The European Union, Sovereign Debt Crises and Investment Agreements

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1. Introduction

The on-going global financial crisis has hit Europe in an especially significant manner. It has demonstrated that even at the heart of the Eurozone, a country can find itself in the need for a sovereign debt restructuring. The role of the European Union as an international actor can be considerably impacted.

International law does not regulate the way in which sovereign debt restructurings are to be performed (Section 2). This legal vacuum is unsatisfactory for both debtors and creditors. The latter have attempted to obtain their capital and interest by any means, and have thus recently resorted to investor-State arbitration (Section 3). Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) signed by European countries could become the grounds for arbitration and endanger sovereign debt restructurings, even though some obstacles would need to be overcome (Section 3).

2. The Unregulated Field of Sovereign Debt Restructurings

International law is a body of rules that has come nowadays to regulate many aspects of life, often in a very detailed manner. Nevertheless, there is one issue for which public international law does not provide an exhaustive framework, but only sparse norms at most: sovereign debt restructuring.

Sovereign debt is the portion of public debt which is issued or guaranteed by the government or the central bank of a country. It can be owed to States, to international organizations, to banks, or to bondholders. Sovereign debt restructurings have been defined as “changes in the originally envisaged debt service payments, either after a default or under the threat of default”.¹ They take place when a country is unable to repay its debt to creditors.

The failure by international law to regulate sovereign debt restructurings has been seen as one of “the most glaring gaps in the international financial architecture”.² It might indeed seem peculiar that an extremely delicate problem has not come under the radar of international law. However, the history is long and full of ups and downs.

After the Second World War and until the 1980s, the situation was relatively straightforward. States mostly financed themselves through loans from other countries, international organisations and bank syndicates. Since the amount of the loans was very significant, banks formed groups and lent States the money.

When governments could not repay the capital they had borrowed, they usually adhered to a procedure that has gradually come into being. First of all, ‘international intergovernmental organizations’ claims have consistently been preferred over those of any other creditor. The

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1 Federico Sturzenegger, Jeromin Zettelmeyer, Debt Defaults and Lessons from a Decade of Crises, 3 (Cambridge MA, MIT press 2007).
organizations concerned are those traditionally implicated in the provision of loans to States: the International Bank for Reconstruction and Development, regional development banks, the International Monetary Fund (IMF), the Bank for International Settlements. It has been affirmed that the preferred status of such creditors stems from a customary rule. The reasons to justify this treatment were essentially that the claims were based on public international law (i.e. on treaties); that non-reimbursement would have affected the very existence of such institutions; and that access to financial markets would have become much costlier if the debtor country defaulted with regard to these international institutions.

Secondly, with regard to the portion of debt owed to other States, the Paris Club has established itself over time as the principal forum for negotiating restructurings. Countries in financial difficulties request a restructuring. Creditor States then find a consensus after private discussions, and stipulate an Agreed Minute. The latter includes the terms of debt relief. The debtor country has a right to be heard. The main characteristics of the functioning of such an informal group are a case-by-case approach, the operation by consensus, solidarity, conditionality (i.e. having a programme in force with the IMF) and comparability of treatment (which means that the debtor must seek a restructuring on comparable terms from all creditors).

Yet, in other instances, the negotiation framework was different: for example, the Organization for Economic Cooperation and Development (OECD) served as forum for the Turkish debt restructuring in the 1980s, since both the debtor and the creditor States were members of this organization. In the case of India and Pakistan, aid groups or consortia were specifically created. This demonstrates that the forum used for public creditors has taken many different forms over time and presents a high level of informality.

Thirdly, with regard to the debt owed to private banks, the latter have organised themselves in a host of different manners. Starting from the 1970s, the London Club has acquired an important role in negotiations on sovereign debt vis-à-vis the main international banks. It consists of ad hoc negotiating committees of major bank lenders, without a predetermined membership. It applies the same operative approaches as the Paris Club. The restructuring operates by agreement only.

The practice of private creditors’ committees established at the request of the debtor was attempted in 1982 by Mexico with thirteen banks forming a "Bank Advisory Group for Mexico", and by Brazil to put in place a committee with all its commercial banks creditors. The attempt was not successful and has not been repeated by other debtors. The banks taking part in this type of committees were not agents of the other banks, but merely “communication links”, in order to avoid any liability vis-à-vis the others. The decision-making procedure followed the unanimity principle.

