tribunal examined consent of the parties given under the relevant BIT clause.\textsuperscript{70} The requirement was also met here.\textsuperscript{71} Finally, after reviewing the characteristics of the promissory note, the tribunal prepared a scheme to differentiate foreign investment from an ‘ordinary commercial transaction.’\textsuperscript{72}

Such scheme was later restated in Salini v. Morocco\textsuperscript{73} and became known as the Salini test: The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of transaction. In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

Notwithstanding the fact that today it has been established that these criteria constitute the definition of ‘investment,’ they should not be treated as a checklist: a certain degree of flexibility must be given while analyzing each case.\textsuperscript{74} Such was the reasoning of the tribunal in the Abaclat award, which surprisingly decided not to use this approach at all reasoning:

If Claimants’ contributions were to fail the Salini test, those contributions – according to the followers of this test – would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants’ contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention’s aim, which is to encourage private investment while giving the

\textsuperscript{65} INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 386 (Todd Weiler ed., 2005).
\textsuperscript{66} DOLZER \& SCHREUER, supra note 52, at 65–66.
\textsuperscript{67} Id. at 66.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Salini v. Morocco, ICSID Case No. ARB/00/4, 42 I.L.M. 609, 622 (2001).
\textsuperscript{74} See Abaclat, ICISD Case No. ARB/07/5.
SOVEREIGN BOND DISPUTES

Parties the tools to further define what kind of investment they want to promote. It would further make no sense in view of Argentina's and Italy's express agreement to protect the value generated by these kinds of contributions. In other words – and from the value perspective – there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be given any protection because – from the perspective of the contribution – the investment does not meet certain criteria. Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the Salini criteria. The Salini criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.  

In this respect, the approach undertaken by the tribunal was to analyze the characteristic of significant contribution, which could possibly offer difficulties to the application of modern investment treaties to financial instruments. Such criteria, however, is not a construction of the Salini tribunal, but a determination embedded in the preamble of the ICSID Convention, which stresses "the need for international co-operation for economic development and the role of private international investment therein."

In this context, the Abaclat tribunal analyzed whether the contributions made by the Claimants led to the creation of the value that is protected under the Italy-Argentina BIT. The tribunal argued:

[T]here is no doubt that Claimants made a contribution: They purchased security entitlements in the bonds and thus, paid a certain amount of money in exchange of the security entitlements. The value generated by this contribution is the right attached to the security entitlements to claim reimbursement from Argentina of the principal amount and the interests accrued.

Consequently, the tribunal decided that the purchase of the security entitlements in the bonds qualified as 'investment' under Article 25 of the Convention.

Fedax v. Venezuela also relied heavily on the abstract contribution of promissory notes to Venezuelan treasury:

The important question is whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance it various governmental needs. It is not
disputed that in this case that the Republic of Venezuela, by means of the promissory notes, received an amount of credit that was put to work during a period of time for its financial needs.\textsuperscript{81}

Thus, the tribunal stated that the promissory notes contributed to Venezuelan treasury, pursuant to the Law of Public Credit, which, in turn, contributed to the host state's development:

The promissory notes were issued by the Republic of Venezuela under the terms of the Law of Public Credit (the Law), which specifically governs public credit operations aimed at raising funds and resources "to undertake productive works, attend to the need of national interest and cover transitory needs of the treasury."\textsuperscript{82}

It is important to note that even though the requirement of significant contribution is subject to some disagreement, as long as the investment was lawfully admitted and implemented, the fact that it is coherent with the legal order of the host state should already mean that it contributes to its development.\textsuperscript{83}

\section{C. Sovereign Bonds as Investment Under BITS}

As previously mentioned, when a jurisdictional objection is made regarding the existence of an "investment," tribunals examine the notion of "investment" under Article 25 of the ICSID Convention and under the scope of consent given by the host state in light of the provision in the investment treaties.\textsuperscript{84}

Multilateral treaties, such as the Energy Charter Treaty,\textsuperscript{85} typically define the term "investment" along the lines of BITs. Most BITs adopt an asset-based formula to define the term "investment."\textsuperscript{86} They commonly contain a general inclusive phrase, followed by a non-exhaustive list that usually illustrates five categories of assets.\textsuperscript{87} This finite and comprehensive definition of assets accounts for the fact that investments develop

\begin{itemize}
\item \textsuperscript{81} \textit{Fedax N.V.}, ICSID Case No. ARB/96/3, 37 I.L.M. at 1386.
\item \textsuperscript{82} \textit{Id.} at 1386-1387.
\item \textsuperscript{83} \textsuperscript{Dolzer \& Schreuer, supra note 52, at 69.}
\item \textsuperscript{84} \textit{Id.} at 61.
\item \textsuperscript{85} \textit{See} Energy Charter Treaty, art. 1(6), Dec. 17, 1994, 34 I.L.M. 360 (defining the term "investment").
\item \textsuperscript{86} \textsuperscript{Dolzer \& Schreuer, supra note 52, at 61.}
\item \textsuperscript{87} \textit{Securing High Investment Protection for EU Investors: A Review of Member States' Model BITs 14} (2011), \textit{Kommerskollegium Nat'l Board of Trade}, http://www.kommers.se/upload/Analysarkiv/In%20English/New%20reports/Report%20Securing%20high%20investment%20protection%20for%20EU%20investors.pdf (last visited Oct. 8, 2011) (explaining that the five categories typically included are: 1) Movable and immovable property and any related property rights such as mortgages, liens or pledges; 2) Various types of interests in companies, such as shares, stock, bonds, debentures or any other form of participation in a company, business enterprise or joint venture; 3) Claims to money and claims under a contract having a financial value and loans directly related to a specific investment; 4) Intellectual property rights; and 5) Business concessions (i.e. rights conferred by law or under contracts)).
\end{itemize}
over time, providing a high level of protection for the investor.\textsuperscript{88} Notwithstanding the usual explicit inclusion of bonds as a protected asset under BITs,\textsuperscript{89} some lists implicitly include sovereign bonds.

For instance, the Argentina-Australia BIT definition of investment explicitly includes \textit{bonds} (in the official English version), or “\textit{bonus}” (in the official Spanish version), in its list:

“For the purposes of this Agreement: (a) ‘investment’ means . . . (ii) shares, stocks, bonds and debentures and any other form of participation in a company or legal person.”\textsuperscript{90}

“A los fines del presente Acuerdo: (a) ‘inversión’ designa . . . (ii) acciones, títulos, bonos y obligaciones y cualquier otro tipo de participación en una sociedad o persona jurídica.”\textsuperscript{91}

It is now important to scrutinize more closely whether the present bondholders’ dispute meets the feature of an investment under the Argentina-Italy BIT.\textsuperscript{92} The BIT states the following: “[For the purposes of this Agreement, the term] investment includes, without limitation . . . (c) obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues.”\textsuperscript{93}

“A los fines del presente Acuerdo: 1. El término “inversión” designa ( . . . ) c) obligaciones, títulos públicos o privados o cualquier otro derecho a prestaciones o servicios que tengan un valor económico, como también las ganancias capitalizadas.”\textsuperscript{94}

\textsuperscript{88} See Dolzer & Schreuer, supra note 52, at 61.
\textsuperscript{91} Id., available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina-australia_sp.pdf (Spanish version).
\textsuperscript{93} See Abaclat, ICSID Case No. ARB/07/5, ¶ 352.
\textsuperscript{94} Spanish translation.
As demonstrated, the coverage in this BIT is extended to "obligaciones," as delineated in the official Spanish version, and does not mention specifically the term 'bonus' or 'bonds.'\textsuperscript{95}

In light of this evidence, the Argentine government contested ICSID jurisdiction based on the argument that bonds are not covered in the BIT.\textsuperscript{96} But, such interpretation did not succeed.\textsuperscript{97}

By definition, the term "obligation," or "obligaciones," is a "legal responsibility, as for a debt."\textsuperscript{98} A debt, on the other hand, is a "general name for bonds, notes, mortgages, and other forms of paper evidencing amounts owed and payable on specified dates or on demand."

