Enforcing Sovereign Debt in Court – A Comparative Analysis of Litigation and Arbitration Following the Greek Debt Restructuring of 2012

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Introduction

On 4th October 2009, in the midst of an unprecedented Global Financial Crisis, George Papandreou's Panhellenic Socialist Movement Party (PASOK) won power in Greece following a snap election.[1] A few days later, after Papandreou's staff had perused the country's financial accounts, the new prime minister publicly announced that the budget deficit of its country was likely to hit 12 percent of the GDP in 2010.[2] However, it took months until it became clear to observers that Greece's huge pile of debt had grown to unsustainable levels. In mid-2010 the European Commission (EC), supported by the International Monetary Fund (IMF) and the European Central Bank (ECB), finally reacted to the looming threat of a full-blown sovereign debt crisis in Europe by passing its first rescue package to Greece.[3] Yet, despite the mammoth €110 billion cash injection, financing conditions for Eurozone periphery states further deteriorated in the course of the

[1] G. Wearden, 'Greece debt crisis: timeline', The Guardian, 5 May 2010, https://www.theguardian.com/business/2010/may/05/greece-debt-crisis-timeline.

[2] This led to an upward revision of the deficit projection by Eurostat from 3.7 to 12.5 percent, compare Eurostat, 'Provision of Deficit and Debt Data for 2008 - Second Notification', Eurostat Newsrelease, 22 October 2009, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-22102009-AP/EN/2-22102009-AP-EN.PDF.

[3] See International Monetary Fund (IMF), 'Europe and IMF Agree €110 Billion Financing Plan With Greece', IMF Survey online, 2 May 2010, http://www.imf.org/external/pubs/ft/survey/so/2010/car050210a.htm. For more details on the Eurogroup's "First Economic Adjustment Programme for Greece", which totalled €80 billion to be disbursed over a period of 3 years *see* The European Commission, 'The Economic Adjustment Programme for Greece', Occasional Papers No 61, May 2010, http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf.

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following months[4] and additional external financial rescue measures soon became inevitable.

Eventually in 2012, two years after the Greek debt crisis had emerged, the country restructured a significant chunk of its outstanding debts under the supervision of EU policymakers. In other words, the country imposed a so-called "haircut" on holders of Greek sovereign debt instruments, thus reducing the value of financial claims held against Greece. Because the official sector had previously pumped hundreds of billions of euros into the ailing Greek economy, the so-called "Troika" (consisting of the EC, the ECB, and the IMF) insisted on a comprehensive "Private Sector Involvement" (PSI). The debt workout was thus restricted to the claims of private-sector creditors rather than encompassing the entire universe of debt owed by the country.

In any event, Greece faced the burdensome challenge of convincing investors that it could no longer repay all of its debt obligations and that a debt cut was inevitable.[5] From the very beginning, it was clear that implementing a debt cut of the size envisaged by the Troika required extraordinary legal measures. Most crucially, the solution had to strike a reasonable balance between managing the risks of bondholder litigation and preventing the country's financial collapse.

Before however delving into a deeper analysis of the Greek PSI, it must be noted that a general predicament exists with regards to the insolvency of nations: countries – in contrast to insolvent corporations or private individuals – cannot avail themselves of bankruptcy proceedings.[6] The challenge for financially-stricken sovereign states is thus – in the words of the most famous sovereign debt lawyer,

[4] Greek sovereign bonds spreads vis-à-vis German government bonds ("Bunds"), used to measure the tightness of financing conditions for states, rose to unprecedented levels. Compare R. A. De Santis, 'The Euro Area Sovereign Debt Crisis – Safe Haven, Credit Rating Agencies and the Spread of the Fever From Greece, Ireland and Portugal' (2012) *European Central Bank Working Paper Series* 1419, https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1419.pdf?20b5463a06e46d4321-d81b1f8fb1990f

[5] Most creditors understood that the economic predicaments faced by Greece in 2012 necessitated a sizeable haircut, especially the country's enormous GDP-to-debt ratio north of 160 percent. Yet, as the Greek government could not promise equal treatment to all creditors, it had to upset creditors by reducing the amount of funds available for distribution among them (thereby increasing the size of the haircut for each of them). Most importantly, Greece had to refrain from imposing a haircut on its biggest creditor, the European Central Bank, due to the prohibition of monetary financing enshrined in the EU Treaties. *See* Case T-79/13 – *Accorinti and Others v European Central Bank (ECB)* (ECLI:EU:T:2015:746).

[6] Compare e.g. R. P. Buckley, 'The Bankruptcy of Nations: An Idea Whose Time Has Come' (2009) 43(3) *The International Lawyer* 1189.

Lee Buchheit[7] – to "cajole" or "bludgeon" the holders of government debt instruments into giving debt relief. Unsurprisingly, some creditors might oppose such measures and choose to "hold out" inthe hope of achieving a better deal by means of litigation than those creditors who accepted the insolvent country's restructuring offer.[8] The problem is that such behaviour, if successful, leads to unequal treatment of individual creditors, may discourage other investors from giving debt relief, and, most strikingly, thwart a quick and orderly debt workout. Argentina's 2001 insolvency is a case in point for speculative hold-out investors holding an entire nation hostage for over a decade.

To avoid a situation in which a minority of bondholders undertakes to block the entire debt restructuring process, Greece resorted to a novel legal technique.[9] Essentially, the Greek Parliament introduced so-called "Collective Action Clauses" (CACs) with retroactive legal effects into the terms and conditions of all government bonds governed by Greek law.[10] This measure sought to ensure that a (super-)majority of bondholders (75 percent) could vote in favour of a debt workout and consequently overrule a minority of hold-outs. However, several bondholders expressed great dissatisfaction with this rather unconventional solution to Greece's debt problem, *inter alia* arguing that the retroactive implementation of CACs amounts to a "clear violation of the 'sanctity' of contracts".[11]

While the debt swap was eventually successful and private investors forgave Greece 53.5 percent of what they were owed, some creditors decided to take legal action against the above-mentioned changes to their debt contracts.[12] These legal actions mark the starting point of this article. In essence, this paper seeks to provide a comparative legal analysis of the most important lawsuits between Greece and its

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[7] L. Buchheit, 'Sovereign Debt Restructuring: The Legal Context' in W. R. Cline and G. B. Wolff (eds.), *Resolving the European Debt Crisis*, (Washington, D.C.: Peterson Institute for International Economics, 2012).

[8] This strategy involves considerable litigation risks for the bondholder as states enjoy a high level of protection from foreign Court orders. *See* e.g. W.M.C. Weidemaier, 'Sovereign Immunity and Sovereign Debt' (2014) 1 *University of Illinois Law Review* 68.

[9] In order to facilitate the bond exchange, the Greek parliament retroactively changed the conditions of Greek government by passing Bondholders Act 4050. For an unofficial translation of the bill see A. Koutras, 'A better translation of Bondholders Act 4050', http://andreaskoutras.blogspot.com.au/2012/03/better-tarnslation-of-bondholders-act.html.

[10] Ibid.

[11] *See* e.g. A. C. Porzecanski, 'Behind the Greek default and restructuring of 2012', *MPRA Paper* No. 44166, at 9, https://mpra.ub.uni-muenchen.de/44166/1/Behind_the_Greek_Default_and_Restructuring_of_2012.pdf.

[12] *See* below Part II.

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(private) creditors following the 2012 debt restructuring across different jurisdictions. While many scholars have analysed the PSI from both a legal and economic point of view[13], there is little comparative research on the outcome of pertinent litigation and arbitration.[14] This is mainly due to the fact that until early 2016, many lawsuits initiated by bondholders against both the Greek government and European institutions had not been settled. With the final judgement in *Accorinti and Others v. ECB*[15]*,* the long-awaited decision by the highest federal German Court ("Bundesgerichtshof" – "Federal Court of Justice")[16], and precedents rendered by the Austrian Supreme Court ("Oberster Gerichtshof" – "Austrian Supreme Court") in relation to bondholder claims vis-à-vis Greece[17], it is time to take stock and draw conclusions. This will allow us to better understand the interplay between sovereign debt restructuring and enforcement, which has gained great importance in the course of debt crises all over the world.

The present article aims to show that enforcing government debt in court remains a strenuous undertaking for creditors dissatisfied with the result of a sovereign debt workout. While the doctrine of sovereign immunity under international law has transformed from an absolute to a relative protection for countries from suit, the attachment of sovereign assets remains subject to manifold limitations. However, in contrast to U.S. courts that rules against Argentina in the wake of its bankruptcy in 2001, municipal Courts in Austria and Germany did not even grant money judgements to litigious creditors suing Greece. This is partly due to an extensive interpretation of what public emergency measures are protected by sovereign immunity. As the majority of lawsuits against Greece reveals, jurisdictional uncertainties, stemming from the lack of choice of forum clauses, may also aggravate chances of debt recovery for hold-out investors. Similarly, as this article

[13] *Compare* the seminal work by J. Zettelmayer, C. Trebesch and M.German Federal Court of Justice Judgement of 8 March 2016 Gulati, 'The Greek debt restructuring: an autopsy' (2013) 28(75) Economic Policy 513.

[14] Some authors have discussed potential legal avenues for investors against the Greek state. *See* e.g. A. Witte, 'Greek Bond Haircut: Public and Private International Law and European Law Limits to Unilateral Sovereign Debt Restructuring' (2012) 9(3) *Manchester Journal of International Law* 307; O. Sandrock, 'The Case For More Arbitration When Sovereign Debt Is To Be Restructured: Greece As An Example' (2012) 23 *The American Review of International Arbitration* 507. Creditor litigation is also partly discussed in Zettelmayer et al., above note 13 and P. Wautelet, 'The Greek Debt Restructuring and Property Rights – A Greek Tragedy for Investors?' (2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373891.

[15] T-79/13, *Accorinti and Others v. European Central Bank,* ECLI:EU:T2015:756.

[16] German Federal Court of Justice Judgement of 8 March 2016 VI ZR 516/14.

[17] *See* below 2.2.1.

will discuss, arbitration before Tribunals of the International Centre for the Settlement of Investment Disputes (ICSID) and litigation in EU Courts failed to yield the results desired by disenchanted investors.

The article is structured as follows: Part I takes a closer look at the Greek PSI of 2012, focusing, in particular, on the differences of restructuring domestic-law bonds as opposed to foreign law-bonds. Part II, which forms the core of this study, analyses selected lawsuits related to the Greek PSI. More specifically, it will scrutinize litigation before domestic courts (Germany and Austria), litigation before EU courts, and arbitration before the International Centre for Settlement of Investment Disputes (ICSID). Part III subsequently examines and compares the respective outcomes of these lawsuits, thereby offering an assessment of the chances of success for creditor litigation following future sovereign debt workouts.

Part I. The Greek Debt Restructuring of 2012

1.1. The "Invitation Memorandum"

On 24 February 2012, Greece outlined the conditions of the debt swap offer made to private holders of its government bonds in an "Invitation Memorandum".[18] The country tendered to exchange almost all outstanding "old" debt securities for "new" papers with reduced face value. More specifically, the Greek government proposed to restructure debt securities held by private investors with a face value of €205.5 billion (approximately 97 percent of its total debt).[19] As the offer only concerned privately-held debt instruments and not, for instance, bonds owned by EU institutions or other countries, the debt restructuring plan was referred to as "Private Sector Involvement" (PSI). The ECB, for instance, Greece's single largest bondholder, swapped its bond in an independent restructuring deal a few weeks before private investors were invited to participate in the PSI. However, in contrast to privately-held bonds, Greece did not impose a debt cut on bonds owned by the ECB since it was feared that official-sector participation might result in a violation of EU primary law.[20] This – arguably unequal – treatment of official and private-sector

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[18] Sandrock, above note 14, at 512. For the original text of the Invitation Memorandum *see* 'Invitation of the Hellenic Republic'(24 February 2012), http://ftalphaville.ft.com/files/2012/02/-Reg_S_Invitation_Memorandum.pdf.

[19] Porzecanski, above note 11, at 9.

[20] *See* e.g. P. Craig and M. Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' (2016) 41 *European Law Review* 1; S. Grund and P. Grle, 'The European Central Bank's Public Sector Purchase Programme, the Prohibition of Monetary Financing and Sovereign Debt Restructuring Scenarios' (2016) 41 *European Law Review* 781.

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creditors was (unsuccessfully) challenged before the European General Court and will be examined in more detail at a later stage.[21]

The debt restructuring negotiations with the Greek government were led by a steering group of 12 banks, insurers, and asset managers on behalf of a larger group of 32 creditors, who together held approximately 30-40 percent of the country's privately owned debt.[22] Smaller retail investors were not represented in this group. This, in part, explains why most of the plaintiffs in the lawsuits discussed in this article were retail investors, such as German savers, rather than institutional investors. In exchange for their debt instruments all creditors were offered three categories of new bonds with reduced face value as well as different maturities and rates of interest.[23] More concretely, they were offered a swap of old Greek government bonds for new securities with a face value equal to 31.5 percent of the face value of the original bonds.[24] Additionally, they were offered European Financial Stability Facility (EFSF) notes with a maturity date of two years or less from the PSI settlement date having a face value equal to 15 percent of the face amount of their original bonds, and detachable GDP-linked securities issued by Greece having a notional amount equal to the face value of each holder's new bonds.[25] Overall, according to calculations by Zettelmeyer et al., bondholders who accepted the debt swap offer incurred losses of approximately 59 percent.[26]

The Invitation Memorandum further stated that Greece would not repay any of its debts to creditors who refused to participate in the restructuring.[27] This announcement was clearly directed towards potential hold-out investors as the Greek government anticipated dissenting voices from several smaller and bigger private investors. According to the Initiation Offer, the precondition for such an automatic "cram-down" of hold-out investors was that 75 percent of the aggregate face amount of all bonds selected to participate in the PSI were tendered for

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[21] See e.g. *Accorinti v. ECB*, above note 15. For a detailed analysis of this judgement compare below 2.3.

[22] Zettelmayer et al., above note 13, at 9. In contrast to other recent debt restructurings, the establishment of this creditor committee rendered creditor coordination more straightforward and made it easier to contain hold-out behaviour.

[23] For a detailed overview compare Sandrock, above note 14, at 513.

[24] 'Greece statement on bond swap: in full', *The Telegraph*, 24 February 2012, http://www.telegraph.co.uk/finance/financialcrisis/9104688/Greek-statement-on-bond-swap-in-full.html. For the full offer *see* above note 18.

[25] Ibid.

[27] Zettelmayer et al., above note 13.

[27] Sandrock, above note 14, at 513.

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exchange. However, in order not to generate an outright default scenario, Greece chose to retroactively introduce CACs according to which a majority of creditors (rather than the Greek government) could amend the dissenting minority's debt contracts.

1.2. Retrofitting Collective Action Clauses (CACs) to Greek-Law Bonds

A key feature of the Greek PSI of 2012 was the retroactive implementation of CACs into the terms and conditions of Greek government bonds governed by Greek law[28]. Set against the backdrop of previous debt restructurings, Greece was a special case. This mainly stems from the fact that Greece was one of the first advanced economies in modern times to face a sovereign insolvency. Unlike most emerging-market economies which defaulted in the course of the past three decades, Greece's debt was denominated in euro rather than in a foreign currency, and most Greek bonds were governed by domestic rather than foreign law.[29] Moreover, in contrast to the small proportion of Greek bonds governed by English law, Greek-law bonds did not contain any CACs. Therefore, Greece had the unique opportunity to restructure much of its outstanding private debt by means of retroactively changing the debt instruments' *lex contractus* to insert CACs.

While many countries have used legislation to suspend debt repayment obligations to investors[30], the Greek PSI went down in history as the first restructuring where a sovereign nation rewrote local law to ensure the success of its debt restructuring operations.[31] The newly inserted CACs essentially set out that the amendment proposed in the Invitation Memorandum, i.e. the reduction in the bonds' face value, would become binding on the holders of Greek-law bonds if at least two-thirds by face amount of a quorum of these bonds collectively approved the amendments.[32] Thus, if such majority was reached, any hold-out investors would be forced to accept the majority-approved amendments to their contracts – a technique used in most corporate debt restructurings.[33]

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[28] For the bill compare Koutras, above note 9.