Starting in the 1990s, sovereign debt has consisted ever more of international securities. Whereas this disintermediation phenomenon has permitted large flows of external financing (especially for emerging countries), it has also introduced considerable challenges for debt restructurings. This is

4 The Paris Club is an informal group of public creditors begun in 1956. It currently comprises 19 permanent members, which hold a considerable portion of sovereign debt. Other creditor States can participate on an ad hoc basis. The Club has a general secretariat composed by high civil servants of the French Treasury. See http://www.clubdeparis.org/ (accessed 6 January 2016).
5 Ibid., 19.
6 Ibid., 19.
10 Tapia, Mexico's Debt Restructuring: The Evolving Solution, 5.
because the sovereign debtor is faced with an atomised creditor community, with extremely diverse interests and bonds issued in different jurisdictions. Coordination amongst them is much more difficult than within the restricted sovereign creditors’ or commercial banks’ groups. Since bonds and similar securities represent a growing portion with respect to intergovernmental or bank loans, sovereign debt restructurings have become ever more cumbersome to perform, leaving both debtors and creditors with often insurmountable problems.

The involvement of the IMF in sovereign debt crises cannot be overestimated. It has been described as “ultimate judge of the appropriate mix between the magnitude of a heavily indebted developing country’s adjustment effort and the commitment to it of new external finance for its remaining balance of payments deficit”. This role is related to three functions it fulfils: the provision of financial assistance, the surveillance of the international monetary and financial system and of the exchange rates policies of its members, and the provision of technical and financial services to its members.

In particular, two of the IMF’s policies have acquired a role of paramount importance with regard to sovereign debt restructuring: lending into arrears and financing assurances. These two IMF policies – crucial for sovereign debt restructuring – are tightly interconnected and have undergone parallel evolutions. Their current state testifies to the difficulties encountered by the Fund to ensure the protection of its own financial interests on the one hand and on the other the power to assist a country in need without being at the mercy of private creditors. A revision of the policies on lending into arrears, most welcome, was foreseen in 2008, but has been postponed sine die, since its revisions will be adopted “as needed”. Without an international procedural framework, the IMF has gradually adapted its policies to the changing context of financial markets, but often has to face the veto power of private creditors.

Against the background of a lacking general framework for sovereign debt restructurings, sovereign debtors and their creditors are faced with an extremely high degree of legal uncertainty. Each government acts in a different way, depending on the economic, political, social and legal circumstances.

In order to perform a restructuring, governments generally tend to negotiate with a group of (more or less self-appointed) representatives of bondholders. Negotiations take place in the shadow, or sometimes after the occurrence, of a default. When an agreement is reached, the legal means to effect a restructuring are mainly exit consents and collective action clauses.

An “exit consent” is “a feature of a debt exchange offer that requires the consent of tendering bondholders to change some of the terms of bond indentures as a condition to participate in the offer”. The offer is subjected to the condition of the attainment of a threshold of creditors’ participation. The latter increases as the importance of the clauses concerned increases. For clauses on jurisdictional immunity and other clauses, the majority required is approximately 66 2/3 %; for clauses not related to the payment, but which impact on it (e.g. the applicable law), the threshold is

15 Paul Bedford and Gregor Irwin, “Reforming the IMF’s lending-into-arrears framework”, 12.
16 IMF, Decision No. 14036-(08/01), 27 December 2007.
17 IMF, Decision No. 14235-(09/1), 31 December 2008.
higher; for clauses directly linked to payment terms, all the bondholders have to accept the exchange for it to become effective.  

Creditors who participate in the exchange accept the amendment of the clauses of the bond from which they “exit”. Thus, by virtue of the “exit consent”, if the lower threshold for the modification of non-payment terms is achieved, those bondholders who have not participated in the exchange will come to hold a financial instrument with conditions less favourable than before. 

Thanks to the decision of the debtor and of the creditors who have agreed, the bonds have lost some advantages they previously featured. Therefore, such bonds will have a lower price on secondary markets or, at any rate, make the recovery of the debt more uncertain because of the elimination of warranties originally stipulated. This in turn “makes the old instruments a whole lot uglier”. 