Hence, even though broad, the term "obligaciones" gives coverage to bonds.

In these terms, the tribunal in the \textit{Abaclat} case stated:

Secondly, lit. (c) specifically addresses financial instruments. It is true that the term "obligations" is a broad term and can refer to any kind of contractual obligation, \textit{i.e.}, debt, and it is also true that the term "title" is also very broad. However, put in the context of the further terms listed in lit. (c) such as "economic value" or "capitalized revenue," as well as considering that lit. (f) already deals with the more general concept of "any right of economic nature," lit. (c) is to be read as referring to the financial meaning of these terms. Thus, the term "obligation" may be understood as referring to an economic value incorporated into a credit title representing a loan. This kind of obligations [sic] would in the English language more commonly be called "bond," rather than "obligation."\textsuperscript{100}

Such understanding was also observed in \textit{Fedax v. Venezuela}: "According to the underlying BIT, the phrasing 'every asset' justifies a broad interpretation and that in addition '[. . .]' this interpretation is also consistent with the broad reach that the term 'investment' must be given in light of the negotiating history of the Convention."\textsuperscript{101}

Further, in \textit{CSOB v. Slovakia}, the tribunal decided that although the term loans were not explicitly mentioned in the Czech Republic-Slovakia BIT, broad terms such as "assets" and "monetary receivables or claims" clearly encompass loans given to the Slovak government.\textsuperscript{102} Hence, the jurisdiction to claim was accepted.\textsuperscript{103}

\textsuperscript{95} See id.
\textsuperscript{96} See \textit{Abaclat}, ICSID Case No. ARB/07/5, ¶¶ 100, 102.
\textsuperscript{97} Id. ¶ 501.
\textsuperscript{98} \textsc{John Downes} & \textsc{Jordan Elliot Goodman}, \textsc{Barron's Dictionary of Finance and Investment Terms} 379 (4th ed. 1995) (emphasis added).
\textsuperscript{99} Id. at 127.
\textsuperscript{100} \textsc{Abaclat}, ICSID Case No. ARB/07/5, ¶ 355.
\textsuperscript{101} \textsc{Org. for Econ. Co-Operation and Dev.}, \textsc{International Investment Law: Understanding Concepts and Tracking Innovations} 67 (2008).
\textsuperscript{102} Id. at 68.
\textsuperscript{103} Id. at 69.
D. Overlapping Jurisdiction over Sovereign Bonds

1. Contract Claims versus Treaty Claims

With the notable exception of Brazil,\textsuperscript{104} sovereign bond contracts are usually governed by municipal law.\textsuperscript{105} International law only comes into sight on a sovereign bond dispute when the bondholder alleges a breach of an international obligation set in a BIT based on the acts of a sovereign.\textsuperscript{106}

In the Abaclat case, it is unquestionable that Argentina has not performed its contractual obligations under the issued bonds.\textsuperscript{107} Therefore, Argentina may or may not be held liable for the breach of the obligations set therein.\textsuperscript{108} But, it is relevant to the ICSID tribunal that Argentina does not justify the enactment of Law n. 26017 due to a contractual right such as a force majeure clause.\textsuperscript{109} On the contrary, Argentina bases its defense on its financial situation and state of insolvency at the end of 2001, which has nothing to do with any contractual right.\textsuperscript{110} Thus, what Argentina did was use its sovereign power to promulgate a law that entitled it to not perform its obligations.\textsuperscript{111} In the words of the Abaclat tribunal:

[T]he present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general, encompassing but not limited to the Claimants.\textsuperscript{112}

In such case, as confirmed by the Abaclat tribunal, the ICSID enjoys concurrent jurisdiction with the competent organ—be it a court or an arbitral tribunal—to solve such a dispute.\textsuperscript{113} There is nothing unusual in this overlap of claims because the legal basis on which the claims rely are different.\textsuperscript{114}

2. Bond’s Collective Action Clauses (CACs) and their Relationship with Treaty Claims

Furthermore, an important issue that has come to light with the spread of CACs, which have now been identified in more than 90 percent of the recently issued bonds,\textsuperscript{115} is whether they can bar recourse to ICSID arbi-

\begin{footnotesize}
\begin{enumerate}
\item See Cross, supra note 11, at 341-43; Waibel, supra note 7, at 732 n.131. Brazilian bonds incorporate UNCITRAL arbitration clauses. The reasons for such incorporation, however, are historic. See Cross, supra note 11, at 335.
\item See Cross, supra note 11, at 341-43; Waibel, supra note 7, at 732.
\item See Cross, supra note 11, at 345.
\item Abaclat, ICSID Case No. ARB/07/5, ¶ 320.
\item See id.
\item Id. ¶¶ 320-21.
\item Id. ¶ 321.
\item Id. ¶ 323.
\item Id. at ¶ 324.
\item See id. ¶¶ 316-17.
\item See id. ¶ 318.
\item UNCTAD, supra note 26, at 6.
\end{enumerate}
\end{footnotesize}
Some submit that where a majority of bondholders have decided on the restructuring of the debt, holdout creditors will not be allowed to allege a treaty breach of an international obligation under the BIT. Such claims would not be possible since the contractual rights once held by the dissenting creditors were modified by the new terms of restructuring.

But, the acts of the creditors are based on a contractual framework and do not concern the acts of a sovereign. Consequently, despite the change in the contractual rights of the bondholders, the treatment standards that should be offered to investors and their investments do not change. As will be seen in the next section, if standards of protection, such as fair and equitable treatment and expropriation without compensation are breached, the state's responsibility to compensate will be triggered, despite the presence of CACs in the bonds.

Many complications may arise from such a procedure. The use of ICSID arbitration could undermine the restructuring procedure, incentivizing creditors not to adhere to the debt restructuring; as a result, the seventy-five percent threshold required to bind all holders with the same bond would not be met. Further, dissenting creditors could be awarded compensation that would not be conferred to the supermajority bondholders, creating an apparent breach of the pari passu clauses provided for in the bond contracts.

On the other hand, with the absence of a statutory framework to deal with sovereign bankruptcy, there is a growing issue as to whether ICSID arbitration and investment arbitration in general could become valuable assets in the debt restructuring procedure used to solve related disputes. This dilemma has been dealt with in section five.