[29] Miranda Xafa, 'Lessons from the 2012 Greek debt restructuring', *VOX – CEPR's Policy Portal*, 25 June 2014, http://voxeu.org/article/greek-debt-restructuring-lessons-learned.

[30] E.g. Argentina's debt moratorium on roughly $155 billion of public foreign-currency debt, declared on 23 December 2001. *See* 'Argentina's default – Foreign creditors join the pyre', *The Economist Print Edition*, 3 Jan 2002.

[31] Ibid.

[32] *See* Sandrock, above note 14, at 515.

[33] Compare for instance the "cram down" provisions in Chapter 7 of the U.S. Bankruptcy Code, which bind dissenting creditors to a debt reorganisation plan approved by a majority of creditors.

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The whole Greece debt workout was settled in about ten months, which compares very favorably to the Argentine debt restructuring operation that took more than nine years.[34] With regard to domestic law bonds, the debt restructuring was a success: 86 percent of private investors, holding bonds with a face value of roughly €177 billion, accepted the proposed changes.[35] This majority easily met the required voting threshold to "cram down" the remaining hold-outs. However, as the latter had never actually consented to the debt reduction, the strategy of binding a minority of bondholders to the will of the majority was considered by some commentators as "consent by coercion".[36] It remains hotly debated in academic literature whether the legislative technique applied by the Greek Parliament to facilitate the bond swap was in fact "coercive"[37] and "arbitrary"[38] or rather a "legitimate exercise of sovereign power"[39] to resolve its debt crisis.. In any event, the country's extraordinary measures during its debt crisis served as the starting point for many lawsuits against Greece, which will be subject to closer scrutiny in Part II of this paper.

1.3. Restructuring Foreign-Law Bonds

Approximately three percent of all outstanding Greek government bonds were governed by English law.[40] In contrast to Greek-law bonds, these English-law bonds already contained CACs to keep hold-out investors at bay. However, the restructuring of these foreign-law debt securities was hampered by the design of these CACs.[41] Only 17 of the 36 foreign-law bonds were successfully restructured.[42]

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[34] Marcus Miller and Dania Thomas, 'Eurozone sovereign debt restructuring: keeping the vultures at bay' (2013) 29(4) Oxford Review of Economic Policy 745, at 748.

[35] Ibid.

[36] Ibid. Similarly, Porzecanski describes the retroactive implementation of CACs as a clear violation of the "sanctity of contracts", *see* Porzecanski above note 11, at 8. The Economist described it as a tool that "forced investors holding out for a better deal to swallow the loss", *see* 'An illusory haven – What lessons should investors learn from the Argentine and Greek restructurings?', *The Economist,* 20 April 2013.

[37] This view is supported *inter alia* by Sandrock, above note 14; Porzecanski, above note 11 and Witte, above note 14.

[38] M. Guzman, J. A. Ocampo and J. E. Stiglitz (eds.), *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises* (New York: Columbia University Press, 2016), at 164.

[39] Miller/Thomas, above note 34, at 753.

[40] Ibid, at 747.

[41] More specifically, CACs under English law lacked aggregation features, meaning that a 75 percent of creditors had to accept the proposed amendments in each individual series of bonds. This made it easier for hold-outs to thwart restructuring efforts by acquiring a blocking position in just one of the series and then sue for repayment of the full face value of the bonds.

The remainder resulted in holdout claims amounting to roughly €6.4 billion.[43] Fearing decade-long litigation à la Argentina, the Greek government decided to pay these hold-outs in full.[44] This resulted in a situation where owners of domestic-law bonds took a haircut of more than 50 percent while holders of foreign-law government bonds received 100 cents on the euro.[45] Several hedge funds, who had bought large amounts of English-law governed Greek debt at steep discounts in the run up to the crisis, were greatly rewarded for their speculative strategy. Ultimately, the different treatment of foreign and local-law bonds, albeit not serving as a powerful legal argument in Court, was another motivation for private investors to attempt debt recovery against Greece before municipal courts and international tribunals.

Greece's decision to spare foreign-law governed debt securities and impose a haircut of more than 50 percent on domestic-law securities emphasized the importance of distinguishing between these different categories of government bonds, raising new questions about inter-creditor equity in sovereign debt workouts. As Part III will discuss, the generous treatment of foreign-law bonds may, too, lead to a flight of investors to such debt instruments not just in Greece but also in other euro area Member States.[46] While conventional wisdom has always suggested that a borrowing state can exert considerably more influence over domestic-law than foreign-law bonds[47], the Greek PSI and subsequent litigation confirmed fears in the market that legislation may be employed by a defaulting sovereign state to implement a debt restructuring – particularly if CACs are absent.

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[42] Miller/Thomas, above note 34, at 747.

[43] *See* e.g. R. Matezou, 'In about-face, Grecce pays bond swap holdouts', *Reuters*, 15 May 2012, http://www.reuters.com/article/us-greece-bond-idUSBRE84E0MY20120515.

[44] Ibid.

[45] According to Reuters, private creditors who accepted the haircut were furious and called the decision to pay the holdouts "scandalous", *see* Matezou, above note 43.

[46] Choi et al. for instance note that similar patterns of gradually increasing risk premia for domestic-law bonds could be observed in other euro area periphery countries in the course of the European sovereign debt crisis, *see* S. J. Choi, M. Gulati and E. A. Posner, 'Pricing Terms in Sovereign Debt Contracts: A Greek Case Study with Implications for the European Crisis Resolution Mechanism' (2011) 6(2) *Capital Markets Law Journal* 163.

[47] *See* e.g. for an analysis of the different academic viewpoints on the issue of governing law in the realm of sovereign debt in New York City Bar Association, 'Governing Law in Sovereign Debt – Lessons from the Greek Crisis and Argentina Dispute of 2012', Committee on Foreign & Comparative Law, February 2013, http://www2.nycbar.org/pdf/report/uploads/20072390-GoverningLawinSovereignDebt.pdf.

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Part II. Litigation and Arbitration following the Greek PSI

2.1. Domestic Court Litigation

2.1.1. Sovereign Debt Litigation in Domestic Courts – An Overview

Domestic Courts are an imperfect forum to settle disputes between sovereign borrowers and their lenders. While many proposals for reform have been put forward by international financial institutions[48], the United Nations[49], as well as academia[50], there is currently no specialized (international) bankruptcy Court or Tribunal to mediate between an insolvent country and its (private) lenders in the event of a debt crisis. Hence, if states cease to repay their debts, municipal courts are the only forum creditors may turn to for recovery. Similarly, lenders to sovereigns may challenge any formal change to their debt contracts as a consequence of debt restructuring measures if this results in a monetary loss.[51] To provide for greater legal certainty, most sovereign bond contracts contain choice of forum clauses that confer jurisdiction upon the courts of a specific country or city.[52]

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[48] Compare the famous proposal by the IMF to establish a "Sovereign Debt Restructuring Mechanism (SDRM)" in A. O. Krueger, *A New Approach to Sovereign Debt Restructuring* (Washington, D.C.: International Monetary Fund, 2002).

[49] While the U.N. General Assembly (*see* General Assembly resolution 68/304, Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes, A/RES/68/304 (17 September 2014) , http://www.un.org/press/en/2014/ga11542.doc.htm) has voted in favour of the implementation of a multilateral legal framework for sovereign debt restructuring, very few steps have been taken to transform this idea into a set of tangible and enforceable rules of international law. This multilateral framework is designed to stop disruptive vulture litigation and allowing for an orderly and equitable debt restructuring procedure on the international plane. Also compare United Nations Conference on Trade and Development (UNCTAD), 'Sovereign Debt Workouts: Going Forward', 28 April 2015, http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=987.

[50] *See* above Buckley, above note 6; K. Rogoff and J. Zettelmayer, 'Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001' (2002) 49(3) *IMF Staff Papers*, http://scholar.harvard.edu/files/rogoff/files/bankruptcy_procedures_for_sovereigns_a_history_of_ideas_1976_2001.pdf?m=1360041532; S. L. Schwarcz, 'Sovereign Debt Restructuring Options' (2012) 2 *Harvard Business Law Review* 95.

[51] Typically, when sovereigns restructure their debts, they reduce their financial obligations by swapping old bonds for new bonds with a reduced face value. Legally speaking, any such debt swaps require an alteration of the underlying debt contracts, which creditors may object to by initiating legal action.

[52] *See* e.g. G. Weisz, N. E. Schwarzkopf and M. Panitch, 'Selected Issues in Sovereign Debt Litigation' (1991) 12(1) *University of Pennsylvania Journal for International Business Law* 1. Two jurisdictions play an outstanding role in this regard. As of June 2015, approximately 50 percent of the total outstanding stock of international (external) sovereign bonds are governed by New York law and 46 percent by English law; *see* IMF, 'Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts', September 2015, at 3,

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It must however be noted that sovereign debt enforcement in municipal Courts remains an arduous undertaking that has rarely been successful in the past[53], even in creditor-friendly jurisdictions such as New York City.[54]

This mainly stems from the special legal status of sovereignty, which significantly limits the power of foreign courts to enforce debt obligations against a foreign sovereign's will. While countries that borrow funds abroad are no longer immune from suit[55], sovereign debtors may thwart collection attempts on money judgments obtained by creditors in domestic courts.[56] This power on the debtor's side to obstruct debt enforcement attempts stems from two facts. First, the attachment of the sovereign's foreign property is limited under international law[57], meaning that states can keep certain valuable assets, such as central bank funds, abroad without having to fear execution attempts. Second, some of the most lucrative sovereign assets, such as the power of taxation, are located within the sovereign debtor's own borders and thus remain inaccessible to foreign court orders.[58]

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http://www.imf.org/external/np/pp/eng/2015/091715.pdf. Typically, the governing law and the forum are equivalent, meaning that if New York law governs the bond contract, the forum for litigation is New York as well.

[53] For an overview *see* F. Sturzenegger and J. Zettelmeyer, 'Has the Legal Threat to Sovereign Debt Restructuring Become Real?' (2006) *Universidad Torcuato Business School Working Papers*, http://econpapers.repec.org/paper/udtwpbsdt/legalthreat.htm.

[54] Compare Weisz et al., above note 52.

[55] Compare for U.S. law *Allied Bank International v. Banco Credito Agricola*, 757 F.2d 516 (2d Cir. 1985); for German law e.g. German Federal Constitutional Court Judgement of 8 May 2007 2 BvM 1/03, 2 BvM 2/03 (declining Argentina's sovereign immunity before German Courts); for English law *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* [1977] 1 QB 529. Also *see* for an overview of European case law on sovereign immunity in A. Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17(4) *The European Journal of International Law* 803.

[56] Recently however, a hedge fund that refused to participate in Argentina's sovereign debt restructuring of 2005 found a new legal avenue to enforce sovereign debt obligations following the "sovereign debt trial of the century"; *see NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013*)*. Rather than seeking to attach Argentine assets abroad, the hedge fund was granted an injunction against Argentina and its agents designed to block payments made to its international creditors. The remedy worked and because Argentina refused to pay the hold-out investor even after New York Courts had issued the injunction, the country went bust in 2014. For an overview of this litigation saga compare J. Kaplan, 'Collective Action and the Competence of Courts: The Lessons of NML v. Argentina' (2014) 20 *Stanford Journal of Law, Business, and Finance* 1.

[57] W. Bratton and M. Gulati, 'Sovereign Debt Reform and the Best Interest of Creditors' (2004) 57(1) *Vanderbilt Law Review* 1, at 10 – 11. For instance, property that is used for diplomatic purposes must not be subject to execution.

[58] M. Waibel, *Sovereign Defaults before International Courts and Tribunals* (PhD thesis, 2008), at 24 (on file with author).

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Some authors[59] have argued that while attachment is constrained, a court ruling in favour of a bondholder could, under certain circumstances, impose an embargo on a defiant sovereign borrower. Such embargo may hamper trade and financing in the respective jurisdiction. Empirical evidence furthermore suggests that threats of protracted lawsuits following a sovereign debt crisis have become an incentive for sovereigns to either pay hold-out creditors in full[60] or avoid default in the first place. While it is true that market access for a recalcitrant sovereign borrower is restricted in jurisdictions where creditors have obtained money judgments, the remedies in private creditors' hands remain nonetheless weak and vary strongly across different jurisdictions.[61]

Equally, chances for disgruntled bondholders to successfully recover their debts in the wake of the Greek PSI were *ex-ante* considered slim by leading experts in the field.[62] As mentioned previously, unlike most emerging market economies, which traditionally issue debt instruments under New York or London law, a sizeable chunk of Greece's outstanding debt instruments was governed by Greek law.[63] This allowed the insolvent state to, on the one hand, unilaterally change the contracts underpinning its debt obligations by virtue of legislation[64] and meant, on the other hand, that bondholder claims would have had to be assessed against the backdrop of Greek (and EU) law. Moreover, in the absence of a choice of forum clause in Greece's sovereign debt instruments, uncertainty remained as to whether holders of

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[59] *See* for the theory of "Court-imposed embargos", which argues that such embargos can discourage third parties from dealing with the sovereign and therefore make the sovereign pay in M. C. Weidemaier and A. Gelpern, 'Injunctions in Sovereign Debt Litigation' (2014) 31 *Yale Journal of Regulation* 189.

[60] It is typically argued that the reason as to why Greece treated hold-out creditors with English-law bonds so favourably was the fear of a messy decade of litigation, which could be observed in the wake of the Argentine debt crisis of 2001. *See* e.g. Allen & Overy, 'How the Greek debt reorganisation of 2012 changes the rules of sovereign insolvency' (2012) Global Law Intelligence Unit, at 32, http://www.allenovery.com/SiteCollectionDocuments/AO%20-%20Greek%20debt%20-reorganisation%20of%202012.pdf.

[61] For an overview of hold-out creditor litigation across different jurisdictions and legislative measures to combat such behaviour *see* A. Iversen, 'Holdout Creditor Litigation: An Assessment of Legislative Initiatives to Counter Aggressive Sovereign Debt Creditor Litigators' (2015) *University of Oslo Faculty of Law Research Paper Series* No. 2015-13, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613280.

[62] *See* for an analysis of options for claims brought by private bondholders before German Courts in C. Thole, 'Klagen geschädigter Privatanleger gegen Griechenland vor deutschen Gerichten?' (2012) 38 *Zeitschrift für Wirtschafts – und Bankrecht* 1793.

[63] *See* Zettelmeyer et al., above note 13.

[64] *See* above 1.2.

Greek bonds could enforce their claims in jurisdictions other than Greece.[65] Seemingly unimpressed by these legal predicaments, several German investors were nonetheless quick to announce their intentions to challenge the Greek PSI in court.[66]

The next two sections shine a light on the litigation that has taken place after the Greek PSI of 2012, juxtaposing lawsuits in two jurisdictions where the majority of claims against Greece's debt workout were filed, namely Germany and Austria. At this point in time, the highest civil courts in both countries rejected all bondholder claims, thereby avoiding a politically delicate upset between two EU Member States. Nonetheless, the respective judgments offer compelling insights into the contemporary judicial understanding of key concepts of international law in civil-law jurisdictions. Crucially, courts in both jurisdictions weigh in on the doctrine of sovereign immunity, some supposing that sovereign debt enforcement in European courts is barred by the doctrine of state immunity[67], and others granting legal protection to sovereign borrowers from creditor litigation.[68]

Both sovereign borrowers and lenders may draw important conclusions from the lawsuits, not least since sovereign debt litigation has been few and far between in Europe. As discussed in Part III, creditors may, as a consequence, demand higher returns on domestic-law bonds, insuring themselves against the risk of a retroactive implementation of new contractual terms which cannot be challenged in a foreign court. Moreover, sovereign borrowers may become more inclined to use CACs in all their government bonds, regardless of whether they are governed by foreign or domestic law. The judgments in Germany and Austria also come at a time of heightened legal uncertainty in the sovereign debt space more generally after U.S. courts granted extensive debt enforcement remedies to speculative hedge funds in the infamous *NML v. Argentina*[69] case. Finally, the development of a body of case law on sovereign debt litigation in Europe could provide an important intellectual

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[65] Thole, above note 62, at 1795 (discussing potential jurisdictional issues with respect to claims of German holders of Greek government bonds).

[66] *See* e.g. A. Trotman and M. Strydom, 'Debt crisis: as it happened – March 12, 2012', *The Telegraph*, 12 March 2012, http://www.telegraph.co.uk/finance/debt-crisis-live/9137373/Debt-crisis-as-it-happened-March-12-2012.html.