There is some element of coercion involved in the use of exit consents. This can be the case when some bondholders might feel obliged to accept an exchange only because they would be left with a worthless instrument in the alternative. However, with the objective of a balanced restructuring in mind, the exit consent technique does offer important incentives for bondholders to take part in the exchange. Yet, substantively, it does not necessarily provide a balanced result to the negotiations. The spread of “exit consents” has to be correlated to the perception that US law would have prohibited bond amendments absent the agreement of all bondholders, just like for bonds issued by corporations. Consequently, only the “exit consent” mechanism was deemed admissible for sovereign bonds featuring New York law as their applicable law.

Collective action clauses comprise four different types of clauses, which deal with: collective representation; majority action; sharing; acceleration. The majority action clause is the most interesting one, since it aims at solving the most important difficulty of any sovereign debt restructuring: the problem of reaching an agreement with an extremely wide population of bondholders. This clause consists of a “majority amendment clause permitting amendments of payment terms with the approval of a supermajority of bondholders”. The majority needed to modify “reserve matters” (which include payments terms, such as change in payments dates, reduction in principal or interest, change in currency, and any instruction to the representative so as to exchange or convert the bonds) varies across jurisdictions.

3. The Resort to Investor-State Arbitration

Even when a sovereign debt restructuring is achieved thanks to the participation of a high percentage of bondholders, legal uncertainty for the debtor is not over. Creditors who have not agreed to the haircut may seek any means available to them in order to recover the interests and capital according to the original bonds.

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19 Rodrigo Olivares-Caminal, Legal Aspects of Sovereign Debt Restructuring, 444 pp., 118 (Sweet & Maxwell 2009).
21 International Law Association, Committee on International Monetary Law, Final Report, 6 (2012).
23 The Trust Indenture Act of 1939 actually only applied to corporate bonds issued to the public, but the documentation standard was followed also for sovereign bonds. Buchheit, Gulati, Exit Consents in Sovereign Bond Exchanges, 10.
24 Olivares-Caminal, Legal Aspects of Sovereign Debt Restructuring, 111.
Whilst litigation before the domestic court identified by the forum selection clause of the bond is rather common and well-known (but definitely not less troubling\textsuperscript{26}), a more recent feature is represented by the resort to international investor-State arbitration. This occurred for the first time with Argentina, which defaulted on its sovereign debt in December 2001.

In 2005, Argentina launched a first swap of its debt, giving a choice to bondholders as regards the form of the new debt they would obtain. Securities linked to the new bonds were dependent on the country’s GDP. Moreover, Law 26,017 or “Emergency Law” was enacted. It provided that those bonds which were not exchanged in the agreement proposed by the government could not be allowed to be exchanged in the future. Furthermore, the government was inhibited from reaching any judicial, quasi-judicial, or private transaction with regard to those bonds.\textsuperscript{27}

76.15\% of the holdings took part in the exchange, which settled on 2 June 2005.\textsuperscript{28} Many of those who did not agree (whose amount of outstanding debt held totalled US $25 billion\textsuperscript{29}), sought to obtain the payment of capital and interest before courts in New York, Germany, and Italy.\textsuperscript{30} Claimants encountered difficulties in enforcing their favourable judgements: the Argentinian government refused to pay and it was hard to find attachable Argentine assets to levy against\textsuperscript{31}; as it was remarked, litigation had “yet to yield a penny”\textsuperscript{32}.

Amongst others, a group of Italian bondholders did not agree to the unilateral exchange offer proposed by the Argentinian government. On 14 September 2006, the law firm White & Case filed the Request for Arbitration with ICSID on behalf of some 180,000 Italian bondholders.\textsuperscript{33} They based their filing on the \textit{Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments}, signed in Buenos Aires on 22 May 1990 and entered into effect on 14 October 1990 (hereinafter, the Argentine-Italy BIT).

In 2010 Argentina made another attempt to complete its outstanding debt restructuring. The new offer therefore purported to “restructure and cancel defaulted debt obligations of Argentina represented by Pre-2005 Eligible Securities, to release Argentina from any related claims, including any administrative, litigation or arbitral claims and to terminate legal proceedings against Argentina in respect of the tendered Eligible Securities in consideration for the issuance of New Securities and, in certain cases, a cash payment”.\textsuperscript{34} The 2005 Emergency Law was suspended for the time of the offer.