In light of the above analysis, a possible solution for countries wishing to avoid liability in cases concerning public debt is to explicitly include guidelines in the investment treaties concerning the interaction between

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116. It is important to note that this matter does not pertain to the Italian bondholder case since the sovereign bond contracts in question do not provide for CACs.
117. See Waibel, supra note 7, at 736.
118. See id. at 736-37; see also Sovereign Debt Restructuring and International Investment Agreements, supra note 44, at 6.
120. See, e.g., Waibel, supra note 7 at 736.
121. Id. at 713, 736.
122. Rodrigo Olivares-Caminal, Understanding the Pari Passu Clause in Sovereign Debt Instruments: A Complex Quest, 43 INT'L LAW. 1217, 1226 (2009) (defining "pari passu" as "refer[ring] to things that are in the same situation [or] that rank equally"). According to Francis B. Palmer, "'[t]here is no special virtue in the words 'pari passu', 'equally' would have the same effect or any other words showing that the [bonds] were intended to stand on the same level footing without preference or priority among themselves.'" Id. (quoting FRANCIS B. PALMER, COMPANY PRECEDENTS: FOR USE IN RELATION TO COMPANIES SUBJECT TO THE COMPANIES ACT, 1862-1890: WITH COPIOUS NOTES AND AN APPENDIX CONTAINING ACTS AND RULES 109-10 (8th ed. 1902)).
123. See Waibel, supra note 7, at 715.
124. See, e.g., Cross, supra note 11, at 337.
sovereign debt restructuring and those treaties.\textsuperscript{125} Such a provision was stated in Annex 10-A of the Central America-Dominican Republic-United States of America Free Trade Agreement:

The rescheduling of the debts of a Central American Party or the Dominican Republic, or of such Party's institutions owned or controlled through ownership interests by such Party, owed to the United States and the rescheduling of any of such Party's debts owed to creditors in general are not subject to any provision of Section A other than Articles 10.3 [National Treatment] and 10.4 [Most Favored Nation Treatment].\textsuperscript{126}

These provisions can be seen as a step towards recognizing the need to implement a special mechanism for the payment of debt when states are facing financial and economic crises.

Once ICSID jurisdiction has been accepted, demonstrating a breach of the BIT standards of protection is the next step to triggering the responsibility of the state under international law.\textsuperscript{127} The next section examines the standards of protection most frequently sought to trigger state responsibility and analyzes necessity as a possible justification for international wrongful conduct.

IV. STATE RESPONSIBILITY UNDER SOVEREIGN DEBT CRISES

The Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), adopted by the International Law Commission in 2001, set the basic rules of state responsibility for its internationally wrongful acts.\textsuperscript{128} Article 2 states that for responsibility to be attributed to the State, the wrongful act must constitute a violation of an international obligation of the State.\textsuperscript{129} The term "international obligation" encompasses both treaty and non-treaty obligations.\textsuperscript{130} In light of this definition, a breach of an obligation set in an investment treaty will trigger state responsibility.\textsuperscript{131}

Taking into account the need to protect foreign investors against the risk of placing their assets under the jurisdiction of a host state, investment treaties include treatment obligations designed to protect investors


\textsuperscript{126} Id.

\textsuperscript{127} Waibel, supra note 7, at 738-39.


\textsuperscript{129} Id. art. 2.

\textsuperscript{130} Id. art. 2 commentary ¶ 7.

\textsuperscript{131} Id.
from the interference or regulation of their investments by host states.\textsuperscript{132} Although treaties do not typically define “treatment,” arbitral tribunals have defined the term as follows: [T]he ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.\textsuperscript{133}

The application of the treatment standards establishes the precise impact of the treaty: by interpreting the standards, arbitrators can determine the scope of the sovereign power and decide whether and how public authority may be used to limit the investors’ actions.\textsuperscript{134}

Given this framework, an important issue to be analyzed is whether defaults on sovereign bonds or sovereign debt restructurings breach treaty obligations and, thus, trigger state responsibility.\textsuperscript{135} Even further, in the Argentine context, one should analyze whether governmental measures taken as a response to a financial crisis are exempt from treaty obligations.\textsuperscript{136}

This section prima facie analyzes two of the most important and frequently sought standards of protection in BITs: a) fair and equitable treatment; and b) expropriation.\textsuperscript{137} Subsequently, the article analyzes whether the concept of necessity, as defined in the ILC Articles, can be invoked as a justification for the suspension of payment by the Argentine government of its external bonds.

A. STANDARDS OF TREATMENT

1. Fair and Equitable Treatment

Fair and equitable treatment (FET) is the most important standard of protection in investment disputes.\textsuperscript{138} It is frequently invoked by investors and is nearly always accepted.\textsuperscript{139} Most investment protection treaties contain a reference to FET.\textsuperscript{140} For instance, article 2.II.a of the BIT between the United States and Argentina states: “Investment shall at all times be accorded fair and equitable treatment.”\textsuperscript{141}

The definition of FET is rather imprecise.\textsuperscript{142} Therefore, tribunals have

\begin{itemize}
\item \textsuperscript{132} Salacuse, supra note 119, at 205.
\item \textsuperscript{133} Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. The Argentine Republic [2006] ICSID Case No. ARB/03/19
\item \textsuperscript{134} Salacuse, supra note 119, at 205-07.
\item \textsuperscript{135} Waibel, supra note 7, at 738.
\item \textsuperscript{136} Abaclat, ICSID Case No. ARB/07/07, ¶ 320.
\item \textsuperscript{137} Christoph Schreuer, Fair and Equitable Treatment in Arbitral Practice, 6 J. WORLD INV. & TRADE no. 3, at 356, 373 (2005).
\item \textsuperscript{138} Id. at 373-74.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\item \textsuperscript{142} Schreuer, supra note 137, at 385.
\end{itemize}
made many attempts to give a more specific meaning to the standard.\textsuperscript{143} One of the most complete and often cited definitions was set forth by the tribunal in \textit{Tecmed v. Mexico}:

The Arbitral Tribunal considers that this provision of the Agreement, in light of the \textit{good faith principle} established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the \textit{basic expectations} that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, \textit{free from ambiguity and totally transparent}ly 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 . . . The foreign investor also expects the host state to \textit{act consistently} . . . The investor also expects the State to use the \textit{legal instruments} that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.\textsuperscript{144}

In spite of this lack of a precise definition, the vast case law rendered over the years has made it possible to identify particular circumstances where the FET standard has been applied.\textsuperscript{145} Therefore, an analysis of the FET concept in light of the typical factual situations leads to a group of more concrete principles that are protected under the broad FET standard.\textsuperscript{146} As identified by Schreuer, such principles include: “transparency and the protection of the investor’s legitimate expectations; freedom from coercion and harassment; procedural propriety and due process; and good faith.”\textsuperscript{147}

But, it is not clear whether the reliance on contractual undertakings is one of the factual situations protected by the FET concept.\textsuperscript{148} The decisions on this matter are not definite.\textsuperscript{149} The tribunal in \textit{Mondev v. United States} suggested that contractual obligations were protected under NAFTA Article 1105 (5), which states, “[i]n deed a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance.”\textsuperscript{150} This position was also upheld by the tribu-

\begin{itemize}
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} Técnicas Medioambientales Tecmed, S.A. v. Mex., ICSID Case No. ARB(AF)/00/2, Award, ¶ 57 (May 29, 2003), 10 ICSID Rep. 134 (2006) (emphasis added).
  \item \textsuperscript{145} Christoph Schreuer, \textit{Fair and Equitable Treatment in Arbitral Practice}, 6 J. WORLD INV. & TRADE no. 3, at 356, 373 (2005).
  \item \textsuperscript{146} \textit{Id.} at 373-74.
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} \textit{Id.} at 379.
  \item \textsuperscript{149} \textit{Id.}
  \item \textsuperscript{149} Mondev Int’l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶ 134 (Oct. 11, 2002), 6 ICSID Rep. 192 (2004).
\end{itemize}
nal in *SGS v. Philippines*.\(^{151}\)

Some tribunals have embraced a restrictive approach, stating that a simple breach of contract would not amount to a violation of the FET standard, provided that the state did not exercise its sovereign power to repudiate the contract.\(^{152}\) Such a position was sustained by the *Waste Management v. Mexico* tribunal: "[E]ven the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem."\(^{153}\)