[67] *See* e.g. Court of Appeals Oldenburg Judgement of 15.4.2016 13 U 43/1. Rather than sovereign immunity, jurisdictional issues render debt enforcement attempts fruitless for litigious creditors.

[68] *See* e.g. Federal Court of Justice Judgement of 8 March 2016 VI ZR 516/14 (discussed above 2.1.2.1.).

[69] *NML v. Argentina,* above note 56.

input for global policymakers, who are yet to devise better rules for the orderly, fair, and efficient resolution of sovereign debt crises.

2.1.2. Litigation Before German Courts

2.1.2.1. German Federal Court of Justice Judgement of 8 March 2016 VI ZR 516/14

The plaintiffs in this case were three German retail investors who bought Greek government bonds in 2010 and 2011 with a face value of €110.000, €50.000, and €8.000, respectively.[70] The bonds were governed by Greek law and did not contain CACs at the time of acquisition.[71] The plaintiffs had acquired the debt securities through a commercial bank acting as an agent.[72] Because this very bank was not a member of the Greek cheque system, which is used to transfer property rights to the creditor, the bank had itself not acquired the respective bonds directly from Greece but rather on the secondary market.[73]

In the above-mentioned Greek PSI of 23 February 2012, the plaintiffs were offered a bond swap by the Greek government equaling a 53.5 percent haircut on their debt instruments.[74] The plaintiffs refused to accept this offer and were overruled by a majority of bondholders on basis of the retroactively introduced CACs.[75] Accordingly, their bonds were exchanged for new debt instruments with a reduced face value by the Greek National Bank. Subsequently, the plaintiffs filed suit in Germany and demanded compensation from the Hellenic Republic for damages arising from the PSI. Their main argument was that the retroactive implementation of CACs amounted to an undue violation of their property rights given their refusal to accept the bond swap.[76]

Both the District Court and the Court of Appeals in Frankfurt rejected the plaintiff's claims on grounds of sovereign immunity.[77] They held that bondholders could not sue Greece over the PSI, for the law used to retrofit CACs to Greek-law

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[70] German Federal Court of Justice Judgement of 8 March 2016 VI ZR 516/14, at 5.

[71] Ibid.

[72] Ibid. This modus of transferring property rights to the investors by registering them with the Greek central bank is laid down in the Greek law 2198/1994.

[73] German Federal Court of Justice Judgement of 8 March 2016 VI ZR 516/14, at 5 et seq.

[74] Ibid, at 9.

[75] Ibid.

[76] Ibid, at 10.

[77] Ibid, at 12. *See* for the judgement of the Court of Appeals Frankfurt Judgement of 18 September 2014 16 U 41/14.

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sovereign bonds (the Bondholder Act 4050/2012[78]) was to be considered *acta iure imperii*.[79] While the Court of Appeals acknowledged that the retroactive change to the plaintiffs' bond contracts adversely affected their legal position, it held that the principle of sovereign immunity generally bars courts from assessing the legality of Greek laws.[80] The Court of Appeals also noted that German courts did not have jurisdiction in the present case as the conditions of Art. 5 of the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter "Brussels I Regulation")[81] were not met.[82]

The highest German court in civil matters, the Federal Court of Justice essentially followed the lower Courts' legal reasoning.

First, it explained why international law restricts domestic courts from rendering judgments relating to the internal affairs of a foreign country. It also remarked that sovereigns only enjoy immunity from suit if they have acted in a "sovereign capacity" (*acta iure imperii*).[83] Other "non-public", "commercial" legal acts (*acta iure gestionis*) are not protected by international law and may thus be subject to the assessment of a foreign court.[84] According to the Federal Court of Justice, the distinction between public and non-public legal acts ought not to be solely assessed with regard to their purpose or motive but also with respect to their nature.[85] It therefore depends on whether the state has acted with the unique powers of a sovereign or merely entered into a legal relationship under private law.[86]

Second, the Federal Court of Justice remarked that the issuance of government bonds is generally deemed a non-public legal act (*acta iure gestionis*) and may thus

[78] For a translation of this law *see* Koutras, above note 9.

[79] German Federal Court of Justice Judgement of 8 March 2016 VI ZR 516/14, at 12. Under the doctrine of (relative) sovereign immunity foreign Courts can only adjudicate claims brought against a sovereign nation when the latter has waived its immunity from suit or when the action at stake can be qualified as "commercial activity". *See* e.g. L. Mola, 'Sovereign Immunity, Insolvent States and Private Bondholders: Recent National and International Case Law' (2012) 11 *The Law and Practice of International Courts and Tribunals* 525.

[80] Ibid.

[81] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, pp. 1-23).

[82] German Federal Court of Justice Judgement of 8 March 2016 VI ZR 516/14, at 12.

[83] Ibid, at 16.

[84] Ibid.

[85] Ibid, at 18.

[86] Ibid.

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be subject to a lawsuit in the courts of another state.[87] However, in the present case, the plaintiffs challenged the involuntary withdrawal and exchange of their bonds by the Greek government. Their claim was therefore based on the violation of property rights *in* the sovereign debt papers (rights *in rem*) rather than the violation of rights to repayment arising *from* the debt instruments (rights *ex contractu*).[88] This debt swap, as well as the subsequent withdrawal of the plaintiffs' bonds from the Greek National Bank's deposits, was based on the Greek Bondholder Act 4050/2012, which was, in the Federal Court of Justice's view, clearly a public legal act. Were the plaintiffs to invoke the violation of contractual rights, rather than the violation of rights *in rem,* the Federal Court of Justice held, albeit *obiter*, that Greece would not be protected by the doctrine of sovereign immunity.

Since the plaintiffs invoked their property rather than their contractual rights, the Federal Court of Justice held that the legal measure taken by the Greek government must be qualified as *acta iure imperii* that could not be subject to review in German courts. While Greece had retroactively changed the legal relationship between a sovereign debtor and its creditors, the Federal Court of Justice made clear that such amendments are covered by the principle of sovereign immunity. After all, states remain the "masters of their domestic law".[89] This understanding of international law dealt a huge blow to the claims of German bondholders, considerably restricting the enforceability of domestic-law bonds.

As discussed below[90], however, the Federal Court of Justice's judgment also reflects a highly diplomatic stance, tailored to circumvent potentially harmful political repercussions in the already fragile relationship between Germany and Greece. From a legal viewpoint, the outcome undermines the sanctity of contracts, exacerbating uncertainties with regards to the enforceability of sovereign debt obligations. For this and other reasons, subsequent Court decisions somewhat deviated from the Federal Court of Justice's broad interpretation of sovereign immunity.

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[87] Ibid. This assessment aligns with case law in the U.S. and the U.K., compare e.g. Weidemaier, above note 7.

[88] German Federal Court of Justice Judgement of 8 March 2016 VI ZR 516/14, at 22.

[89] Ibid*,* at 29. The Federal Court of Justice however noticed that many voices in literature assume that the principle of sovereign immunity does not apply to legislative measures that disturb the contractual relationship between a state and its counterparty. *See* e.g. A. Szodruch, *Staateninsolvenz und private Gläubiger* (Berlin: Berliner Wissenschaftsverlag, 2008), at 379.

[90] *See* below Part III.

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2.1.2.2. Oldenburg Federal Higher Regional Court Judgement of 15 April 2016 13 U 43/1

Quite remarkably, in this decision on Greek bondholder claims, the Court of Appeals rebutted some of the core arguments made by the Federal Court of Justice just one month earlier. The facts in both cases were undoubtedly similar and seem not to justify such a different legal assessment, at least at first glance. As in the Federal Court of Justice decision analysed above, the Court of Appeals Oldenburg's ruling related to claims brought by German citizens who had acquired Greek government bonds between 1998 and 2010 against the Greek State for retroactively amending the bond contracts by means of legislation.[91] The plaintiffs argued that the Greek Bondholder Act 4050/2012 unlawfully forced losses upon them, binding them to a restructuring deal including a 53.5 percent haircut which they had never consented to in the first place. This, in the plaintiffs' view, resulted in both a breach of contract by the Greek government and an unlawful expropriation by the Greek State.[92]

Akin to the Federal Court of Justice, the Court of Appeals Oldenburg focused on the question whether Greece enjoyed sovereign immunity from suit. First, it noted that the issuance of bonds by the Greek government was to be considered *acta iure gestionis*. When governments raise funds via capital markets, it noted, they behave like a private individual or corporation and does not exercise its "sovereign powers". Regarding Greece's immunity for adopting the Bondholder Act 4050/2012, however, the Court of Appeals Oldenburg clearly deviated from the Federal Court of Justice's assessment. Most importantly, the Court of Appeals noted that "a legal relationship that was once considered 'private' cannot lose this character due to 'public' measures that were taken at a later stage".[93] In other words, the Hellenic Republic could not retroactively change the applicable statute for the sake of "immunizing" its public financing activities.

Hence, while the Federal Court of Justice had considered Greece the "master of its domestic law", the Court of Appeals Oldenburg argued that retroactive legislative changes that had unduly interfered with the property rights of Greek investors were not covered by the doctrine of sovereign immunity. Rather, it remarked, the Hellenic Republic was to be treated like any other private debtor who refused to

[91] Court of Appeals Oldenburg Judgement of 15 April 2016 13 U 43/1.

[92] Ibid, at 9-10.

[93] Ibid, at 21. Translation by the author.

repay its debts on grounds that they had been revoked by virtue of legislation.[94] Therefore, German courts had to assess the merits of the claims made by the bondholders rather than rejecting their jurisdiction due to state immunity.[95]

However, to avoid blatant divergence between its own and the Federal Court of Justice's legal opinion, the Court of Appeals made an important caveat. It held that the plaintiffs in the present case asserted their contractual right to repayment under Greek debt securities they had previously acquired.[96] Conversely, in the Federal Court of Justice case, the plaintiffs sued for damages resulting from the allegedly coercive exchange of their bonds through the Greek Parliament's actions. The Court of Appeals Oldenburg added that only a contractual claim based on the Greek state's non-performance allows for a review of the case's merits. Other claims, such as the alleged expropriation of German bondholders or the involuntary exchange of bonds by means of governmental actions, must be rejected on grounds of sovereign immunity.[97]

While qualifying the Greek Bondholder Act 4050/2012 as *acta iure gestionis*, the Court of Appeals Oldenburg eventually rejected the plaintiffs' claims, holding that it did not have jurisdiction under the Brussels I Regulation. More specifically, the Court said that the original creditor to the Greek government was not a consumer in the sense of Art. 15 para 1 lit c of the Brussels I Regulation but rather an institutional (wholesale) investor who acquired the bonds directly from Greece.[98] Furthermore, in accordance with the terms and conditions in the government bond prospectus, the contractual "place of performance" (Art. 5 para 1 Brussels I Regulation) was not Germany but Greece.[99] Consequently, German investors must pursue legal action in Greek rather than German courts to be granted an enforceable judgment against the sovereign debtor.

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[94] Ibid.

[95] Ibid.

[96] Ibid, at 22.

[97] Ibid, at 22-23.

[98] Ibid, at 28. The plaintiffs never entered a contractual relationship in the sense of Art 15 of the Brussels I Regulation since they bought their interest in the sovereign bonds from an intermediary.

[99] Ibid, at 31.

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2.1.3. Litigation Before Austrian Courts

2.1.3.1. Austrian Supreme Court Judgement of 20 May 2014 4 Ob 227/13f and Supreme Court Judgement of 27 January 2016 4 Ob 163/15x

The plaintiffs in these cases, which cover the same bondholder claim, had acquired Greek sovereign bonds through an Austrian retail bank.[100] They put forward that the Greek government failed to service the debt at the point of maturity. This, the private bondholders argued, was a direct result of the Greek Bondholder Act 4050/2012, the bill adopted by the Hellenic Republic to restructure its debt at the expense of private investors.[101] The plaintiffs noted that these legislative measures amounted to a breach of their bond contracts. The retrofitted CACs, which were used to implement the debt reduction, were not part of the original credit agreement. Thus, the Hellenic Republic did not comply with its contractual obligations, caused damages for the plaintiff, and unduly interfered with the plaintiff's property rights.[102] While the lower Courts rejected the plaintiff's claims on grounds of sovereign immunity, the Austrian Supreme Court ("Supreme Court") drew a distinction between the three different arguments put forward by the plaintiffs.

First, the Supreme Court noted that the Greek Bondholder Act 4050/2012 was legislative in nature and must therefore be considered a "public" act (*acta iure imperii*) under international law.[103] Hence, Austrian Courts may not review the lawfulness of such sovereign legal measures, even if they alter valid and existing contractual obligations. However, the Supreme Court also remarked that the issuance of bonds was to be qualified as "commercial" act (*acta iure gestionis*).[104] As a consequence, if other requirements such as jurisdiction were fulfilled, the Hellenic Republic's contractual obligation could indeed be enforced by courts located outside of Greece. After all, the Greek State appeared to the investors much like a private individual, entering a legally binding loan agreement through the issuance of debt instruments on capital markets.[105]

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[100] Supreme Court Judgement of 20 May 2014 4 Ob 227/13f, at 2.

[101] Ibid.

[102] Ibid, at 3.

[103] Ibid, at 5.

[104] Ibid. It held that as long as a state acts like a private individual, for instance by borrowing money, it does not enjoy sovereign immunity before foreign Courts.

[105] Ibid.

However, the problem with this first Austrian Supreme Court decision on the claims of Austrian bondholders against the Greek government lies in its brevity.[106] While underscoring the general enforceability of government bonds, the Supreme Court refrained from examining whether or not Greece had indeed violated its contractual obligations. Moreover, even if the judgment was to be interpreted broadly, it remained ambiguous as to whether the plaintiffs could claim full repayment (despite the imposition of a haircut by virtue of the CAC procedure) or merely sue for the reduced face value of the bonds. This stemmed, in particular, from the Supreme Court's reluctance to further investigate the relationship between the Greek Bondholder Act 4050/2012 (a measure protected by sovereign immunity) and the issuance of government bonds (a "commercial" activity not protected by sovereign immunity). Instead, the Supreme Court shifted from the more intricate and sensitive questions of sovereign immunity to the more straightforward jurisdictional issues.

Essentially, the Supreme Court held that the jurisdiction of Austrian courts in such "commercial" lawsuits ought to be determined against the backdrop of Art. 1 para 1 Brussels I Regulation since both Austria and Greece are EU Member States.[107] As discussed previously[108], the pertinent provisions of this EU Regulation were subject to an in-depth review by the German Federal Court of Justice in its ruling on claims of German nationals against Greece. While German courts uniformly held that none of the conditions laid down in the Brussel I Regulation applied to claims made by private bondholders against Greece[109], the Supreme Court was reluctant to jump to conclusions.[110] Rather, it held that it was the defendant's responsibility to prove that the requirements to establish jurisdiction of Austrian Courts in accordance with the Brussels I Regulation.[111] For that purpose, the lower Courts

[106] The judgement in Supreme Court 4 Ob 227/13f has just 7 pages and, in contrast to the above-discussed German bondholder cases, fails to explain in detail how Greek Bondholder Act 4050/2012 interferes with the Claimant's property rights and why this act is protected by sovereign immunity.

[107] Supreme Court 4 Ob 227/13f, at 6.

[108] *See* Federal Court of Justice VI ZR 516/14.

[109] *See* Court of Appeals Oldenburg 13 U 43/15.

[110] Supreme Court 4 Ob 227/13f, at 6.

[111] Ibid. More specifically, it noted that the jurisdiction of Austrian Courts in the present case may be based on Art 15 para 1 in conjunction with Art 16 para 1 Brussels I Regulation. This however means that the plaintiff has to prove that it is a consumer in the sense of EU law in its contractual relationship with Greece. This, as German case law indicates, may prove difficult if the bondholder has acquired his debt instrument through third party. *See* above Court of Appeals Oldenburg 13 U 43/15.