\textsuperscript{27} Art. 3 of the Law: “Prohibese al Estado nacional efectuar cualquier tipo de transacción judicial, extrajudicial o privada, respecto de los bonos a que refiere el artículo 1º de la presente ley”. (Unofficial translation provided by Argentina to the Tribunal: “The national Government is precluded from entering into any type of judicial, extra-judicial or private settlement with respect to the bonds to which Article 1 of the present law refers”), Law 26,017.
\textsuperscript{28} Mauro Angelo Megliani, \textit{Debitori Soprani E Obligazionisti Esteri}, 98 (Giuffrè 2009).
\textsuperscript{33} Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility,§§90-91 (2011).
Sixty-six per cent of the hold-out creditors reacted favourably to the offer. Also a portion of the Italian bondholders decided to participate in the 2010 Exchange Offer and thus withdrew from the ICSID proceedings.

The *Abaclat and others v. Argentina* case was thus the first ICSID arbitration to deal with a sovereign debt workout. Heretofore, there has been a Decision on Jurisdiction and Admissibility (with a Dissenting Opinion by Georges Abi-Saab) and numerous procedural orders. The case is still pending as to the merits phase.

In its Decision, the majority of the Tribunal affirmed that bonds constituted “‘obligations’ and/or at least “public securities” in the sense of Article 1(1) lit. (c)” of the Argentina-Italy BIT, and they are consequently a form of protected investment. Furthermore, the Tribunal held that the inclusion of forum selection clauses could not be read as limiting “the existence and/or validity of Argentina’s consent to ICSID arbitration”. Contrary to the respondent’s and the dissenting arbitrator’s arguments, the majority upheld the jurisdiction of the ICSID Tribunal over the claims put forward by the Italian bondholders, according to the Argentina-Italy BIT and the ICSID Convention.

The involvement of investor-State arbitration for disputes related to the Argentinean sovereign debt restructuring was replicated by two other cases: *AmbienteUfficio S.p.A. and others v. Argentine Republic* and *Giovanni Alemanni and others v. Argentine Republic*. As regards the *AmbienteUfficio* dispute, a Decision on Jurisdiction and Admissibility was issued on 8 February 2013: as in *Abaclat*, the majority of the Tribunal agreed to hear the claims, leaving the jurisdiction and admissibility analysis for each claimant to a later stage. On 28 May 2015, however, the proceedings were discontinued after a suspension of more than six months.

For *Giovanni Alemanni*, the Decision on Jurisdiction and Admissibility of 17 November 2014 sided with *AmbienteUfficio*. It found that bonds can be considered as investments (para. 296), while the issue of there being a single dispute, the exact nature of the claimants’ entitlements as well as their being made in the territory of Argentina were left for the merits stage. This case, alongside *Abaclat*, is now pending on the merits.

A similar resort to investor-State arbitration has already partly materialised with respect to the Greek sovereign debt restructuring of 2012. The most important steps of the latter will be sketched.

In July 2011 European policymakers considered a voluntary debt restructuring of Greek debt, described as “private sector involvement” (“PSI”). In February 2012, when European leaders and the Greek government initiated the implementation phase of the formally voluntary restructuring, rather high losses for private sector holders (“a nominal haircut amounting to 53.5%”41) were deemed necessary in order for Greece to return to debt sustainability. Therefore, a tough debt restructuring,

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35 Cross, Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims against Argentina, 2.
36 *Abaclat*, Decision, §499.
Holders of Greek bonds constituted a highly heterogeneous group, and this was a cause for concern. Out of the total €206 billion of government bonds, only about €120 billion were in the hands of large institutional investors such as banks, pension funds, and insurance companies, according to data provided by J.P. Morgan. These entities would arguably have incentives to co-operate with Greek and European institutions, as well as with the IMF. Whereas asset managers, sovereign wealth funds, and retail investors, who accounted for roughly €80 billion of bonds, aimed essentially at maximising their profits to whatever extent possible. Since European policymakers had excluded the possibility of a default, this second category of investors did not have before itself the menace of the non-service of the debt in case it refused to agree on the offer. Thus, a significant “free rider” issue arose: non-institutional bondholders had an incentive for not consenting to the swap and obtain payment of their capital and accrued interests from Greece, whilst bigger investors were to suffer from the haircut. It is important to notice that approximately 90% of the total was governed by Greek law. The rest was issued under the law of another jurisdiction, mostly English law. In order to perform the swap, the Greek parliament enacted Law 4050/2012 and added Collective Action Clauses (CACs) to bonds issued under Greek law. As mentioned above, these clauses make a decision taken by the majority of bondholders binding on the whole group. Such modifications could obviously not be made to the other bonds, outside of the Greek legislature’s purview. In April a restructuring of approximately €199 billion, 96.9% of the total face amount of bonds eligible to participate in the invitations, was announced.