In *Vivendi v. Argentina*, the tribunal suggested that "‘mere’ breaches of contract” would not amount to a breach of the FET standard.\(^{154}\) Schreuer goes even further by stating that when the breach of contract results from financial difficulties, a breach of the FET standard cannot be invoked.\(^{155}\)

These controversial decisions indicate that, in order to determine the applicability of the FET standard to contract claims, it is imperative that tribunals balance the interests of the investors with the governmental acts.\(^{156}\) Thus, an analysis of whether the host state’s interference with the investor’s rights is arbitrary or a legitimate response to a situation of genuine difficulty will need to be undertaken.\(^{157}\)

In the Italian bondholder cases, Argentina’s default possibly goes beyond a mere breach of contract.\(^{158}\) By prohibiting the reopening of the restructuring process, Law n. 26017 definitely hinders investors’ contractual rights.\(^{159}\) On the other hand, if Schreuer’s postulate is correct and a country’s default cannot be invoked as a breach of the FET standard, then the implementation of the debt restructuring process could be invoked.\(^{160}\)

Given this framework, brief interpretations of the specific FET principles shall be made regarding this subject matter.

a. Transparency and Protection of the Investor’s Legitimate Expectations

Transparency and the protection of the investor’s legitimate expecta-


\(^{152}\) See Waste Management, Inc. v. Mex., ICSID Case No. ARB(AF)/00/3, Award, ¶ 115 (Apr. 30, 2004), 11 ICSID Rep. 362 (2007); see also Waibel, supra note 7, at 751.

\(^{153}\) Waste Management, Inc., supra note 152, at ¶ 115.


\(^{155}\) See Schreuer, supra note 145, at 380.

\(^{156}\) See Waibel, supra note 7, at 759.

\(^{157}\) See id. at 746-47, 759.

\(^{158}\) Id. at 746.

\(^{159}\) Id.

\(^{160}\) Id. at 751.
tions often overlap and blend into one another. Transparency means that the legal framework affecting the investor's investment and decisions is easily perceived. This does not mean that the government cannot change its laws. What matters is that the basic legal framework offered to the investor is not undermined.

The investor's legitimate expectations emerge from the legal framework of the host state at the time the investment is acquired. Thus, if the state creates certain expectations through its legislation (leading the contracting party to invest), and then reverses such assurances, a violation of the principle of FET results.

In the Italian bondholders' case, the restructuring of the debt should not be the main transparency issue because Argentina has restructured its sovereign debt many times. Therefore, there should not be a major concern about legitimate expectations there. But, with Law n. 26017, the legal status quo changes significantly. As described by Owen Pell, "the Exchange Offer does not preclude amendment, extension, or future offers, and the Most Favored Creditor clause appears to allow for side or other future settlements with Bondholders above the levels offered in the Exchange Offer." Thus, by abrogating rights to non-participating bondholders, the violation of the fair and equitable treatment standard seems clear.

b. Freedom from Coercion and Harassment

A confrontational and aggressive exchange offer could potentially be seen as a violation of the FET standard. In Tecmed v. Mexico there was a replacement of an unlimited license with a limited license for the operation of landfill. The tribunal pointed out that such a permit denial would force the investor to relocate to another site at its own expense: under such circumstances, such pressure involves forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investments under Article 4(1) of the Agreement and objectionable from the perspective of international law.

Such a rationale may be employed to analyze the recent Argentine case

161. Schreuer, supra note 145, at 374.
162. Id.; see also Waibel, supra note 7, at 752.
163. See Schreuer, supra note 145, at 374.
164. Id.
165. Id.; SALACUSE, supra note 119, at 231.
166. See Waibel, supra note 7, at 752.
167. Id.
168. Memorandum from Owen C. Pell to Global Committee of Argentina Bondholders, supra note 13.
169. Id.
170. See id.
171. See Waibel, supra note 7, at 752.
172. Técnicas Medioambientales Tecmed, S.A. v. Mex., ICSID Case No. ARB(AF)/00/2, ¶ 57.
173. Id. ¶ 163.
and the real motivation of Law n. 26017. Was its primary objective to serve as a commitment device, or to coerce holdout creditors to participate in the exchange offer?

c. Procedural Propriety and Due Process

As emphasized by many scholars, a fair procedure by the host state is a crucial prerequisite of the rule of law and a fundamental element of the FET standard. The bondholders may argue in this case that there were serious procedural shortcomings in the exchange offer because the Argentine government did not negotiate with the creditors and did not leave the holdout creditors any choice but to agree with the new terms of the bond.

As noted by the UNCTAD, it is not possible to conduct efficient negotiations with the thousands, sometimes even hundreds of thousands of creditors. Thus, the government expects a majority of its creditors to accept when it makes an exchange offer. Although such negotiations may in fact be impossible, the bondholders had to be conferred an option as to whether they wanted to agree with the new terms or not. As previously noted, such an option was not given.

d. Good Faith

Finally, if the actions of the host state are taken in bad faith, then a violation of the FET standard occurs. The notion of bad faith, however, is not essential to ascertain whether there was a violation of the FET standard. This was the position of the arbitral tribunal in Mondev v. United States: “[W]hat is unfair or inequitable need not to equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”

Determining whether the Argentine government acted in bad faith requires a thorough knowledge of the economic situation of Argentina and its payment capacity. The bondholders then must demonstrate that the debt restructuring procedure was elaborated due to the governments’ unwillingness to pay. Taking into account the promulgation of Law n.

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174. Waibel, supra note 7, at 752.
175. See Dolzer & Schreuer, supra note 52, at 142; Salacuse, supra note 119, at 241.
176. See Waibel, supra note 7, at 752.
177. Sovereign Debt Restructuring and International Investment Agreements, supra note 44, at 5.
178. Id.
179. See Waibel, supra note 7, at 752.
180. See id.
181. Salacuse, supra note 119, at 243.
182. Schreuer, supra note 145, at 385.
183. Mondev Int’l Ltd., ICSID Case No. ARB(AF)/99/2, ¶ 116.
184. See Waibel, supra note 7, at 753.
185. Id.
26017, the bondholders also must demonstrate that the government intended to annul the non-participating bondholders’ rights.\textsuperscript{186}

Notwithstanding those probable violations, the notion of bad faith is difficult to prove because a government can always offer a public policy justification for its actions.\textsuperscript{187} Also, the arbitral tribunal is put in a very delicate position and possibly would not desire to give a decision against the state in such terms, when other violations of the FET principles could be used instead.\textsuperscript{188}

2. \textit{Expropriation}

One of the main concerns for foreigners in general (and for foreign investors) has been the international rules on expropriation.\textsuperscript{189} Expropriation is one of the most serious ways to obstruct the use of property, because seizing an investment without compensation destroys all investor expectations.\textsuperscript{190} Thus, it became a classical substantive standard of protection and is sometimes seen as synonymous to investor protection.

a. The Scope of Expropriation

The definition of investment in the BITs with host states will define the scope of protection given to investors against expropriation.\textsuperscript{191} Such protection is usually extended to tangible and intangible rights, thus including contractual rights.\textsuperscript{192} Because contracts outline the legal and financial structure of the investment, practically all investment treaties support the idea that rights arising from a contract are susceptible to expropriation and are, consequently, covered by the term “investment.”\textsuperscript{193}

This was the position adopted in \textit{Siemens A. G. v. Argentine Republic} while employing the German and Argentine BIT:

The Contract falls under the definition of “investments” under the Treaty and Article 4(2) refers to expropriation or nationalization of investments. Therefore, the State parties recognized that an investment in terms of the Treaty may be expropriated. There is nothing unusual in this regard. There is a long judicial practice that recognizes that expropriation is not limited to tangible property.\textsuperscript{194}

\textsuperscript{186} See \textit{id.}.
\textsuperscript{187} \textit{Salacuse}, supra note 119, at 243.
\textsuperscript{188} \textit{id.}
\textsuperscript{189} \textit{Dolzer & Schifer}, supra note 52, at 89.
\textsuperscript{190} \textit{id.}
\textsuperscript{191} \textit{id.} at 90.
\textsuperscript{192} \textit{See id.} at 116-17.
\textsuperscript{193} \textit{id.}
\textsuperscript{194} \textit{Siemens A. G. v. Arg.}, ICSID Case No. ARB/02/8, Award, ¶ 267 (Feb. 6, 2007), 14 ICSID Rep. 518 (2009); \textit{see also Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Pak.}, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 255 (Nov. 14, 2005), available at http://icsid.worldbank.org/ICSID/ FrontServlet?requestType=Cases RH&reqFrom=Main&ActionVal=ViewAllCases (follow link labeled “click here for advanced search options,” type “Bayindir” in the “Claimant” box, and click “Search.” Then, click on “ARB/03/29.” Select the “Decisions and Awards” tab. Then, click on “English (Original)” (not yet reported in ICSID Rep.); Consor-
Regardless, in the aftermath of a financial crisis, where a state defaults on sovereign bond contracts or restructures its debt, direct or indirect expropriation\(^\text{195}\) could be invoked as a result of such actions. But, because BITs do not specifically address whether defaults and debt restructurings constitute expropriation, it is unclear whether sovereign bonds are qualified as contractual rights subject to expropriation.

There are different views regarding the possibility of expropriation of sovereign bonds. As highlighted by Waibel,\(^\text{196}\) some scholars, such as Feilchenfeld, confirmed such protection. On the other hand, scholars such as Borchard associate bonds with commercial undertakings.\(^\text{197}\) In this way, the contractual obligation arising out of the bond would be of a commercial nature, and not of an investment nature.\(^\text{198}\) Therefore, arbitral tribunals should reject jurisdiction over bond disputes.\(^\text{199}\) But, having already established the investment nature of the bond dispute, it seems unlikely that such position will be undertaken by the arbitral tribunal in the Italian bondholder case.

b. Requirements for Expropriation

In harmony with the concept of territorial sovereignty, it has been accepted that expropriation of investors' assets by a host state is not illegal if certain conditions are met.\(^\text{200}\) Hence, investment treaties address the conditions and consequences of such action but do not affect the right to expropriate.\(^\text{201}\)

There are four basic requirements in international law for a lawful expropriation to occur: a) the measure must serve a public purpose; b) the measure must be non-discriminatory; c) the procedure should follow due process; and d) full, adequate and effective compensation shall be given.\(^\text{202}\)

\(^\text{195}.\) The difference between direct and indirect expropriation lies on whether the legal title of the investor is affected by the measure. Under direct expropriation, the title is taken away, and under indirect expropriation, the title continues with the investor. Direct expropriations have become rare, while indirect expropriations have gained prominence. Dolzer & Schreuer, \textit{supra} note 52, at 92.

\(^\text{196}.\) Waibel, \textit{supra} note 7, at 744.

\(^\text{197}.\) \textit{Id.}

\(^\text{198}.\) \textit{Id.}


\(^\text{200}.\) Dolzer & Schreuer, \textit{supra} note 52, at 89.

\(^\text{201}.\) \textit{Id.}

\(^\text{202}.\) \textit{Id.} at 90-91.
Compensation is the most controversial of these requirements.\textsuperscript{203} Expropriation that is fully compensated likely will not be contested.

Compensation must be full, adequate, and effective.\textsuperscript{204} Adequate compensation is usually understood as the full market value of the expropriated investment at the time of the taking.\textsuperscript{205} But, such amount of compensation is difficult to determine, especially when a debt restructuring takes place.\textsuperscript{206} In such a case, what should be the appropriate compensation given to the holdout creditors? Should the original value of the bond be taken into account, or the value agreed upon by the other bondholders in the new exchange offer? The position of the arbitral tribunal will determine the effectiveness of future exchange offers because bondholders may be tempted not participate in the exchange offers, therefore making it difficult to achieve the required threshold to consider debt restructuring of successful countries.\textsuperscript{207}

Another important question is whether the legal duty to compensate for internationally wrongful acts remains in effect when the necessity defense is invoked.\textsuperscript{208} On this matter, Article 27 of the ILC Articles is very clear:

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question.\textsuperscript{209}

Therefore, because there is no rationale for the host state to take advantage of the plea of necessity and for the investor to suffer the costs, compensation should be given as soon as the emergency situation ceases to exist.\textsuperscript{210} The tribunal adopted a similar understanding in CMS v. Argentina: "Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed."\textsuperscript{211}

Such decision was also adopted by the Tribunal in Enron v. Argentina.\textsuperscript{212} On the other hand, the LG&E v. Argentina tribunal decided that Argentina should only be held liable for the decisions it took before and

\textsuperscript{203} \textit{id.} at 91.
\textsuperscript{204} \textit{id.}
\textsuperscript{205} \textit{id.}
\textsuperscript{206} \textit{See id.}
\textsuperscript{208} \textit{See Dolzer & Schreuer, supra note 52, at 91.}
\textsuperscript{210} \textit{See Dolzer & Schreuer, supra note 52, at 170.}
\textsuperscript{211} CMS Gas Transmission Co. v. Arg., ICSID Case No.ARB/01/8, Award, ¶ 382 (May 12, 2005), 14 ICSID Rep. 158 (2009).
\textsuperscript{212} Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, ¶ 321, 339 (May 22, 2007).
after the state of emergency had ceased to exist.\textsuperscript{213}

c. Effect of the measure

The effect of the measure over the investment is another relevant element in determining the existence of an expropriation requiring compensation. Whenever such effect is extensive, lasts for a considerable duration of time and is driven by intent, it will be assumed that a seizure of the investment has happened.\textsuperscript{214}

In light of these requirements, the “mere non-performance” of contractual obligations is not considered by case law as expropriation. Other elements need to be present.\textsuperscript{215} The arbitral tribunal in \textit{Waste Management v. Mexico}, for instance, decided that the failure to pay the fees by the City of Acapulco under a concession contract was not equivalent to expropriation. The tribunal reasoned: “The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts.”\textsuperscript{216}

As Schreuer noted, “the context suggests that the Tribunal’s point was that mere non-payment of a debt does not constitute an expropriation... [I]t is also possible that what the Tribunal meant was simply that there had to be some positive action rather than a mere omission.”\textsuperscript{217} In this sense, for expropriation to take place, intent is required.\textsuperscript{218} The City of Acapulco, however, found itself in a situation of genuine difficulty, and thus did not act in an arbitrary manner.