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were ordered to allow Greece to put forward arguments rejecting the jurisdiction of Austrian Courts in this cross-border litigation.[112]

In the second round of litigation, after the defendant was given the chance to present the case against the jurisdiction of Austrian Courts, the plaintiffs remained unsuccessful in obtaining a judgment against the Hellenic Republic.[113] First, the Supreme Court said that jurisdiction cannot be based on Art. 15 Brussels I Regulation, which allows consumers to sue professionals in the country where the consumersare domiciled.[114] Second, it held that the conditions to establish jurisdiction in accordance with Art. 5 para 3 Brussel I Regulation were not fulfilled. This stems from the fact that the present matter did not relate to tort, delict, or quasi-delict but rather concerned a (quasi-)contractual relationship between Greece as debtor and the bondholder as creditor.[115] Third, the Supreme Court found that, due to the contractual nature of the relationship between plaintiff and defendant, Art. 5 para 1 Brussels I Regulation may be applicable.[116] This provision basically stipulates that "a person [herein the Hellenic Republic] may be sued in another Member State in matters relating to a contract, in the Courts for the place of the performance of the obligation…"[117]

Yet, the plaintiffs did not invoke Art. 5 para 1 Brussels I Regulation to establish Austrian court jurisdiction over their claims. This, as it seems, was not so much due to a mishap on the part of the plaintiff's lawyer but part of the litigation strategy. Since the District Court had implied that the "place of performance", as stipulated by Art. 5 para 1 Brussels Regulation, presumably lay in Greece and not in Austria, this legal avenue seemed very much like a dead end.[118] Consequently, the Supreme Court decided to reject the plaintiff's case due to the lack of jurisdiction. The

[112] Ibid, at 7.

[113] See Supreme Court Judgement of 27 January 2016 4 Ob 163/15x.

[114] Ibid, at 5 et seq. As the second Supreme Court judgement in this case was rendered after two other claims of Austrian bondholders against Greece had been rejected, the key reasons as to why Art 15 Brussel I Regulation is not to be applied will be discussed below, *see* Supreme Court 8 Ob 67/15h and Supreme Court 8 Ob125/15p.

[115] Ibid.

[116] Ibid, at 10.

[117] Ibid.

[118] Ibid. The plaintiff's reluctance to argue in favour of Art 5 para 1 Brussels Regulation stems from the difficulty of proving that Austria rather than Greece was the place of performance for principal and interest payments on Greek government bonds. Essentially, the failure to rebut Greece's claim that such payments are to be made by the Greek National Bank, and therefore in Greece, also led to the rejection of the claims made by bondholders in German Courts. *See* above Court of Appeals Oldenburg 13 U 43/15 and Federal Court of Justice VI ZR 516/14.

complex issue of whether sovereign immunity ought to be granted to Greece with respect to a "coercive" exchange of bonds, as alleged by the plaintiff, could therefore be left open.

2.1.3.2. Austrian Supreme Court Judgment of 30 July 2015 8 Ob 67/15h

The decision in *Supreme Court Ob 67/15h* had a very similar factual background to the first instance of bondholder litigation in Austrian Courts. The plaintiff claimed roughly €61.000 plus interest from Greece stemming from government bonds the plaintiff had acquired through an Austrian retail bank.[119] The claim was based on the alleged non-performance of a contractual obligation as well as the violation of property rights through the involuntary exchange of the plaintiff's bonds as a consequence of the CAC "cram down" procedure.[120] However, the plaintiff made clear that she sought to directly challenge the Greek Bondholder Act 4050/2012, which other courts had previously qualified as *acta iure imperii*. She thus argued that the Act was *acta iure gestionis*, rendering Greece's debt repudiation an unlawful measure for which compensation was due.

In its legal assessment, the Supreme Court again confirmed that the issuance of government bonds is to be characterized as *acta iure gestionis* because the State "participated like a private person in economic transactions".[121] Furthermore, it noted that the Hellenic Republic had not complied with its repayment obligations but unduly altered the law governing the debt instruments, resulting in an economic loss for the plaintiff. Citing a decision by the European Court of Justice (*Fahnenbrock*[122]), the Supreme Court also held that the qualification of a state act as "private" depends, in particular, on whether private individuals could have entered the same legal relationship.[123] In this context, the Supreme Court held that the issuance of bonds on capital markets, something many big corporations regularly do, was in fact not an activity exclusively available to sovereigns.

Like other judgments before by the Supreme Court on claims of Greek bondholders, however, the present ruling failed to conclusively answer how the plaintiff may recover its debts from Greece. While confirming that Greece's

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[119] Supreme Court Judgement of 30 July 2015 8 Ob 67/15h, at 2.

[120] *See* above 1.2.

[121] Ibid*,* at 4.

[122] C-226/13, *Stefan Fahnenbrock v Hellenische Republik* (ECLI:EU:C:2015:383).

[123] Supreme Court 8 Ob 67/15h, at 10.

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financial obligations are both valid and enforceable, the Supreme Court prioritized jurisdictional issues.[124] As the Supreme Court noted, rules of procedural law require Austrian courts to first establish jurisdiction before reviewing the merits of the bondholders' claims and hence the legality of the Greek Bondholder Act 4050/2012.[125] In this respect, the Brussels I Regulation was once again subject to closer scrutiny, in particular its Art. 5 para 3, according to which a person domiciled in one Member State may be sued in another Member State in matters relating to tort, delict, or quasi-delict.

Along the lines of the decisions discussed above, Supreme Court 4 Ob 163/15x and Supreme Court, 4 Ob 227/13f, the judges in the present case concluded that the legal relationship between a holder of government debt instruments and the borrowing state was contractual in nature, even if the debt instruments at stake are tradable securities issued on capital markets.[126] Consequently, Art 5 para 3 Brussels I Regulation, which exclusively covers non-contractual claims of damages, could not be successfully invoked by the plaintiffs to establish jurisdiction.

Finally, the Supreme Court remarked that Art 5 para 1 Brussels I Regulation, which confers jurisdiction upon Courts located at the contract's "place of performance", may serve as a legal basis for the jurisdiction of Austrian Courts.[127] Yet, anticipating difficulties in proving that the "place of performance" was indeed Austria, the plaintiff refrained from calling Art 5 para 1 Brussels I Regulation into use. Acknowledging this reluctance, the Supreme Court did not further investigate jurisdictional questions but dismissed the plaintiff's case in its entirety.

2.1.3.3. Austrian Supreme Court Judgement of 25 November 2015 8 Ob125/15p

In this final case of bondholder litigation before Austrian Courts, the plaintiff had acquired Greek government bonds with a face value of €45.000 through an intermediary.[128] After Greece retroactively implemented CACs, the plaintiff was "crammed down" by the majority of investors who, in contrast to the plaintiff,

[124] Ibid.

[125] Ibid, at 10. While this case might eventually end up before the Supreme Court again, Austrian case law appears considerably more settled now that the Supreme Court (*see* in particular Supreme Court 4 Ob 163/15x) has clarified under what circumstances Austrian Courts may oversee private bondholder litigation against an EU Member State.

[126] Supreme Court 8 Ob 67/15h, at 9.

[127] Ibid.

[128] Supreme Court Judgement of 25 November 2015 8 Ob125/15p, at 2.

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accepted the proposed haircut of approximately 53.5 percent on government bonds governed by Greek law.[129] As a consequence of the forced bond exchange, the plaintiff claimed a loss of €33.700. However, in contrast to previous bondholder litigation in Austria, the plaintiff did not argue that the damage arose directly from the Greek Bondholder Act 4050/2012. Rather, she asserted that by issuing sovereign bonds, the Greek government had incurred a financial obligation which it had failed to honour when it fell due.[130] Because the latter activity is "commercial" rather than "sovereign", the plaintiff argued that Greece could not invoke the defense of sovereign immunity.[131]

As in the cases described previously, the Hellenic Republic asserted the defense of sovereign immunity. Essentially, it argued that the plaintiff's losses were due to the implementation of CACs through the Greek Bondholder Act 4050/2012.[132] Because the adoption of this act had legislative character, the Hellenic Republic enjoyed immunity from suit in foreign courts.[133]

The District Court sided with the plaintiff and held that Greece may not rely on the sovereign immunity defense as the implementation of CACs, for such act did not necessarily qualify as sovereign or public.[134] The Court of Appeals, however, rejected this legal assessment, remarking that the damages suffered by the plaintiff emanated from the adoption of the Greek Bondholder Act 4050/2012.[135] While this led to a reduction in the bonds' face value, the plaintiff may not sue Greece for full repayment since the haircut was based on a legislative, and thus public, legal act.[136]

In contrast to the lower courts, the Austrian Supreme Court almost exclusively focused on the question of jurisdiction in its judgment, only broaching more contentious immunity concerns. However, akin to the decisions discussed above[137], the highest Austrian court did not offer a final answer but rather reversed the lower courts' judgments, ordering them to hear the parties' arguments with regards to the issue of jurisdiction again.

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[129] Ibid. Compare above 1.2.

[130] Ibid, at 3.

[131] Ibid, at 5.

[132] Ibid.

[133] Ibid.

[134] *Ibid,* at 4. *See* for the lower Court's judgement Commercial Court Salzburg Judgement of 29 July 2015 GZ 7 Cg 148/13w-30.

[135] *See* Court of Appeals Linz Judgement of 23 September 2015 GZ 2 R 137/15b-34.

[136] Ibid. Also *see* Supreme Court 25.11.2015 8 Ob125/15p, at 4.

[137] *See* Supreme Court Ob 227/13f and 8 Ob 67/15h.

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What the Supreme Court nevertheless confirmed was that claims of Greek bondholder may be assessed by Austrian courts, provided they have jurisdiction under the Brussels I Regulation. Simply because the Hellenic Republic adopted the Greek Bondholder Act 4050/2012, which the Supreme Court qualified as a "public" act (*acta iure imperii*), the country's obligation to repay its bondholders was not automatically rendered void. Instead, the issuance of government bonds constitutes the very activity to be taken into account when assessing the applicability of state immunity.[138] According to (Austrian[139] and German[140]) case law, the issuance of sovereign bonds on capital markets is generally deemed "private" or "commercial" in nature and may therefore be subject to judicial review by a foreign municipal Court.[141]

However, the Brussels I Regulation once again stood in the way of bondholders who tried to enforce their claims against Greece. The Austrian courts remarked that the "place of performance" in the sense of Art 5 para 1 Brussels I Regulation had to be Austria in order for the merits of the bondholders' case to be reviewed. Since litigation in German courts had, however, yielded that the "place of performance" for Greek government bonds lay in fact in Greece rather than Austria or Germany[142], the plaintiffs refrained from invoking Art 5 para 1 Brussels I Regulation. The case was thus again dismissed on jurisdictional grounds, leaving Greece's creditors empty handed.

As a consequence, not a single case exists up to this date in which Austrian or German private bondholders have successfully sued Greece for full repayment of its debt obligations. However, as discussed below[143], the highest courts in both countries did not exhaustively answer the politically sensitive question as to whether the Greek PSI has unduly interfered with foreign bondholders' property rights.

It was in particular the procedural barriers to cross-border litigation laid down in the Brussels I Regulation that allowed the Hellenic Republic to shield itself from

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[138] The Supreme Court noted that such contractual relationship, even if one of the parties is a sovereign state, fall under the definition of "civil and commercial matters" in the Brussels I Regulation. *See* Supreme Court 8 Ob125/15p, at 8-9. Hence, the Supreme Court essentially follows *Fahnenbrock*, where the ECJ essentially concluded that the issuance of government bonds by a sovereign state is to be considered a "civil or commercial" matter. *See* below 2.3.

[139] *Compare* e.g. Supreme Court 8 Ob 67/15h.

[140] E.g. Federal Court of Justice VI ZR 516/14.

[141] This view contradicts the Federal Court of Justice's legal assessment (*see* above 2.1.2.1.) but aligns with the Court of Appeals Oldenburg's decision (*see* above 2.1.2.2.).

[142] Compare above 2.1.1. in Court of Appeals Oldenburg 13 U 43/15.

[143] *See below* Part III.

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potential enforcement attempts by foreign judiciaries. Theoretically, in the absence of a specific EU Regulation on jurisdiction, courts would have had to delve into the substantive review of the alleged bondholder expropriation in the course of the Greek debt restructuring. Because such jurisdictional issues could have been easily dealt with by including a choice of forum clause in the pertinent debt instruments (German courts would then have been entitled to review bondholder claims), Part III I will shortly outline and discuss the key (substantive) laws and conventions protecting property rights in Europe generally and Greece more specifically.

2.2. Arbitration before the International Centre for the Settlement of Investment Disputes (ICSID)

2.2.1. Sovereign Debt Restructuring and International Investment Arbitration

In the absence of a single specialised forum to settle disputes between sovereign borrowers and lenders, the International Centre for the Settlement of Investment Disputes (ICSID) has emerged as a viable alternative to domestic courts.[144] However, in modern day government financing, sovereign debt arbitration is relatively unusual. Contracts between sovereign debtors and creditors typically provide for the submission to the jurisdiction of domestic courts should a dispute emerge.[145] Moreover, arbitral tribunals typically assess bondholder claims against the backdrop of international law and investment treaties. In most cases, private contractual relationships between investors and sovereign borrowers are subject to assessment by municipal courts. Nonetheless, as Waibel[146] has compellingly demonstrated, international tribunals such as the Mixed-Claims Commission[147] have a long-standing history in adjudicating sovereign debt disputes.

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[144] Belen Olmos Giupponi, 'ICSID Tribunals and Sovereign Debt Restructuring-Related Litigation: Mapping Further Implications of the Allemanni Decision' (2015) 30(3) *ICSID Review* 556, at 560. Also *compare* the seminal work in this respect by M. Waibel, *Sovereign Debt before International Courts and Tribunals* (Cambridge: Cambridge University Press, 2011). Also *compare* M. Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 *American Journal of International Law* 711 (2007); K. Chan, 'The Relationship between International Investment Arbitration and Sovereign Debt Restructuring' (2014) 7(1) *Contemporary Asia Arbitration Journal* 229 and K. Halverson-Cross, 'Arbitration as a Means of Resolving Sovereign Debt Disputes' (2006) 17(3) *American Review of International Arbitration* 335.

[145] Halverson-Cross, above note 144, at 336 (reviewing the claims of 195.000 Italian bondholders brought before the ICSID against Argentina following its 2005 debt restructuring).

[146] *Compare* Waibel, above note 144, at 171-182.

[147] Ibid.

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The ICSID is the world's leading institution devoted to international investment dispute settlement and was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"[148] or "Washington Convention").[149] Whether an ICSID Tribunal actually enjoys jurisdiction over contractual claims put forward by investors against States is a function of the interaction between the ICSID Convention and the applicable Bilateral Investment Treaty (BIT).[150] Thus, sovereign lenders may, in theory, resort to both domestic courts as well as ICSID Tribunals to seek compensation for losses emanating from a sovereign default or debt restructuring.

The core idea underpinning the framework of investor protection under international investment law is the requirement for the state to pay compensation in the event of expropriation, regardless of whether such expropriation is lawful or unlawful.[151] Leaving aside the unambiguous case of direct takings[152], which involve the transfer of title and/or physical seizure of the property, it remains heavily disputed what other measures adopted by a state vis-à-vis foreign investors amount to an unlawful expropriation.[153] In this regard, Gallagher[154] contends that sovereign

[148] Available here 'ICSID Convention', 14 October 1966, https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx (15 June 2016). Currently the ICSID Convention is ratified by 153 contracting states.

[149] ICSID, 'About ICSID', https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default. The arguable advantage of having the ICSID as an alternative dispute settlement forum on the international plane is its independent and depoliticised character as well as the specialisation in international law.

[150] Waibel, above note 144, at 738.

[151] *See* I. Glinavos, 'Investors vs. Greece – The Greek 'Haircut' Investor Arbitration under BITs, Greece and Austerity Policies' Greece Conference 2014 – Where next for its Economy and Society, 20 October 2014, http://greececonference2014.weaconferences.net/wp-content/uploads/sites/13/2014/10/WEA-greececonference2014-GLIVANOS.pdf. More generally *see* UNCTAD, *Expropriation* (New York and Geneva: UNCTAD Series on Issues in International Investment Agreements II, 2012), http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (noting that the protection of foreign investors from uncompensated expropriations traditionally has been one of the main guarantees found in international investment agreements).

[152] Virtually all BITs contain an expropriation provision and customary international law also contains rules on the expropriation of foreign-owned property. Direct expropriation means a mandatory legal transfer of title to the property or its outright physical seizure for the benefit of the state itself or a state-mandated third party. *Compare* UNCTAD, above note 151, at 6.