In light of the new, promising avenue opened by the Abaclat Decision (and the others that followed), non-participating bondholders in the Greek restructuring then considered attempting to recover their money via arbitration. Indeed, law firms immediately advised holders of Greek and other Eurozone countries’ bonds on how to best make use of BITs and ICSID.

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46 The Greek public debt management agency however attempted to hint at future difficulties for non-participants by stating that Greece “does not contemplate the availability of funds” to pay non-participating creditors (Greek Public Debt Management Agency, Press Release, 6 March 2012). Waibel, Steering Greece's Debt Restructuring Through the CDS Quicksand, 25.
47 Gulati, Zettelmeyer, Making a Voluntary Greek Debt Exchange Work, 3.
49 Greek Bondholder Act enacted by the Greek Parliament on 23 February 2012, Law 4050/2012.
52 Specifically on BITs signed by Greece, see Christian Hofmann, Greek Debt Restructuring and Abaclat v. Argentina – The impact of Bilateral Investment Treaties (BITs) on the Greek default, Transnational Notes - Reflections on Transnational Litigation and Commercial Law, NYU Center for Transnational Litigation and Commercial Law, (2012).
A first claim was brought to the ICSID: Poštovábanka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, which was registered on 20 May 2013.53 The definition of investment in Article 1(1) of the Slovakia-Greece BIT did not include “obligations”, differently from the Argentina-Italy BIT. In its award of 9 April 2015, the Tribunal had to assess whether the bonds could be considered as “loans” or “claims to money”. It performed a thorough legal analysis of sovereign bonds, which it distinguished from interests purchased by bondholders on secondary markets.54 Greece had a contractual relationship with the Participants and the Primary Dealers on primary markets, and not with Poštovábanka. Thus, the claimant did not have an investment within the meaning of the Greece-Slovakia BIT.55 The Tribunal ventured even further. After establishing there was no investment under the relevant BIT, the majority of the Tribunal ruled that the instruments concerned would not qualify as investment under Article 25 of the ICSID Convention. If an objective test were adopted, the aspect of a contribution to an economic venture would be problematic. Such contribution needs a “process of creation of value, which distinguishes it clearly from […] a subscription to sovereign bonds which is also a process of exchange of values i.e. a process of providing money for a given amount of money in return”.56 The majority also recalled the distinction between sovereign bonds linked to public works or services and those used for general public funding.

Furthermore, the element of risk would not be present in the purchase of interests on sovereign bonds. The latter would undoubtedly involve commercial and sovereign risks. Nevertheless, such instruments do not feature “a risk inherent in the investment operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned”.57 Consequently, the interests on Greek bonds purchased by Poštovábanka did not qualify as investments under the relevant BIT, and would not have qualified under Article 25 of the ICSID Convention. The Award stands in clear contrast with respect to the previous decisions on the Argentinian sovereign debt restructuring.

4. Limitations to Investor-State Arbitration

On the one hand, the involvement of investor-State arbitration allows bondholders to access a very efficient dispute resolution mechanism, which might also guarantee better results as regards enforcement of favourable decisions. On the other hand, the systemic implications for sovereign debt restructuring processes are rather detrimental. Such negotiations could become more difficult, since non-participating creditors will be aware of the opportunity to initiate arbitral proceedings if they are not content with the bond exchange proposed.

However, there exist several limitations to the recourse to investor-State arbitration for matters related to sovereign debt restructuring. Currently, such obstacles concern, amongst others, the definition of investment, the territorial link, and the mass claim nature of some arbitral disputes. Prospectively, they might be strengthened by a different drafting of future BITs/FTAs.

In these remarks, the focus will be on the ICSID system of investor-State arbitration. As is well-known, other arbitration rules and fora are also available, such as the United Nations Commission on
International Trade Law (UNCITRAL) and the Stockholm Chamber of Commerce. Nevertheless, ICSID accounts for the vast majority of registered claims.\(^{58}\) Moreover, several BITs only allow investors to use ICSID facilities. Furthermore, the sovereign debt restructuring cases have so far all arisen before ICSID tribunals.