Nevertheless, the condition of “mere non-performance” does not apply to the debt restructuring in Argentina.\textsuperscript{219} Firstly, Law n. 26017, which forbade the reopening of the exchange offer and any negotiations with creditors that refused to participate in the restructuring process, is certainly a state act that interferes with existing contractual rights.\textsuperscript{220}

But, it is always important to differentiate whether the measures were taken to enhance the exchange offer or to coerce holdout creditors to accept the bond exchange.\textsuperscript{221} It is apparent that Law n. 26017 is discriminatory against holdout creditors and coercive.\textsuperscript{222} As a result, such re-

\textsuperscript{213} LG&E Energy Corp., LG&E Capital Corp. and LG&E Int'l Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, ¶ 228-29 (Oct. 3, 2006).
\textsuperscript{214} SALACUSE, supra note 119, at 308.
\textsuperscript{215} MICHAEL WAIBEL, SOVEREIGN DEFaulTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS 282 (2011).
\textsuperscript{216} Waste Management, Inc., ICSID Case No. ARB(AF)/00/3, ¶ 174.
\textsuperscript{217} Christoph Schreuer, The Concept of Expropriation Under the ETC and Other Investment Protection Treaties, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 108, ¶ 118 (Clarisse Ribeiro ed., 2006)
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 746-47.
\textsuperscript{222} Id. at 747.
structuring method will trigger the states' international liability to compensate.\textsuperscript{223}

Furthermore, as discussed in the Memorandum from Owen Pell to the GCAB in February 2005, "Recent Argentine Legislation and Bondholders Remedies" ("GCAB Memorandum"), Argentina defaulted on its debt in 2001.\textsuperscript{224} But, even though by 2005 some individual creditors had received favorable judgments in U.S. federal court, they had "little success in locating, and no success in attaching or executing on, any Argentine assets."\textsuperscript{225}

Thus, as mentioned, the duration of the measure is also an important feature for the assessment of the existence of expropriation. A similar understanding was stated in \textit{LG&E v. Argentine Republic}:

Similarly, one must consider the duration of the measure as it relates to the degree of interference with the investor's ownership rights. Generally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations.\textsuperscript{226}

In spite of the coercive measures taken by governments, recent decisions have tried to find a balance between the right of protection of the investors' investment and the right of host states to take actions that are excused under the customary international doctrine of necessity.

\textbf{B. The Plea of Necessity}

The term "necessity" (\textit{état de nécessité}) is used to indicate extraordinary conditions in which the only way for a state to preserve its essential interests endangered by grave and imminent peril is not to comply with its international obligations.\textsuperscript{227} Such plea precludes international wrongful acts perpetrated by the state.\textsuperscript{228}

In the past, this claim was connected to the idea of self-preservation.\textsuperscript{229} Thus, when there was an imminent threat to self-preservation, any lawful or even unlawful action could be taken in order to protect the endangered right.\textsuperscript{230} Hugo Grotius stated that such right was applicable not only to individuals, but also to inter-state relations.\textsuperscript{231} In this way, Grotius set the nineteenth century understanding that States possessed certain fundamental rights, which included the right to existence and the

\textsuperscript{223.} \textit{Id.}
\textsuperscript{224.} Memorandum from Owen C. Pell to Global Committee of Argentina Bondholders, \textit{supra} note 13.
\textsuperscript{225.} \textit{Id.}
\textsuperscript{226.} \textit{LG&E Energy Corp.}, ICSID Case No. ARB/02/1, ¶ 193.
\textsuperscript{227.} \textit{Draft Articles on Responsibility of States for Intentionally Wrongful Acts}, \textit{supra} note 128, at 80.
\textsuperscript{228.} \textit{Id.}
\textsuperscript{230.} \textit{Id.}
\textsuperscript{231.} \textit{Id.}
right to self-preservation.232

But, by understanding that self-preservation was a right many problems were created because one would need to balance which opposing rights were more important. Thus, contemporary law has ended such dilemma by dispensing the notion of a right and acknowledging that self-preservation and other interests of the state could be used as an excuse to noncompliance of international obligations under certain circumstances.233

Such excuses were not left unfettered. At the request of the ILC, Professor Robert Ago, who was appointed judge of the International Court of Justice ('ICJ'), prepared a study of the defense of necessity in international law,234 which culminated in its codification as Article 25 of the ILC Articles. The Article states that the necessity defense requires “grave and imminent peril;” that the action was the “only way” to safeguard an essential interest; and that the state has not “contributed to the state of necessity.”235

Necessity plays an important role in Argentina’s defense strategy, because it has argued that its financial crisis led to a state of necessity, thus giving reason for the suspension of payments on its external bonds. On the other hand, some contend that Argentina’s crisis was a result of the inability of the country to implement the advice it received from many experts, including the IMF,236 therefore excluding the possibility of invoking state of necessity under the ILC Articles. The IMF’s own report states:

The catastrophic collapse of the Argentine economy in 2001-02 represents the failure of Argentine policy makers to take necessary corrective measures at a sufficiently early stage. The IMF on its part, supported by its major shareholders, also erred in failing to call an earlier halt to support for a strategy that, as implemented, was not sustainable.237

The arbitral tribunal in the Italian bondholders’ cases has to determine whether such a plea justifies non-payment of financial obligations by the state, and whether there are any grounds for not allowing necessity to be

232. Id.
233. See id. Thus, the trend in the international practice became to consider not only the self-preservation aspect, but also other interests of the state. Such was the understanding of the arbitral tribunal in the Torrey Canyon incident, which recognized the British excuse of environmental necessity. A Liberian super tanker carrying a cargo of approximately 120,000 of crude oil was shipwrecked off the coast of Cornwall, in England, causing an environmental disaster. Faced with probability of the tanker breaking apart and creating even further environmental damage, the British bombed the vessel so as to burn off the remaining oil.
234. Id.
invoked. So far, such argument has not been completely successful in courts and tribunals.

The Argentine government has recently raised the necessity defense plea in German courts. In 2007, the Constitutional Court in Germany ruled that Argentina defaulting on its debt does not even justify a short-term refusal to repay its debt to private creditors. The decision stated that Argentina’s economic recovery meant that it could no longer argue that it did not have enough money to service its debt.

Despite such understanding, many scholars have been sympathetic towards Argentina’s troubles and have been ever more doubtful of the merits of the investment regime to solve situations which involves a financial crisis. Schreuer recently declared that he doubted that the ICSID investment arbitration regime was deemed to settle financial crisis and state of necessity disputes.

Thus, the problem today is not just whether an arbitral tribunal is competent to settle sovereign bond disputes, but whether an arbitral tribunal should be competent to settle disputes related to a financial crisis at all. As emphasized by Alvarez, this question is deemed to become more prominent in discussions on the prospects of the investment regime as well as on possible institutional reforms. The following section looks at these discussions and complaints that have been generated so far by the Argentine cases.

V. MAPPING THE DEFICITS OF SOVEREIGN DEBT ARBITRATION IN THE INTERNATIONAL INVESTMENT REGIME

In May 2009, the Committee on Ways and Means and the Trade Subcommittee of the U.S. Congress held a hearing to consider changes in the investment obligations contained in U.S. BITs in order to ensure that U.S. Free Trade Agreements (‘FTAs’) and BITs “advance the public interest.” Amongst some of the concerns expressed regarding the investment provisions, the doubt as to “whether FTAs and BITs were giving governments the ‘regulatory and policy’ space needed to protect the environment and the public welfare” was expressed.