[153] For a comprehensive overview of this debate *see* Organisation for Economic Co-operation and Development (OECD), '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (2004) 4 *OECD Working Papers on International Investment*, https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf. For a case study on indirect expropriation *see* e.g. S. Grund, 'COMPAÑÍA DEL DESARROLLO DE SANTA ELENA, S.A.

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debt restructuring or default could be seen as constituting an indirect expropriation. This is because both defaults and restructuring obviously diminish the value of an asset, namely the bond held by the private foreign investor.[155]

Since states typically offer "take-it-or-leave-it" swap arrangements[156], a bondholder is only left with the choice to either lose a bond altogether or to accept a new bond with a haircut; both may be considered indirect expropriations under international investment law.[157] Foreign investors may also base their claims on the violation of other principles of international investment law, such as a breach of the "fair and equitable treatment" (FET) clause[158] or the "Most-Favoured-Nation" (MFN) clause.[159]

However, in contrast to domestic courts, which may review creditor claims of all kinds, ICSID tribunals only resolve disputes between states and foreign investors on the basis of "international investment agreements" (IIAs).[160] Since the ICSID Convention does not define "investment", there is widespread disagreement as to whether sovereign debt instruments, such as loans or bonds, fall under this definition.[161]

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v. THE REPUBLIC OF COSTA RICA Case No. ARB/96/1' (2016) *University of Vienna Research Papers*, https://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/grund.pdf.

[154] K. Gallagher, 'The New Vulture Culture: Sovereign debt restructuring and trade and investment treaties' (2011) 1 *The IDEAs Working Paper Series*, at 18, http://www.ase.tufts.edu/gdae/publications/GallagherSovereignDebt.pdf. It should also be noted that scholars maintain that expropriation covers tangible and intangible rights with debts typically being considered the latter. See for the discussion in Waibel, above note 144, at 743 (citing Feilchenfeld, who argues that "[d]ebts are property rights; as property rights they are protected by the general rule of maintenance recognized in international law; ... this rule is not restricted to tangible property").

[155] Ibid

[156] *See* e.g. the discussion on Greece's "Invitation Memorandum", which made clear that hold-out investors would lose their claims against the country, above 1.1.

[157] Gallagher, above note 154, at 19.

[158] Ibid.

[159] Both clauses can be found in most modern BITs. The MFN clause is a means of providing for a non-discrimination between one state and other states in international investment law. It obliges the host state to treat investors "no less favourably" than investors of other (third) states.

[160] According to Art 25 of the ICSID Convention, ICSID Tribunals have jurisdiction *ratione materiae* for "any legal dispute arising directly out of an investment". Also *compare* L. Brahms, 'Legitimacy in global governance of sovereign default: The role of international investment agreements' (2013) 6 *PIPE – Papers on International Political Economy*, http://www.polsoz.fu-berlin.de/polwiss/forschung/oekonomie/ipoe/pipe_working_papers/papers/PIPE_Working_Paper_16-13_Brahms_-_Legitimacy_in_Global_Governance_of_Sovereign_Default.pdf.

[161] *See* e.g. Waibel, above note 144, at 718 (noting that in the early days by including an ICSID arbitration clause in the contract, the parties implicitly concurred that the object of the dispute was

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Waibel[162] for instance argues that case law fails to reveal a strong basis for ICSID jurisdiction over bonds as sovereign bonds "do not display the typical features of an investment". Moreover, from a policy point of view, he contends that "If sovereign debt were to qualify as an investment, then the jurisdictional reach of ICSID becomes extremely broad… The likely effect would be to convert ICSID Tribunals into commercial Courts of general jurisdiction, in lieu of domestic Courts called on to adjudicate such disputes by virtue of contractual dispute resolution clauses."[163] Sornarajah endorses this view, remarking that "since the host State cannot know to whom linkages are created through the sales of bonds…on stock exchanges, there can be no concrete relationship creating responsibility."[164]

The United Nations Conference on Trade and Development (UNCTAD)[165] however notes that most BITs cover "every kind of asset" owned or controlled by an investor and suggests that it may therefore include government bonds as well. Consequently, investors may argue that government debt workouts unduly interfere with their proprietary rights protected under the applicable BIT and thereby undermine the *ad-hoc* system of voluntary debt restructurings. Looking at the few instances of arbitration in the realm of sovereign debt, it becomes clear that ICSID tribunals are yet to adopt a uniform approach with respect to the relationship between "investment" as defined in international investment law and sovereign debt instruments.

Giupponi[166] opines that it was only after the *Abaclat*[167] case, where a large number of Italian retail investors sued Argentina, that international investment law started to

indeed an "investment" under Art. 25 ICSID Convention). Also *see* for pertinent arbitration cases *Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Application for Annulment (1 November 2006), at 31 (holding that "the special and privileged arrangements established by the Washington Convention can be applied only to the type of investment which the Contracting State to that Convention envisaged); *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014), at 296, (noting that nothing in the ICSID Convention itself presents an obstacle to considering that [government] bonds are capable of constituting investments).

[162] Waibel, above note 144, at 722.

[163] Ibid, at 251.

[164] *See* M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010), at 8.

[165] UNCTAD, 'Sovereign Debt Restructuring and International Investment Agreements' (2011) *IIA Issues Note* No. 2, at 4, http://unctad.org/en/Docs/webdiaepcb2011d3_en.pdf. Similarly Sornarajah remarks that "sovereign debt bonds may be characterised as securities instruments through which capital is raised for ventures", *see* Sornarajah, above note 164.

[166] Giupponi, above note 144, at 560.

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play a significant role in terms of sovereign debt restructuring. Essentially, the ICSID tribunal in *Abaclat* rejected the *Salini* test[168]. The standard set out in *Salini* was previously used to determine whether sovereign bonds would qualify as investment under Art. 25 ICSID Convention and ultimately required holders of sovereign debt to have made a contribution to the economic development of the host state. In *Abaclat* however, it was decided that the private bondholders' "contributions" to the borrower country's economy can take different forms and shall not be limited by the criteria set out in *Salini.*[169] Thus, the contribution made by Argentina's bondholders, i.e. the payment of money in exchange of the security entitlements, was protected under the applicable BIT between Italy and Argentina.[170] Subsequently, other ICSID tribunals likewise adopted this wide interpretation of sovereign bonds as an "investment" under Art. 25 ICSID Convention, heralding a new age of sovereign debt arbitration.[171]

While the definition of "investment" undoubtedly plays a crucial role in arbitration between foreign government debt investors and the state, there are other obstacles that render debt enforcement via the ICSID a dubious and uncertain undertaking for disgruntled investors. Legal uncertainties can *inter alia* stem from the specific drafting of a BIT[172] or the admissibility of multiple parties (so-called "mass claims" proceedings).[173] Nevertheless, some scholars[174] strongly believe that international arbitration offers remarkable advantages in comparison to domestic court litigation

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[167] *Abaclat and others v Argentine Republic* (formerly *Giovanna a Beccara and others v Argentine Republic*), ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011).

[168] According to the *Salini* test for a transaction or activity to qualify as ―investment‖ in the sense of Art. 25 ICSID Convention, it would require (i) a contribution, (ii) of a certain duration, (iii) of a nature to generate profits or revenues, (iv) showing a particular risk, and (v) of a nature to contribute to the economic development of the Host State. Compare *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).

[169] *Abaclat*, above note 167, at 364-365. Although ICSID Tribunals are generally not bound by precedents they take into account previous arbitral awards and justify deviations in their reasoning.

[170] Ibid, at 366.

[171] *See* e.g. *Alemanni,* above note 161, at 100 (noting that "as to the '*Salini* test' itself and the five conditions which the Respondent derives from it, the Counter-Memorial submits that some Tribunals have attached undue weight to them, citing in particular the more flexible approach taken by the *CSOB, MCI v Ecuador, and Biwater Gauff* Tribunals").

[172] Some BITs, such as the ones between Canada and Columbia or Australia and Chile, expressly exclude sovereign debt from the treaty coverage, *see* UNCTAD, above note 140, at 4.

[173] *See* for a discussion Giupponi, above note 144, at 565.

[174] E.g. Sandrock, above note, 14, at 508 and Halvercross, above note 144, at 377 (concluding that arbitration may be a more attractive mechanism than litigation, whether viewed from the perspective of the sovereign debtor or the creditors).

regarding the settlement of investor-state disputes emanating from sovereign debt restructuring. Others think that arbitration is a somewhat "mixed blessing".[175]

Even though ICSID tribunals have rendered several decisions relating to the Argentine debt restructurings of 2005 and 2010, enforcement of ICSID decisions may still prove difficult, depending on the national jurisdiction.[176] Moreover, as Stern[177] remarks, there is a risk of politicization of investment arbitration before the ICSID. In the realm of sovereign debt, interference with debt readjustment programs through ICSID tribunals, which operate outside the four corners of a domestic judicial system, is sometimes considered problematic both from a democratic and political viewpoint.[178] Indeed, if hold-outs can rely on ICSID tribunals to pressure sovereign debtors into better settlements, arbitration might undermine future debt workouts. This has particular relevance if municipal courts decline their jurisdiction to adjudicate sovereign debt trials, as evidenced by the litigation discussed above[179], rendering arbitration the sole forum to challenge sovereign debt workouts. I will discuss the implications of international investment arbitration as an avenue for private bondholders to challenge sovereign debt restructurings more in-depth in Part III.

2.2.2. Arbitration Following the Greek PSI

With regards to the Greek debt restructuring, investment arbitration has so far played a minor role. Up to this day, only two cases were brought to ICSID, one under the 1992 Cyprus-Greece BIT and the other one under the Slovakia-Greece BIT.[180] As the former mainly concerns the Greek government's takeover of a Cypriot bank and is therefore not directly related to the Greek PSI, this article focuses on the arbitration in *Poštová banka.*[181]

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[175] Giupponi, above note 144, at 588.

[176] Ibid.

[177] B. Stern, 'Are Some Disputes Too Political to Be Arbitrable?' (2009) 24(1) *ICSID Review*, at 96.

[178] As Waibel remarks "there is a need to counterbalance creditor repayment with the attendant loss of public services to the incumbent residents of the debtor nation, which may have difficulty in paying anything close to the full notional amount, and this balancing may be better suited for political actors than investment Tribunals."; *see* Waibel, above note 144, at 317.

[179] *See* above 2.1.

[180] *Marfin Investment Group Holdings SA, Alexandros Bakatselos and others v Republic of Cyprus*, ICSID Case No ARB/13/27, Notice of Dispute (23 January 2013) (not publicly available); *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015).

[181] Ibid.

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Generally, it can be observed that, in contrast to the Argentine debt restructuring[182], claimants in investment arbitration proceedings have thus far been small banks rather than large groups of retail investors. While this might change in the upcoming months and years, the absence of widespread arbitration claims against Greece could stem from the fact that none of the documents regulating the Greek PSI (most crucially the "Invitation Memorandum") provide for the jurisdiction of international arbitral tribunals.[183]

Moreover, as mentioned above, Greek bondholders have to draw upon their rights bestowed by a BIT rather than their contractual positions, shifting the focus away from the government bond's contractual language to the drafting of BITs concluded between Greece and other countries decades ago.[184] From a procedural point of view, jurisdiction and admissibility of claims typically constitute critical obstacles to investors' success in ICSID arbitration cases. In this respect, the definition of "investment" both under the respective BITs and international law has assumed a seminal role – not only in the *Poštová banka* case.[185] With regard to the legal substance of bondholder claims brought before the ICSID, tribunals typically have to assess whether or not a reduction of the face value of a sovereign bond amounts to an exercise of legitimate state power, or a form of expropriation that gives rise to a claim for compensation under international investment law.[186]

As Sandrock[187] shows, Greece had entered into 38 BITs, including BITs with Cyprus and Germany, excluding however some other important advanced

[182] Compare a critical analysis of the Argentina's default and its treatment of private bondholders in e.g. A. C. Porzecanski, 'From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default' (2005) 6(1) *Chicago Journal of International Law* 311, at 331 (arguing that the very harsh way Argentina has dealt with its bondholders has set a troubling precedent for other sovereign debtors in future financial straits).

[183] Sandrock, above note 14, at 511 (noting that these "deficiencies" represent a serious setback for private holders of Greek government bonds). Also *compare* Thole, above note 62, at 66.

[184] Sandrock, above note 14, at 524. One of the first, and arguably important, question that arises in this context is whether treaty claims can be affected by forum selection clauses in sovereign bond contracts. Sandrock argues that it cannot be affected while Waibel (above note 144, at 714) seems to be of the opposite opinion.

[185] For a discussion *see* Waibel, above note 144.

[186] Glinavos, above note 151, at 4.

[187] Sandrock, above note 14, at 526. Greece has however not entered into BITs with the U.S. or the U.K. Consequently, U.S. based hedge funds, who have a remarkable track record in litigating against bankrupt nations around the globe, are unlikely to initiate arbitral proceedings against Greece.

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economies. Most existing Greek BITs[188] seem to include sovereign debt in the definition of "investment" according to Art. 25 ICSID Convention. However, as the *Poštová banka*[189] illustrates, ICSID tribunals are not bound by precedents and might therefore opt for a stricter interpretation of the specific BIT than previous ICSID tribunals in factually similar cases.[190] This approach may aggravate the existing legal uncertainty facing states in the course of debt restructuring operations, for litigation and arbitration risks become harder to determine *ex-ante*.

2.2.2.1. Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic[191]

Poštová banka concerns a dispute between Poštová banka, a Slovak Bank, and Istrokapital SE, a European Public Limited Liability Company, as claimants and the Hellenic Republic (Greece) as respondent. The claimants asserted that Greece's retroactive implementation of CACs as part of the PSI resulted in a significant erosion of the value of their investment in Greek government bonds. The legal basis for the arbitration cases were the Slovakia-Greece BIT, the Cyprus-Greece BIT as well as the ICSID Convention.[192] The request for arbitration was made in May 2013 and the ICSID tribunal was constituted by 21 October 2013.[193] After multiple exchanges of documents, the tribunal rendered the award on 9 April 2015, dismissing the claim in favor of Greece due to lack of jurisdiction.[194]

In its award, the ICSID tribunal first outlined the factual background, which, in parts, involved highly complex legal, economic and political issues inherent to most sovereign debt restructuring operations. It noted that Poštová banka acquired its interest in Greek government bonds on the secondary market in early 2010, hence after the country's alarming financial and economic condition became public.[195] The bonds belonged to five series of Greek government bonds, were all governed by

[188] Compare e.g. Art. 1 para 1 Greek-Slovak BIT of 1991, which states that "investment" means every kind of asset and in particular,...c) loans, claims to money or to any performance under contract having a financial value.

[189] *Poštová banka,* above note 181, at 336 et seq.

[190] *Compare* e.g. the wider interpretation of Art 25 ICSID Convention and the applicable BIT in *Alemanni*, above note 161.

[191] *Poštová banka*, above note 180.

[192] *Poštová banka,* above note 180, at 1-4.

[193] Ibid, at 17.

[194] Ibid.

[195] Ibid, at 51. See *above* Introduction. This suggests some speculative behaviour on Poštová banka's side as the bonds' rating was already much lower than a year before and the spread to other European government bonds had risen to significant levels.

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Greek law and did not contain any CACs.[196] In February 2012, Greece implemented the Greek Bondholder Act 4050/2012 and issued the "Invitation Memorandum", tendering an exchange of old Greek government bonds for a set of new debt instruments.[197]

Poštová banka rejected the Greek government's offer, voting against the exchange of their bonds after the retroactively inserted CACs were activated.[198] Given the acceptance of the "haircut" by a sufficient majority of creditors (91.5 percent had consented to the swap), Poštová banka was "crammed down" and its government bonds were replaced by the Greek government for debt securities with a lower face value.[199] The claimants Poštová banka and Istrokatpital SE, whose shares in the former suffered from devaluation as a result of the Greek PSI, subsequently demanded compensation for their losses and submitted the dispute to the ICSID.

Before the Tribunal could assess the merits of the claims, it had to resolve jurisdictional questions. The core legal point[200] made by the claimants was that Poštová banka has a protected investment, arguing that "the Slovakia-Greece BIT's language clearly encompasses a sovereign bond, and the rights to that bond were taken away by Greece's forced surrender of the bonds".[201] The respondent Greece put forward that the tribunal lacked jurisdiction *ratione materiae* as Poštová banka's investment was neither protected under the the Slovakia-Greece BIT nor the ICSID Convention.[202] More specifically, the Hellenic Republic argued that the term "investment" in Art. 25 of the ICSID Convention as well as the Slovakia-Greece BIT did not cover Greek government bonds.[203] In contrast to the *Abaclat* case[204],

[196] *Poštová banka,* above note 180, at 51-58.