Firstly, the inclusion of sovereign bonds in the definition of investment of Article 25 of the ICSID Convention is highly controversial. Whilst the majority of the Tribunal in Abaclat opined that the ICSID Convention does not contain its own definition of investment, and thus fully relied on the list contained in the Italy-Argentina BIT, the Abaclat Dissenting Opinion and the Poštovábanka Award reiterated that Article 25 of the Washington Convention refers to an objective notion of investment. The latter would not extend to sovereign bonds, which are considered by some authors as ordinary commercial transactions rather than investments.\(^{59}\)

In this regard, the text of the BIT (or of the FTA) might play an ever more important role. Most of the treaties ratified by Eurozone countries seem not to expressly exclude sovereign debt restructuring issues from their scope nor portfolio investments or government bonds from their definition of investment.\(^{60}\)

The increased use of CACs does not necessarily shield sovereign debt restructurings from arbitral proceedings. Since Collective Actions Clauses deal with contractual rights, they do not prevent investors from invoking the violation of treaty rights.\(^{61}\) In spite of Greece’s recourse to CACs, holdout bondholders could obtain a favourable ICSID award.

Secondly, the question of the territorial link between the sovereign bond and the respondent country might yield to diverging interpretations. Whilst the majority in Abaclat affirmed that security entitlements partook of the same economic operation as the bond issuance and that the decisive criterion was that Argentina had benefited from the investment, it might be argued (as in Poštovábanka) that the sale on secondary markets is intrinsically different from the relationship between a private party and a host country that an investment would require.

Thirdly, in the case of Abaclat the dispute was initiated by approximately 180,000 holders (nowadays shrunk to about 60,000). This mass claim nature was heatedly debated before the Tribunal, and it has been provoking important difficulties for the management of the proceedings,\(^{62}\) especially in terms of conflict of interests as to the keeping of the bondholders’ databases. More importantly, it begs the question of the State consent to such type of disputes being heard by a Tribunal constituted on the basis of the ICSID Convention. This might discourage future mass claims by huge groups of bondholders. On the other hand, this problem does not arise for other disputes, such as AmbienteUfficio and Giovanni Alemanni (multi-party disputes in the view of the Tribunal) and the Poštovábanka, a.s. and ISTROKAPITAL SE case, with two claimants.

In the near future, the involvement of investor-State arbitration in sovereign debt restructuring might be prevented more effectively. In the recent past, some countries have modified their BITs so as to exclude sovereign bonds from the definition of protected investment. Otherwise, they have excluded them from the jurisdiction of investor-State arbitral tribunals. This occurred for instance with the US-Uruguay BIT in 2005 (with its Annex G ‘Sovereign Debt Restructuring’), with the Peru-Singapore

\(^{59}\) Waibel, Opening Pandora’s Box: Sovereign Bonds in International Arbitration, 722.
\(^{62}\) The high number of procedural orders and statements of dissent are indicative in this regard. See the Available Documents on the Investment Treaty Arbitration website: http://www.italaw.com/cases/35 (accessed 25 August 2015).
FTA in 2008 (with its Chapter 10, art. 10.18, ‘Public Debt’), with the Canada-Colombia FTA (with its art. 838, footnote 11). A similar path seems to be the one envisaged by the European Union in the drafting of its free trade agreement with Canada. According to the Consolidated CETA Text published on 26 September 2014:

“Annex X: Public Debt

1. No claim that a restructuring of debt issued by a Party breaches an obligation under Sections [Non-Discriminatory Treatment, Investment Protection] may be submitted to, or if already submitted continue in, arbitration under Section 6 [Investor-State Dispute Settlement] if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article X.6 [National Treatment] or Article X.7 [Most-Favoured Nation].

2. Notwithstanding [ISDS: Article X.22 Submission of a Claim to Arbitration, para 4], and subject to paragraph 1 of this Annex, an investor of another Party may not submit a claim under Section 6 [Investor-State Dispute Settlement] that a restructuring of debt issued by a Party breaches an obligation under Sections [Non-Discriminatory Treatment, Investment Protection] (other than Article X.6 [National Treatment] or Article X.7 [Most-Favoured Nation]) unless 270 days have elapsed from the date of receipt by the respondent of the written request for consultations pursuant to [Article X.18 Consultations].

3. For the purposes of this Annex, ‘negotiated restructuring’ means the restructuring or rescheduling of a debt instrument that has been effected through (i) a modification or amendment of such debt instrument, as provided for under its terms, or (ii) a comprehensive debt exchange or other similar process in which the holders of no less than 75 percent of the aggregate principal amount of the outstanding debt under such debt instrument have consented to such debt exchange or other process”.