Approximately one year later, in August 2010, a group of thirty-seven professors of law issued a public statement (the “Osgoode Hall Statement”) that originated from debates held at the Osgoode Hall Law

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239. Id.
240. Schreuer, supra note 61.
241. Alvarez, supra note 236, at 257.
243. Id.
School in Canada.\footnote{244}{Public Statement on the International Investment Regime, OSGOODE HALL LAW SCHOOL (Aug. 31, 2010), http://www.osgoode.yorku.ca/public-statement/documents/Public\%20Statement\%20June\%202011\%20.pdf.} The statement expressed the concern for the damage done to the public welfare by the current investment regime. Pursuant to the professors, "states have a fundamental right to regulate on behalf of the public welfare and this right must not be subordinated to the interests of investors where the right to regulate is exercised in good faith and for a legitimate purpose."\footnote{245}{Id. \& \citename{244}.} 

Thus, in spite of the recent increase of investment treaties and an apparent increase of investment arbitrations registered under the ICSID Convention,\footnote{246}{See INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CASELOAD – Statistics 7-9 (July 2011), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics.} much has been going on to suggest a universal criticism against investor-state arbitrations.\footnote{247}{ALVAREZ, supra note 236, at 347.} There has been a decrease in the number of investment agreements being negotiated and an increase in national laws that does not grant foreign investors as many rights as once contemplated.\footnote{248}{Id. at 348.} Bolivia and Ecuador have denounced the ICSID Convention.\footnote{249}{Denunciation of the ICSID Convention and Bits: Impact on Investor-State Claims, U.N.C.T.A.D. IIA ISSUES NOTE No. 2 (Dec. 2010), http://www.unctad.org/en/docs/webdiaieia20106_en.pdf.} Other Latin American states, such as Nicaragua and Venezuela, are contemplating to take the same path.\footnote{250}{Id.} Many negative reactions towards the claims and awards against the Argentine government can also be included amongst this current backlash against investment arbitration.

The next sections seek to address some of the concerns towards the current investment regime, focusing on some issues posed by the use of arbitration to settle financial crisis disputes. It should be noted in advance that this section does not intend to create further dilemma by stating that the arbitral mechanism is not appropriate to resolve public policy disputes. Criticizing the present regime is much easier than proposing changes.

As well put by Waibel et al,\footnote{251}{MICHAEL WAIBEL ET AL., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY xxxix (Michael Waibel et al., eds. 2010).} the investment regime is ready to listen and should be able to gain much with constructive criticism. But, listening and adapting to these critiques is necessary, or else all benefits achieved so far will shortly be threatened. Therefore, unless these concerns are addressed and reform to the current system is made, host countries, investors and arbitral practitioners are bound to lose.
A. INCONSISTENT INVESTMENT ARBITRAL AWARDS

Two recent ICSID awards, namely *LG&E v. Argentine Republic*\(^{252}\) and *CMS v. Argentine Republic*\(^{253}\) have distressed stakeholders of the investment arbitration regime. In *LG&E*, the tribunal decided that the financial crisis in Argentina equated to a state of necessity, while eighteen months before, the tribunal in *CMS* achieved a different conclusion while analyzing practically the same facts.\(^{254}\) These conflicting decisions on the application of the state of necessity in international law suggest that investor-state arbitration is not as foreseeable and constant as some would have anticipated.

These decisions are not the only ones that have produced concerns. Interpreting the meaning and scope of “investment” included in BITs, the interpretation of the most favored nation clause, and umbrella clauses have also been a source of disagreements. On the other hand, it has been noted that arbitral tribunals cite decisions of prior tribunals in their own awards. Thus, there is not a complete disregard to previous decisions.

The imprecision of many investment treaties, as well as of the ICSID Convention, could probably explain these diverging opinions. But, it becomes harder to explain these inconsistencies when the problem arises from treaties that have the same language or disputes with similar facts.

Even further, it is very challenging to explain such lack of consistency when it comes from the arbitrators themselves. For instance, ICJ judge Francisco Rezek was the appointed arbitrator from Argentina in both the *CMS* and *LG&E* cases.\(^{255}\) Two different decisions were rendered with no dissenting opinions.

Explaining the possible reasons for such an outcome, Alvarez cited Jan Paulsson, which suggested that this reflects the notion that there is no need to issue a dissenting opinion when the main duty of an arbitrator is solve a dispute and to do so in a way that will make it easy for the winning party to enforce the award.\(^{256}\)

This inconsistency is also an issue in the present Italian bondholder dispute. Three different arbitral tribunals were constituted in order to solve disputes relating to exactly the same facts. Because there is a lack of transparency in the process due to the confidentiality principle of arbitration and taking into account that arbitrators from different tribunals are not allowed to discuss the disputes amongst themselves, it is possible that three different decisions will be rendered on the same subject-matter.

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252. *LG&E Energy Corp.*, ICSID Cae No. ARB/02/1.
These problems are maximized due to a lack of a permanent court that can establish precedents and appoint arbitrators specialized in public law, and of an effective and statutory mechanism to deal with sovereign debt restructurings and defaults.

1. ICSID Annulment Process as a Form of Appellate Review

Another relatively new concern with the present system regards the annulment procedure embodied in Article 52 of the ICSID Convention.\textsuperscript{257} Conceived and designed as a very narrow procedure, some Annulment Committees have been very expansive on their annulment awards due to the fact that they disagree with the award.

Such problem has become even more apparent with the issuance of the annulment decisions in \textit{CMS},\textsuperscript{258} \textit{Enron},\textsuperscript{259} and \textit{Sempra}.\textsuperscript{260} Notwithstanding the very narrow nature of the ICSID annulment process and the fact that it is not intended to be a form of appellate review, this is precisely what happened with these three decisions. José E. Alvarez precisely describes the situation:

States and investors now face three distinct annulment outcomes arising from strikingly similar cases. In one case, CMS, an annulment committee severely criticizes but does not annul a decision contending that to do so would be to confuse a wrongful application of the law from an act that fails to apply the correct law. The second, Sempra, goes ahead and annuls a comparable decision for failing to distinguish customary law from Article XI of the United States-Argentina BIT, ignoring the earlier annulment committee's warning against acting as an appellate court. The third, Enron, affirms the very same legal findings annulled in Sempra but annuls the underlying award for failing to apply the customary defence that Sempra found to be improper!\textsuperscript{261}

Thus, while annulment decisions have not been limited to instances where the tribunal has "manifestly exceeded its powers" or where there has been a "serious departure from a fundamental rule or procedure,"

\begin{footnotesize}
\begin{enumerate}
\item Article 52(1) establishes the grounds for the request of the annulment of the award: "(1) Either Party may request annulment of the award by an application in writing addressed to the Secretary-General 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." ICSID Convention, Regulations and Rules art. 52, Oct. 14, 1966, http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.
\item CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Decision (Sept. 25, 2007).
\item Enron Corp. and Ponderosa Assets v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Annulment (July 30, 2010).
\item Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Annulment (June 29, 2010).
\item Alvarez, supra note 236, at 292.
\end{enumerate}
\end{footnotesize}
the confidence in the system and the legitimacy of ICSID becomes, in turn, seriously undermined.

B. Threat to Sovereignty

The "threat to sovereignty" argument stated against the investor-state regime does not concern the BITs and FTAs entered into by the governments. Even though these agreements allow individuals to have rights against the state, they do not violate the nation's right to self-determination. On the contrary, it is one of the ways the state can exercise this right. Such understanding was consolidated in the 1923 Permanent Court of International Justice (PCIJ) S.S. Wimbledon case. The tribunal stated:

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.

Therefore, if a state—Argentina, for instance—no longer agrees with the terms of the treaties it entered into, it should terminate or amend them, but not unilaterally decide to not comply with the obligations set therein, in light of the pacta sunt servanda principle requires compliance.