[197] *See* above Part I for an overview of the Greek PSI.

[198] *Poštová banka,* above note 180, at 73.

[199] Ibid*,* at 74-75.

[200] It was also disputed between the parties whether or not the purchase on the secondary market had an impact on the Tribunal's jurisdiction due to the lack of a direct contractual relationship. Moreover, the respondent asserted that the Tribunal lacks jurisdiction *rationae personae. See* e.g. *Poštová banka,* above *note* 180, at 134. Also compare for an overview of all of Greece's arguments against the jurisdiction in J. Chevry, 'Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8 (*Poštová banka* v. *Greece*)', 15 *World Trade Review* 169 (2016), at 171.

[201] *Poštová banka,* above note 180, at 127.

[202] Ibid, 95.

[203] Greece noted that the four cumulative criteria to determine whether an investment was made for the purposes of Art. 25 para 1 ICSID Convention ((a)contribution in money or other assets; (b) significant duration, (c) element of risk, (d) contribution to the economic development of the host State) were not fulfilled. *See* Poštová banka, above note 180, at 97.

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where an ICSID tribunal qualified Argentine government bonds as "investment" under the Italy-Argentina BIT, the respondent asserted that neither the Slovakia-Greece BIT nor the Cyprus-Greece BIT expressly include sovereign debt instruments.[205]

In order to review the merits of the Claimant's case, the tribunal had to establish that Poštová banka's holdings of Greek government bonds were protected investments under the Slovakia-Greece BIT. For this purpose, the arbitral tribunal analysed in great detail whether the BIT's definition of investment included debt securities issued by a sovereign state.[206] Art. 1 of the Slovakia-Greece BIT comprised a (non-exhaustive) list of what rights are to be considered an "investment". In this provision "investment" was referred to as "every kind of asset and in particular, though not exclusively,…(c) loans, claims to money or to any performance under contract having a financial value".[207] Applying Art. 31 Vienna Convention of the Law of Treaties[208], the Tribunal noted that while Art. 1 of the Slovakia-Greece BIT first alludes to "every kind of asset", it subsequently specifies the different types of assets actually covered. In the tribunal's view, if it was to ignore the list of examples provided in the BIT and assume that investors were protected with respect to virtually any type of asset, much of Art. 1 would be "unnecessary, redundant or useless".[209]

Thus, while "investment" according to the language of the BIT meant "every kind of asset", the explicit mentioning of "loans" indicated that securities, such as government bonds, were not to be subsumed under the definition of "investment".[210] This result stood in contrast to the *Abaclat*[211] arbitration, where the underlying BIT between Italy and Argentina expressly included government bonds in the definition of "investment". Accordingly, the tribunal in *Poštová banka* concluded that "the Slovakia-Greece BIT did not contain language suggesting that the state parties considered, in the wide category of investments of the list of Art.

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[204] *See Abaclat,* above note 167.

[205] *Poštová banka,* above note 180, at 101.

[206] Ibid, at 276.

[207] Ibid, at 278.

[208] *Vienna Convention on the Law of Treaties* (concluded in Vienna on 23 May 1969).

[209] *Poštová banka,* above note 180, at 294.

[210] The Tribunal held that "loans and bonds are distinct financial products" due to circle of potential creditors, the tradability and regulation applicable only to securities. *See Poštová banka,* above note 180, at 337.

[211] *Abaclat,* above note 167. In the *Abaclat* case government debt securities purchased by Italian bondholders were in fact qualified as investments under the Italy-Argentina BIT.

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1(1) of the BIT, public debt or public obligations, much less sovereign debt, as an investment under the treaty".[212]

The tribunal also rejected the claimant's case on other grounds. Most importantly, it held that only primary dealers (i.e. market participants who purchase bonds on the primary market at the time of issuance) and not the ultimate owners of the interest in the debt security have a contractual relationship with the intermediary.[213] The tribunal agreed with the respondent that loans always involve contractual privity between the lender and the debtor, while bonds do not involve contractual privity.[214] Thus, since Poštová banka acquired the bonds on the secondary market through Clearstream, there was no such privity between the claimant and the sovereign debtor Greece.[215] Poštová banka was rather in a relationship of contractual privity with Clearstream.[216]

The tribunal further noted that the conclusion it had reached with respect to the definition of investment under the Slovakia-Greece BIT rendered it "unnecessary" to determine whether the claimant's interest in the Greek government bonds is covered under Art. 25 of the ICSID Convention.[217] Nonetheless, "because the Parties devoted significant attention to that issue"[218], the tribunal also broached the Convention's definition of investment. In light of other arbitral awards pertaining to sovereign debt, the Tribunal in *Poštová banka* concluded that "an investment [under Art. 25 of the ICSID Convention] requires a contribution of money or assets, duration and risk, which elements form part of the objective definition of the term investment".[219]

According to this so-called "objective" approach, it further stated that Greek government bonds ought not to be qualified as "investments", for the issuance of

[212] *Poštová banka,* above note 180, at 332.

[213] Ibid, at 338.

[214] Ibid.

[215] Ibid, at 339.

[216] Ibid, at 338.

[217] Ibid, at 351. According to Art. 25(1) of the Washington Convention: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

[218] *Poštová banka,* above note 180, at 349.

[219] Ibid, at 356. It referred to this approach as the "objective" test and to the analysis of the pertinent BIT as the "subjective" test".

such bonds is not linked to a "process of creation value" but rather to an "exchange of value".[220] Moreover, funds raised by Greece through the issuance of bonds were used in particular for repaying debts and not to finance economically productive activities.[221] According to the tribunal, a distinction must thus be drawn between sovereign bonds that are used for general funding purposes and those used for public works or services.[222] If financial instruments could not be linked with a concrete economic venture, as was the case in *Poštová banka*, ICSID tribunals have not considered them as "contribution" in the sense of Art. 25 of the ICSID Convention.[223] Finally, investors in Greek government bonds had no operational risk since the profits did not depend on the success or failure of the economic venture concerned.[224]

In sum, the tribunal declined its jurisdiction due to lack of jurisdiction *rationae materiae* and the claim was dismissed in Greece's favour. On the one hand, the tribunal established that the Slovakia-Greece BIT did not protect investments made in government bonds. On the other hand, it held *obiter* that the requirements for an investment to be protected under Art. 25 of the ICSID Convention were not fulfilled. An annulment procedure initiated by the claimant under Art. 52 para 3 of the ICSID Convention is still pending.[225]

2.3. Litigation before European Courts

2.3.1. Overview

Both from a factual and a legal point of view, the cases discussed under this subheading differ greatly from Greek bondholders' attempts to sue for compensation in national courts or arbitral tribunals that I have described previously. Most importantly, the claimants in the respective cases do not directly target the Greek state. Accordingly, in *Accorinti* the applicant sued the ECB for damages after the bank had – in contrast to private holders of debt instruments – circumvented a haircut on its bonds through an exclusive exchange offer with the

[220] Ibid, at 361. Such "exchange of value" is a process of providing money for a given amount of money in return, while the "creation of value" refers to a contribution to an economic venture undertaken by the state.

[221] Ibid, at 363.

[222] Ibid, at 364.

[223] Ibid, at 371.

[224] Ibid, at 369 and 371. All other risks – such as commercial or sovereign risks – are not relevant for characterizing an investment under the objective approach.

[225] Chevry, above note 201, at 172.

Greek government. The second case, *Fahnenbrock*[226], concerns the interpretation of Art. 1 of the EC Regulation on the Service of Documents[227] as part of a preliminary ruling under Art. 267 of the Treaty of the Functioning of the European Union (TFEU). The request in *Fahnenbrock* was submitted by a German court which was to adjudicate on a compensation claim brought by a German national against the Hellenic Republic.

Both cases are worth mentioning in the context of the Greek PSI. First, *Accorinti* provides a valuable legal analysis of the first sovereign debt restructuring operation in Europe and, in part, elaborates on the rights of bondholders vis-à-vis both official sector creditors as well as the sovereign borrower. Second, in *Fahnenbrock,* the European Court of Justice deemed litigation pertaining to sovereign debt as a "civil or commercial matter" under EU law. This opened up new legal avenues for bondholders, providing more clarity on the paramount difference between "public" and "civil" matters in the realm of sovereign debt litigation.[228]

2.3.2. Cases

2.3.2.1. Alessandro Accorinti and Others v. European Central Bank (ECB)[229]

The General Court (EGC)'s recent decision in *Alessandro Accorinti and Others v European Central Bank (ECB)*[230] offers valuable insights into the ECB's position during the Greek PSI. More specifically, it deals with the Greek PSI, where private market participants voluntarily swapped their old Greek bonds against new Greek bonds with less favorable repayment conditions, resulting in a nominal haircut of approximately 53.5 percent.[231] As mentioned above[232], the ECB pre-empted a haircut on its Greek bonds by virtue of an exclusive arrangement with the Greek

[226] *Fahnenbrock*, above note 122.

[227] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ L 324 10.12.2007, p. 79-120).

[228] *See* above 2.1.

[229] *Accorinti*, above note 15. For an overview also compare Grund/Grle, above note 20.

[230] *Accorinti*, above note 15.

[231] Ibid, at 21.

[232] *See* above 2.3.1.

government.[233] This agreement was subject to harsh criticism by journalists[234] and private-sector market participants[235] as well as experts in the field[236].

The ECB's desire to avoid a haircut on its bond holdings, which could lead to a mutualisation of losses from a Greek bankruptcy on the Union level, was mainly rooted in Art. 123 TFEU.[237] The ECB feared that it would engage in monetary finance if it was to accept a haircut. Unsurprisingly, the markets and certain bondholders, such as the applicant in *Accorinti*, showed great dissatisfaction and challenged the legality of the ECB's manoeuvre in court. Alessandro Accorinti[238], an Italian national, argued that the ECB had infringed his legitimate expectations, violated the principle of legal certainty, and disobeyed the principle of equal treatment of private creditors by imposing preferred creditor status upon itself. As it would go beyond the scope of this article to discuss the issue of legitimate expectations in greater detail,[239] I will focus on the applicant's claim that the ECB has violated the principle of equal treatment of creditors.

In the applicant's view, the ECB's decision to swap its Greek sovereign bonds for new securities with equal repayment conditions[240] while private creditors were forced to participate in a debt swap violated the central bank's inter-creditor duties under customary international law to accept *pari passu* treatment.[241] Thus, the ECB illegally granted preferred creditor status to itself, to the detriment of the private

[233] *See Accoriniti,* above note 15, at 17. As mentioned above, on 15 February 2012 the ECB and the NCBs of the Eurosystem agreed on the exchange of their Greek debt securities for new Greek debt securities with equal payment conditions. Conversely, private creditors took a haircut of approximately 53.5 percent of the outstanding principal.

[234] E.g. R. Atkins, 'ECB avoids forced losses on Greek bonds', Financial Times, 16 February 2012, http://www.ft.com/intl/cms/s/0/6144c5b6-58ca-11e1-b118-00144feabdc0.html#axzz46qmBCHtv. Also *see* Grund/Grle, above note 20, 788-790.

[235] P. Dobson and A. Moses, 'ECB Greek Plan May Hurt Bondholders While Triggering Debt Swaps', Bloomberg, 17 February 2012, http://www.bloomberg.com/news/articles/2012-02-17/ecb-plan-to-shield-its-greek-bonds-may-subordinate-some-holders-ubs-says (quoting several banks that challenge the ECB's seniority status).

[236] Witte, above note 14, at 335.

[237] Ibid, at 335.

[238] Accorinti was one of the bondholders, who voted against the Greek PSI but were crammed-down in the CAC procedure.

[239] Essentially the EGC concluded that statements made by ECB staff prior to the Greek PSI were not sufficiently precise, unconditional and consistent statements to create legitimate expectations. *See Accorinti*, above note 15, at 81.

[240] For the deal struck by the ECB *compare Accorinti,* above note 15, at 17.

[241] Ibid, at 85.

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sector.[242] The ECB, the applicant argued, was also bound to the *pari passu* rule owing to the general principle of non-discrimination enshrined in Art. 10 TFEU and Art. 20 and 21 of the Charter of Fundamental Rights.[243] These provisions essentially protect individuals by requiring EU institutions, such as the ECB, not to treat comparable situations differently or different situations in the same way, unless objectively justified.[244] In the applicant's view, by purchasing Greek government bonds the ECB and the NCBs had become, just like other bondholders, private law creditors of the Hellenic Republic bound by the rule of non-discrimination under EU law.[245]

The ECB countered that there is neither a rule of international law prescribing the equal treatment of creditors in sovereign debt workouts nor a contractual obligation according to which the ECB must be ranked *pari passu* with other bondholders.[246] Crucially, the ECB claimed that it was not a creditor of Greece comparable with the applicants who were investors seeking high returns and made investments exclusively in their private capacity.[247] Instead, the ECB had bought Greek bonds solely in the exercise of the public mandate conferred on it by Art. 127 para 1 TFEU.[248] The ECB's Governing Council considered these purchases necessary to maintain the proper functioning of the monetary policy transmission mechanism essential to ensure price stability over the medium term.[249] The ECB must therefore be considered to be a different type of creditor, as the decision to buy Greek government bonds was in accordance with the ECB's principal objective of maintaining price stability.[250]

The EGC sided with the ECB on all points. Most importantly, the Court rejected the applicant's claim that the ECB had violated the principle of non-discrimination under Art. 20 and 21 Charter of Fundamental Rights by conferring preferential creditor status upon itself through the exclusive debt exchange agreement with

[242] Ibid.

[243] Ibid.

[244] Ibid, at 87.

[245] Ibid, at 85.

[246] Ibid, at 86.

[247] Ibid, at 86. Also compare Eurogroup, 'Statement of 21 February 2012', http://www.efsf.europa.eu/attachments/2012-02-21%20Eurogroup%20statement%20Bailout%20for-%20Greece.pdf (noting that the Eurosystem holdings of Greek government bonds have been held for public policy purposes).

[248] *Accorinti*, above note 15, at 17.

[249] Ibid, at 86.

[250] Ibid.

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Greece.[251] In the EGC's opinion, the applicant made an erroneous assumption by claiming that all individuals who acquired Greek bonds were indeed 'private' creditors of the Hellenic Republic.[252] In fact, the ECB, in contrast to the applicant, had purchased Greek bonds to exercise its basic task of maintaining price stability pursuant to Art. 127 para 1 and 2 TFEU and Art. 18 para 1 of the ECB Statute.[253] According to the Court, the applicant was therefore in an entirely different situation as it had purchased Greek bonds exclusively for private purposes.[254] This difference in fact sufficiently justified a different treatment of ECB-held debt, also ensuring the transmission of monetary policy in a time of severe stress on the financial system.

2.3.2.2. Stefan Fahnenbrock v Hellenische Republik[255]

In *Fahnenbrock*, the ECJ had to answer a request by a German Regional Court (Landesgericht Kiel) regarding the interpretation of Art. 1(1) of Regulation (EC) No 1393/2007.[256] The respective Regulation concerns the transmission of documents between authorities in EU Member States in judicial and extrajudicial matters. German bondholders had brought proceedings against Greece, claiming compensation for the disturbance of ownership and property rights as well as contractual performance.[257] In the course of the proceedings, the competent German court had to ascertain whether these legal actions concerned civil or commercial matters in the sense of Art. 1(1) of Regulation No 1393/2007[258] or rather actions or omissions in the exercise of state authority.

In *Fahnenbrock* the ECJ thus had to assess whether dissenting hold-out creditors could bring challenges against the Greek PSI in municipal courts. This finding, as

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[251] Ibid, at 88.

[252] Ibid.

[253] Ibid.

[254] Ibid, at 94.

[255] *Fahnenbrock,* above note 122.

[256] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) No 1348/2000 (OJ 2007 L 324, p. 79).

[257] *Fahnenbrock,* above note 122*,* at 14.