The wording of paragraph 3 would arguably shield sovereign debt restructurings effected through a recourse to Collective Action Clauses (in its first hypothesis) or through a bond swap to which a supermajority has agreed (in its second hypothesis). The EU negotiating text for the Transatlantic Trade and Investment Partnership contains an Annex II on public debt with similar wording. The major differences in the third section are highlighted hereafter:

“For the purposes of this Annex, ‘negotiated restructuring’ means the restructuring or rescheduling of debt instruments issued by a Party that has been effected through (i) a modification or amendment of such debt instruments, as provided for under their terms and governing law, or (ii) a debt exchange or other similar process in which the holders

63 Examples are taken from: Strik, Investment Protection of Sovereign Debt and Its Implications on the Future of Investment Law in the EU, 185.
of no less than 66% of the aggregate principal amount of the outstanding debt under such debt instruments subject to restructuring, excluding debt held by that Party or by entities owned or controlled by it, have consented to such debt exchange or other process. For greater certainty, debt issued by a Party means debt issued by any administrative level of a Party including with respect to the European Union a government of or in a European Member State or its sub-federal level”.

The innovations are thus mainly four. The first is the acknowledgment that an excluded restructuring can be performed in accordance with the governing law of the bond, although the procedure was not foreseen in the contract terms. This is what happened in Greece, where the domestic law was modified to insert retroactive CACs. The second modification concerns the lowered threshold to exempt restructurings. This has been brought from 75% to 66% of the aggregate principal amount of the outstanding debt. This should increase the chances of shielding restructurings from ISDS. Thirdly, the TTIP explicitly excludes from the debt those bonds owned by the issuing government or entities controlled by it. This is known as disenfranchisement and routinely features in modern CACs. Fourthly, the clause clarifies the entities whose restructured debt can be excluded from the dispute resolution mechanism of the TTIP. With respect to the EU, the entities are the governments of a member State or of a sub-federal administration.

Another option would aim at shielding sovereign assets from attachment by holdout creditors. One of the ways in which such objective could be attained at the Eurozone level would be an amendment to the Treaty on the European Stability Mechanism (ESM), as advocated by Buchheit, Gulati and Tirado. The idea is that when a country receives financial assistance from the ESM and performs a debt restructuring, those creditors who hold out from it could not then attempt to enforce their bonds on assets located in the territory of the Eurozone.

5. Conclusion

This article has analysed the problematic relationship between sovereign debt restructuring and investment agreements in the case of the Eurozone. The financial crisis has brought to the spotlight the vulnerabilities of developed countries within the European currency area. It has even prompted Greece to perform a sovereign debt restructuring in 2012.

The question of sovereign debt restructuring is not fully regulated by international, or even European Union, law. Over time, several practices have been followed, which include the preferred status of debt owed to intergovernmental organisations, the resort to the Paris Club for negotiating debt owed to other countries, and the London Club for syndicated bank loans. With the increase in debt in the form of bonds, exit consents and collective action clauses have been used. Yet, the restructuring has proven much more complicated to carry out.

The Argentinean crisis started in 2001 has led to a major development in this area. Investor-State arbitral tribunals have been called upon to hear disputes brought by non-participating bondholders. This opened the way for creditors dissatisfied with the Greek restructuring to resort to this new avenue – so far, in vain.

However, several issues would limit the likelihood of such a development. The inclusion of sovereign bonds as protected investment is disputed, and so is the territorial link with the host country. Furthermore, mass claims are not necessarily within the competence of an ICSID tribunal or within the consent given by the signatory State. Finally, some governments might consider modifying the text of BITs or FTAs in order to exclude sovereign bonds from the definition of investments or exclude restructurings from arbitration. The Consolidated Text of the CETA and the EU negotiating text for the TTIP signal a (nuanced) move in this direction, within the more general overhaul in the European Union’s approach to investor-State dispute settlement.69

All in all, it might be argued that the materialisation of the sovereign debt crisis in the heart of the Eurozone has had an impact on the European Union’s strategy as an actor in international investment. The problems currently faced by Argentina before the ICSID have made European countries more aware of the potential dangers hidden in their BITs. This has in turn led to a careful drafting of the CETA and the TTIP, and potentially of all the other major FTAs to follow.