On the other hand, as declared in the Osgoode Hall Statement, States have the right to regulate on behalf of the public welfare. In cases involving a financial crisis, for instance, a state should be given more regulatory space by the international community.

But, a balance needs to be reached with regard to the appropriate measures that can be taken by a government when facing a financial crisis. Up to what point can the rights of individuals be neglected in the name of public interest? The take-it-or-leave-it exchange offer launched by the Argentinean government offered investors a 66.3% reduction of the original value of the bonds. On the other hand, had the Argentine government not made such an offer, the restructuring of the state might not have been possible at all. Was then the right to regulate exercised in good faith and for a legitimate purpose?

In light of the complexity of such issues, the international community has been questioning whether investment treaty arbitration is a fair, independent, and balanced method to solve investment disputes.

263. Id.
264. Public Statement on the International Investment Regime, supra note 244.
265. Id. ¶ 4.
C. Threat to Human Rights

Even if there is not a threat to the sovereignty of nations, will the measures in furtherance of human rights obligations conflict with the international obligations to protect foreign investors and their activities? Human rights obligations have been invoked by the Argentine government in several occasions to rebut allegations of BIT breaches. Under this argument, treaty breaches that were a result of emergency measures taken in the face of the financial crisis would be excused due to the obligation of the government to protect the basic rights and liberties of Argentine citizens. Nevertheless, when faced with such a broad human rights argument, tribunals have been reaching different conclusions.267

In Continental Casualty v. The Argentine Republic, the tribunal argued that it was impossible to deny that a crisis that brought about extreme social and economic hardship to the country qualified as a situation where the maintenance of public order and the protection of essential security interest were crucial.268 The tribunal stated:

The fact that Argentina’s Congress declared a “public emergency” in economic, financial, exchange, social and administrative matters in conformity with Art. 76 of its Constitution, and enacted a specific “Public Emergency Law” to cope with the crisis, is powerful evidence of its gravity such as that could not be addressed by ordinary measures. The protection of essential security interests recognized by Art. XI does not require that “total collapse” of the country or that a “catastrophic situation” has already occurred before responsible national authorities may have recourse to its protection. The invocation of the clause does not require that the situation has already degenerated into one that calls for the suspension of constitutional guarantees and fundamental liberties. There is no point in having such protection if there is nothing left to protect.269

On the other hand, in Sempra v. The Argentine Republic, a witness for the claimants argued that the American Convention on Human Rights compelled Argentina to sustain its constitutional order in spite of the 2001 financial crisis.270 The tribunal decided that the Argentina’s constitutional order was not imperiled by the crisis and that many policy measures were available other than the emergency measures taken.271 It argued that even if the emergency legislation was necessary, the legitimately acquired rights could have been somehow accommodated.272

268. Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008).
269. Id. ¶ 180.
271. Id. ¶ 332.
272. Id.
In more recent cases, particularly those involving foreign investors in
the privatized water sector, the human rights defense has been evoked
even more forcefully. In Vivendi Universal SA v. The Argentine Republic,
for instance, the tribunal noted that human rights and treaty obligations
are not inconsistent, contradictory or mutually exclusive.\textsuperscript{273} Therefore,
Argentina could have respected both types of obligations.

Thus, in this context, arbitrators face a difficult and novel task of judging
how states are supposed to comply with both human rights and economic
law obligations.

\section{D. Pro Investor Bias}

There are some concerns that there is a pro investor bias in investment
arbitration. Gus Van Harten argues that arbitrators lack security of tenure
and therefore are more susceptible to financial and business complications.\textsuperscript{274} Therefore, arbitrators are more vulnerable and their views
dery up reflecting, to some extent, those of the appointing authorities.\textsuperscript{275}
National judges, on the other hand, are financially independent, because
they receive their income regardless of how they perform in individual
cases, and are appointed for a fixed period of time.\textsuperscript{276}

The hearing held by the Committee on Ways and Means and the Trade
Subcommittee of the US Congress also expressed such concern that the
investment treaties entered into by the government provided less policy
space to the state due to the protections given to investors.\textsuperscript{277}

But, there is no evidence to support such allegations. First, the appoint-
ment of at least two arbitrators is not made by the investor-claimant
and none of those chosen to be part of the Annullment Committees owe
their appointment to a member of the business community or to the dis-
puting parties.

Also, a good number of cases are dismissed on jurisdictional
grounds,\textsuperscript{278} and the largest available analysis on investor-state awards in-
dicates that 58 percent of cases were won by respondent states, while 39
percent of the cases were won by investors.\textsuperscript{279}

Nevertheless, the 39 percent of cases won by investors does not prove
whether such cases should have been really won by them. Even further,
these studies are only on the publicized investor-state awards. No one
can be quite sure what happens in the universe of the non-publicized
decisions.

An additional feature brought to light by these studies is that even
when the investor claim prevails, the amount of damages awarded to in-

\textsuperscript{273} Suez v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶
240 (July 30, 2010).
\textsuperscript{274} Van Harten, supra note 19.
\textsuperscript{275} Id.
\textsuperscript{276} Id. 167-8
\textsuperscript{277} Hearing, supra note 242.
\textsuperscript{278} Schreuer, supra note 61.
\textsuperscript{279} Alvarez, supra note 236, at 389.
vestors is much less than that requested. But, such facet might only demonstrate that the amounts sought by claimants are immeasurably overstated. Nonetheless, these numbers bring the concerns towards investment arbitration closer to reality and discourage pro-investor unfounded allegations.

There is a relatively new aspect that should also be considered when questioning about pro-investor bias. As previously mentioned, some Ad Hoc Annulment Committees have been very expansive on the annulment procedure because they disagree with the awards and have been annuling many decisions in favor of Argentina. Not only this new trend leads the whole system astray, but also appears to contradict claims of pro-investor bias.

VI. CONCLUSION

As countries attract unsustainable debts, there is a growing need to restructure their debt. But, absent an effective restructuring mechanism, creditors facing default are confronted with only two possible outcomes while seeking payment on defaulted debt: either getting bound to the exchange offer or resorting to national courts. Considering the ineffectiveness of the legal remedies available in national courts, ICSID arbitration offers benefits that could increase protection to investors, though not without setbacks.

If arbitration through ICSID becomes the dispute resolution mechanism to solve sovereign debt related issues, there would be a drastic change in sovereign debt restructurings and in the international arena. Arbitrators would be empowered to review and discipline states public policies, in what might become a threat to sovereignty, and the policy space of governments facing a financial crisis is likely to decrease. Further, the probability that creditors will holdout and not participate in the debt restructuring proceedings in order to submit their claims to arbitration due to a higher expected recovery will possibly increase.

Therefore, even though it has been proved that ICSID has jurisdiction over sovereign bond claims, at present it does not have the appropriate tools to adjudicate such disputes because, as highlighted by Schreuer, the ICSID investment arbitration regime was not even established to settle financial crisis and state of necessity disputes.

Notwithstanding these setbacks, the existing alternatives to solve disputes related to sovereign default and debt restructurings, such as national courts in host countries, inspire even less confidence than the current investment arbitration regime. As Gary Born stated, "In fact, the truth is less clear-cut, and lies somewhere between these extremes: 'The more enthusiastic of [its sponsors] have thought of arbitration as a universal panacea. We doubt whether it will cure corns or bring general beatitude. Few panaceas work as well as advertised.' At bottom, if

280. Schreuer, supra note 61.
generalizations must be made, international arbitration is much like de-
mocracy; it is nowhere close to ideal, but it is generally better than the
existing alternatives."\textsuperscript{281}

Comment and Case Note