[258] Art. 1 para 1 of Regulation No 1393/2007 states that "This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there. It shall not extend in particular to revenue, customs or administrative matters or to liability of the State for actions or omissions in the exercise of State authority (*acta iure imperii*)."

virtually all sovereign debt trials in Austrian and German Courts have revealed, was crucial to determine the extent to which Greece could rely on the sovereign immunity defence. Leaving aside the aforementioned intricacies of establishing jurisdiction of foreign courts under pertinent EU law[259], the ECJ in *Fahnenbrock* ruled that Greek Bondholder Act 4050/2012 was to be considered *acta iure gestionis.* Henceforth, lawsuits initiated by holders of Greek government debt fall under the definition of "commercial and civil matters" in the sense of Art 1 para 1 of Regulation (EC) No 1393/2007.

The ECJ put stated the following reasons: first, it noted that Regulation No 1393/2007 is not applicable to disputes where a public authority acts in exercise of State authority.[260] Second, the ECJ remarked that "the issue of bonds does not necessarily presuppose the exercise of powers falling outside the scope of the ordinary legal rules applicable to relationships between individuals, hence the rules of private law."[261] Third, while the judges acknowledged the Greek Bondholder Act's nature as a legislative act to manage public finances, they made clear that using a law to facilitate debt restructuring is, in itself, not decisive to conclude that the state acted in the exercise of state authority.[262]

However, the ECJ also held that "it is not obvious that the adoption of the Greek Bondholder Act 4050/2012 led directly and immediately to changes to the financial conditions of the securities in question and therefore caused the damage alleged by the applicants."[263] Those changes were effected by a decision of a majority of the bondholders on the basis of the retrofitted CACs.[264] The court concluded that this confirmed the intention of the Greek state to keep the management of the bonds within a regulatory framework of a civil nature.[265] As a consequence, "Art. 1(1) of Regulation (EC) No 1393/2007 must be interpreted as meaning that legal proceedings for compensation for disturbance of ownership and property rights, contractual performance and damages, such as those at issue in the main proceedings, brought by private persons who are holders of government bonds against the issuing state, fall within the scope of that regulation in so far as it does

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[259] *See* above 2.1.

[260] *Fahnenbrock,* above note 122, at 50.

[261] Ibid, at 53.

[262] Ibid, 55-56.

[263] Ibid, at 57.

[264] Ibid.

[265] Ibid.

not appear that they are manifestly outside the concept of civil or commercial matters."[266]

Fahnenbrock thus serves as an important yardstick for the assessment of the nature of legislative measures adopted by EU Member States and aimed at retroactively amending government bond indentures. As van Calster[267] rightly notes, since the ECJ ruled that it was the bondholder vote (under the CAC procedure) which adversely affected property rights of certain creditors – rather than the Greek Bondholder Act 4050/2012 – litigation is not *ex ante* barred by the doctrine of sovereign immunity. Consequently, cross-border bondholder debt enforcement attempts within the EU must be assessed against the background of EU civil procedural law. Provided national courts follow this legal reasoning and also apply it to cases where Regulation (EC) No 1393/2007 is not directly applicable, the ECJ's view renders it impossible for Greece to rely on the immunity defence.

However, one caveat must be made. Regulation (EC) No 1393/2007, which was applied in *Fahnenbrock*, exclusively governs the service of documents between authorities in different EU Member States. Yet, jurisdiction of municipal courts to adjudicate cross-border (civil and commercial) lawsuits is to be determined under a different act of secondary EU law, namely the Brussels I Regulation. Even though both Regulations distinguish between public and commercial/private legal acts, principles established with regards to one of the Regulations might not be simply transferrable to interpret the other. Hence, courts ought to exercise caution when assessing the immunity of sovereigns in bondholder litigation on the basis of *Fahnenbrock*.[268] This leaves some jurisdictional issues unresolved, rendering it difficult for bondholders to decide on where their chances of success may be the highest.

Part III. Discussion: Sovereign Debt Enforcement in Europe – Quo Vadis?

Part III analyses the judgments rendered by domestic Courts (3.1.) as well as the decisions by international investment tribunals (3.2.) in relation to bondholder claims brought against Greece following the 2012 PSI. It also discusses how these

[266] Ibid, at 59.

[267] G. van Calster, 'Fahnenbrock: 'Civil and commercial' viz bearers of Greek bonds. ECJ puts forward "direct and immediate effect"', *GAVC Law*, 11 March 2016, https://gavclaw.com/2015/06/15/fahnenbrock-civil-and-commercial-viz-bearers-of-greek-bonds-ecj-puts-forward-direct-and-immediate-effect/.

[268] As Austrian case law illustrates, municipal courts have nevertheless referred to *Fahnenbrock* to distinguish between public and private State acts. *See* above 2.1.3.

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decisions have influenced and altered sovereign debt management practices in Europe and how they could inform policies aimed at resolving future sovereign debt crises. I will however refrain from commenting on the two cases before European courts which I have focused on in section 2.3. Although they are related to the Greek PSI, the underlying facts, the defendants, as well as the claims put forward by the applicants, differed from the direct debt enforcement attempts adjudicated by domestic courts and ICSID tribunals. This latter body of case law serves as a more adequate basis to render qualified assumptions about the potential enforceability of government bonds by hold-out investors in Europe.

3.1. Litigation before Domestic Courts

3.1.1. What Lessons Can Be Drawn?

If bondholders had in fact been successful in challenging the Greek PSI and had obtained money judgments against Greece, significant political and economic ramifications within the euro area and beyond would have ensued. Once foreign municipal Courts had undertaken to unwind the first, hard-won, euro area debt restructuring, copycat litigation as well as shocks to financial stability would have hampered the ongoing economic recovery within the EU. Nonetheless, despite the rejection of bondholder claims in municipal courts, the rulings allude to fundamental legal questions arising in the context of sovereign debt restructuring as well as hold-out litigation. For the first time, both German and Austrian courts have addressed some of the most contentious questions in the realm of sovereign debt, fostering a better understanding of how European judicial bodies balance sovereign debtor and creditor rights after a financial crisis.

As shown above, the highest civil courts in Austria and Germany have thoroughly examined the contractual relationship between private holders of government bonds and sovereign debtors under domestic and public international law. Since much of the existing sovereign debt litigation took place in U.S. courts following the 1980s and 1990s Latin American debt crises as well as Argentina's default in 2001[269], the emergence of a genuinely European body of case law fosters a better understanding of how the interests of hold-out creditors and insolvent states are mediated by judicial authorities in European courts. So what are the core lessons that can be drawn from these sovereign debt enforcement attempts by hold-out creditors?

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[269] *See* for an overview M. Megliani, *Sovereign Debt Genesis – Restructuring – Litigation* (Berlin: Springer, 2015).

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3.1.2. Domestic and Foreign-Law Governed Debt – Possible Implications

One consequence of the Greek PSI and ensuing court battles was the measurable increase in risk premia (peripheral) countries have to pay for government debt securities governed by local law.[270] Greece's decision to impose a haircut on domestic-law bonds but spare foreign-law bonds[271] has undoubtedly lessened the attractiveness of issuing domestic-law governed debt in the future. Signs that within the euro zone, where the majority of debt is still governed by domestic law, a shift towards more foreign-law debt looms, are amplified by the Greek government's choice to use English law for newly issued debt securities.[272] As Zettelmayer et al.[273] argue, resorting to English law and including its standard creditor protection clauses ought to comfort investors by precluding another change of their contractual rights through legislative fiat. That issuing more foreign-law debt makes sense from an economic point of view is further supported by recent empirical studies, which indicate that governments can borrow at lower rates under foreign law – especially in times of crisis.[274]

Besides the likely decline of domestic-law government bonds within the Eurozone, what broader lessons can be drawn for the future of (potentially disruptive) sovereign debt litigation? For slightly different reasons, Austrian and German courts were reluctant to undermine Greek sovereignty by declaring the Greek Bondholder Act 4050/2012 void as some commentators had suggested.[275] Their approach corroborates a well-standing principle of international finance[276], namely the inherent danger for creditors to lend money to a sovereign under its very own

[270] *See* M. Chamon, J. Schumacher and C. Trebesch, 'Foreign Law Bonds: Can They Reduce Sovereign Borrowing Costs?' (2015) Annual Conference of Economic Theory and Policy, http://crei.cat/conferences/ICF15/papers/chamon.pdf.

[271] Compare Zettelmayer et al., above note 13, at 13-14. Also compare for a more detailed analysis of the differentiation made in the Greek PSI between domestic and foreign bonds in B. Gruic and P. Woodbridge, 'Enhancements to the BIS debt securities statistics' (2012) *BIS Quarterly Review*, at 67, http://www.bis.org/publ/qtrpdf/r_qt1212h.pdf.

[272] Gruic/Woodbrige, above note 272, at 67.

[273] Zettelmayer et al., above note 13, at 26-27. Note that previously a large majority of Greek public debt instruments was governed by Greek law.

[274] *See* Chamon et al., above note 270 and A. Clare and N. Schmidlin, 'The Impact of Foreign Law on European Government Bond Yields' (2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406477.

[275] E.g. Witte, above note 14.

[276] Described e.g. by P. Wood, 'Conflict of Laws & International Finance' (2007) 6 *The Law & Practice of International Finance* 1.

domestic laws.[277] States enjoy a considerable degree of discretion under international law to employ legislation as a means of altering their debt repayment obligations. As Gruson[278] had already observed in the early 1980s, "it is particularly dangerous to have a loan agreement with a sovereign borrower governed by the law of the borrower because it is within its own power to change that law and frustrate the rights of the lender."

With respect to the Greek case, the New York City Bar Association notes that the retroactive legislative changes by the Greek Parliament to government bonds highlight the array of legal weapons sovereign debtors could avail themselves of if their debt was governed by domestic laws.[279] However, Greece was not the first country to exploit obvious advantages offered to the sovereign debtor through domestic law governing the debt instruments.[280] For instance, Russia and Uruguay successfully restructured their domestic-law bonds in 1998 and 2003 respectively.[281] The advantages of local-law bonds for sovereign borrowers – as evidenced by the instances of litigation discussed in this article – stem, in particular, from the prohibition under international law for courts located in one state to review *acta iure imperii* adopted by another state. This relative principle of sovereign immunity, i.e. states enjoying immunity from suit with regards to their public legal acts, is well-established under customary international law and codified in the legal orders of most nations.[282]

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[277] As pointed out above however, the highest civil Courts in both Austria and Germany rejected the bondholder claims on procedural grounds, especially the lack of jurisdiction under the Brussels I Regulation.

[278] M. Gruson and R. Reisner, *Sovereign lending: Managing legal risk* (London: Euromoney Publications, 1984), at 51.

[279] New York City Bar Association, above note 47, at 12.

[280] Perhaps unsurprisingly, a country's ability to issue debt governed by domestic law for a reasonable price has thus always mirrored potential default risks. For instance, Europe's biggest and most potent economies, such as Germany, France and the U.K. have no foreign law issues outstanding while smaller and less developed countries, such as Lithuania, Poland and Latvia show the highest proportions of foreign-law debt in the EU, *see* Clare/Schmidlin, above note 275.

[281] M. Gulati and L. C. Buchheit, 'How to Restructure Greek Debt' (2010) *Duke Law Working Papers* No. 47, at 5, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2959&context=faculty_scholarship. However, bonds in both countries were denominated in local currency while Greece is part of a monetary union, sharing the euro as a currency with 17 other countries.

[282] *See* e.g. J. Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2011) 21(4) *The European Journal of International Law*. Also *see* e.g. Federal Court of Justice VI ZR 516/14. Also compare 28 U.S. Code § 1604 Foreign Sovereign Immunities Act 1976 (FSIA) stating that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign State shall be immune from the jurisdiction of the Courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter".

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3.1.3. Blurring the Lines Between Public and Private Acts of States

However, the Greek Bondholder Act 4050/2012 , appears to blur the lines between what legislative acts ought to be considered "public" and what acts are – despite their legislative appearance – "commercial or private" in nature. Clearly, we can observe an increasing between different judgments by municipal courts in Germany and Austria.[283] For example, the most recent German bondholder decision in Germany – rendered by the Court of Appeals Oldenburg[284] – illustrates that legislative measures taken by the Greek government to retroactively introduce CACs cannot alter the commercial nature inherent to issuing government bonds.[285] In other words, a government may not use public legal acts to unilaterally amend its legal obligations stemming from *acta iure gestionis* for the sake of protecting itself from creditor enforcement attempts.

This problem has arisen in previous debt litigation cases, and has been referred to as "mixed activity": states sometimes deliberately obscure the difference between "fiscal" or "private" activates (e.g. issuing public debt) and "public" acts (e.g. retroactive changes to the governing law).[286] The most prominent and most widely debated example was, once again, the Argentine bankruptcy where the government had employed legislative measures (*acta iure imperii*) to suspend its financial obligations vis-à-vis private investors (*acta iure gestionis*).[287] Many courts across different jurisdictions[288] were reluctant to grant sovereign immunity to Argentina and other states for having recourse to legislation to implement a debt restructuring, with the Italian Supreme Court[289] marking a noteworthy exception. The mixed

[283] *See* above 2.1.

[284] Ibid.

[285] Court of Appeals Oldenburg 13 U 43/15, at 21.

[286] See e.g. Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford: Oxford University Press, 2015), at 190; B. I. Bonafè, 'State Immunity and the Protection of Private Investors: The Argentine Bonds Case Before Italian Courts' (2006) 16(1) *The Italian Yearbook of International Law* 165.

[287] *Ibid.* Also *see* for an overview of the Argentine bankruptcy in A. Gelpern, 'After Argentina' (2005) *Policy Briefs in International Economics* No. PB05-02, http://ssrn.com/abstract=880794.

[288] E.g. for the U.S.: *Allied Bank International v. Banco Credito Agricola de Cartago* 566 F.Supp. 1440 (S.D.N.Y. 8 July 1983); *NML Capital, Ltd. v. Republic of Argentina* 699 F.3d 246 (2d Cir. 2012); for U.K court decisions compare, for instance, *Donegal Int'l Ltd v Zambia* [2007] EWHC (Comm) 197; for Germany, *see* German Constitutional Court Judgement of 8 May 2007 2 BvM 1/03.

[289] Italian Court of Cassation, all civil sections, decision No. 11225 of 27 May 2005, RDIPP, 2005, p. 1091 et seq.

activity debate also came to the surface in the Greek debt restructuring.[290] Greece had used laws (Greek Bondholder Act 4050/2012) in order for a majority of (institutional) investors to override a minority of (retail) investors. However, in contrast to the Argentine case, the issue could be neglected since additional jurisdictional barriers rooted in the Brussels I Regulation eventually came to Greece's rescue.

3.1.4. Some Thoughts on the Expropriatory Character of the Greek PSI

One hypothetical question that is of particular importance for the topic of this article remains however open: would hold-out bondholders have been successful with their challenge under substantive law? Most likely, as suggested by the Court of Appeals Oldenburg, the legality of Greece's emergency legislation would have had to be assessed against the backdrop of Greek (constitutional) law. More specifically, a substantive review would have boiled down to an analysis as to whether the Greek Parliament's actions during the crisis had violated higher norms, such as its human rights obligations vis-à-vis private investors. A number of scholars have weighed in on this matter;since this question bears great relevance for future sovereign debt workouts, I will shortly present the most important views.

Witte[291] for instance remarks that the Greek Bondholder Act 4050/2012 amounted to an unlawful expropriation of bondholders under public international law, not, however, under substantive European law. He puts forward that the Greek haircut – in contrast to other (domestic) mechanisms for debt restructuring – was imposed retroactively, tailor-made for one particular case, and lacked sufficient safeguards for creditors.[292] Buchheit and Gulati[293] have identified three specific legal sources for a challenge to the Greek Bondholder Act 4050/2012, namely the Greek Constitution, the European Convention of Human Rights (ECHR), and BITs. All of these laws interdict expropriatory measures if they are neither in the public interest nor offer adequate compensation in exchange, although the standard of protection varies. The only actual challenge of the Act brought before Greek

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[290] *See* above 2.1.2.

[291] Witte, above note 14, at 318 (noting that "[a] reduction in the amount of debts owed is therefore not only equivalent, but in fact identical, to a taking of assets owned by the creditors.").

[292] Ibid*,* at 322.

[293] Buchheit/Gulati, above note 282, at 12-13. However, the authors do not make an assessment of the potential chances for bondholders who invoke these legal sources in Court.

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Courts which has so far reached the European Court of Human Rights was, however, dismissed on grounds of public interest.[294]

Zettelmayer et al.[295] adopt a more nuanced view, arguing that the retroactive implementation of CACs does not equal an outright expropriation, which bondholders could challenge under the Greek constitution, the ECHR, and principles of customary international law. Rather, the law passed by the Greek legislature put holders of Greek-law bonds in the same legal position as English-law bondholders since the collective action mechanism imposed was roughly analogous to the English CAC procedure.[296] Moreover, the subsequent decision of imposing a haircut on privately-held bonds emanated from a creditor vote rather than a unilateral decision by Greece.

This view appears reasonable against the backdrop of other recent sovereign debt crises, most notably the Argentine bankruptcy of 2001. Argentina had also made use of legislative and executive measures to curtail its debt repayment obligations vis-à-vis international lenders, though it had acted more bluntly than Greece. Rather than retroactively introducing CACs to facilitate a majority-approved debt workout, the Argentine government simply declared a debt moratorium and ceased interest and principal payments on its international bonds.[297] Later, the Argentine Congress passed the so-called "Lock-Law", which prohibited the Argentine state from making any arrangement to pay investors who did not accept its debt restructuring offers.[298] These emergency measures were partly motivated by the fact that most of the country's debt was governed by New York law over which it had no direct control.[299]

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[294] *See* below note 306.

[295] Zettelmayer et al., above note 13, at 11.

[296] Ibid*,* at 12.

[297] Compare e.g. IMF, *Lessons from the Crisis in Argentina*, October 2003, at 62, https://www.imf.org/external/np/pdr/lessons/100803.pdf (5.7.2016).

[298] *See* e.g. Shearman & Sterling, *Don't Cry for Me Argentine Bondholders: the Second Circuit Decides NML Capital v Argentina*, Client Publication, 29 October 2012, http://www.shearman.com/~/media/Files/NewsInsights/Publications/2012/10/Dont-Cry-for-Me-Argentine-Bondholders-the-Second__/Files/View-full-memo-Dont-Cry-for-Me-Argentine-Bondhol__/FileAttachment/DontCryforMeArgentineBondholdersSecondCircuitDec__.pdf (5.7.2016).

[299] *See* e.g. J. F. Hornbeck, *Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts"*, Congressional Research Service, 6 February 2013, https://fas.org/sgp/crs/row/R41029.pdf (6.7.2016).

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Argentina's measures were subsequently deemed illegal in most jurisdictions where bondholders undertook to challenge them.[300]

Both the debt moratorium and the "Lock Law" constituted clear violations of Argentina's contractual obligations under its sovereign bonds as well as of key principles of international law – hardly any scholar argued in the sovereign borrower's favour.[301] Wary of upsetting markets in a similar fashion, Greece adopted a more cautious legal approach with the supposed objective of rendering bondholders' success in court more unlikely. By merely using its legislative authority over the outstanding government bonds to introduce new contractual clauses – which are in fact prevalent in most newly issued sovereign debt instruments around the globe – creditors faced the strenuous challenge of establishing a causal link between the retrofitting of CACs and the alleged expropriation in Court.

To this extent, a coherent legal argumentation will likely reach its limits. The debt cut was the direct result of a creditor voting process. Thus a (super-)majority of investors approved of Greece's exchange tender, in contrast to the Argentine case, where Congress took unilateral legislative measure to repudiate the country's debt obligations.[302] To put it in the words of Buchheit and Gulati[303], the two key architects of the Greek PSI, "the incorporation of the CACs into Greek law does not result in the sovereign directly taking tangible assets…but leaves the dirty work to the consenting bondholders".

Indeed, retrofitting CACs appeared like the most commensurate legislative response to cater to the European political imperative of involving the private sector in a Greek debt restructuring. As Boudreau[304] rightly remarks, the exchange offer with a retrofit CAC was painful for the creditors but appeared both proportional and restrained in light of the severe Eurozone crisis. Similarly, in a very recent

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[300] Compare e.g. the decision of the highest German civil Court in Federal Court of Justice Judgement of 24 February 2015 XI ZR 193/14. Also *see* the infamous ruling by the Southern District Court of Manhattan in *NML v. Argentina,* above note 56. Also *see* Porzecanski, above note 184.

[301] For an overview of the academic discussion *see* e.g. S. Grund, 'Restructuring government debt under local law: The Greek experience and implications for investor protection' (2017) 12(2) *Capital Markets Law Journal* 1; Kaplan, above note 57.

[302] The Argentine "Lock Law" on the other hand seemingly interferes with bondholders' property rights, ruling out any repayment to certain class of bondholders.

[303] Buchheit/Gulati, above note 282, at 11.

[304] M. A. Boudreau, 'Restructuring Sovereign Debt Under Local Law: Are Retrofit Collective Action Clauses Expropriatory?' 2 *Harvard Business Law Review Online* 164 (2012).

judgment the European Court of Human Rights (ECtHR) unanimously held that "the forcible participation did not violate property rights of bondholders protected by Art. 1 of the Protocol No. 1 of the ECHR."[305] More specifically, the Court concluded that "the collective action clauses and the restructuring of the public debt had represented an appropriate and necessary means of reducing the public debt and saving the state from bankruptcy" and that the interference with bondholder's property rights "pursued a public-interest aim, that is to say preserving economic stability and restructuring the national debt, at a time when Greece was engulfed in a serious economic crisis."[306]

Overall, although the legal technique employed by the Greek Parliament has proven measured enough to dodge disruptive hold-out litigation, for the following reasons it could not be repeated if Greece was to encounter another debt crunch. First, Greece has decided to swap its old Greek-law bonds with new debt securities governed by English law in an attempt to appease investors. As mentioned before, the Greek Parliament has no legal authority to alter English law and thus the financial conditions of these bonds. Second, government bonds issued by EU Member States after 1 July 2013 both under local and foreign law[307] as well as English-law[308] government bonds already contain CACs. Only with respect to "old" local-law government bonds, which lack CACs, will the bondholder lawsuits in Austria and Germany analysed previously provide some relief for highly indebted euro zone Member States. As pointed out before though, Investors are likely to drop sovereign debt securities governed by domestic law faster than before, potentially exacerbating the liquidity position of the sovereign debtor.

3.2. Arbitration before ICSID Tribunals

As the analysis of *Poštová banka*[309] has illustrated, the question whether investors may successfully challenge a debt restructuring before an arbitral tribunal depends

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[305] *See Mamatas and Others v. Greece*, application nos. 63066/14, 64297/14 and 66106/14, ECtHR (21 July 2016).

[306] Ibid.

[307] Since July 2013 all new euro area government securities with an original stated maturity of more than one year must include standardised CACs. *See* EFC Sub-Committee on EU Sovereign Debt Markets, 'Collective Action Clause – Explanatory Note', 26 July 2011, http://europa.eu/efc/sub_committee/pdf/explanatory_note_draft_on_the_model_cac_-_26_july.pdf.

[308] For the most recent model CAC under English law, which must be distinguished in its drafting from the Euro CAC, *compare* International Capital Market Association (ICMA), 'ICMA Standard CACs – August 2014', http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/collective-action/.

[309] *Poštová banka,* above note 180. For the analysis *see* above 2.2.2.1.

very much on the interpretation of "investment" under both the applicable BIT and Art. 25 of the Washington Convention. Just like sovereign immunity precludes further legal assessment of bondholder claims put forward in municipal courts, labelling sovereign debt securities as "investment" is a precondition for their substantive legal review in arbitration proceedings.

Interestingly though, the decision in *Poštová banka* has generated some divergence on this issue, particularly against the backdrop of arbitral awards rendered in the wake of the Argentine insolvency.[310] According to the "double barreled" test, applied by many arbitral tribunals, the alleged investment must fit into the definition of investment as provided in the BIT and, at the same time, must correspond to the inherent meaning of investment as contemplated by the ICSID Convention.[311] In *Poštová banka*, the applicable Slovakia-Greece BIT contained different definitions of "investment" from most other BITs Argentina that had concluded[312]. The principles established in previous arbitral awards with regard to the claims of Argentine bondholders, such as the ones in *Abaclat* and *Ambiente Ufficio,* could not be directly applied to *Poštová banka.* The tribunal thus rightly concluded that Greek government bonds fall outside the scope of assets protected in the investment treaty.

As a consequence, the focus must be laid on the definition of "investment" as provided in Art. 25 of the ICSID Convention when assessing the potential implications of *Poštová banka* for future instances of sovereign debt arbitration.[313] BITs are arguably too divergent on the definition of "investment" to draw general conclusions. However, even with respect to the interpretation of Art. 25 of the ICSID Convention, *Poštová banka* set new standards. A glance at older sovereign debt arbitration cases shows why.

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[310] *See* especially *Abaclat,* above note 167 and *Ambiente Ufficio S.p.A. & Ors. v. Argentine Republic,* ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013).

[311] *See* e.g. *Abaclat,* above note 167, at 344.

[312] The Argentina-Italy BIT expressly protects "obligations" and "public titles" while the Slovakia-Greece BIT only expressly protects "loans" and "claims to money". *See* for an analysis of this issue in P. Plachy, 'Poštová Banka And Istrokapital V. Greece: A Seeming Departure From The Abaclat "Norm"', *Slovak Arbitration Blog*, 26 May 2015, http://slovarblog.com/postova-banka-istrokapital-v-greece-departure-abaclat-norm/.

[313] It must be noted however that definition of "investment" in a BIT does not have to fit into the definition under the ICSID convention, since each of them focus on different aspects. *See Abaclat,* above note 166, at 351.

In *Abaclat* for instance, the tribunal found that the purchase of debt security entitlements by Argentine bondholders constituted a protected investment under Art. 25 ICSID Convention. It held that such purchases resulted indirectly in the economic benefit or flows from funds to the state.[314] More specifically, the Tribunal noted that "there is no doubt that Claimants made a contribution" since "they purchased security entitlements in the bonds" and the value generated by this contribution is the right to claim reimbursement from Argentina.[315] It was thus established that this contribution generated the value that is protected under international investment law.[316]

Conversely, in *Poštová banka*, the tribunal concluded that the process of providing money for a given amount of money in return merely amounts to a "process of exchange" rather than a "creation of value".[317] For this purpose, the tribunal stressed the importance of distinguishing whether funds received by Greece through the sale of its bonds were used for general funding purposes or public works and services. Since Greece used the proceeds to refinance old public debts, the tribunal rejected the claimant's view that a contribution was made and that the payments were destined for a "productive activity".[318]

The divergent findings were subject to some scholarly commentary. Montanaro[319] for instance notes that "the conception of the 'substantial contribution' requirement [as applied in *Poštová banka*] differs radically from the that in *Ambiente Ufficio,* where the majority decision did not link the contribution to a productive activity".[320] He thus argues that sovereign debt restructuring does not necessarily yield to investment arbitration, something that arbitration following the Argentina insolvency undoubtedly suggested.[321] Conversely, Plachy[322] argues that the award in *Poštová banka* does not depart from previous Argentine cases but highlighted the importance of the particular working of each and every investment treaty.

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[314] *Abaclat,* above note 167, at 365 et seq.

[315] *Ibid,* at 365-366.

[316] The same view was adopted by the Tribunal in *Ambiente Ufficio,* above note 311.

[317] Poštová banka, above note 180, at 361.

[318] *Ibid,* at 361 et seq.

[319] F. Montanaro, 'CASE COMMENT: Poštová Banka SA and Istrokapital SE v Hellenic Republic – Sovereign Bonds and the Puzzling Definition of 'Investment' in International Investment Law' (2015) 30(3) *ICSID Review* 549, at 554.

[320] *Ambiente Ufficio* relied heavily on the conclusions reached in *Abaclat* (above note 167)*; see Ambiente Ufficio,* above note 311.

[321] Ibid, at 555.

[322] Plachy, above note 313.

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In any event, *Poštová banka* is a landmark case emphasizing both the relevance of the precise drafting of a BIT as well as the destiny of funds acquired by a state through sovereign debt issues. The requirement that investors need to make a contribution to a "productive activity" in order to enjoy protection under international investment law is not new. In fact, it has been a key criterion of the *Salini*[323] test but was later rejected by ICSID tribunals in *Abaclat* and *Ambiente Ufficio*. In *Poštová banka,* the tribunal – at least *obiter* – rowed back and resorted again to the *Salini* test in order to ascertain the nature of sovereign debt in international investment law.

Returning to this stricter interpretation of Art. 25 ICSID Convention means that hold-out creditors will have slimmer chances to recover their debts by virtue of investment arbitration. Only in very rare cases will investors be able to link government bonds to a specific "productive activity" where the funds obtained have been employed. However, even if such strict interpretation was desirable from a policy perspective in order to bar disruptive hold-out arbitration[324], *Poštová banka* has increased legal uncertainty. By failing to sufficiently explain why the concerns raised in *Abaclat* and *Ambiente Ufficio* in opposition to the *Salini* test were not applicable this time, it has introduced a new standard of investor protection. Given the divergent views with respect to Art. 25 of the Washington Convention, states and investors would be well advised to expressly include or exclude public debt instruments from the range of investments covered by a BIT.[325]

3.3. Conclusion

This article set out to explore whether sovereign debt enforcement has become a viable legal avenue for disgruntled owners of government debt papers in Europe in the wake of a financial crisis. For this purpose I have looked at recent rulings rendered by Austrian and German municipal courts (2.1.) and decisions handed down by ICSID tribunals (2.2.). Two European court cases indirectly linked to the Greek debt restructuring have also been subject to closer scrutiny.

Overall, Greece successfully shielded itself from hold-out litigation in various forums and was able to implement its restructuring without further disturbances. While some courts granted sovereign immunity to Greece with respect to its emergency legislation, others dismissed the bondholders' case due to their lack of

[323] *Salini,* above note 168. Also *see* above 2.2.1.

[324] As argued, for instance, by Waibel, above note 144. For a general discussion *see* above 2.2.1.

[325] *See* above 2.2.2. for a general discussion as to whether arbitration is considered an adequate legal avenue for sovereign debt collection.

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jurisdiction under EU law. In a similar fashion, ICSID tribunals dismissed the claims brought by private investors under the pertinent rules of international investment law. Crucially, the BITs concluded between Greece and the claimants' home state did not cover government debt securities. In addition, the ICSID tribunal reversed some of the principles established with regard to Art. 25 of the ICSID Convention in the wake of the Argentine insolvency. Nonetheless, it is seemingly uncertain that the relevance of investment arbitration in the realm of sovereign debt is in fact on the decline. The precise drafting of BITs and the express inclusion or exclusion of sovereign debt instruments under the definition of "investment" will continue to matter. The remarkably divergent interpretation of the ICSID Convention following the Greek and the Argentine default, respectively, is likely to exacerbate legal uncertainty inherent to sovereign debt arbitration.

The results presented in this article clearly deviate from the Argentine experience, where decade-long trials eventually forced the country to settle with hold-out creditors under terms and conditions highly favorable for them. It must however not be forgotten that Greece – quite literally – paid a high price to avoid litigation before ostensibly creditor-friendly English courts. Hold-out investors who had acquired bonds governed by English-law were paid out in full. European policymakers were keen to keep hold-out investors at bay and pre-empt a messy Argentine-style restructuring. Greece's advantage was that only a very small chunk of its overall debt was governed by foreign law.

Finally, the article has looked at the (hypothetical) question whether the Greek PSI amounted to an unlawful expropriation of bondholders. While it is clear that the debt workout adversely affected the value of bonds held by private investors, the decision to "cram down" hold-outs was taken by a majority of creditors rather than by the Greek state directly. It can thus be argued that a sufficient causal link between Greece's legislative measures and the reduction of the bondholders' claims is absent. Moreover, as emphasized in a recent decision by the ECtHR, the forcible participation of bondholders in the PSI was proportionate a measure under to avert a Greek insolvency. This view, as I have shown, was also shared by most commentators, who denounce overly invasive attempts by municipal Courts to obstruct economically sound sovereign debt adjustment measures. Moving forward, courts will continue to play a central role in balancing the interests of sovereign borrowers and debtors post-default. However, it is to be questioned whether the current legal framework provides judicial bodies with the necessary tools and the desired flexibility to foster smoother and fairer debt restructurings on the international plane.